



For the attention of Robert Sheehan

Our Ref: PD CORR 147

Bilfinger Berger UK Limited
9 Lochside Avenue
Edinburgh
EH12 9DJ
United Kingdom

Date: 19 February 2009

By e-mail and fax

Dear Gentlemen,

**INFRACO CONTRACT RELATING TO THE EDINBURGH TRAM NETWORK --
DEFAULT**

I refer to the e-mail received on 18 February 2009 (timed at 14:07) in respect of commencement of work in Princes Street. We are astonished at both the tone and the substance of the message. We have to ask; first whether the position set out in that message is the fully agreed BSC consortium position. This response is on the record to the consortium and is written on the working assumption that your e-mail received today is the consortium position.

You have stated that BSC do not consider themselves contractually obliged to commence works in Princes Street. That statement ignores both the active agreement to do so, the long-standing preparations (as will be confirmed by BSC's own employees) to accommodate the changed works in Princes Street and your obligations under the contract in any event to carry out and complete the original works and to implement any changes thereto. I must notify you of the following points:

1. The works in Princes Street are part of the originally-designated Works under this contract.
2. We gave to BSC notice of change on 12th January 2009 detailing a requirement simply to retain the option, for a two week period during the carrying out of the works on Princes Street, to allow use of the westbound bus lane.
3. You have no grounds whatsoever for refusing to implement that change and have not given notice of refusal to do it and not, until today, stated any opinion that you are not obliged either to implement the change or indeed to proceed with any works on Princes Street. You have stated simply that an Estimate has

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not been agreed and that you are precluded from properly planning and executing the works with the consequential delay and disruption. Your e-mail goes nowhere near a legitimate reason for refusing to implement this change.

4. Contrary to what you say, you have put forward proposals for the valuation of that change, both in terms of adjusting the timetable for the production and agreement of an estimate for it, and for quantifying your entitlement. It was agreed (and on the extended valuation timetable it has to have been agreed) that the process for agreeing the Estimate cannot hold up implementation of the change. We have engaged with you in that exercise in terms of agreeing the procedure and agreeing the valuation save for one item, being preliminaries.
5. We are entitled to expect that throughout the period since the Notice of Change was given, you have been fulfilling your obligations in preparation for the implementation of this change, including the obligation to work in mutual co-operation, to approach all Permitted Variations on a collaborative and open-book basis, to avoid unnecessary complaints, disputes and claims. You are required to take reasonable steps to mitigate any foreseeable losses and liabilities of **tie** which are likely to arise out of any failure to take such steps and to take all reasonable steps to manage, minimise and mitigate all costs.

We have up to this point remained willing and ready to conclude agreement with BSC to value the change. However we have to take your message of yesterday as evidencing your unwillingness to conclude that agreement, except on financial terms which you already know are totally unacceptable to us and are not aligned with the Contract. We therefore direct you to commence all works in implementation of the change without agreement or determination of an Estimate, pursuant to *Clause 80.13* of the Contract. Furthermore, under *Clause 80.15* upon reference to Dispute Resolution Procedure (see below) **tie** consider the change to be urgent and you are required to implement this change with immediate effect. That change will be valued under *Clause 80.6* of the contract. Your e-mail fails to explain, other than in characteristically unhelpful generality, what the disruption to your construction methodology will be. For clarity, the foregoing instructions are issued by **tie** without prejudice to **tie's** primary position that BSC has already agreed to implement this change to achieve mobilisation on 21 February 2009.

Any failure, refusal or delay by you to continue to carry out and complete the works and any failure, refusal or delay by you to implement the change will be a wilful and fundamental breach of your contractual obligations in respect of which we reserve all of our rights.

In view of the importance of this section of the works to the city, your full prior knowledge about this and your obligation not to "*wilfully detract from the image and reputation of tie, Transport Edinburgh Limited, CEC, the Scottish Ministers, Transport Scotland or the Edinburgh Tram Network*", tie requires a written response from the BSC consortium by 12 noon GMT today confirming that you will mobilise as planned on 21 February 2009.

tie has made enormous effort in the last 96 hours to use the meeting with BSC senior executives to explore and find workable solutions. I have personally devoted considerable time to briefing stakeholders about BSC's approach and my hope that this week would go some way to reconstructing our confidence in BSC. Despite our requests under Clause 6.5, BSC have not produced any cogent written plan on how to remedy BSC's numerous and obvious performance failings. Coupled with this situation, we will have no option but to treat a failure by you to respond positively by noon today as clear evidence of BSC's intention not to commence works in Princes Street (as planned) and as a further serious breach of contract.

For the avoidance of doubt, we will hold you liable for any losses incurred by tie and tie will not hesitate to invoke the indemnity provisions to protect other parties.

Separately, we hereby give notice under *Clause 111* of the Contract and paragraph 9 of *Schedule Part 9* that we are referring the following two issues to the Dispute Resolution Procedure provided for under *Schedule Part 9* of the contract:

1. Our failure to agree the Estimate in relation to the tie Change; and
2. Your assertion in your message under reply that you are not "*contractually obliged to commence works in Princes Street*".

In accordance with *Clause 111.1.2.2* this letter is being faxed to BSC at the specified address and tie require your representative in tie's offices at 10:00 am this Friday for the meeting under *paragraph 9* of the Dispute Resolution Process.

Yours sincerely,



David Mackay
Chairman
tie Ltd