



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 4032

19th February 2010

Dear Martin,

**Edinburgh Tram Project - Infracore
Notification, Clause 80 Notices and Estimates and Best Value.**

To fully complete the current Audit Programme instructed by tie's Board it is necessary for us to conduct a Review of the Estimates you have given pursuant to Clause 80.4 regarding tie Changes and Notified Departures. Our preliminary findings based upon our "Status of Estimates" report of 22nd January 2010 are:

- Notifications are substantially delivered by you in the form of a standard letter.
- Such notices include a request for an extension to the period of time for delivering an Estimate prescribed by Clause 80.3.
- Such requests for extension are substantially neither explained nor quantified.
- Of the 518 only 47 have been submitted within the prescribed time.
- You have failed to submit Estimates within agreed extended period(s) and many Estimates have been submitted materially late (up to 250 days late).
- You have submitted 214 Estimates against the 518 notices.
- 214 Estimates have not been fully completed in accordance with Clause 80.4.
- Your Estimates generally only address your opinion pursuant to Clause 80.4.10.
- Such opinions are regularly, and often after lengthy delay, subsequently revised (mainly by significant reduction) by you.
 - Current analysis of issued tie Change Orders shows an average agreed value ~60% of the original Estimate submission.
- Your letter dated 11 December 2008, (ref: 25.1.201/MRH/1134) sets out a systemic intention to fail to meet your obligations to give full and timeous Estimates.
- You have not met the extended periods proposed in your letter.
- Of the 518 notifications circa 130 allege "design changes" without explanation.

We do not accept that your insistence on refusing to commence work without an agreement of the valuation of the work required by reason of a claimed Notified Departure is consistent with your obligations under the Agreement. We have needed to proceed with instigating the Dispute Resolution Process because of the absence of Estimates from you.

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You are obliged to assist us in meeting our duties under the *Local Government in Scotland Act 2003* (Best Value) which requires us to review our activity on a regular basis. We have therefore to notify you that:

1. We confirm that you are and have been instructed to commence all work required to execute disputed **tie** changes pursuant to Clause 80.15 under the payment provisions prescribed by Clause 80.16 (demonstrable cost on an interim basis), save for such potential **tie** Changes that include work by the SDS Provider where the valuation of such work has not been agreed. We have agreed validated design costs with you for work done by the SDS Provider in this regard.

In all other circumstances, Infraco is obliged to commence work wherever if directed to do so by **tie**, subject only to:

- the provisions of Clause 80.12; and
 - the provisions of Clause 80.15
2. Whilst we deny your assertion that the volume of changes intimated by you under Notified Departure have rendered the provisions of Clause 80.4 inoperable or impractical, on the hypothesis that you are correct, we believe that your obligations inter alia under Clauses 6 and 7 require you take measures which mitigate delay, minimize costs and assist us in achieving best value. Forcing the DRP process to be instigated to establish an adjustment to value and thereby not commencing work before doing so does not satisfy your obligations, in particular your obligation under Clause 6.3 to use reasonable endeavours to avoid unnecessary disputes and your obligations to act fairly and reasonably (Clause 118).

We require that you make clear your position on this matter.

Is it your argument that the volume of changes has developed to a point where the terms of Clause 80.4 became inoperable or impractical (if so, when)?

Or are you asserting that the terms were never operable or practical? If not, when do you assert that the terms became inoperable or impractical and explain why they should not become operable and practicable when you revise the Programme?

3. If it is your contention and you were correct – and we disagree strongly – that the terms of Clause 80.4 are inoperable, it would have to be the case that the provisions of Clauses 80.13.1 and 2 and 80.14 also fall, leaving the general power of **tie** to direct, along with the full effect of Clause 80.15.
4. In the circumstances that you allege exist or that you have caused, you have a duty to correct such failure (either in the Agreement or by your action) and you should proceed with the works with due expedition.

5. We also give you notice that any purported notice given by you in accordance with Clause 80 and/or in accordance with Schedule Part 9, either within 18 days prior to the date of this letter or after the date of this letter will not be deemed a competent notice (subject to your response to item 2 above) unless a complete Estimate is submitted to our reasonable satisfaction within the periods of time prescribed by Clause 80 or such reasonable extended period granted by ourselves in writing.
6. Your attention is drawn to the requirements of Clause 65.2 for you to give notice "as soon as is reasonably practicable". Any Estimate given by you pursuant to Clause 80 should include such relevant notices you may deem appropriate under Clause 65.2 (unless such notice has already been given). In the event that you are unable to give a definitive duration of delay, you should state your best estimate on an interim basis and update this.
7. Your attention is also drawn to the provisions of Clause 73 as we are charged with commenting on Infraco's level of performance in making "*arrangements to secure continuous improvement in the way in which the Infraco Works are conducted having regard to the Project Vision and a combination of economy, efficiency and effectiveness.*" To carry out our assessment it will be necessary for us to compare your opinions with the detailed make-up of the Construction Works Price. This being material created by an Infraco Party or Parties in relation to the Infraco Works, we deem it to be a "Deliverable" as defined in Schedule Part 1 and we request you to provide us with full copy with a certificate that it is complete and unaltered. We believe that 14 days is a reasonable time for you to produce this material.
8. Pursuant to Clauses 6 and 7 you are obliged and have a duty of care to take reasonable mitigation measures to minimize tie's costs, exercising a reasonable level of professional skill, care and diligence. Pursuant to Clauses 7.3.6, .7, .9, .10, .13 and .17 you are obliged to carry out and complete the Works in accordance with certain policies of tie and CEC, the Code of Construction Practice and Good Industry Practice. Moreover you have to ensure compliance with Tram Legislation, applicable Law, Land Consents and Consents. Please provide a summary with each Estimate of the measures you have taken to comply with these obligations and an estimate of the cost saving you have caused thereby pursuant to the above Clause 7 obligations and those of Clause 80.7.

Yours sincerely



Steven Bell
Edinburgh Tram – Project Director