

20.12

tie Underperforming Warning Notice in respect of Design
Trackwork and Responses thereto.



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

Our Ref: INF CORR 6421

Date: 12 October 2010

Dear Sirs,

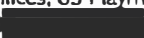

**INFRACO CONTRACT: UNDERPERFORMANCE WARNING NOTICE
DESIGN: TRACKWORKS**

Enclosed is an Underperformance Warning Notice issued in accordance with Clause 56.7.1 of the Infraco Contract.


Yours faithfully,

for 
Steven Bell
Project Director Edinburgh Trams

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

Tel: +44 (0)  Email: info@edinburghtrams.com Fax: +  Web: www.edinburghtrams.com

Registered in Scotland No: 230949 at City Chambers, High Street, Edinburgh, EH1 1YJ. Edinburgh Trams is an operating name of tie Ltd.

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CEC02084529_0002

UNDERPERFORMANCE WARNING NOTICE

DESIGN: TRACKWORKS

1. Material Breach

- 1.1 The Infraco has committed a material breach of its obligations under the Infraco Contract by failing to deliver a complete, fully integrated, assured design for the on-street trackworks (chainage 100000 to chainage 131247). Such failure prevents the Infraco from proceeding with the Infraco Works with due expedition.
- 1.2 Such material breach constitutes a breach of *inter alia* the following obligations under the Infraco Contract:
 - 1.2.1 Clause 7.1 - to carry out and complete the Infraco Works fully and faithfully in accordance with the Infraco Contract;
 - 1.2.2 Clause 7.2 - 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;
 - 1.2.3 Clause 8.1.6 - to ensure that certain key elements of the system integration of the Infraco Works are implemented, including ensuring that safety assurances and the Case for Safety will be achieved at the issue of a Certificate of Sectional Completion;
 - 1.2.4 Clause 8.5 - to ensure that all elements of design (which form part of the Infraco Works) relative to the Edinburgh Tram Network ("ETN") are compatible with system integration and to make qualified personnel available to ensure system integration throughout the Term;
 - 1.2.5 Clause 10.9 - to ensure that the Deliverables fulfil the requirements of the Infraco Contract and meet the needs of Approval Bodies (as defined under the Infraco Contract);
 - 1.2.6 Clause 11.3 - to procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement;
 - 1.2.7 Paragraph 2.8.1 of Part C of Schedule Part 14 (*Design Review Procedure*) - to provide a Design Assurance Statement along with each design package;
 - 1.2.8 Sections 3.6.1 of Schedule Part 2 (*Employer's Requirements*) - 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;
 - 1.2.9 Section 3.6.1 of Schedule Part 2 (*Employer's Requirements*) - 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;

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- 1.2.10 Section 3.6.2 of Schedule Part 2 (*Employer's Requirements*) - 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; and
- 1.2.11 Section 17.2.6 of Schedule Part 2 (*Employer's Requirements*) - 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 ("ROGS"), 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.

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

2. Nature of Material Breach

- 2.1 As at the date of this Underperformance Warning Notice, the Infraco has not delivered a complete, integrated and assured design for on-street trackworks (chainage 100000 to chainage 131247).
- 2.2 Despite the Infraco having constructed approximately one kilometre of on-street trackworks between Lothian Road and Waverley Bridge, the Infraco has not delivered a complete, integrated and assured design for these on-street trackworks.
- 2.3 The Infraco's breach of its design obligations by not delivering a complete, integrated and assured design prevents tie from issuing Permits to Commence Works for on-street trackworks.
- 2.4 The on-street trackworks are critical to the substantial completion of Section C of the Infraco Works. The failure to have a complete integrated and assured, design means that these works cannot be completed.
- 2.5 The Infraco's failure to deliver a complete, integrated and assured design for the on-street trackworks interfere with tie's rights to be able to demonstrate to the Independent Competent Person that the requirements of ROGS are being met.
- 2.6 The failure to deliver a complete, integrated and assured design for on-street trackworks as at the date of this Underperformance Warning Notice is a material breach.

3. Relevant Evidence of Material Breach

- 3.1 The lack of a complete, integrated and assured design has been the subject of much discussion between the Parties and it is understood between the Parties that the Infraco has not delivered a complete integrated and assured design as at the date of this Underperformance Warning Notice.
- 3.2 The lack of a complete, integrated and assured design has been verbally admitted by the Infraco and has been referred to in writing (including, for example, email exchange between Steven Bell and Miguel Berrozpe, entitled "Design Assurance", dated from 2 July 2010 until 5 July 2010 and email exchange between Anthony Rush and Miguel Berrozpe, entitled "Trackform Workshop", dated 11 August 2010 and 30 August 2010).

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- 3.3 The lack of a complete, integrated and assured design has been the subject of correspondence between the Infraco and the SDS Provider (including letter from the Infraco to the SDS Provider dated 28 May 2010, reference: 25.1.201.CBr.2707).
- 3.4 The Nichols Audit Report dated 1 March 2010 states the findings of the Audit on Design Assurance, System Integration and Best Value which was carried out on 28 January 2010. This Report was communicated to the Infraco by letter on 10 March 2010 (reference: INF CORR 4510/RB). This Report recognises that as at that date there is no complete, assured, integrated design and there is no integrated design programme being maintained and utilised by the Infraco.
- 3.5 The Infraco's letter (ref: 25.1.201/BDo/5937) of 9 June 2010 admitted that the works carried out to Section 1C/D (i.e. on Princes Street) are not in accordance with the Infraco Contract and acknowledged that there is no integrated, assured design for the works.
- 3.6 The Infraco's rectification plan, dated 17 September 2010, in response to the Remediable Termination Notice in respect of defective works on Princes Street admitted that there is no integrated and assured design for the on-street works and admitted that the current design required enhancement.
- 3.7 The Infraco has failed to take steps to rectify their failure after being asked to by tie, including by the following correspondence:

Date	Reference
8 April 2010	INF CORR 4736
24 May 2010	INF CORR 5133
15 June 2010	INF CORR 5346
18 June 2010	INF CORR 5400

- 3.8 The Infraco has failed to attend workshops held on the following dates to seek to rectify their failure:

Date	Workshop title
11 August 2010	Trackform Workshop

4. **Reminder**

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

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for and on behalf of tie Limited

..... **Project Director**

..... **Date**

Our ref: ETN(BSC)TIE=T&ABC#052172
Your ref: INF CORR 6421

Bilfinger Berger-Siemens- CAF
Consortium

25 October 2010

tie limited
CityPoint
65 Haymarket Terrace
Edinburgh
EH12 5HD

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

Phone: [REDACTED]

Fax: [REDACTED]

For the attention of Steven Bell – Project Tram Director

Dear Sirs,

Edinburgh Tram Network Infraco
Infraco Contract: Alleged Underperformance Warning Notice (Design: Trackworks)

We refer to your letter dated 12 October 2010 (INF CORR 6421).

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 design of the trackworks are entirely concerned with construction and not the performance of Maintenance Services. Your attempt to found upon clause 56.7.1 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 Remediable Termination Notice (under cover of your letter INF CORR 5995) proceeds upon the same allegations as your purported Underperformance Warning Notice. We will reply to your letter INF CORR 5995 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 6421 and enclosure is not 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, it 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 6421.

Yours faithfully,

M Förder
Project Director
Bilfinger Berger Siemens CAF Consortium

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

Bilfinger Berger UK Limited EDI			
Date Received		Scanned	
File Number	27 OCT 2010		
Action			
Distribution			



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 6544

Your Ref: ETN(BSC)tie=
 T&ABC#052172

Date: 27th October 2010

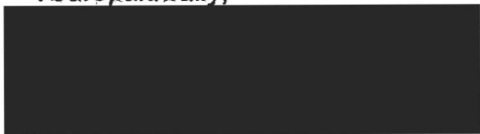
Dear Sirs,

**EDINBURGH TRAM NETWORK - INFRACO
 UNDERPERFORMANCE WARNING NOTICE**

We have received your letter dated 25th October 2010 (ETN(BSC)tie=T&ABC#052172) which purports to reply to our Underperformance Warning Notice issued under cover of letter INF CORR 6421 on 12th October 2010.

We have read your response and the Notice stands.

Yours faithfully,



Steven Bell
 Project Director - Edinburgh Tram

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

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