

20.11

tie Underperforming Warning Notice in respect of Clause 60
- Programme and Responses thereto.

Bilfinger Berger UK Limited EDI			
Date Received	07 SEP 2010	Scanned	
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FAO Mr Martin Foerder
 Bilfinger Berger – Siemens – CAF Consortium
 9 Lochside Avenue
 Edinburgh Park
 Edinburgh
 EH12 9DJ

Our Ref: INF CORR 5992

Date: 7 September 2010

Dear Sirs

**INFRACO CONTRACT: UNDERPERFORMANCE WARNING NOTICE
 CLAUSE 60 (PROGRAMME)**

Enclosed is an Underperformance Warning Notice in respect of Infraco Default under the Infraco Contract.

We look forward to receiving your rectification plan within 10 Business Days of the date of this Underperformance Warning Notice.

Yours faithfully,



Steven Bell
Project Director Edinburgh Trams

Citypoint Offices, 65 Haymarket Terrace, Edinburgh, EH12 5HD

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UNDERPERFORMANCE WARNING NOTICE

CLAUSE 60 (PROGRAMME)

1. Material Breaches

1.1 The Infraco has committed a material breach of its obligations under:

1.1.1 Clause 60.2 of the Infraco Contract by not updating the Programme in accordance with the provisions of Schedule Part 2 (*Employer's Requirements*); and

1.1.2 Clause 60.9 of the Infraco Contract by not taking all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works.

1.2 As a result of these breaches, the Infraco is not carrying out the Infraco Works to a meaningful or contractually compliant Programme. In breach of these provisions, and in breach of the Infraco's obligations under Clauses 6.1 and 7.2 of the Infraco Contract, the Infraco has failed to give tie any visibility of how the Infraco Works are progressing in accordance with the Programme (as defined in the Infraco Contract), any slippage or any mitigation measures to limit the over-run to the Programme. This denies tie the ability to exercise its rights under the Infraco Contract and denies tie the right to make a decision about instructing acceleration measures pursuant to Clause 61.2 of the Infraco Contract.

1.3 Individually and cumulatively, these breaches are material and continuing.

2. Nature of Material Breaches

2.1 For the duration of the Infraco Contract (since 14 May 2008), the Infraco has failed to comply with the provisions of the Infraco Contract by:

2.1.1 not updating the Programme in accordance with the requirements of Schedule Part 2 (*Employer's Requirements*); and

2.1.2 not taking all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works by not applying measures to limit the over-run to the Programme and wrongly assuming that "Designated Work Area" means a full intermediate section of the Infraco Works.

2.2 tie has thereby been denied its contractual entitlement to consider whether it would be appropriate to issue instructions pursuant to Clause 61.2 of the Infraco Contract.

2.3 Repeatedly throughout the duration of the Infraco Contract to date, tie has corresponded with the Infraco on this matter and discussed this matter with the Infraco, in an attempt to uphold tie's contractual entitlements under Clauses 60.2 and 60.9 and Schedule 2 (*Employer's Requirements*) of the Infraco Contract. The Infraco has persisted in not complying with the terms of the Infraco Contract on this matter.

2.4 tie expressly instructed the Infraco in writing to properly update the Programme in accordance with the Infraco Contract, which includes allowing for mitigation measures, by the following letters:

Date	Reference
15 March 2010	Ref: INF.CORR. 4426
1 April 2010	Ref: INF.CORR.4648
20 May 2010	Ref: INF. CORR 5092

2.5 tie expressly required the Infraco in writing to comply with the Employer's Requirements, including inter alia Section 12, by the following letters:

Date	Reference
2 July 2010	INF. CORR 5449/MJ
16 July 2010	INF. CORR. 5632/MJ

2.6 As at the date of this Underperformance Warning Notice, the Infraco has not complied with tie's instructions pursuant to any of the letters mentioned in paragraphs 2.4 and 2.5 above. This is a material breach of the Infraco Contract.

3. Reminder

3.1 Pursuant to Clause 56.7 we are obliged to inform you of the implications of this Underperformance. Your attention is drawn to Clause 56.10 and to Infraco Default (g).

for and on behalf of tie Limited



Project Director

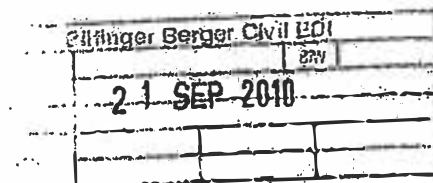
7 September 2010 Date

Our ref: 25.1.2011/KDR/6772
Your ref: INF CORR 5765

Bilfinger Berger-Siemens- CAF
Consortium

21 September 2010

CityPoint Limited
CityPoint
65 Haymarket Terrace
Edinburgh
EH12 5HD



BSC Consortium Office
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EH12 9DJ
United Kingdom

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For the attention of Steven Bell – Project Tram Director

Dear Sirs,

Edinburgh Tram Network Infraco
Infraco Contract: Alleged Underperformance Warning Notice (Clause 60 – Programme)

We refer to your letter dated 7 September 2010 (INF CORR 5992).

With regard to the content of your letter and purported Notice, we summarise our response as follows:

1. The Infraco Contract does not permit you to serve an Underperformance Warning Notice at this time.
 2. The Notice does not identify a material breach of Infraco's obligations.
 3. Your purported Notice does not therefore constitute a valid Underperformance Warning Notice.
 4. Any attempt to terminate the Infraco Contract on the basis of this alleged Notice will be entirely without contractual basis.
1. **No Right to Serve Underperformance Warning Notice**

It is clear from the context of clause 56 of the Infraco Contract that an Underperformance Warning Notice relates solely to the performance of the Maintenance Services by the Infraco. The matters you raise regarding Programming are entirely concerned with the programming of the works during the construction period and not the performance of Maintenance Services. Your attempt to found upon clause 56.7 is based on a selective reading of the provisions, ignoring entirely its context.

This is evident from clause 56.10 to which you also refer. That clause refers to increased monitoring of Infraco, echoing the provisions of clause 56.5 which is concerned with monitoring of compliance in respect of Maintenance Services.

With regard to your reference to Infraco Default (g), we would note that this refers to "Underperformance Warning Notices" which are defined as relating solely to clause 56.7.2.

2. No Material Breach of Obligations by Infraco

As noted above, clause 56.7 envisages the identification of a material breach of Infraco's obligations as these relate to the provision of the Maintenance Services. You have made not such an allegation. Furthermore, your Notice details no material breach of any other of Infraco's obligations under the Infraco Contract.

Your purported Remedial Termination Notice (under cover of your letter INF CORR 5819) proceeds upon the same allegations as your purported Underperformance Warning Notice. We will reply to your letter INF CORR 5819 in accordance with the Infraco Contract but can confirm that we do not believe that any breach of Infraco's obligations has been identified.

3. Letter INF CORR 5992 and enclosure is not a valid Underperformance Warning Notice

As (a) service of an Underperformance Warning Notice is relevant only to the performance of Maintenance Services and (b) in any event, he has failed to identify any breach of Infraco's obligations, you have no right to serve any Underperformance Warning Notice as you have purported to do.

4. No right to Terminate

Given your reference to Infraco Default (g) we must advise you that no grounds for termination can be founded upon this purported Notice.

We invite you to withdraw your purported Notice served with letter INF CORR 5992.

Yours faithfully,


M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

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

Client:	Berger UK Limited EDI		
Date:	01 OCT 2010		
Project:			
Site:			
Project No.:			



FAO Mr Martin Foerder
 Bilfinger Berger – Siemens – CAF Consortium
 9 Lochside Avenue
 Edinburgh Park
 Edinburgh
 EH12 9DJ

Our Ref: INF CORR 6313

Date: 29 September 2010

Dear Sir,

**Edinburgh Tram Network
 Infraco Contract: Underperformance Warning Notice (Clause 60 - Programme)**

We write in response to your letter of 21 September 2010, reference 25.1.201.KDR.6772 and note your position at this time.

Yours faithfully,



Steven Bell
 Project Director – Edinburgh Tram

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