



Mr Brandon Nolan
McGrigors
141 Bothwell Street
Glasgow
G2 7EQ

Our Ref: INF CORR 5420

Date: 23 June 2010

Dear Brandon,

Edinburgh Tram Project
Infraco Contract – DRP for INTC 109 / Clause 80.13 Instruction

As discussed recently and further by telephone yesterday we confirm that McGrigors are instructed to act for ~~tie~~ in the above dispute.

This dispute was instigated by Infraco (reference letter 25.1.201/KDR/5763) on 21st May 2010. The internal contractual DRP process has concluded that the parties intend to take the matter to adjudication and agreement has been reached on the choice of panel this being the legal panel. We now await the Notice of Adjudication and proposal from Infraco on the selection of the adjudicator. We would welcome your advice in the selection of the adjudicator in the first instance.

We look forward to working with you on this, and we enclose a copy of the initial DRP letter, and the respective position papers exchanged by both parties during the internal process. As you are aware, McGrigors advised on the ~~tie~~ Position Paper.

Yours sincerely



Steven Bell
Project Director - Edinburgh Tram

Enc Infraco correspondence – 25.1.201/KDR/5763
Infraco correspondence – 25.1.201/KDR/5898
~~tie~~ correspondence – INF CORR 5237

Our ref: **25.1.201/KDR/5763**

21 May 2010

tie limited
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Bilfinger Berger Civil EDI	
21 MAY 2010	REV

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For the attention of Steven Bell – Tram Project Director

Dear Sirs,

**Edinburgh Tram Network Infraco
Infraco Contract: Infraco Notice of tie Change No. 109, Clause 80.13 Instruction**

We refer to our letter dated 21 May 2010 (25.1.201/KDR/5762), setting out the Infraco's position in relation to tie's entitlement to instruct Infraco to commence, carry out and complete works which are the subject of an INTC or tie Notice of Change. We refer specifically to tie's entitlement to issue an instruction to Infraco to proceed with the works which are the subject of INTC 109.

The Parties have failed to agree the Estimate submitted by Infraco on 30 September 2009. As narrated by correspondence dated 8 February 2010 (INF CORR 4007/SJ) and 17 February 2010 (25.1.201/WIM/4715) the Parties have failed to agree whether the amendment to the design of Structure S21C requiring permanent/sacrificial sheet piling is a Notified Departure. We note tie has agreed in its letter of 20 November 2009 (INF CORR 2850/SJ) that the introduction of security gates is a Notified Departure and included tie's assessment of the change at £4,333.58 excl VAT. Infraco have in our letter dated 23 November 2009 (25.1.201/MRH/4080) acknowledged agreement of tie's assessment of the change at £4,333.58 excl VAT. As this element of the Estimate is agreed, Infraco is proceeding with the works associated therewith in accordance with the programme.

However, as at 19 March 2010 and the date of this notice there was and is no agreed Estimate for permanent/sacrificial sheet piling element of the INTC.

Infraco's position is that in the absence of a tie Change Order or agreed Estimate in respect of the permanent/sacrificial sheet piling tie is not entitled to instruct Infraco under Clause 80.13 or 34.1 to commence, carry out or complete those works. tie are not entitled to issue the instruction in its letter of 19 March 2010 (INF CORR 4487) in so far as it relates to the requirement for permanent/sacrificial sheet piling.

From the above, it is apparent that the parties cannot agree on whether:

- (1) the introduction of permanent/sacrificial sheet piling and associated works is a Notified Departure; and
- (2) tie is entitled to issue to Infraco an instruction under Clauses 80.13 or 34.1 to commence, carry out and complete the works which are the subject of the disputed element of INTC 109

We therefore give notice pursuant to Clause 111 of the Infraco Contract and paragraph 9.1 of Schedule Part 9 that we hereby initiate the Internal Dispute Resolution Procedure in respect of the Dispute.

The matter we hereby refer to the Dispute Resolution Procedure is:

1. Is the requirement for permanent/sacrificial sheet piling in the IFC Drawings for Structure S21C a Notified Departure?
2. Is Infraco obliged to commence, carry out or complete the works which are the subject of the disputed element of INTC 109 as instructed by tie by its letter of 19 March 2010 (INF CORR 4487)?

For the avoidance of doubt, this notice of dispute deals specifically with tie's entitlement to instruct works which are the subject of INTC 109. tie's entitlement to instruct works which are the subject of the other INTCs referred to by the 19 March 2010 will be dealt with separately.

In accordance with Clause 111.1.2.2 this letter is being faxed to tie at the required address, and tie's Representative is requested to attend a meeting to resolve this dispute at the Infraco offices on 25 May 2010 at 18h00 in accordance with paragraph 9 of the Infraco Contract.

Yours faithfully


Martin Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

cc R. Walker – Bilfinger Berger
M. Flynn - Siemens
A. Campos - CAF
M Berrozpe – Siemens
A. Urriza - CAF



FAO Mr Martin Foerder
Bilfinger Berger – Siemens – CAF Consortium
9 Lochside Avenue
Edinburgh Park
Edinburgh
EH12 9DJ

Our Ref: INF CORR 5237

Date: 1 June 2010

Dear Sir,

**Edinburgh Tram Network Infraco
Dispute Resolution Procedure – Infraco Notification of tie Change (INTC) number
109**

Following the referral of the above matter to Dispute Resolution Procedure on 21 May 2010 we attach our Position Paper pursuant to Paragraph 9.2 of Schedule Part 9.

Yours faithfully,



Steven Bell
Project Director – Edinburgh Tram

DISPUTE RESOLUTION PROCEDURE

Structure S21C - Murrayfield Stadium Underpass

Infraco Notification of tie Change (INTC) number 109

TIE LIMITED

POSITION PAPER PURSUANT TO PARAGRAPH 9.2

OF SCHEDULE PART 9 (DISPUTE RESOLUTION PROCEDURE)

relating to

the agreement between tie Limited

and

Bilfinger Berger Civil UK Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles
consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

1 June 2010



1. INTRODUCTION

- 1.1 By way of letter dated 21 May 2010 (reference 25.1.201/KDR/5763) the Bilfinger Berger Civil UK Limited / Siemens plc / Construcciones y Auxiliari de Ferrocarriles consortium (hereinafter collectively referred to as "Infraco") gave notice to **tie** Limited (hereinafter referred to as "**tie**") that it wished to initiate the Internal Resolution Procedure in respect of certain matters which had arisen between **tie** and the Infraco in connection with or arising from the agreement between **tie** and the Infraco (hereinafter referred to as the "**Infraco Contract**") in connection with the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006*.
- 1.2 This Position Paper has been prepared by **tie** pursuant to *paragraph 9.2 of Schedule Part 9 (Dispute Resolution Procedure)* to the Infraco Contract.

2. THE DISPUTE

- 2.1 **tie** understands that the two matters referred to the Internal Resolution Procedure by Infraco in its letter dated 21 May 2010 (reference 25.1.201/KDR/5763) are:
- 2.1.1 Is the requirement for permanent/sacrificial sheet piling in the IFC Drawings for Structure S21C a Notified Departure?
- 2.1.2 Is Infraco obliged to commence, carry out or complete the works which are the subject of the disputed element of INTC 109 as instructed by **tie** by its letter of 19 March 2010 (INF CORR 4487)?
- 2.2 For the purposes of clarity, each of the matters listed at *paragraphs 2.1.1 and 2.1.2* above represent, and are properly treated as, two separate Disputes. Notwithstanding that both matters are addressed by **tie** in this Position Paper, in the event of any further proceedings (such as mediation or Adjudication) in respect of either matters, a separate referral of each matter noted at *paragraph 2.1.1 and paragraph 2.1.2* above to any such further proceedings shall be required and insisted upon by **tie**.
- 2.3 For the avoidance of doubt, the matters set out in this Position Paper, including, but not limited to, the redress sought, are without prejudice to and under reservation of **tie's** whole rights and remedies, including, but not limited to any defence which **tie** may wish to raise in the event of further proceedings and any delay to the completion of the Infraco Works as a consequence of or in any way connected with the date of issue by Infraco of Infraco notification of **tie** Change number 109 dated 18 September 2008 issued under cover of letter dated 18 September 2008 (reference 25.1.201/IO/495) ("**INTC 109**") and/or the date of delivery to **tie** by Infraco of the estimate dated 30 September 2009 (the "**Estimate**") in respect of INTC 109 and/or the absence of a **tie** Change Order in response to the Estimate.
- 2.4 There follows **tie's** position on the matters noted at *paragraphs 2.1.1 and 2.1.2* above, together with its comments (where appropriate) on **tie's** understanding of the Infraco's position on the matters noted at *paragraphs 2.1.1 and 2.1.2* above.



3. **TIE'S POSITION ON THE MATTERS REFERRED TO THE INTERNAL RESOLUTION PROCEDURE BY INFRACO IN ITS LETTER DATED 21 MAY 2010 (REFERENCE 25.1.201/KDR/5763)**

Permanent/sacrificial sheet piling depicted on the Issued For Construction Drawings relative to Structure S21C

3.1 It is tie's position on the matter noted at *paragraph 2.1.1* above that:

3.1.1 strictly on the basis of the particular facts and circumstances pertaining to Structure S21C, tie are prepared to accept that the amendment to the steel sheet piling from it being part of the temporary works to it being part of the permanent works depicted on the Issued For Construction Drawings numbered ULE90130-05-BRG-00683 revision 4 and ULE90130-05-BRG-00687 revision 3 constitutes a Notified Departure in terms of *Pricing Assumption 3.4.1.1 of Schedule Part 4 (Pricing)* to the Infraco Contract.

Infraco's obligation to commence, carry out and complete the works which are the subject of the disputed element of INTC 109 as instructed by tie by its letter of 19 March 2010 (reference INF CORR 4487)

3.2 In the first instance tie note that the phrase "*the disputed element of INTC 109*" is lacking in specification (on which point tie reserves its right to rely upon in any future proceedings) - it being unclear whether that phrase refers only to the matter noted at *paragraph 2.1.1* above. Subject to that, for the purposes of this Position Paper only, tie sets out below its preliminary observations on the matter noted at *paragraph 2.1.2* above.

3.3 The whole scheme of the Infraco Contract, including *inter alia*, *Clause(s) 34.1 and 80.13* of the Infraco Contract, does not support an interpretation of the Infraco Contract whereby Infraco are entitled to hold up the progress of the Infraco Works in circumstances where firstly the only issue between the parties is who should bear the cost and time consequences of a particular item of work; and secondly, Infraco will be entitled to apply for recovery of the cost and time consequences in the event that it transpires that tie should bear those consequences.

Clause 34.1

3.3.1 *Clause 34.1* of the Infraco Contract provides

"The Infraco shall construct and complete the Infraco Works in strict accordance with this Agreement and shall comply with and adhere strictly to tie and tie's Representative's instructions on any matter connected therewith (whether mentioned in this Agreement or not) provided that such instructions are given in accordance with the terms of this Agreement and will not cause Infraco to be in breach of this Agreement. The Infraco shall take instructions only from tie, tie's Representative, subject to Clause 25.8, from tie's Representative's duly appointed delegate or the Operator or Operator's Representative in accordance with 17.10."

3.3.2 In terms of *Clause 34.1* of the Infraco Contract, tie are entitled to issue instructions to Infraco, and Infraco are obliged to comply with those



instructions, provided that they do not conflict with Infraco's obligations under the Infraco Contract.

- 3.3.3 Where there is a dispute or difference between **tie** and Infraco as to whether the work which is the subject matter of an instruction issued pursuant to *Clause 34.1* is a Notified Departure, that work should progress in the interim until that dispute or difference is resolved.
- 3.3.4 In the event that it eventually transpires that the work in question is properly a Notified Departure then Infraco will be entitled to recover the time and cost consequences in accordance with the provisions of the Infraco Contract in the usual way. Infraco's legitimate interests in this respect are safeguarded by the provisions of *Clause 34.3*.
- 3.3.5 Where it transpires that the work in question was not a Notified Departure, the instruction issued to Infraco properly constitutes an instruction to proceed with work which forms part of its contractual scope of work, and in relation to which there is no entitlement to additional payment, relief or an extension of time.

Clause 80.13

- 3.3.6 *Clause 80.13* of the Infraco Contract provides

"80.13 Subject to Clause 80.15, as soon as reasonably practicable after the contents of the Estimate have been agreed tie may:

80.13.1 issue a tie Change Order to Infraco.; or

80.13.2 except where the Estimate relates to a Mandatory tie Change, withdraw the tie Notice of Change, in which case Infraco shall be entitled to claim the reasonable additional costs incurred by the Infraco in complying with this Clause 80 in relation to that tie Notice of Change including the cost of any abortive works where tie has instructed Infraco to commence works prior to the agreement of the Estimate.

Subject to Clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a tie Change until instructed through receipt of a tie Change Order unless otherwise directed by tie."

- 3.3.7 The words "*Subject to Clause 80.15*" at the opening of the relevant paragraph should be interpreted as meaning "*unless prohibited, or contradicted, by Clause 80.15*".
- 3.3.8 The words "*unless otherwise directed by tie*" at the end of the relevant paragraph require to be given meaning.
- 3.3.9 The *Clause 80.15* mechanism envisages **tie** issuing a **tie** Change Order in any event. It does not refer to some "*lesser*" instruction in the form of a "*direction*", and there would be no need to use the words "*unless otherwise directed by tie*" if all that was intended was that Infraco should proceed on the basis of a **tie** Change Order.

- 3.3.10 It is clear from *Clause 80.13.2* that the Infraco Contract envisages situations where the Infraco has executed works at cost prior to the agreement of an Estimate and any **tie** Change Order on the basis of a **tie** instruction. That instruction clearly correlates with **tie** directing otherwise.
 - 3.3.11 If an entitlement to a Notified Departure is established then *Clause 80* will be applicable, failing which the matter is governed by *Clause 34*.
 - 3.4 The provisions of both *Clause(s) 34.1* and *80.13* referred to above point to a clear contractual entitlement which allows **tie** to require work to proceed, while still protecting Infraco's entitlement to make recovery for it in the event that it transpires that **tie** should be responsible for its cost and time consequences.
- 4. REQUIRED OBJECTIVES OF REFERRAL OF THE MATTERS LISTED AT PARAGRAPHS 2.1.1 AND 2.1.2 TO THE INTERNAL RESOLUTION PROCEDURE**
- 4.1 In respect of the matter noted at *paragraph 2.1.1* above, in light of the position set out at *paragraph 3.1* above, **tie** are of the opinion that there is no objective in continuing with the referral of that matter to the Internal Resolution Procedure.
 - 4.2 In respect of the matter noted at *paragraph 2.1.2* above, **tie** requires the Infraco to:
 - 4.2.1 commence, carry out and complete the works which are the subject of INTC 109 as instructed by **tie** in its letter dated 19 March 2010 (reference INF CORR 4487).
- 5. REQUIRED REDRESS (IN THE EVENT OF FUTURE PROCEEDINGS)**
- 5.1 In respect of the matter noted at *paragraph 2.1.1* above, in light of the position set out at *paragraph 3.1* above, **tie** are of the opinion that there is no requirement presently for any further proceedings in regard to that matter. In the event of any further proceedings, **tie** reserves its position as to the redress required.
 - 5.2 In respect of the matter noted at *paragraph 2.1.2* above a declaration that:
 - 5.2.1 Infraco is obliged to commence, carry out and complete the works which are the subject of INTC 109 as instructed by **tie** in its letter dated 19 March 2010 (reference INF CORR 4487).
- 6. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE MATTERS REFERRED TO THE INTERNAL RESOLUTION PROCEDURE BY INFRACO IN ITS LETTER DATED 21 MAY 2010 (REFERENCE 25.1.201/KDR/5763)**
- 6.1 Without prejudice to and under reservation of **tie's** position set out above in this Position Paper, **tie** sets out its further comments below.
 - 6.2 Infraco also requires to take account of the provisions of *Clause 80.20* which, *inter alia*, requires it to comply with instructions and within 20 Business Days operate *Clause 80.4* or *80.5* if relevant.
 - 6.3 This Position Paper is served under reservation of a right by **tie**, both in its sole discretion and in any event in response to new information coming to light, at any time to add, omit, alter or otherwise amend in whole or in part its position as set out in this Position Paper.



Our ref: 25.1.201/KDR/5898

Bilfinger Berger-Siemens- CAF Consortium

02 June 2010

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For the attention of Steven Bell – Tram Project Director

Dear Sirs,

**Edinburgh Tram Network Infraco
Schedule Part 9 - Dispute Resolution Procedure – Clause 9.2 Position Paper
Infraco Notice of tie Change No. 109, Clause 80.13 Instruction**

We refer to our letter dated 21 May 2010 (Ref: 25.1.201/KDR/5763) in which Infraco referred the above matter to the Dispute Resolution Procedure:

In accordance with Clause 9.2, we hereby serve in accordance with the provisions of Clause 111 (Notices) of the Agreement, our written "Position Paper" upon tie.

Yours faithfully,



M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

Encl: Infraco Position Paper – tie Instruction to commence works / Infraco Notice of tie Change No. 109 – Murrayfield Underpass Structure S21C

cc: R. Walker – Bilfinger Berger
W. Meiler – Bilfinger Berger
M. Flynn – Siemens
M. Berrozpe – Siemens
A. Brandenburger - Siemens
A. Campos - CAF
A. Urriza - CAF



EDINBURGH TRAM PROJECT**INFRACO POSITION PAPER**

relating to

**tie INSTRUCTION TO COMMENCE WORKS/ INFRACO NOTICE OF tie CHANGE NO. 109
("INTC 109") – MURRAYFIELD UNDERPASS STRUCTURE S21C**

This Position Paper is prepared by Infraco in accordance with paragraph 9.2 of the Dispute Resolution Procedure initiated by Infraco by its letter of 21 May 2010 (Ref: 25.1.201/KDR/5763). It is in respect of tie's instruction to commence works which are the subject of INTC No 109 in the absence of an agreed Estimate in respect of those works. Subject to the content of the tie Position Paper, Infraco reserve their position on adding, omitting or otherwise amending their position in this Dispute should this, in the opinion of the Infraco, become necessary.

Introduction and Chronology

The dispute concerns the instruction issued by tie on 19 March 2010 (INF CORR 4487) (the "Instruction") to commence, carry out and complete the works which, inter alia, are the subject of INTC No 109.

The INTC

INTC 109 relates to:

- The addition of a sacrificial/permanent sheet pile wall and ground anchors to Structure S21C between the new tram line and Network Rail (NR) mainline to Haymarket adjacent to Murrayfield Stadium and Training Pitches ; and
- An additional requirement for Security Gates for Structure S21C.

These additions are apparent from a comparison of the Design as informed by the BDDI drawings (ULE90130-05-BRG-00681 revision 4 and 00683 revision 2) and the Design as informed by the IFC Drawings (BRG-00687 revision 3 and BRG 000683 revision 4).

Tie has accepted the new requirement for security gates is a Notified Departure on 20 November 2009 and this element of the Estimate is agreed. It does not form part of the Dispute.

The Parties have failed to agree on the status of the addition of the permanent sheet pile and associated works.

Infraco understand tie's position in respect of the sheet piling to be as set out in its letter of 9 February 2010 (INF CORR 4007/SJ):

"The IFC Drawings issued merely clarifies Actual requirement. We therefore deem this to be Normal completion of the design and not a Change under the Infraco Contract"

Infraco's position as set out in its Estimate dated 30 September 2009 (Ref:25.1.201/IO/3651) and further explained in correspondence dated 17 February 2010 (Ref: 25.1.201/WIM/4715) is that both of these amendments to the Design between BDDI and IFC are Notified Departures under paragraph 3.4.1 of Schedule Part 4 of the Infraco Contract. It has also been further demonstrated that such changes arose from the requirements of an Approval Body and as such, also constitute Notified Departures pursuant to Pricing Assumption 3.4.1.3.

The BDDI drawings only anticipated that temporary works would be required to facilitate construction and did not specify the type of temporary works to be adopted by the contractor.

The IFC Drawings, whilst fulfilling the Infraco's requirements for temporary works, introduce a new requirement for permanent sheet piling to sustain load effects during construction and then to act as a permanent separation between the two lines to prevent potential future consolidation settlement of the Tram from affecting the NR line.

Following on from this:

- The sheet piling specified in the IFC drawings is part of the permanent works and part of the Design prepared by SDS at IFC, and thus not to be confused with temporary works, which falls to be designed and implemented entirely at the discretion of Infraco.
- The requirement for permanent sheet piling is a change in design principle (resulting in changes of shape, form and specification) between BDDI and IFC. The design principle at BDDI was the use of temporary sheet piling to support the Network Rail embankment on a temporary basis whilst the new vertical earth retaining structure was completed. At IFC, the new design principle requires that permanent sheet piling isolate the existing Network Rail structure from potential effects of differential settlement and consolidation.
- In any event the requirement for permanent sheet piling came from Network Rail in its capacity as an Approval Body.

The Instruction

On 19 March 2010 tie issued the Instruction. Inter alia, the Instruction, instructed Infraco to:

"commence, carry out and complete the following works with due expedition. In the event that the any item of the said works is, becomes or is alleged to be the subject of a tie Notice of Change, an Infraco Notice of tie Change, a tie Change Order or a Mandatory tie Change Order, at anytime, this instruction will be deemed to have been given and shall operate for such works pursuant to Clause 80.13 "

The "following works" referred to a list of INTCs, which included INTC 109.

Infraco queried the status of the Instruction and tie's intentions in respect of the Instruction by letter dated 26 April 2010 (Ref. 25.1.201/KDR/5208). This letter requested tie's confirmation that it agreed the Estimates relating to the INTCs included in the Instruction which had not yet otherwise been agreed.

By letter of 2 April 2010 (INF CORR 4652) tie informed Infraco that the Instruction did not constitute acceptance (implied or express) to the outstanding Estimates.

INFRACO POSITION

Infraco's position is that it is not obliged to comply with the Instruction to commence, carry out and complete the works which are the subject of the disputed element of INTC 109. However Infraco does accept that even in the absence of a tie Change Order, it is required to comply with the instruction to proceed with the security gates, being that part of the INTC in respect of which there is an agreed Estimate.

As is apparent from the facts narrated above there is no agreed Estimate or tie Change Order for the sheet piling and associated works under INTC 109. In fact tie has not even agreed that such amendments to the Design are Notified Departures.

Clause 80.13 only entitles tie to direct Infraco to commence work in respect of a tie Change in circumstances where the contents of the Estimate have been agreed as clearly provided for in the opening words of Clause 80.13:

"as soon as reasonably practicable after the contents of the Estimate have been agreed tie may"

Clause 34 can not be used to circumvent the Clause 80 process. Clause 34.1 requires that any instruction given by tie or tie's Representative must be in accordance with the terms of the Infraco Contract. As Clause 80.13 does not permit an instruction to proceed other than in the circumstances set out above, Clause 34.1 can not be used to instruct Infraco to proceed with works where there is no agreed Estimate.

Redress Sought by Infraco

Infraco seek to have declared that:

- (1) The requirement for permanent/sacrificial sheet piling and associated works (or any part thereof) in the IFC Drawings for Structure S21C is a Notified Departure;
- (2) Infraco is not obliged to commence, carry out or complete the works which are the subject of the disputed element of INTC 109 as instructed by tie by its letter of 19 March 2010 (INF CORR 4487).

Without prejudice to the generality of Infraco's right (*supra*) to amend its position within this Dispute, Infraco further reserves its position on seeking protection from damages and/or recovering any loss and expense germane to or arising from tie's administration of this matter.