BILFINGER BERGER Civil SIEMENS CAF

Our ref: **25.1.201/KDR/4843**
Your ref: **INF CORR 4143**

1 March 2010

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For the attention of Steven Bell - Tram Project Director

Dear Sirs,

Edinburgh Tram Network Infraco
Infraco Contract: Claims for Entitlement Pursuant to Clause 65.2

We refer to your letter of 19 February 2010 (ref INF CORR 4143) in relation to the operation of Clause 65.2 of the Infraco Contract.

Your letter asserts that Infraco has chosen not to comply with Clause 65.2 insofar as Infraco is obliged to provide a *'timely assessment relating to individual facts and circumstances'*. The tenor of your letter is that, in breach of its contractual obligations, Infraco has chosen to hide behind the existence of INTC 429 in relation to the incomplete MUDFA Works.

We strongly refute that Infraco is in breach of Clause 65.2.

Infraco has complied with its contractual obligation to give notice of the occurrence of Compensation Events and has complied with the requirements of Clause 65.2.2 by providing as much information as it is in a position to provide at present. As with recent correspondence on Estimates, you appear to focus on the mechanics of the procedure by which Compensation Events are to be managed, rather than accepting the underlying entitlement which we have to an extension of time and money as a result of the considerable delays suffered on this project to date.

Central to this is an acknowledgement of the extent to which Infraco's works have been severely hampered by ongoing delays (not of Infraco's making), not least of which is the fact that the MUDFA works remain incomplete almost two years after their intended completion date, with doubt remaining over when these works will actually complete. Your letter is astounding insofar as it ignores entirely the discussions between us which have been ongoing since early 2009 in an attempt to arrive at an agreed and workable Programme, which takes account of the MUDFA (and other) delays and against which it is possible to monitor and assess the impact of the various Compensation Events.

Although you state that it has not been determined that the dominant cause of delay on the Project is the MUDFA works or that this has any bearing on the continued proper operation of the Infraco Contract, this is plainly nonsense. You have acknowledged elsewhere the impact of the MUDFA works and have offered to grant a 9 month interim extension of time in relation to this delay alone. Many of the Compensation Events issued to date relate to the late release of the IFC design by the SDS Provider. Although this information may be issued late in terms of the dates shown on the Programme (Revision 1), many of these Events may have little if any delaying impact on the Project for the very reason that if the MUDFA works are still ongoing, no construction works can commence in any case in particular areas. Thus, to give you individual assessments of delay in respect of individual Compensation Events is entirely meaningless without having a baseline (an agreed and realistic Programme reflecting where matters sit at present as a

result not only of the MUDFA delay, but also all other factors impacting on progress including the many INTCs issued with reference to Clause 80), against which to assess and monitor progress.

Following on from this, it should be noted that Clause 65.2.2.1 obliges Infraco to provide its estimate of the likely effect upon the Programme or the adverse effects on the performance of its obligations under the Agreement. This presupposes that there is a Programme in place against which it is possible to actually give an estimate which is of any meaning or effect. As you are well aware, in January 2009 it was noted that the project did not have an effective monitoring tool for the progression of the works, and it was agreed by both parties that a revised Programme (Revision 2) was needed and would be jointly prepared.

Throughout the early part of 2009, parties worked together to carry out this exercise. The proposed Programme (Revision 2) was submitted to tie on 20 May 2009. That programme was rejected by tie on 21 August 2009, for reasons we do not consider were justified. As you are further aware, discussions in an attempt to agree a Programme against which it is possible to record progress are ongoing (in accordance with the agreement reached by Messrs Darcy and Jeffrey in November 2009).

You state throughout your letter that we have not given you a meaningful indication of when we will be able to give you information which does satisfy the requirements of Clause 65. We have been very clear about when we will be able to provide you with such information. This will be when we have agreed between us a revised Programme which will allow us to give a meaningful estimate. We have been unable to achieve this because of tie's continued refusal to properly engage with us in agreeing this Programme. Instead tie appears to be focusing its attentions on developing a whole gambit of spurious allegations and claims against us, involving both parties in a futile exchange of correspondence and diverting critical resources away from the issues which would actually help move this project forward (including Programme).

Leaving this aside, your letter acknowledges that where we are unable to determine what effect the Compensation Event will actually have (such that it is not practicable to submit full details in accordance with Clause 65.2), then in these circumstances notice to that effect can be given together with interim written particulars. We have provided you with these notices and as much interim information as we can. In terms of providing you with further interim particulars (Clause 65.2.2(b)), the point here is that nothing has moved on. We have not yet agreed a workable Programme with you (despite having provided you with what we consider to be an acceptable Programme) and your request to suspend the MUDFA dispute pending resolution of an On Street Supplemental Agreement, has further delayed any resolution of this. tie's proper engagement on the many issues surrounding the Programme is central to our ability to be able to provide the additional information requested.

We would note also that tie is in breach of Clause 65.2A1.1 in that it has continually failed to notify Infraco within 20 Business Days of receipt of the notices issued by Infraco, of its agreement or otherwise on whether a Compensation Event has occurred. The provision by Infraco of information under Clause 65.2.2 should in no way impact on tie's ability to advise whether, as a matter of principle, it considers a Compensation Event to have occurred.

Other statements made in your letter are responded to as follows:

- You refer to our alleged breach of contract as being "detrimental to our statutory obligations in terms of best value". We cannot understand on what basis you make such a statement.

  Firstly, tie does not have a statutory best value obligation. The 1973 Act as amended by The Local Government in Scotland Act 2003 placed local authorities under a duty of Best Value. This duty does not apply to companies owned by local authorities.

  Secondly and in any event, we can not believe CEC would consider a breach of contract by any Contractor as being capable of causing it to fail in its best value duty. We would assume, given the guidance on the criteria against which local authorities will be judged in relation to their efforts

towards continuous improvement (best value), CEC's position is that in respect of the procurement of the ETN it has discharged its duty of Best Value by entrusting the contractual negotiation and contract management of the Infraco Contract to an organisation of procurement professionals such as tie. Nevertheless we are extremely concerned by the allegations you make in this regard and we will be writing to CEC to confirm its position on this issue.

- You state that you are not satisfied that we have demonstrated compliance with Clause 65.3 for the majority of the Compensation Events claimed. We assume you mean in fact Clause 65.2.3 given the contract provisions quoted. However, you are wrong that our entitlements under Clause 65.3 are in any way conditional upon compliance with Clause 65.2.3. Compliance or otherwise with Clause 65.2.3 is not in any way a condition precedent to our entitlement to an extension of time or to recovery of our demonstrable costs in respect of the Compensation Events. Clause 65.3 requires only that we have complied with Clause 65.2.2. As noted above, we consider that we have complied with this clause, even if that compliance is to explain to you why we cannot submit the full details required by Clause 65.2.2

- We acknowledge that we are under a contractual duty to continue to carry on the Infraco Works despite Compensation Events and are doing so. There is no obligation upon us to maximize productivity. Where does this obligation exist? Good Industry Practice will not cover any such obligation. We have however been continuously working to make such progress as we can, where we can, notwithstanding the occurrence of Compensation Events. We have been doing so under extremely difficult site conditions where we still do not have access to large sections of the works as a result of matters for which tie is solely responsible, including the ongoing delay to the MUDFA works.

In conclusion, we consider that we have complied with Clause 65.2 and that there is no Infraco Default in this regard. Any claim by tie in this respect will be vigorously defended.

Yours faithfully

[redacted]

M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

cc: M. Berrozpe
A. Urriza
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M. Flynn