20.6

tie Remediable Termination Notice in respect of alleged Failure to Progress Demolition Works at Plots 97 & 102 Russell Road and Responses thereto.

Advanced Copy

21 SEP 2010 Edinburgh Trams

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 6254

Date: 21 September 2010

Dear Sirs,

INFRACO CONTRACT
REMEDIABLE TERMINATION NOTICE
INFRACO DEFAULT (a): FAILURE TO PROGRESS DEMOLITION WORKS AT PLOTS 97 AND 102 RUSSELL ROAD

Enclosed is a Remediable Termination Notice in respect of Infraco Default under the Infraco Contract.

We look forward to receiving your rectification plan within 30 Business Days of the date of this Remedial Termination Notice.

Yours faithfully,

[redacted]

Steven Bell
Project Director – Edinburgh Tram

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REMEDIABLE TERMINATION NOTICE

INFRACO DEFAULT (a): FAILURE TO PROGRESS DEMOLITION WORKS AT PLOTS 97 AND 102 RUSSELL ROAD

1. Infraco Default (a)

1.1 The Infraco has breached its obligations under clause 7.2 of the Infraco Contract to ensure that, in carrying out and completing the Infraco Works, the Infraco exercises a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity.

1.2 The Infraco has breached its obligations under clause 34.2 of the Infraco Contract to ensure that the mode, manner and speed of construction of the Infraco Works are in accordance with the Infraco Contract.

1.3 Individually and cumulatively, these breaches materially and adversely affect the carrying out and completion of the Infraco Works.

1.4 This is an Infraco Default (a) under the Infraco Contract.

2. Nature of Infraco Default which requires to be rectified

2.1 As at the date of this Remediable Termination Notice, the Infraco has failed to commence works to demolish Plots 97 and 102 at Russell Road (including part of the structure located on Plot 96 which protrudes into Plot 97).

2.2 These demolition works are covered by Infraco Notice of tie Change ("INTC") 117 in respect of the demolition of structures (including Plots 97 and 102), which was raised by the Infraco on 18 September 2008; tie Notice of Change ("TNC") 042 issued by tie on 27 March 2009 in respect of demolishing structures on Plots 97 and 102; and INTC 368, which was raised by the Infraco on 9 April 2009 (letter reference: 2252) (after the Infraco received TNC 042). Each of INTC 117, INTC 368 and TNC 042 cover the demolition works at Plots 97 and 102 Russell Road and TNC 042 and INTC 368 also cover the demolition of part of the building on Plot 96 which protrudes into Plot 97. It is accepted that the demolition of Plots 97 and 102 and part of the structure located on Plot 96 which protrudes into Plot 97 at Russell Road constitute a tie Change.

2.3 The Infraco provided an Estimate in respect of the design element to gain a Building Warrant only for these works on 1 June 2010 (letter dated 31 May 2010, reference: 25.1.201/JMD/5531 in respect of INTC 368a). This is over 20 months after the date the Infraco first raised INTC 117; over 14 months after tie issued TNC 042 and over 13 months after the Infraco raised INTC 368. In respect of each INTC/TNC, the time taken to provide a part Estimate only is significantly later what ought to have been reasonably practicable and is significantly later than the period permitted in the Infraco Contract of 18 Business Days and is significantly later than any reasonable extension ought to have been, had it been requested and agreed to.

2.4 As at the date of this Remediable Termination Notice, the Infraco has not yet provided an Estimate in respect of the construction element of these works. On 27 August 2010, the Infraco advised tie (letter reference: 25.1.201/JMD/6559) that it had obtained the relevant

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Building Warrant for the demolition works and it is now seeking prices for the works. The Infraco has significantly delayed in obtaining the Building Warrant. The Infraco has significantly delayed in seeking prices for the demolition works at Plots 97 and 102 and part of Plot 96 at Russell Road.

2.5 The demolition works at Plots 97 and 102 and part of Plot 96 at Russell Road are necessary in order to facilitate the construction of the Russell Road Retaining Wall (RRRW4 sections 23-28). The demolition works must be completed before the construction of the Russell Road Retaining Wall sections is able to commence.

2.6 It is matter of fact that, due to the location of these demolition works (the Railway Corridor at Sections 5A and 5B), the lack of progress of these works has a significant material and adverse impact on the construction of the Russell Road Retaining Wall and the Infraco Works at that location, which in turn has a significant material and adverse impact on other works due to take place in the Railway Corridor.

2.7 The Infraco is (or ought to be) in a position to commence the demolition works at Plots 97 and 102 and part of Plot 96 at Russell Road. The Infraco's failure to commence the demolition works at Plots 97 and 102 and part of Plot 96 at Russell Road is currently preventing the Infraco Works from progressing.

2.8 As at the date of this Remediable Termination Notice, the Infraco has not provided an Estimate for the construction element of INTC 117/368 and the Infraco has not commenced the demolition works at Plots 97 and 102 and part of Plot 96 at Russell Road. This is having an ongoing material and adverse effect on the Infraco Works.

3. Rectification Plan

3.1 tie looks forward to receipt of a comprehensive rectification plan from the Infraco addressing this Infraco Default (a) within 30 Business Days of the date of this Remediable Termination Notice.

for and on behalf of tie Limited

[redacted] **Project Director**

21 September 2010 **Date**

BILFINGER BERGER Civil SIEMENS CAF

Our ref: 25.1.201/KDR/7265
Your ref: INF CORR 6254

1 November 2010

Bilfinger Berger-Siemens- CAF Consortium

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For the attention of Steven Bell – Tram Project Director

Dear Sirs,

Edinburgh Tram Network Infraco
Infraco Contract: Alleged Remediable Termination Notice
Infraco Default (a): Failure to progress demolition works at Plots 97 and 102 Russell Road

We refer to your letter dated 21 September 2010 (INF CORR 6254).

As at the date of writing you have served Remediable Termination Notices in respect of another 9 matters. None of these matters have been the subject of referrals to dispute resolution. It appears to us that tie has abandoned the contractual mechanism for resolution of disputes. This may be because every major issue of principle has been decided against tie in adjudication. However that is no justification for now abusing the termination provisions of the contract. It is clear that tie is now pursuing a policy of serving a Remediable Termination Notice in respect of each and every grievance it may have, regardless of the significance of each grievance and its implications for the Infraco Works. Whilst we will respond to each Remediable Termination Notice in turn, we object to tie's adoption of this policy.

We summarise our response to the Notice as follows:

1. The Notice does not identify matters which constitute a breach or breaches of contract by Infraco.

2. Even if there was a failing on Infraco's part to proceed with due diligence in the demolition works at Plot 97 and 102 (which we deny), this failure would not materially and adversely affect the carrying out and/or completion of the Infraco Works as a whole.

3. The Notice does not therefore identify matters which constitute an Infraco Default (a). Further, if the Infraco were to proceed with the demolition they would be placing themselves in breach of the Infraco Contract.

4. The notice does not, therefore, constitute a valid Remediable Termination Notice. In addition the Infraco cannot remedy the circumstances affecting the lack of progress of the demolition works referred to since the delay to progress is currently as a direct result of tie's inaction.

5. Any attempt to terminate the Infraco Contract on the basis of this alleged Notice will be entirely without contractual basis.

[redacted]

BILFINGER BERGER Civil SIEMENS CAF

This is further explained below, following a general response to the Remediable Termination Notice:

General response to inaccuracies in tie Remediable Termination Notice

The demolition works referred to by tie within the Notice are inaccurate in description.

Plot 97 is the open area housing the Scottish Power Supply Building and the Smoking Shelter. Plot 96 is Rosebum Garage Building which requires partial demolition and reconstruction of the rear gable in a temporary position.

Plot 102 is a lean-to building to the rear of Plot 101. Plot 101 also requires partial demolition and reconstruction of the rear wall.

Accordingly, the full scope of the 'demolition works Plot 97' is part demolition of Plot 96, reconstruction of rear gable to Plot 96 in a temporary position including storing downtakings, demolition of Plot 97 buildings, relocation of SP Supply and re-erection of the smoking shelter.

The full scope of the 'demolition works Plot 102' is demolition of the rear gable to Plot 101, reconstruction of the rear gable to support the roof to Plot 101 and demolition of the lean-to on Plot 102.

Initially, Infraco allocated Infraoo Notification of tie Change (INTC) 117 to the demolition works by letter dated 18 September 2008 (25.1.201/IL/497). This was followed by tie's assertion within a letter dated 5 November 2008 (INF CORR 325) that the additional demolition was not a variation to the contract, which was responded to in Infraco letters dated 12 November 2008 (25.1.201/IL/735) and 21 January 2009 (25.1.201/IL/1316). tie issued tie Notice of Change (TNC) 042 within letter dated 27 March 2009 (INF CORR 1088). Therefore the question of entitlement to Change was disputed by tie until 27 March 2009.

However TNC 042 was insufficient in detail to allow the Infraco to prepare an Estimate. In addition the Infraco could not gain access to the structures to undertake a survey. Both these facts were recorded in Infraco letter dated 09 April 2009 (25.1.201/BOc/2252) and requested a revised TNC. At this point in time the Infraco allocated INTC 368 to the demolition works to reflect the revised scope required and therefore revised TNC.

Aocess was granted to the Plots and the scope was discussed at a site meeting tie/Infraco on 24 August 2009. The scope was revised by tie as recorded in their letter dated 08 February 2010 (INF CORR 2290/DC).

The scope was clarified by Infraco within letter dated 10 February 2010 (25.1.201/JMD/4637) and confirmed within tie letter dated 31 March 2010 (INF CORR 4578/RB). Therefore, in the absence of a revised TNC the scope was not fully available to the Infraco until receipt of tie letter dated 31 March 2010 (INF CORR 4578/RB).

The Infraco Estimate for the design element to gain Building Warrant for plot 96/97 was provided by letter dated 31 May 2010 (25.1.201/JMD/5531), approximately 9 weeks from receipt of the information. In this period access was arranged direct with the owner, site visits with Structural Engineers were arranged, quotes were received and analysed, finalisation of subcontracts were negotiated. The Estimate could not be forwarded to tie until all aspects were either included in the Estimate or clarified.

tie approved Infraco Estimate for the design element on 22 July 2010 (INF CORR 5659/SBa) albeit that they considered the Estimate to be incomplete.

Infraco in letter dated 20 August 2010 (25.1.201/JMD/6460) advised tie that Building Warrant approval took some 12 weeks and on receipt of this an Estimate for the works themselves will be prepared. This is

[redacted]

due to the approved Building Warrant drawings forming the primary information in obtaining quotations for carrying out the demolition works to Plots 96/97.

The Infraco were advised that Building Warrant approval was gained on 27 August 2010 and the Estimate for this element of the demolition works was forwarded in letter dated 21 October 2010 (25.1.201/JMD/7173), approximately 9 weeks from receipt of this information. In this period invitations to tender were prepared, access was arranged direct with the owner, site visits with potential Subcontractors were arranged, quotes were received and analysed, finalisation of subcontracts were negotiated. The Estimate as forwarded to tie containing a number of qualifications and assumptions due to the lack of full information from tie and as requested in Infraco letter dated 10 February 2010 (25.1.201/JMD/4637).

Further to the above, a report on the risks associated with the demolition of Plot 102 was forwarded to tie in letter dated 22 October (25.1.201/JMD/7186).

To conclude, the dates stated in tie's Notice paragraphs 2.2 and 2.3 are erroneous and the relevant INTC is No.368 and not No.117.

1. **No Breach of Contract**

Your letter states that Infraco Default (a) has occurred (a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works), and the specific obligations tie consider have been breached are obligations under clause 7.2 and obligations under clause 34.2. Each clause will be dealt with separately.

1.1 **Clause 7.2**

Clause 7.2 states:

'Notwithstanding the specific responsibilities set out in Clause 7.3 the Infraco undertakes to tie that in carrying out and completing the Infraco Works it has exercised and undertakes to continue to exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity. The Infraco acknowledges that tie will rely upon the skill, care and diligence of the Infraco in connection with all matters for which the Infraco is responsible under this Agreement. (emphasis added)

Clause 7.3.1 provides: *'The Infraco shall ....., and shall procure that the Infraco Parties, carry out and complete the Infraco Works in accordance with and so as to comply in all respects with this Agreement'*;

Clause 7.2 sets out our general obligation regarding the competency expected of the Infraco by tie for the carrying out and completion of the Infraco Works and Clause 7.3.1 sets out our specific obligations to comply with the Agreement as a whole.

The particular works which you consider we have defaulted on is our failure to commence works to demolish Plots 97 and 102 Russell Road.

tie have accepted that the demolition works to Plots 97 and 102 are a tie Change. The Change stems from the fact that the Infraco Works could not be constructed without further areas being made available at the rear of plots 96, 97, 101 and 102.

[redacted]

Plots 96 and 97 do not form part of the permanent land or temporary site made available to construct the Infraco Works and are occupied, trading as a garage.

Plots 101 and 102 do not form part of the permanent land or temporary site made available to construct the Infraco Works and are also occupied.

Therefore, and in the absence of tie providing evidence to Infraco that Land Consents have been agreed with the owners/occupiers of the Plots, Infraco cannot proceed to occupy these Plots since to do so, would result in Infraco breaching their obligations within the Infraco Contract, including but not restricted to Clause 7.3.10, Clause 18.11, Clause 18.14.4, clause 18.17 and Clause 18.17A.

In addition, Infraco have not received from tie any evidence of what has been agreed between tie and owners/occupiers of the Plots regarding any restrictions placed on the Infraco during the period of temporary occupancy of these plots (generally to be found in Third Party Agreements).

Further, in the case of Plots 96 and 97 the area within the building required to carry out the demolition works has not been cleared, which is tie's responsibility (tie letter INF CORR 4578/RB refers).

It is thus a condition precedent to Infraco's ability to perform its obligations under the Infraco Contract that tie provide the following:

(i) verification that tie have concluded an agreement with the owners of Plots 96/97 and Plots 101/102 which gives the owners' permission for Infraco to occupy and carry out works on these properties;

(ii) tie completing their obligations to facilitate the clearing within the building on Plot 96 to allow the demolition works to commence;

(iii) the revised Third Party Agreement with the owner of Plots 96/97;

(iv) the Third Party Agreement with the owner of Plots 101/102.

The progress (or lack of progress) of the demolition works to Plots 97 and 102 is therefore primarily a matter entirely within tie's control.

Infraco consider that in not progressing the demolition works until tie provide the information required as listed at i) to iv) above, they are complying diligently with their obligations under Clause 7.2.

1.2 **Clause 34.2**

Clause 34.2 provides:-

The whole of the materials, Infraco's Equipment and labour to be provided by the Infraco under Clause 7 (Duty of Care and General Obligations in Relation to the Infraco Works) and the mode, manner and speed of construction of the Infraco Works are to be in accordance with this Agreement.

Since the Infraco have not commenced demolition works and cannot commence the demolition works until tie provide the information required as listed i) to iv) above, it is not clear how there can currently be a breach of an obligation relating to the construction of the Infraco Works. Indeed, in refusing to commence these works in these circumstances, Infraco are complying with their contractual obligations, not least under Clauses 7.3.10, 18.11, 18.14.4, 18.17 and 18.17A as referenced above.

2. **Carrying out and Completion of the Works not materially affected.**

None of the alleged breaches identified by you materially or adversely affects the carrying out and completion of the Infraco Works. You allege that due to the location of the demolition works (the Railway Corridor at Sections 5A and 5B), the lack of progress of these works has a significant material and adverse impact on the construction of the Russell Road Retaining Wall and the Infraco Works at that location, which in turn has a significant material and adverse impact on other works due to take place in the Railway Corridor. You also allege that Infraco is or ought to be in a position to commence these works at Plots 97, 102 and part of Plot 96 at Russell Road.

We do not accept this to be the case. Firstly, even if there was a failing on Infraco's part to proceed with due diligence in the demolition works at Plot 97 and 102 (which we do not accept), this failure would not materially and adversely affect the carrying out and/or completion of the Infraco Works as a whole.

Whilst Infraco agree that the lack of progress on the demolition works at plots 97 and 102 impacts on the completion of Russell Road Retaining Wall sections 23-29 and therefore the follow on works at that location, Infraco do not agree that this activity path is currently critical to completion of the Infraco Works as a whole.

Secondly and in any event, the progress (or lack of progress) of the demolition works to Plots 97 and 102 is primarily a matter entirely within tie's control. In the absence of the information noted at items (i) to (iv) under paragraph 1.1 above, Infraco are unable to commence the demolition works noted. No action or alleged inaction by Infraco is therefore materially or adversely affecting the carrying out and completion of the Infraco Works.

3. **No Infraco Default (a)**

It follows from the preceding paragraphs that the circumstances you narrate in your Notice do not meet the definition of "Infraco Default (a)" in the Agreement Schedule Part 1, contrary to your assertion.

4. **Letter INF CORR 6254 is not a valid Remediable Termination Notice**

As no Infraco Default has occurred, you have no right to serve any Remediable Termination Notice as you have purported to do.

5. **No right to terminate**

No grounds for termination can arise from this alleged Remediable Termination Notice.

[redacted]

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To conclude, we consider that the facts and circumstances surrounding the current non-demolition of Plots 97 and 102 are matters which tie and not the Infraco are culpable for. Consequently, we are unable to forward a Rectification Plan in accordance with the Infraco Contract. Works cannot proceed until tie provide the outstanding information required by the Infraco and as detailed above.

We invite you to withdraw your purported Notice served with letter INF CORR 6254.

Yours faithfully,

[redacted]

M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

cc: R. Walker
M. Flynn
A. Campos
M. Berrozpe
A. Urriza

[redacted]