BILFINGER BERGER Civil   SIEMENS   CAF

Our ref: **25.1.201/KDR/4837**
Your ref: **INF CORR 4112**

1 March 2010

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For the attention of Steven Bell - Tram Project Director

Dear Sirs,

Edinburgh Tram Network Infraco
Infraco Contract: Response to Letter INF CORR 4112

We refer to your letter dated 16 February 2010 (ref. INF CORR 4112).

We respond to the issues raised in your letter under the various Bullet Point headings below.

Please note that our position on all of these points has already been clearly set out in detail elsewhere. On this topic, please be aware that we have been required to allocate considerable resources to answering the huge volume of mail which we have received from tie. To put this into perspective, Infraco have received 110, 74, 40 and 88 letters from you in week commencing 1, 8, 15 and 22 February 2010 respectively which is a total of 312 letters received in the Month of February 2010 alone. Whilst we can and will respond to these letters, you must appreciate that your tactic of bombarding us with correspondence in this manner can only divert resources which would be better allocated to moving the project forward.

In this regard we would also record what we see as a marked shift in tie's approach since the beginning of this year. We have been required to respond to a large number of allegations of breach of contract which have been developed now for the first time, including in relation to our management of SDS, Best Value, as well as very general accusations of breach of clauses 6, 7 and 73, all of which are entirely lacking in any detail. We remain confident of the veracity of our position in response to all of these spurious accusations and respond to some of them below and in separate correspondence sent today. This exceptionally aggressive approach by tie, no doubt designed specifically to place Infraco under pressure, is accordingly both transparent and entirely baseless.

Bullet Point 1

We have sent to you today under separate cover, our letter (ref. 25.1.201/KDR/4834) which responds in detail to your letter of 11 February 2010 (ref. INF CORR 4069) on the issue of programme.

You make many of the same points in your letter of 16 February 2010 as were made in the 11 February 2010 letter. Without wishing to repeat our position at any great length, the main criticisms which you make and our brief answers thereto, are as follows:

- **That there has been a failure by Infraco to take all reasonable steps to mitigate the delays and that such delays are the responsibility of tie**

  Our separate letter of today's date provides a history to the development of programmes on this contract and the agreement reached between David Darcy and Richard Jeffrey in November

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2009. The early draft of the Revision 3 step 4 Programme shows substantial mitigation of the delays and prolongation incurred, and which will be incurred on the project. There has been a concerted effort by Infraco to produce a programme which reflects all of the mitigation measures which both parties agree are achievable. Although we have provided you with much detailed information on all of the points relative to the Darcy/Jeffrey agreement, we are yet to receive any properly detailed response other than assertions that further mitigation measures are possible which, as we have pointed out *ad nauseam*, they are not.

We strongly object to any assertion that we have failed to mitigate delays or failed to look at all possible mitigation measures which might be taken. tie must recognise that mitigation is only possible to the extent that (i) the current delay to the completion of the project milestones is determined (we believe we have now provided you with a great deal of detail on this); (ii) mitigation measures can be identified that have a neutral or positive impact on overall project cost, and (iii) we actually receive firm confirmation of when we will be given access to carry out our construction works. This latter point remains of particular concern to us in light of the progress of the MUDFA delays to date, and uncertainty which remains over when the utility diversion works will actually complete.

The MUDFA Rev 8 programme did not replace the Programme (Revision 2). It was provided initially in order to demonstrate our entitlement to an extension of time in respect of the delays apparent in the Programme (Revision 2). Your comments in this regard are not correct.

- **Whether the purpose of the programme is to establish an extension of time**

In the original meeting between Messrs Jeffrey and Darcy, it was stated by tie that the Programme (Revision 3) would be used as the basis of revising the Section A, B, C & D completion dates. Infraco concurred with this however at no point since then, has it been stated that the manner in which Infraco is revising the programme is purely to establish an extension of time. Infraco has been and continues to work hard to produce programmes which can be agreed in line with the Darcy/Jeffrey agreement. This is not a global extension of time claim. As we make clear in our separate letter of today's date, the process of compiling the step 4 programme has never been envisaged as a global extension of time claim and we refute your comments in this regard.

We continue to work in order to achieve the earliest possible completion date in light of all of the circumstances which are affecting progress on this project. To suggest that we are failing to work to any extended date for completion is entirely misleading. The extended date for completion as it exists at present, only reflects the initial award of 7.6 weeks. Clearly there is no possibility of us meeting this date standing the MUDFA delays which you acknowledge have had a significant impact on our ability to complete by this date. It is worthy of mention that the tie offer dated 13 November 2009 in which the extension of time of 9 months (6 months remunerated) was offered, whether intentionally or simply carelessly, was at best vague and did not clearly set out the cut-off date. This would leave the reader to assume it would be in November 2009, and not 31 March 2009, which was the basis upon which Infraco's claim was progressed. Such conduct by tie cannot be viewed as being reasonable or in our opinion, genuinely aimed at moving the parties forward. Instead the imprecise wording of the offer of 13 November 2009 seems if anything designed to promote dispute, rather than resolve it.

The extent of progress against work areas available and the impression that Infraco is ignoring its obligations under the Agreement

You cite many statistics and percentages as a means of justifying these allegations. The technical complexity (or otherwise) of the project cannot form the sole criteria by which progress can be measured, particularly where there are other significant factors at play including the logistics associated with working in confined areas with traffic management restrictions. We do not

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understand the basis of your calculation of work site available to us and disagree with the other percentages quoted.

Crucial to the issue of when the works will be completed, is your ability to provide access to us to actually carry out the construction works. Until this happens, any prediction of when the work might actually complete, is totally meaningless. Our INTC 429 for the MUDFA Rev 8 Delays is based on information up to and including 31 March 2009 and the mitigated programme clearly shows an extension of time required of 9 Months. This, added to the Programme Revision 1 Completion date of 6 October 2011, shifts the Section D Completion Date to 6 May 2012. With MUDFA still not complete at the writing of this letter and your confirmation that the Utility diversions will be completed in August 2010, we fail to understand that if we were to assess the delays today (almost 11 months later), why the overall delay should not be in the order of 20 months (INTC 429 of 9 months plus the time between 31 March 2009 and end of February 2010). This would then take completion to May 2013, even before factors such as the increased scope of works (BDDI to IFC) are taken into account. We therefore consider your statement that we are ignoring our obligations under the Agreement and the spirit of the Darcy/Jeffrey agreement, to be inflammatory and clearly incorrect.

Bullet Point 2

Although you state you do not agree with our interpretation of Clause 80, it is the one which reflects what the express words of the contract are, particularly Clause 80.13 which, in any analysis, you appear to ignore entirely. You have failed to explain to us why our interpretation is wrong. The best that you can manage is to say that such an interpretation produces a result which is 'plainly absurd'. This is simply not correct. Clause 80 and the method by which tie Changes can be implemented was negotiated at length between the parties. Clause 80.13 was insisted on by tie in order that it could control the Change procedure, particularly in relation to cost and time. tie cannot now ignore the clear wording of the Agreement simply because the result does not suit it. You have yet to provide us with a clear explanation of why you consider, standing the wording of Clause 80, Infraco is obliged to proceed with changed work in the absence of either (i) a tie Change Order or (ii) an instruction under Clause 80.15.

We therefore strongly refute that we are using Clause 80 as *'a means to justify delay in discharging our obligations'* or that we are suspending parts of the work *'without due cause'*. Rather, Infraco is complying with a very clear contractual prohibition against proceeding with work in respect of a tie Change except in these two express situations (we assume your reference to Clause 80.16 is in error and you intended to refer to Clause 80.15).

We would remind you that we have in fact commenced work in certain areas as a gesture of goodwill and without prejudice with the express aim of breaking the deadlock between us. As has consistently been the case, tie has refused to reciprocate with any kind of commercial concession from its (erroneous) position, leaving us to conclude that no actions by us, will ever convince tie to depart from a position which is demonstrably baseless.

Bullet Point 3

We have sent to you today under separate cover, our letter (ref. 25.1.201/KDR/4836) enclosing the Comparison of Original Submitted Estimates vs tie Change Orders. In contrast to your figures, our analysis shows that tie have issued 122 tie Change Orders with a total value of £11.1m compared to our original submitted Estimates (Clause 80.4) with a total value of £12.8m.

The Parties' positions on the operation of Schedule Part 4 have been set out at great length in the voluminous correspondence passing between us and in the pleadings on the three adjudications which have dealt with this subject. It has been established by two Adjudicators over three adjudications that our position is correct. There is nothing 'wrong with the words' of Schedule Part 4 - they are clear in their meaning and effect.

To answer your specific question, we do agree that not all changes from BDDI to IFC are Notified Departures. They are Notified Departures to the extent that the conditions set out in Clause 3.4.1 of Schedule Part 4 are met. Thus, if those conditions are met, then changes of the type envisaged by your category (ii) may well be Notified Departures. The Agreement is clear, and the Adjudicators have confirmed, that the reason for the change between BDDI and IFC is not relevant (save to the extent that the change is caused by a breach of contract by the Infraco, an Infraco Change or a Change in Law). In terms of your category (iii), to the extent that the change can be shown to have resulted from a breach of contract by Infraco of any of its obligations under the Agreement (including in relation to SDS), then we accept that in these circumstances it would not be a Notified Departure. However, to date, tie has neither adduced any evidence nor otherwise advanced any arguments that a breach by Infraco has occurred which would fall into the third category. Indeed, contrary to tie's position that Infraco is obliged to prove it is not in breach (a ridiculous notion requiring Infraco to prove a negative), the Adjudicators have clearly confirmed that it befalls tie to prove such a breach has occurred.

If your interpretation of what constitutes a compensable design change were correct (apparently restricted to a change by tie to the Employer's Requirements only), then a large part of Schedule Part 4 is rendered meaningless. That is clearly not what the Parties intended. You may disagree with our interpretation but your confidence that your interpretation will be upheld would appear to be naively optimistic in light of the Adjudication Decisions to date.

Bullet Point 4

We can only reiterate in line with the position that we have set out above, that we are not contriving a position to force tie into adjudication, or using estimates for that purpose. We are simply seeking to apply the express terms of the Agreement. We disagree entirely that through the Dispute Resolution Procedure, our valuations have on average been reduced by some 40% in value – this is explained in detail in our letter dated 1 March 2010 (ref. 25.1.201/KDR/4836). This is an erroneous and misleading statement and tie must know it to be so. You are well aware, as we are, that in relation to the Russell Road Retaining Wall adjudication by way of example, we were awarded a sum of approximately £1.46m against the total of £1.84m claimed, not the £4.59m which you wrongfully report (bearing in mind that only one of the three heads in this particular claim was referred by us to Adjudication). We would remind you that tie's stated position in the Adjudication was that we were entitled to nothing. It is astounding that tie can seek to distort the facts in this manner, whilst also continuing to refuse to accept the Adjudicator's Decisions and the proper interpretation of the Agreement. It is tie's obstinate approach in this regard which is forcing matters to be referred to adjudication, not any action on the part of Infraco. tie is clearly in breach of its obligation under Clause 6.3.2 to use reasonable endeavours to avoid unnecessary complaints, disputes and claims. We would advise extreme caution if and when passing inaccurate and misleading statistical information to any third parties, especially where such third parties rely on such information in whichever form.

We are pleased that the Board recognises that Infraco is entitled to whatever the Agreement prescribes for it. Our joint aim must therefore be to find a way through our current disagreement on what this means.

Yours faithfully,

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M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

cc: M. Berrozpe
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