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5 March 2010

**Transport Edinburgh Limited**  
55 Annandale Street  
Edinburgh  
EH7 4AZ

| Bilfinger Berger Civil EDI |             |    |  |
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For the attention of Brian Cox

Bilfinger Berger--Siemens-- CAF  
Consortium

BSC Consortium Office  
9 Lochside Avenue  
Edinburgh Park  
Edinburgh  
EH12 9DJ  
United Kingdom

Phone:   
Fax: 


Dear Sir,

**Edinburgh Tram Project**

Please find enclosed a copy of letter sent to Mr. David Mackay from Bilfinger Berger AG dated 5 March 2010.

We are available to answer your questions on the enclosed as you may consider appropriate.

Yours faithfully,

  
**R.J. Walker**  
Chairman - Infraco Consortium Board

Encl: Bilfinger Berger AG letter dated 5 March 2010

cc: Michael Flynn – Infraco Consortium Board (Siemens)  
Antonio Campos – Infraco Consortium Board (CAF)  
David Mackay – Transport Edinburgh Limited  
Richard Jeffrey – tie Limited

Kenneth D. Reid  
Member of the Board of Executive Directors

  
BILFINGER BERGER

Bilfinger Berger AG  
Carl-Reiss-Platz 1-5  
68165 Mannheim  
Germany

Mr David Mackay  
tel  
55 Annandale Street  
Edinburgh EH7 4AZ  
UK

WITHOUT PREJUDICE

5 March 2010

Dear David,

**RE – Edinburgh Tram Project**

Thank you for sparing the time to see me at your offices when I was in Edinburgh this morning.

Whilst my visit was informal, I welcomed the chance to have a general discussion with you about the current difficulties being faced by both tie and the consortium on the project.

I understand the tremendous political, media and financial pressures that tie is under to deliver this project in an optimal manner. I also trust that you similarly understand the frustrations and many pressures on the consortium side, as they are currently being challenged to deliver a successful project in circumstances which are now fundamentally different under those which formed the original basis of the contract.

I am pleased that we certainly appear to share a strong mutual interest in finding, if at all possible, a common way forward under the terms of the contract.

The existing contract between tie and the consortium is of a form which is based upon the assumption that (at the time of signing) the design would have been substantially completed, and also that the defined timings for site access and completion would run as expected. The form of contract is 'lump sum, fixed price', but subject to variation in accordance with Schedule 4, in so far as it contains clear mechanism for the parties to amend both schedule and price, depending upon actual circumstances encountered during execution. The problem today appears to be that there was never expectation (on the part of tie or the consortium) of requiring so many changes to the scope, and also so many difficulties in site access due to ongoing delays in the remaining utility diversion works. As a direct result, both parties have a situation where there are more than 500 separate changes which need to be valued and agreed, and where even today we still have no clear certainty as to the sequence and timing for completion of the remaining utility diversion works. It seems that both parties are engaging a significant amount of money (including external costs and precious management time) in addressing how these many changes to the original contract are to be substantiated, valued, agreed and programmed. It would clearly be more expedient if these resources could be 100% focused towards delivering a successful project in a manner which is optimal, but which also properly accounts for the changed actual circumstances.

Chairman of the Supervisory Board:  
Dr. h.c. Bernhard Walter

Executive Board:  
Herbert Bodner, Chairman  
Joachim Mueller  
Klaus Raps  
Kenneth D. Reid  
Prof. Hans Heimul Schetler  
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I am aware that there is an ongoing internal tie review process to evaluate the potential options to take the project forward. Whilst I am not aware of your full detailed conclusions, I would advise my own assessment of the current options as follows,

- 1) **Continue As Present.** Because of the large number of changes to the scope and schedule, this would require both parties to expend even more resources in following the defined contractual processes to value and agree the implications of each change. Where the parties still disagree, the contract has a proven (but quite expensive, and not 'immediate') process for independent determination. There is no doubt that the existing contract can be followed, and will in the end produce the required completed tram system. However, this process might not give an outcome that is either the quickest delivery programme or optimal overall cost.
- 2) **Mutual Agreement To Amend The Existing Contract** (where the scope/delay issues are 'high complexity', or where the project is 'schedule critical'). This was the mutual (and successful) collaborative approach taken during 2009 for the works on Princes Street. These works were completed ahead of schedule, with strong field cooperation between the tie and consortium staff, and under a cost regime that optimised the actual resource utilisation/cost. I understand that there were detailed discussions to extend this arrangement to cover other parts of the project which were either time critical, or where tie had specific schedule issues (either with public programme commitments it had made, or where there were key issues with the utility diversion works progress). I understand that the consortium has presented detailed proposals to tie as to how this might work, but that tie (at this time) has not opted to proceed. I think this is a pity, since this option clearly focuses both teams on achieving successful delivery, without constant pressure to deal with complex contractual issues. It gives tie a fully 'open-book' approach to the costing, and also the full flexibility to amend working sequences on the project to suit its own objectives (in regard to meeting commitments to local businesses etc.).
- 3) **De-phase The Existing Programme.** To remove the possibility of a future situation arising where tie comes under budgetary pressure with disparate section of the tram network incomplete, the consortium has presented tie with proposals whereby it could re-sequence the priorities so that an operable system (commencing at the airport) could be achieved in various stages. This would give tie clear opportunity to operate at least discrete sections of the tram network at the earliest possible date.
- 4) **Suspend The Existing Contract** (until there is full clarity on exactly when the utility diversion works will be finished – by which time the outstanding changes should also have been finalised). On the basis of a known access programme, the project could then be re-sequenced (by tie and the consortium together) to meet the revised overall completion schedule objectives of tie. The existing contract would then have to be re-priced at that time to reflect the amended requirements, and (in all practicality) a new contract would probably have to be entered in to for a 'fresh start'. It would cause additional delay on-site for some

months until the new sequence and pricing were finalised, but it would ultimately lead to a much more efficient execution of the work on site for the remainder of the project. Whilst there is no direct provision within the existing contract to undertake this action, if tie believed this to be in the project's best interests, then I would personally support such an initiative – but always on the clear understanding that the consortium's commercial position (under both existing and new contracts) is properly protected and not disadvantaged.

- 5) **Mutual Agreement To Terminate (or to partially terminate) The Existing Contract.** This would not be a favoured choice of the consortium, but I understand why tie must consider its full range of options. Were it to be the wish of tie to enter in to discussions about such a scenario, then I think that the consortium would not object, but again on the very clear understanding that the commercial position of the consortium (and its individual partners) is properly protected and not disadvantaged.

Of the above options, I would personally consider that a combination of 2), 4) (and if necessary 3)) would give the project best chance to achieve optimal programme and overall cost results.

In addition to these options, I am aware that tie may also seek to consider whether it has an option to terminate the consortium for alleged default. I think it is only right that I caution you as to the likely consequences of such a decision. Whilst such an action may provide short term political gain for tie and/or its Sponsors, the following considerations could also be relevant,

- It is clear to any objective observer that the entire project is significantly delayed and adversely affected by slow progress on tie's utility diversion works contract, and also by numerous changes which have directly impacted the progress of the consortium's work. There is clear mechanism within the existing contract to deal with these matters, which is being followed by the consortium. At this time, there is no valid legal basis to support the existence of any material default on the part of the consortium under the contract.
- The consortium is well-prepared to proactively defend its legal position and entitlements. Any invalid termination will result in direct legal action against tie.
- The consortium and its partners are fully resolved and united at highest level to react vigorously against any action of tie to seek a termination for alleged default, and to do so in an open and public manner. This will include appropriate involvement with media to ensure that the consortium's position is properly documented and reported.
- The likely additional costs to tie in defending its termination position would easily run in to significant millions of pounds, as well as consuming senior management time. Given that the consortium at this time remains fully prepared and open to discussing with tie all of the various options that exist to move the project forwards (irrespective of whether these are contemplated in the existing contract), then it is unclear what tie would gain in proceeding with an aggressive and unjustified default termination action.

- The consortium would undertake necessary legal action to prevent tie from engaging third parties to complete the works while any litigation remain in progress.

David, I wish to assure you that the consortium and its members remain fully committed to working with tie in a mutual effort to resolve the current issues in a way that allows the project to proceed in an optimal manner, but which simultaneously also respects the existing contractual rights of the consortium and its members. We remain fully open to discussion and agreement with tie on how the project might be taken forward in a constructive manner. This offer is open not only to finding a solution within the existing contractual framework, but also to discussing potential alternative solutions which could be concluded outside of the terms of the existing contract (subject always to the existing contractual rights of the consortium and its members being adequately protected).

It will not be easy from this current state to find an optimal solution, but I do know that I speak for senior levels of the consortium partners in declaring our willingness to find a practical and pragmatic solution that allows our respective teams to work together and to focus their efforts and talents on effective delivery of a project in which we can ultimately all take rightful pride.

I hope that next time we meet, it can be to reflect upon an improved situation where all parties are finally concentrated on working together to implement an agreed and optimal delivery solution.

With kind regards,

Yours sincerely,



Kenneth D. Reid

Member Of The Executive Board  
Bilfinger Berger AG