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Your ref: **INF CORR 4070**

**Bilfinger Berger–Siemens– CAF Consortium**

1 March 2010

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**For the attention of Steven Bell - Tram Project Director**

Dear Sirs,

**Edinburgh Tram Network Infraco**  
**Infraco Contract: Response to Letter INF CORR 4070 - Programme**

We refer to your letter dated 11 February 2010 (ref. INF CORR 4070) and respond below although prior to dealing with the points you raise in detail, our initial impression is that the author(s) are completely oblivious to or otherwise choose to misrepresent the current facts and circumstances e.g. the detailed process being undertaken by both Infraco and tie to attempt to agree a revised Programme – a process which has been ongoing since the beginning of 2009.

Under these circumstances as mentioned above it is now necessary to provide some “Programme” history in order to put the Programme and difficulties into perspective.

Prior to Contract award it was agreed between the Parties that Infraco would incorporate the SDS Design Delivery Programme V31 (V31) into the Schedule Part 15 - Programme and the result would be the first tie change. The proposed revised Programme was submitted to tie on 02 June 2008, but remained without agreement until 17 December 2008.

In this time, the project experienced vast and unforeseen volumes of change arising from *inter alia* delayed provision of IFC design, increases in the scope of the works from BDDI to IFC stage and incomplete Utility Works.

In October 2008, it was agreed between the Parties that because of the concurrencies of, and complicated interrelationship between these delays, tie's Tom Hickman and Infraco's Stephen Sharp should carry out a time slice analysis to ascertain the effect and culpability of all these changes. A number of time slices would be considered between May and December 2008.

However, in January 2009, despite the time slice analysis progressing well, it was noted that the project was absent of an effective monitoring tool for the progression of the works, and thus it was agreed by the Parties that a revised Programme (Revision 2) was needed and should also be prepared jointly. The time slice analysis was thereby suspended.

Through January, February and March 2009 civil works programmes were prepared for each Intermediate section of the works which incorporated all changes known at that time and it was agreed that a cut off / data date of 31 March 2009 would be used. Each Intermediate section programme was submitted to tie but received little if any response. These programmes were then combined, the Siemens (Systems and Trackwork) activities added, and the proposed Programme (Revision 2) was submitted to tie on 20 May 2009. In parallel, a separate extension of time programme was produced to demonstrate that Infraco had an entitlement to an extension of time (identifying individual changes) that would cover the

difference between the Revision 1 and Revision 2 Programmes. Both programmes were baseline at 31 March 2009.

Tie rejected the proposed Programme (Revision 2) on 21 August 2009, stating that, "*continued discussions about your entitlement based on the proposed Rev. 02 Programme are preventing agreement in accordance with the contract.*"

In reviewing the above outline chronology of events it would be nothing short of absurd to allege that Infraco had in any way failed to act reasonably when attempting to produce a workable programme.

Following the informal mediations in June and July 2009 where tie again stepped back from what Infraco considered to be agreed programmes, Infraco considered there to be no alternative other than to utilise the DRP process within the contract and on 4 September 2009, triggered a dispute based on the Rev 8 MUDFA programme details which demonstrated an entitlement to both time and money of 9 months from the cut-off date of 31 March 2009. However following meetings between Messers Jeffrey and Darcy in November 2009 an agreement (without prejudice to Infraco's entitlements) was reached to temporarily suspend the DRP process in an attempt to reach agreement on the entire programme issue by taking an incremental approach.

The schedule attached to your letter somewhat bizarrely compares an interpretation of the Jeffrey/Darcy Agreement on one side of the page with notes of a workshop held on 3 February 2010 on the other. Clearly, no such comparison is possible.

Tie undertook to record and issue notes of the 3 February 2010 workshop which we have not as yet received. If and when we receive these notes they will only be agreed by us as true records if words such as "*minimal*", "*alleged*" and "*claimed*" do not appear because these words were not stated at the workshop.

It would appear that tie believes mitigation includes the increased cost of starting all construction activities at the earliest possible start date whether or not a corresponding saving in time related costs can either be identified or achieved. Indeed throughout negotiations on this matter tie have continually confused the concept of mitigation with acceleration. Notwithstanding the matter of the status on agreed (or not) changes in accordance with clause 80, given that the MUDFA works are still not complete, the job of programming the works is subject to reliable information on exactly when and where MUDFA works will be complete. Infraco can easily demonstrate, and tie have this information, that due to the MUDFA works all attempts in the past to either commence works or programme works have been thwarted by the MUDFA not being complete as stated by tie. Indeed tie agreed this to be the case in Leith Walk when it was jointly agreed to cease works as Infraco were prevented from working effectively alongside MUDFA works. Infraco carried out work on Leith Walk for a 2 month period to effectively only achieve 2 weeks of progress. The MUDFA works are still ongoing despite the project being in month 23, with an indication from tie that the MUDFA works are expected to be complete a further 6 months from the date of this letter.

It should be noted that as part of the Jeffrey / Darcy agreement tie asked for its construction staff to be involved in the process of producing a revised Programme. To this end a number of workshops, following the exchange of data, have been held between tie and Infraco to discuss how the Programme (Revision 1) would evolve into the revised Programme (Revision 3). The meeting held on 3 February 2010 was one of these planned workshops. It was to discuss "a work in progress", sent by e mail two days earlier, and was a first draft of a Step 4 programme. Workshops had been held with tie previously to discuss mitigation ideas in general and details of Intermediate Sections in particular have been incorporated into the draft programme.

The use of the word "*transpired*" in your letter implies that the workshop had a negative conclusion; in fact tie at the end of proceedings confirmed that everyone was happy with the outcome.

We are at a loss to comprehend how we could not have completed steps 1 to 3 of the Revision 3 process as envisaged. Step 1 is the Programme bound into the contract, step 2 is the Programme (Revision 1) agreed in December 2008. A first draft of the step 3 programme was forwarded on 10 February 2010 (prior to the date of your letter). As previously notified some parts of the step 3 and step 4 programmes had been compiled simultaneously in an attempt to mitigate previous delays caused by tie to the production of the Programme (Revision 3).

At no time during the exchange of data or at the various workshops has any reference by Infraco been made to extension of time. However, it must be noted that in the original Jeffery / Darcy meeting it was stated by tie that the Programme (Revision 3) would be the basis of revising the Section A, B, C & D completion dates. It is also axiomatic to all the Parties that an entitlement to an EOT exists *inter alia* manifest in tie's offer dated 13 November 2009.

The process of compiling the step 4 programme has never been envisaged as a global extension of time claim and therefore your comments on this issue although providing padding to your missive are not relevant – the process has been extensive and fully particularised dealing with circa 5500 activities therefore to allege a global approach thus implying a lack of detail is manifestly wrong. The early draft of the Revision 3 step 4 Programme in fact already shows substantial mitigation of the delays and prolongations that have and will occur to the project and does make use of the programme float (therefore again your comments are unnecessary, misleading and ultimately factually incorrect).

Your quoted list of statistics and dates related to the step are both inaccurate and misleading. Crucial to the completion of the works is your ability to provide access to us to actually carry out the construction works. You state that utility diversions are due to be completed by August 2010 yet the schedule you sent to us for the production of the Programme (Revision 3) shows completion on 10 December 2010 – how you account for this contradiction is unclear to us. This schedule also shows that the average delay to the forecast completion of the utilities in each intermediate section is 24 months in comparison to the Programme (Revision 1). It is therefore unsurprising to find that, even after substantial mitigation measures that reduce the effect of these delays and the prolongation resulting from both an increased scope and more onerous traffic management constraints, the overall delay to the completion of the works is in the order of two years. It is therefore totally meaningless to record how long it will take from now to complete the works, the real measure is from when we are given access.

We have no idea as to the basis of your calculation of the percentage of the work site available to us. However, considering a calculation by the route chainage, the on-street element comprises 39% of the works and if we only gain access to 60% of this by June 2010 the remaining 40% or 17 % of the total works is still unavailable. This seems illogical if supposedly 80% of the works are available to us now with so little access to the on-street works and other issues discussed at the meetings held on 18 and 25 November 2009.

In addition your site teams have reviewed the individual programmes that account for the Revenue Service starting in late 2013 and have not responded with any fundamental ideas or comments that would change this commencement date. We believe the spirit of the agreement was to arrive at a realistic programme; this is what has been achieved.

Mr Russell's e-mail of 8 December 2009 clearly establishes the grounds as to why 'Infraco are materially prevented from complying with all the Employers Requirements in relation to programme'. Clearly if we cannot agree a Programme that reflects the actual scope of works i.e. the facts as facts and timescale in which it will be built, it follows that it is not possible to provide and monitor the back-up data that goes with it.

Your bullet points of items where we do not comply are again incorrect e.g. there is no requirement for a three month look ahead programme (and in any case we do provide one).

Clearly, by reference to notes of workshops and exchanges of data, we are working towards the production of a step 4 programme which "we can all work to". Once this is agreed we will be able to comply in all respects with the reporting procedures contained within the Employer's Requirements.

To a layman it would appear overly optimistic to believe that it is possible to complete a 32 month construction project in an additional 9 months when we have been denied access to a considerable area of the works by on average 24 months (which is a matter of proven fact and propagated by tie in the press) and have to construct a substantial additional scope of works.

In conclusion we have spent the last 19 months continuously attempting to agree the effect of tie change, often well in advance of the INTC agreement process, for the majority of that time using methods we believed were jointly agreed with tie. It is tie's inability to respond/agree with our submissions, not our lack of submission that is the problem. It would appear that it is tie who wishes to renege on the Jeffrey / Darcy agreement, not Infraco.

tie must accept that access to the works is considerably delayed through no act or omission on the part of Infraco. This is compounded by the increase in the scope of the works to be completed. If tie cannot or will not accept this series of well documented facts it should not attempt to blame Infraco (as innocent party) for delays. The negotiations/discussions on the matter of programme have been characterised by negotiations/discussions appearing to progress well in which all of tie's concerns are successively addressed up until the point where tie realise that the Infraco position is correct. At this point tie appear to back away from those negotiations/discussions, essentially because they do not like the result. We are at a loss as to what we can do to assist tie in this matter. Indeed, only when tie accept a series of fundamental principles of the contract risk distribution and events and circumstances *inter alia* surrounding the delays of the MUDFA works, will a platform exist to allow us to progress. If tie cannot or refuse to grasp that this project is delayed by at least 25 months, then there is little Infraco can do to change this state of affairs.

Yours faithfully,

  
**M Foerder**

Project Director  
Bilfinger Berger Siemens CAF Consortium

cc: M. Berrozpe  
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