



FAO Mr Richard Walker
Chairman of Infraco Consortium Board
Bilfinger Berger Siemens CAF Consortium
9 Lochside Avenue
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Our Ref: INF CORR 4262/RJ

26th February 2010

Dear Richard,

I refer to Martin Foerder's letter date 19th February 2010 and attachments sent to Steven Bell in the matter of an On Street Agreement. This letter has relevance to our agenda for the meeting on 2nd March 2010 and is also essential to your on-going conduct.

We have made it clear to you in the past that tie has a duty to obtain Best Value and that Infraco are obliged to assist with that duty. You have also been reminded that tie are obliged to conform with certain requirements imposed by Public Law. Despite having asked you to address these issues when we met earlier this month, your proposed agreement does not satisfy either of these requirements. For example:

The consequences of what you are proposing are that for payment and extension of time (or other relief) the terms of the proposed agreement apply at the expense of the terms of the Infraco Contract. Moreover you set out to establish that the impact of the On Street Works on the rest of the Infraco Works will be dealt with under the proposed Supplemental Agreement. The proposals would for tie detrimentally affect the dynamics of recovery of costs and create a potential for double recovery under Supplemental Agreement and Infraco Contract, which is explicitly proscribed by Clause 121 of the Infraco Contract.

Your proposals remove any responsibility Infraco may have for concurrent delay. You are proposing that Infraco entitlement is based on any delay other than an Infraco default. Accordingly the Infraco Contract terms as regards to entitlement for delay would be circumvented. In Appendix 4 you seek to establish that the programme is for information and co-ordination purposes only - a "target programme".

Any supplemental agreement which endeavours to obtain Best Value cannot be global if it is possible to specify Infraco's entitlement under the Infraco Contract. Our firm view is this is possible. In other words, the proposal cannot be just to make life easier for either or both parties.

Our discussions on this subject next Tuesday should be predicated on an honest realisation of the essential background factors:

- 1 Diversions of Utility Works have been delayed which in turn has given rise to Infraco being entitled to Compensation and Extension of Time under Compensation Event (d).

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- 2 Any extension of time will have to take account of mitigation measures performed or lost by Infraco.
- 3 Infraco have been offered an extension of time of nine months (in addition to the 7.6 weeks granted) in absence of any detailed application by Infraco (see **tie** letter dated 13th November 2009)
- 4 Infraco's current draft programme shows that Infraco are intending to seek a further 16 months extension. Such extension has not been substantiated, nor do **tie** believe that it could ever be substantiated.
- 5 Moreover **tie** has confirmed that six months of prolongation costs will be valued (see **tie** letter dated 13th November 2009).
- 6 Infraco have given notice that they are de-mobilising "key-subcontractors" engaged in On-street works. The recent audit carried out by **tie** shows that Infraco has failed to appoint key-subcontractors for any Civil Engineering Works in the terms required by Clause 28 of the Infraco Contract.
- 7 Under explanation that the SDS Provider should have completed the design in January 2009, **tie** are not satisfied that Infraco have complied with their obligations under the Infraco Contract in managing the SDS Provider.
- 8 CEC assert that Infraco has been responsible for delays in obtaining approvals.
- 9 Representatives of Infraco and **tie** have been unable to agree on the value of On-street works and give certainty of cost, thereby making it impossible for **tie** to fulfil their duties to obtain Best Value.
- 10 Infraco Members have expressed a desire for an alternative arrangement for procuring civil engineering works to the On-street Works.
- 11 The parties have been engaged in attempting to negotiate an "On-street Supplementary Agreement". However, **tie** are advised that the terms insisted on by Infraco would put **tie** in breach of European Procurement Law. Any arrangement/supplementary agreement will be required to comply with Public Law and **tie**'s obligations to CEC.

Any Best Value Agreement cannot gratuitously abandon key requirements in the Infraco Contract which give protection to **tie**'s stakeholders. As examples only: Schedule Part 14 (Bonds Warranties etc) and Clause 74 must not be changed; Clause 120 – Joint and Several Liability and Clause 121 – Double Recovery must not be diminished or diluted; and Clause 28 must be complied with.

In respect of the latter provision we note that you have hitherto failed to appoint Key-subcontractors for civil engineering works and/or obtain the required warranties. As a consequence, we will be seeking to apply Clause 67.14 to recover and retain monies paid in respect of these works until the matter is rectified – this includes work carried out under the PSSA. Moreover, we will in future require you to demonstrate that Key-subcontractors have been properly appointed before you use them to execute Infraco Works. In light of your assertion that you are able to commence On-Street Works next week we suggest that you provide us with all requisite information on subcontractors with some urgency.

Application of pre-conditions to commencing work, as given in your penultimate paragraph, would amount to wilfully breaching your obligations under the Infraco Contract. If you do not commence works for the sole reasoning given by you, we are entitled to apply the provisions of Clause 90.1.2. You may therefore wish to reflect on this and on your persistent delinquent behaviour in ignoring our instructions pursuant to Clause 80 for the Off-street works and then give assurances on Tuesday which will render any action by us under Clause 90.1.2 unnecessary.

Finally, we would require any Best Value agreement to address your obligations pursuant to Clause 11.3 to manage the activities of the SDS provider.

This letter is written strictly without prejudice and cannot be relied upon without the expressed written approval of **tie limited**. Any steps or agreement based on this letter would be subject to the approval of **tie limited**'s Board.

Yours sincerely,



PP Richard Jeffrey
Chief Executive

cc: Michael Flynn, Siemens
Antonio Camos, CAF
Martin Foerder, Bilfinger Berger