



For The Attention of Martin Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium
9 Lochside Avenue
Edinburgh Park
Edinburgh EH12 9DJ

Our Ref: INF CORR 4143

Date: 19th February 2010

Dear Martin,

**COMPENSATION EVENTS
CLAIMS FOR ENTITLEMENT PURSUANT TO CLAUSE 65.2**

We refer to previous correspondence in relation to Compensation Events and your stated position which is a refusal or inability to provide contractually compliant information to meet your obligations under Clause 65 of the Infraco Contract. You have made a global assertion that this inability is due to the unresolved EOT claim flowing from INTC 429 (issued to us on 6 August 2009) in relation to the incomplete MUDFA Works.

It is our firm view that the reason for your inability to comply with your contractual obligations does not lie in INTC 429, nor the frequency of occurrence of Compensation Events, but rather in your decision not to respect the proper operation of the Contract and compounding consequences of your unwillingness to produce any timely assessment relating to individual facts and circumstances.

There are numerous cases of notifications in which you have not complied with Clause 65 and have given no meaningful indication as to when details will be received which do satisfy the requirements of Clause 65.

As an example, which is representative, we refer to the letters of 26 January 2009 (25.1.201/MRH/1386), 23 February 2009 (25.1.201/MRH/1708) and 16 March 2009 (25.1.201/MRH/1935).

It is not credible that your reason for failing to provide full details of the claim is that these cannot be ascertained until the resolution of the dispute concerning INTC 429. This has been your attitude towards the vast majority of Compensation Events from the debut of the Infraco Contract and has not simply changed following the submission of INTC 429 in August 2009.

We acknowledge that the quantum of INTC 429 is subject of Dispute Resolution Procedure, but it has not been determined that the dominant cause of delay on the Project is the delayed MUDFA Works or that this has any bearing on the continued proper operation of the Infraco Contract.

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In any case, it is not contractually correct for you to assert that INTC 429 produces a situation in which you are excused on an ongoing blanket basis from any obligation to provide compliant meaningful estimates of the likely effect of delay upon the Programme and adverse effects on performance of your obligations; details of your costs and losses (excluding Indirect Losses); mitigation measures adopted and, if unsuccessful, the reasons why; and any acceleration or other measures which you could take to mitigate effects of delay or non-performance and associated cost estimates.

You ought to be able to consider these matters (as a properly qualified and competent contractor ought to be able to) for some, if not all, of the specific alleged Compensation Events. For example, it is reasonable for us to expect to receive an indication from you how long a particular piece of unexpected work might take to carry out and what the cost of that work would be and any particular/additional materials or services which would be required. It is reasonable for us to expect you to make suggestions for approaches to deal with the alleged Compensation Event, in particular any mitigating measures which you might consider (bearing in mind our overarching project partnering and best value rights and obligations). It is reasonable for us to expect you to make some effort to satisfy these requirements. This information is identifiable, within your knowledge and control and independent of the Programme or the actual start date for the works in question. There is therefore no excuse for you not to provide us with a sensible level of transparency regarding the alleged Compensation Events which you are claiming, as required under the Infraco Contract.

In any case, Clause 65.2 includes the possibility (in defined circumstances), where you are not able to provide full details of the claim at the initial notification stage, for you to submit instead: "*a statement to that effect with reasons, together with interim particulars of the items referred to at Clause 65.2.2 insofar as such items are available...*" and further interim particulars until such time that the full details are available. This is not qualified by requiring any particular instruction or direction from us. This is a straight obligation in the Infraco Contract. Not to be providing us with some level of interim (and updated) information is also a breach of contract, contrary to Good Industry Practice and detrimental to our statutory obligations in terms of best value, in particular under the Local Government (Scotland) Act 1973. It gives us absolutely no comfort or visibility that you are doing anything to mitigate any cost and delay to the Project arising from any alleged Compensation Event. In addition, it is detrimental to the validity of your own Compensation Event claim, which requires you to comply timeously with the information requirements in Clause 65.2, otherwise you will not be entitled to relief for the time during which you delay, in this case by your choice, in complying with these requirements.

In addition to and independent of the specific details of the claim which are required by Clause 65.2.2, you are obliged under Clause 65.3 to demonstrate to our reasonable satisfaction that:

- you could not reasonably have avoided the occurrence of the Compensation Event or consequences;
- the Compensation Event is the direct cause of the delay, inability to perform and/or the additional costs subject of the claim; and
- you are using reasonable endeavours to otherwise perform your obligations under the Infraco Contract.

We are not satisfied that you have demonstrated this for the majority of the Compensation Events claimed. We do not consider that this requirement for demonstration is contingent upon any other factor. INTC 429 can have no effect on your obligations under this provision.

The provisions on Compensation Events are designed to allow for transparency, notice and visibility of potential claims which arise and to allow us to accurately and fairly assess any time and/or cost entitlement for you flowing from that claim, while you otherwise progress the Infraco Works. These provisions are not designed to allow you to put a veil over contractual compliance due to other events which are happening in the course of the Project.

You are under a contractual duty to continue to carry on the Infraco Works despite Compensation Events and to do so using reasonable endeavours to maximise productivity by reference to Good Industry Practice and with due expedition and in a timely and efficient manner without delay.

The stance you have adopted on the provision of contractually deliverable information under Clause 65.2 puts you in breach of contract and this Infraco Default is persistent. We expressly reserve all our rights to recover our losses and liabilities incurred because of this ongoing breach and we will account for delay and cost caused by your breach when evaluating any proper substantial claim which you submit.

Please report to us how you propose to remedy this breach within 10 Business Days of this letter.

Yours sincerely,

A black rectangular redaction box covering the signature of Steven Bell.

Steven Bell
Project Director – Edinburgh Tram