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59. Clause 65.2 - failure to give tie notice within 20 Business Days after the Infraco becomes aware of a Compensation Event which has caused, or is likely to cause, delay or adversely affect the performance of the Infraco Works or cause the Infraco to incur additional costs, of the Infraco's claim for an extension of time and/or costs and relief and failure to give full details of the nature of the Compensation Event, the date of occurrence and its likely duration;
60. Clause 65.2.2 - failure to include when notifying a Compensation Event full details of the extension of time and relief required and/or any costs claimed, including (i) the Infraco's estimate of the likely effect of delay upon Programme or the adverse effects on the performance of its obligations under the Infraco Contract; (ii) details of the costs or losses which are not Indirect Losses; (iii) mitigation measures adopted and why unsuccessful; and (iv) any acceleration or other measures which the Infraco could take to mitigate the effects of delay or non-performance and, where applicable, estimates of the costs thereof;
61. Clause 65.2.2(a) and (b) - where the Compensation Event has a continuing effect or the Infraco is unable to determine whether the effect of the Compensation Event will actually cause it not to be able to comply with its obligations under the Infraco Contract, such that it is not practicable for the Infraco to submit full details at the time of notification, failure to submit a statement to that effect with reasons and interim written particulars and failure to submit to tie update particulars;
62. Clause 65.2.3 - failure to demonstrate to the reasonable satisfaction of tie that (i) the Infraco and the Infraco Parties could not reasonably have avoided the occurrence of a Compensation Event or consequences by steps which they might reasonably be expected to have taken; (ii) the Compensation Event is the direct cause of the delay, inability to perform and/or the additional costs; and (iii) the Infraco is using reasonable endeavours to perform its obligations under the Infraco Contract;
63. Clause 65.10 - failure to inform tie at the earliest opportunity if the Infraco Works are delayed in circumstances other than those entitling the Infraco to a Compensation Event, and to give tie an estimate of the likely effect upon the Programme and to take acceleration measures (at its own expense) as are necessary to achieve the requirements of the Programme;
64. Clause 65.11 - failure to continue to carry out the Infraco Works notwithstanding the occurrence of a Compensation Event;
65. Clause 73.1 - failure to, throughout the Term and to the extent consistent with its obligations under the Infraco Contract, make arrangements to secure continuous improvement in the way in which the Infraco Works are conducted having regard to the Project Vision and a combination of economy, efficiency and effectiveness;
66. Clause 73.2 - failure to undertake such actions as tie reasonably requests and prepare and support and assist tie in preparing best value performance plans and conducting best value reviews in relation to the Infraco Works;
67. Clause 73.2.3 - failure to comply with requests for information, data or other assistance made by tie in pursuance of its best value assessments;
68. Clause 75.2 - failure to comply with the representation, warranty and undertaking that the Infraco's provision of any Deliverables and the use by tie of the Deliverables provided to it as part of the Infraco Works has not infringed and shall not infringe any third party's Intellectual Property Rights;
69. Clause 79.1.2 - failure to deal with Infraco Changes in accordance with Clause 81;

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70. Clause 80.3 - failure to complete and return Estimates to tie within 18 Business Days of receipt of a tie Notice of Change;
71. Clause 80.3 - where the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to tie within 18 Business Days of receipt of a tie Notice of Change, failure to deliver to tie, within 5 Business Days of receipt of a tie Notice of Change, a request for a reasonable extended period of time for return of the Estimate and to act reasonably in agreeing such extended period;
72. Clause 80.4 - failure to deliver to tie within 18 Business Days (or such longer reasonable period as may be agreed) of receipt of the tie Notice of Change, Estimates which include the opinion of the Infraco on the matters listed in Clauses 80.4.1 to 80.4.10;
73. Clause 80.4.8 - failure to deliver Estimates which include the opinion of the Infraco (acting reasonably) on proposals to mitigate the impact of the proposed tie Change;
74. Clause 80.7.1 - failure to include in the Estimate evidence demonstrating that the Infraco has used all reasonable endeavours to minimise any increase in costs and to maximise any reduction of costs;
75. Clause 80.7.2 - failure to include in the Estimate evidence demonstrating that the Infraco has investigated how to mitigate the impact of the tie Change;
76. Clause 80.7.4 - failure to include in the Estimate evidence demonstrating that the proposed tie Change will, where relevant, be implemented in the most cost effective manner;
77. Clause 80.8 - where the Infraco does not intend to use its own resources to implement any proposed tie Change, failure to comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any sub-contractor or Deliverable required in relation to the proposed tie Change;
78. Clause 80.17 - failure to update the Programme, Schedule Part 5 and other Deliverables as soon as reasonably practicable (and in any event within 20 Business Days) of issue of a tie Change Order;
79. Clause 81.3 - failure to propose to tie any changes which would be Infraco Changes (which could effect a saving of £20,000 or more);
80. Clause 101.1 - failure to treat all Confidential Information belonging to tie as confidential and safeguard it accordingly;
81. Clause 101.2 - failure not to disclose any Confidential Information belonging to tie to other persons without tie's consent;
82. Clause 101.3 - failure to take all necessary precautions to ensure that all Confidential Information obtained from tie in connection with the Infraco Contract is treated as confidential and not disclosed (without prior approval) or used by any such staff, contractors, agents, subcontractors, consultants and professional advisors otherwise than for the purposes of the Infraco Contract;
83. Clause 101.14 - failure to obtain tie's prior written in respect of all press releases;
84. Clause 102.2 - failure to procure a non-exclusive perpetual irrevocable royalty free licence to use Project IPR created by the Infraco Parties in relation to the Infraco Works;

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85. Clause 104.2 - failure to make the records referred to in Clause 104.1 of the Infraco Contract available for inspection by or on behalf of tie's Representative, tie, CEC, tie's auditors or CEC's auditors or any other third party at all reasonable times during normal working hours on not less than one Business Day's notice;
86. Clause 104.3 - failure to provide to tie's Representative, tie, and tie's auditors, other information, documents, records and the like in the possession of, or available to, the Infraco as reasonably requested and failure to use all reasonable endeavours to procure that the Infraco Parties provide such information, documents, records and the like;
87. Clause 105.2 - failure of the Infraco to comply with the HSQE System and failure to develop appropriate management plans so as to ensure such compliance with the HSQE System;
88. Clause 105.5 - failure to appoint an HSQE Manager as soon as reasonably practicable following the Effective Date;
89. Clause 118 - failure to act fairly and reasonably when giving any opinion and taking actions, having regard to all the circumstances;
90. Clause 119 - failure to take all reasonable measures to mitigate loss which has occurred;
91. Sections 3.6.1 of Schedule Part 2 (*Employer's Requirements*) - failure to achieve the Deliverables necessary to enable the ETN to be constructed, tested and commissioned and brought into commercial service and consistent with the requirements for the Case for Safety;
92. Section 3.6.1 of Schedule Part 2 (*Employer's Requirements*) - failure to approach the design services in a structured manner using a recognised 'V' life cycle model with regard to the integration of design engineering, systems engineering and safety engineering activities;
93. Section 3.6.2 of Schedule Part 2 (*Employer's Requirements*) - failure to undertake such supplementary analysis that will allow further development of the Case for Safety concurrent with any design undertaken to prove that the ETN is acceptably safe;
94. Section 17.2.6 of Schedule Part 2 (*Employer's Requirements*) - failure to design and execute the Infraco Works using safety management and procedures to demonstrate that the ETN is safe to introduce into service as defined by the Safety Management System under the Railway and Other Guided Transport Systems (Safety) Regulations 2006, to develop the Case for Safety to the satisfaction of the Competent Person and the Project Safety Certification Committee; and to undertake all Infraco Works in accordance with tie's written safety verification scheme requirements; and
95. Section 1.1.3 of Schedule Part 3 (*Code of Construction Practice*) - failure to implement and comply with an "environmental management system" in accordance with ISO 14001;
96. Section 3.4 of Schedule Part 3 (*Code of Construction Practice*) - failure to comply with tie's system for controlling access to undertake works activities and failure to obtain an approved permit to commence works from tie for each Works Site and agreed scope of construction activities;
97. Section 3.4.4 of Schedule Part 3 (*Code of Construction Practice*) - failure to identify on each Permit to Commence Form the necessary licences, third party approvals and notifications that have been obtained/granted to enable the works to be undertaken, together with the specific control measures that require to be implemented under the Infraco's safety management system;



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- 98. Section 18.2.1 of Schedule Part 3 (*Code of Construction Practice*) - failure to compile, agree with CEC and publish a schedule of all buildings or structures that are located within the Site, or which are located directly adjacent to Work Sites, which may be at risk of physical damage or damage caused by vibration generated during the Infraco Works;
- 99. Section 22.5 of Schedule Part 3 (*Code of Construction Practice*) - failure to develop, implement and comply with a strategy for the control of invasive and alien species; and
- 100. Paragraph 2.8.1 of Part C of Schedule Part 14 (*Design Review Procedure*) - failure to provide a Design Assurance Statement along with each design package.



Project Director

*30 September 2010*  
.....Date





Our ref: 25.1.2011/KDR/7420  
Your ref: INF CORR 6318

Bilfinger Berger-Siemans- CAF Consortium

10 November 2010

Bilfinger Berger Civil EDI			
Date Sent	10 NOV 2010	BM	
File Number			
Action			
Distribution			

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For the attention of Steven Bell – Project Tram Director

Dear Sirs

**Edinburgh Tram Network Infraco  
Infraco Contract: Alleged Remediable Termination Notice (Breaches evincing course of conduct)**

We refer to your letter dated 30 September 2010 (INF CORR 6318) which purports to enclose a Remediable Termination Notice ('the Notice') in relation to allegations that Infraco is in breach of Clauses 7.1 and 7.2 of the Infraco Contract in a multitude of ways.

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 – perhaps more evident than ever in the Notice enclosed with your letter dated 30 September 2010 (INF CORR 6318). 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 is defective and not in accordance with the Infraco Contract and as such, does not constitute a valid Remediable Termination Notice in terms of Clause 90.1.2.
2. The Notice contains a series of unsubstantiated and general accusations which do not identify any particular breach of Infraco's obligations under the Infraco Contract.
3. You have made no effort to describe how these accusations can be said to materially and adversely affect the carrying out and/or completion of the Infraco Works.
4. The Notice does not therefore identify an Infraco Default (a)
5. Your letter does not therefore constitute a valid Remediable Termination Notice.

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

This is further explained as follows:

1. **tie's Purported Remediable Termination Notice of 30 September 2010 (INF CORR 6318) is Defective**

- 1.1 Clause 90.1.2 provides that:

*"In the event that an Infraco Default as stipulated pursuant to Infraco Default (a), (f), (g) (to the extent that the Underperformance Warning Notices have been issued pursuant to Clause 56.7.2) and (j) in Schedule Part 1 occurs tie may give notice in writing to the Infraco specifying the nature of the Infraco Default which has occurred."*

- 1.2 Your Notice purports to be a notification of Infraco Default (a) defined as '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'. Infraco Default (a) is thus defined in the singular ('a breach') which can be readily understood to the extent that the whole purpose of a Remediable Termination Notice under this Clause is to inform the Infraco of the nature of the alleged breach in sufficient detail to allow it to issue a meaningful rectification plan.

- 1.3 Your Notice does not refer to a breach in the singular but instead makes allegations of multiple breaches of contract which are to a material extent, unspecified and unsubstantiated. As such, it is not what was envisaged by the Infraco Contract and is not in accordance with it. Given the sanctions which may arise from a Remediable Termination Notice, the Infraco is entitled to know with some degree of precision, exactly what is being complained of in order that it may take steps to remedy this situation. Your Notice fails to provide this degree of precision in relation to individual breaches and is accordingly defective for this reason.

- 1.4 Further, and as noted throughout this letter, your Notice contains allegations of the occurrence of Infraco Defaults which are already the subject matter of Remediable Termination Notices issued by tie. We have noted below the particular allegations where this is the case. Infraco has already issued rectification plans and/or responses to those separate Remediable Termination Notices. Notwithstanding those responses, having repeated these allegations in this Notice, tie could be in a position to terminate the Infraco Contract on the basis of any response (including the perceived adequacy of any rectification plan) to the Notice, irrespective of whether the particular allegation has already been dealt with (and rectified). This is clearly not what is anticipated by the Infraco Contract and your Notice is accordingly defective to the extent that it deals with matters which have already been the subject matter of Remediable Termination Notices.

- 1.5 In light of this, the Notice is defective and cannot result in tie being entitled to terminate the Infraco Contract. Notwithstanding this and under reservation of our primary position, we have endeavoured in this letter to respond to the Notice in so far as possible.

## 2. **No Breach of Contract**

- 2.1 The Notice attached to your letter refers to breaches of Infraco's obligations under Clauses 7.1 and 7.2 of the Infraco Contract. It then goes on at considerable length to make many other allegations of breach of contract by Infraco, these allegations being subjective, emotive and to a material extent, unspecified and unsubstantiated. This makes providing a meaningful response to your letter exceptionally difficult.

- 2.2 The Notice also details many alleged breaches which are already the subject of separate Remediable Termination Notices which have been sent by tie and which we have either responded to or are in the course of responding to. We identify below, specific allegations which we will not respond to in this letter, having already responded to them elsewhere.
- 2.3 Finally, attached to the Notice at Appendix A is a list entitled 'Infraco Breaches'. Whilst this purports to identify a list of breaches of contract by Infraco, it would appear simply to be a list of many of the clauses in the Infraco Contract which place an obligation on Infraco to do something, with a statement that Infraco has failed to comply with that particular obligation. As an example, item 15 alleges a failure to carry out and complete the Infraco Works in accordance with all applicable environmental regulations and requirements. Whilst this is a serious allegation to make, no detail whatsoever is provided as to the nature of such failure and the legislation which you consider has been breached. As no detail at all is given of the way in which it is alleged that we are in breach of the particular clauses listed, we cannot provide an answer to these 100 unsubstantiated allegations.
- 2.4 For the avoidance of doubt, we reject that there has been any breach of Clauses 7.1 and/or 7.2.
- 2.5 **General Comments**
- 2.6 The entire tone of your letter is demonstrative of the fundamental disagreement which continues to exist between us on the interpretation and operation of the Infraco Contract. Many of the allegations that are made in respect of Infraco's *'ongoing delinquent and obstructive behaviour'* reflect this underlying and fundamental disagreement. For example, the statement is made at paragraph 2.5.2 of the Notice that:-
- "The Infraco will not continue with any works which are the subject of a tie Change or Notified Departure prior to the issue of a tie Change Order or the referral of the relevant Estimate (if there is one) to the Dispute Resolution Process"*
- 2.7 Your understanding of what constitutes a breach of contract in respect of Clause 80 is based upon your interpretation of the requirements of that Clause. There have been a series of adjudications which have addressed aspects of Clause 80 and the change mechanism. On every point of principle, tie has been shown to have been wrong. Yet it is clear from your Notice that you refuse to accept the decisions of the adjudicators. In relation to this specific allegation, Lord Dervaird's decision of 7 August 2010 makes it clear that Infraco is both required and entitled to refuse to carry out Changes prior to the issue of a tie Change Order or referral of an Estimate to the Dispute Resolution Process.
- 2.8 As noted above, the very high level and general nature of the allegations contained within the Notice, makes it very difficult for us to respond to them in any meaningful way. The fact that tie has considered it necessary to make such a wide ranging and general attack on Infraco's performance, without specific and detailed allegations of material breach being made, is demonstrative of the fact that there is no material breach of contract on the part of Infraco which would entitle tie to terminate the Infraco Contract. Rather, tie appears determined to find any reason for determining the contract, whether that is justified or not. This is clearly what has prompted the trawl through the Infraco Contract and the scatter gun approach contained within the Notice.
- 2.9 Note that we take extreme exception to the allegations of 'delinquency'. Please confirm by return whether or not tie alleges criminality on the part of the Infraco.

**3. Nature of the Infraco Default which has occurred**

3.1 You make allegations of an ongoing course of conduct which constitutes multiple repeated and non remedied breaches of Infraco's obligations under the Infraco Contract without any specific allegation being made. We cannot respond to such unspecific comments but deny entirely that we are in breach of Clauses 7.1 or 7.2 of the Infraco Contract.

**3.2 Approach to the Infraco Works and the Infraco Contract**

3.3 We refer to our general comments above regarding the lack of detail and very general allegations made against us. With regard to your allegations concerning Infraco's adversarial and aggressive conduct, we would note that both parties are currently in a difficult commercial situation and fundamentally disagree on a number of legal and contractual matters. What tie views as a failure to work in mutual co-operation, arises from Infraco's refusal to agree with tie's every request and with tie's position on a range of matters. This does not mean that Infraco is refusing to work in mutual co-operation. Rather, Infraco is seeking to maintain its position commercially and contractually. Infraco has to date been vindicated in adopting this stance in all of the adjudications which have dealt with matters of principle.

3.4 Please specify the facts which you consider Infraco has misrepresented and the ways in which Infraco has changed its position throughout the course of the Infraco Contract. We deny ever having deliberately misrepresented facts. tie may wish to remind itself of its actions and pleadings on the Depot Access Bridge Dispute concerning the A8 Retaining Wall and the £4.9m credit it sought in this regard.

3.5 Infraco operates as a properly functioning consortium comprised of individual commercial entities. It has regular management meetings and processes in place to ensure that it functions at an optimum level. We are therefore unclear as to how it can be said to be "dysfunctional", nor as to how the operation of Infraco as a consortium has had any impact on the completion of the Infraco Works, its relations with tie or the reputation of the Project.

**3.6 Non delivery of the Infraco Works**

Infraco has repeatedly produced programmes for tie's approval which reflect the current status of the Project and which acknowledge the many substantial delays which have occurred which are not of Infraco's making, not least the delay of more than two years to the preceding MUDFA works. tie refuses to accept any of these programmes for the simple reason that it will not acknowledge any delay to the Project. We assume that this is due to the financial and political ramifications of acknowledging these delays. We are currently therefore left with a situation where the Programme (Rev 1) is hopelessly out of date and does not reflect the status of the Infraco Works. We also note in passing that your analysis is based on the original Infraco Programme contained in Schedule Part 15 rather than the current Programme (Rev 1).

3.7 Tie has issued a number of Clause 61.1 instructions, purportedly in relation to the "inadequate speed of execution of the Infraco Works". As we have previously informed you, none of these instructions are contractually valid as they unreasonably ignore the vast amount of Change and Compensation Events which have occurred and which are still to be concluded. These will inevitably entitle Infraco to further extensions of time, not least in relation to the substantial delays caused as a result of the delays to the MUDFA works where tie has publicly acknowledged the criticality of these delays but has so far

failed to award a single day's extension of time (albeit that the adjudication before Robert Howie QC on this matter found Infraco entitled to an extension of time in respect of part of the Infraco Works).

- 3.8 Your assertion regarding Infraco refusing to continue with works which are the subject of a Compensation Event is erroneous. Where Infraco has notified of a Compensation Event, it has continued with that work as the contract requires. Perhaps you are referring to tie's attempts to notify Infraco of a Compensation Event. Such notifications are invalid under the Infraco Contract.
- 3.9 With regard to Notified Departures, we refer to our general comments above and to the Decision of Lord Dervaird.
- 3.10 The Design has been late for many reasons as you are well aware, not least to accommodate the needs of tie and CEC. An assured, integrated design solution for on-street trackworks is not required at this stage but will of course be provided in line with the Infraco Contract. A purported Remediable Termination Notice has been issued in relation to this latter point and having responded to that in detail, we will not repeat our position herein but rather adopt the position taken in that separate response.
- 3.11 **Poor design and defective installation**
- 3.12 We refer to our letter dated 17 September 2010 (25.1.201/KDR/6729). As noted above, many of the matters you refer to are the subject of separate Remediable Termination Notices and rather than repeat our position herein, we adopt the position we have taken in those separate responses.
- 3.13 Your comments regarding the design and the Deliverables are denied and are in any event, too vague and lacking in substance to permit a more detailed response. The Design has been and is being prepared in the appropriate manner by the designer selected by tie. We believe your comments regarding non-compliance with the Employer's Requirements, poor quality and not fit for purpose to be utterly without foundation and defamatory.
- 3.14 **Lack of supervision**
- 3.15 We refer to our letter dated 17 September 2010 (25.1.201/KDR/6729). As noted above, many of the matters you refer to are the subject of separate Remediable Termination Notices and rather than repeat our position herein, we adopt the position we have taken in those separate responses.
- 3.16 Infraco has sought to manage the SDS Provider in the way that it sees best and which will produce a completed design as swiftly as possible and in spite of the obstacles that continue to obstruct progress, such as the voluminous number of CEC comments. We are not aware of any instances of an "entirely inadequate design" having to be redesigned. Please provide specific details in support of this allegation. Any redesign work undertaken has normally stemmed from supervening requirements or opportunities for enhancement being identified through the various design review processes.
- 3.17 We believe that we do have a set of approved Key Subcontractors in place. The real issue, and reason for the lack of collateral warranties, is tie's unreasonable position in relation to approval of the various subcontracts (including its unreasonable position in relation to the appropriate parties to the various subcontracts). Without those subcontracts, there can of course be no collateral warranties. tie is well aware that this



matter is currently being dealt with under the Dispute Resolution Procedure. Again, Infraco considers that its position in this regard will shortly be vindicated by an adjudicator.

**3.18 Disregard for contractual mechanisms**

**3.19** The high level allegations contained within this section are denied. We deny that we have demonstrated a disregard for the application of and adherence to the mechanisms contained in the Infraco Contract to manage the Infraco Contract and the Infraco Works. There are clear disputes between us on these matters. Where disputes on the application of the Infraco Contract have been referred to an adjudicator (not least in relation to Notified Departures and the Clause 80 mechanism), the decision on all issues of principle has been in Infraco's favour. We refer again to the comments made above in relation to Lord Dervaird's decision in particular.

**3.20** Beyond that we would refer you to our letter dated 9 November 2010 (25.1.201/KDR/7390) in response to your Remediable Termination Notice on the operation of Clause 80.

**3.21** Infraco has sought to comply with the Clause 65 process at all times. We have never refused to submit Estimates or provide details regarding acceleration or mitigation where required by Clause 65. We would note however that tie has been labouring under a misapprehension in relation to our duties to accelerate and mitigate. We would refer you to the decision of Robert Howie QC on the MUDFA Revision 8 delays in this regard (a further example of tie refusing to acknowledge the outcome of an adjudication where the result does not suit it).

**3.22** tie's continued policy of exceeding the ambit of Clause 104 has been the subject of much correspondence between us. Infraco considers that it has already gone beyond its obligations under Clause 104 to meet the needs of tie. This has included seeking to provide information requested by tie even when such requests are seriously lacking in any detail. As regards Clause 104 and the provision of an office under Clause 10.16, we would refer you to our letter dated 17 September 2010 (25.1.201/KDR/6732).

**3.23** Your paragraph 2.8.6 is yet another example of the lack of detail contained within your Notice. Infraco believes that it has complied with the requirements of Clause 28 and would refer to our comments above in relation to approval of Subcontracts.

**3.24** No detail whatsoever is provided in support of the alleged failure to comply with Schedule Part 14. We dispute that the Design Review Procedure has been used inconsistently.

**3.25 Performance of Contract**

We refer to our general comments above regarding the lack of detail to be found in this section and in Appendix A. By way of further example, item 7.9 alleges a breach of Clause 81.3 - failure to propose any Infraco Changes. We are baffled as to how tie could ever consider Infraco to have breached this discretionary provision. There is no positive obligation on Infraco to seek out and identify Infraco Changes.

**3.26** In the absence of any detail at all of the ways in which Infraco is said to be in breach of the obligations listed in Appendix A, we cannot answer this section of the Notice.

**3.27 Unwillingness to resolve difficulties or the Infraco's breaches**

**3.28** Infraco has gone to great lengths and expense to engage with tie to resolve the disputes and differences which exist between the parties in relation to the correct operation of the

Infraco Contract. As the Infraco does not consider that it is in breach of contract in the many ways alleged, it would be unlikely to refer these matters to dispute. It is notable that rather than refer the matters alleged in the Notice to dispute, tie has instead adopted the approach of detailing these matters in a Remediable Termination Notice. We have made comments on tie's adoption of this tactic as noted above.

- 3.29 Paragraphs 2.10.2 and 2.10.3 suggest that, because Infraco refuses to agree with tie's position on all matters, it has refused to engage and failed to act in partnership with tie. At the risk of repetition, a dispute exists between Infraco and tie on the correct interpretation and operation of the Infraco Contract. This is evident from the number of meetings and sheer volume of correspondence between us, as well as the many adjudications which have taken place in which Parties have sought a third party determination on these important issues of principle. Infraco's position on all matters of principle has been found to be correct in these adjudications. tie continues to refuse to acknowledge the result of these adjudications but it cannot be said (and Infraco refutes) that it is not engaging with tie in an attempt to resolve difficulties.
- 3.30 Your comments regarding the partnering workshops are again incorrect. Infraco staff members willingly attended and took part in these sessions.
- 3.31 As regards Clause 104 we refer to our comments above and our letter dated 12 October 2010 (25.1.201/KDR/6950).
- 3.32 Your allegations at paragraph 2.10.5 of the Notice in relation to approach to Estimates, Notified Departures and Compensation Events, are strongly refuted. There is no policy of grossly overvaluing Estimates or refusing to provide reasons, information or vouching. Any difficulties caused have been the result of tie's refusal to (i) acknowledge that Notified Departures and Compensation Events have occurred (ii) respond to and properly value Estimates submitted; and (iii) acknowledge and comply with the decisions of adjudicators on points of principle so far as they relate to the treatment of Notified Departures and Estimates. In adopting this approach, it is tie that is in breach of its contractual obligation to avoid unnecessary disputes.
- 3.33 **Underperformance Warning Notices**
- As you are aware, we dispute the validity of the Underperformance Warning Notices issued to date by tie. We refer to our letters dated 17 September 2010 (25.1.201/KDR/6733), 21 September 2010 (25.1.201/KDR/6772) and 25 October 2010 (ETN(BSC)TIE=T&ABC#052172).
- 3.34 **Remediable Termination Notices**
- 3.35 We see no point in responding to this section of your Notice. We are dealing separately with all Remediable Termination Notices received from tie and have responded to, or are in the course of responding to, those separate notices. We refute the validity of all of those Remediable Termination Notices and accordingly dispute that we are in breach of any contractual obligation (such as it may exist) to ensure that they were not issued by tie.
- 3.36 **Disregard for client's public accountability and best value**
- 3.37 Infraco and tie clearly have different views of what Infraco is required to do in terms of best value. This again has been the subject of much discussion between us. We believe that we have complied with our contractual obligations in this regard.

- 3.38 Again, the broad allegations contained within this section of your Notice are denied. We fail to understand how Infraco can "exploit" its rights to potential entitlement. Infraco is either contractually entitled to a remedy or it is not. There is no question of exploitation and such emotive language (together with the much repeated allegations of 'delinquency') is far from helpful. This type of statement suggests that tie simply cannot live with the contract that it has entered into.
- 3.39 We trust that the wild speculation contained within paragraph 2.13.4 of your Notice (and reflected in your associated Remedial Termination Notice) has now been shown to have been without basis (with reference to our letter dated 12 October 2010 (25.1.2011/KDR/6950)).
- 3.40 Again, tie appears to be confusing an obligation to mutually co-operate as a unilateral obligation on Infraco to agree with tie on all matters. It seems as though the fact that Infraco has adopted a different (but we consider correct) interpretation of the Infraco Contract, and continues to maintain its position both contractually and commercially, is somehow taken by tie to be harming tie's public image and that of CEC. We refute this. Any negative publicity attached to the Project and tie, is of tie's own making.
- 3.41 Infraco has not engaged with the media and we do not accept that there has been any breach of Clause 101 of the Infraco Contract. It is quite incredible for tie to make such accusations and to consider them to be capable of being included in a Remediable Termination Notice, when it has no proof of such events ever having taken place. However, given tie's blatant disregard of its own obligations in relation to confidentiality, including the actions of its officer, David McKay, in the course of the last week, we consider that Infraco is no longer bound by the terms of Clause 101 in any case (based on the principle of mutuality of contractual obligations).
- 4. Material and Adverse Effect**
- 4.1 No effort has been made to describe in any detail how the many accusations made in the Notice can be said to materially and adversely affect the carrying out and/or completion of the Infraco Works.
- 4.2 Given the very general accusations made in your letter, it is unsurprising that you are unable to make any detailed assertion of the particular failures you allege to be material, and how these particular matters materially and adversely affect the carrying out and/or completion of the Infraco Works. Instead we are provided with the very general list of 'material and adverse effects' contained at paragraph 3.2 of the Notice and would comment in brief in response to this as follows:
- 4.2.1 In what locations have the Infraco Works not been completed and how has this materially and adversely affected the carrying out and/or completion of the Infraco Works? In the absence of this information, this statement is so general as to be completely meaningless.
- 4.2.2 The Infraco Works have been delayed for the reasons we have provided above. You provide no link between the alleged breaches referred to and any delay to the Infraco Works and accordingly this statement is so general as to be completely meaningless.
- 4.2.3 We take our obligations in relation to Health and Safety very seriously. Please specify which alleged defective works are creating a hazard and we will respond to those specific allegations. In the absence of this information, this statement is so general as to be completely meaningless.

- 4.2.4 You provide no detail whatsoever of any alleged breach which has resulted in the works having a shorter asset life than they ought to. In the absence of this information, this statement is so general as to be completely meaningless.
- 4.2.5 In what locations and in what respects have works been carried out which do not satisfy the necessary statutory requirements? In the absence of this information, this statement is so general as to be completely meaningless.
- 4.2.6 Which works which have been carried out fall short of the contractual standards? In the absence of this information, this statement is so general as to be completely meaningless.
- 4.2.7 Your allegations in relation to absence of a completed, assured and integrated design have been dealt with above and in our letter dated 26 October 2010 (ETN(BSC)TIE=T&ABC#052171). We do not accept that the carrying out and completion of the Infraco Works have been materially and adversely affected by this issue.
- 4.2.8 In what respects has an inefficient and/or incompetent design been produced which has delayed works commencement and completion and which impacts upon tie's rights to meet the requisite statutory requirements? In the absence of this information, this statement is so general as to be completely meaningless.
- 4.2.9 Please specify the respects in which we have interfered with tie's rights as a client in respect of the Infraco Works under the Infraco Contract. Please explain which claims for additional costs have been substantially inflated and how this has had a material and adverse effect on the carrying out and completion of the Infraco Works. In the absence of this information, this statement is so general as to be completely meaningless.
- 4.2.10 In what way have we denied tie the ability to understand and have visibility in relation to the Deliverables necessary for the carrying out and completion of the Infraco Works? In the absence of this information, this statement is so general as to be completely meaningless.
- 4.2.11 In what way have we failed to mitigate the impact of Permitted Variations and how has this had a material and adverse effect on the carrying out and completion of the Infraco Works? In the absence of this information, this statement is so general as to be completely meaningless.
- 4.2.12 We cannot provide you with certainty regarding completion dates and out-turn cost until you are prepared to acknowledge the full extent of your contractual obligations. No detail is however provided on why uncertainty in relation to these matters has had a material and adverse effect on the carrying out and completion of the Infraco Works. In the absence of this information, this statement is so general as to be completely meaningless.
- 4.3 For the avoidance of any doubt, we dispute that there has been any breach of the Infraco Contract by the Infraco which materially and adversely affects the carrying out and/or completion of the Infraco Works.

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

It follows from the preceding paragraphs that, in addition to the defective nature of the Notice as outlined at paragraph 1 above, the circumstances you narrate in your Notice do

not meet the definition of "Infraco Default (a)" in the Infraco Contract Schedule Part 1, contrary to your assertion.

6. **Letter INF CORR 6318 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.

7. **No right to Terminate**

No grounds for termination can arise from this alleged Notice.

8. **Rectification Plan**

Given that the Notice is defective for the reasons outlined at paragraph 1 above, and given there has been no breach of Clauses 7.1 and/or 7.2, Infraco is of the opinion that it need take no steps to remedy the alleged breaches and for this reason, we shall not be submitting a Rectification Plan. Even if Infraco had breached the many Clauses referred to (which is denied), none of the alleged breaches narrated within your Notice are dealt with in sufficient detail to allow Infraco to even begin to ascertain how they might be remedied. We will continue to enforce our contractual rights as we see fit, based on a legitimate and sound interpretation of the Infraco Contract.

We remain committed to carrying out and completing the Infraco Works (including the provision of an approved compliant, integrated, assured complete Design) and to the Infraco Contract generally, and will work in mutual cooperation with you in an attempt to resolve all differences that exist. We would note however, that the latter exercise requires both parties to work together. You may wish to consider this and reflect upon its own course of conduct, including the tactic adopted in relation to the service of multiple purported Remediable Termination Notices. We do not consider this course of action to be conducive to resolving differences. We will however continue to respond appropriately to such Notices.

We invite you to withdraw your purported Notice served with letter INF CORR 6318.

Yours faithfully,



**M Foerder**  
Project Director  
Bilfinger Berger Siemens CAF Consortium

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

