

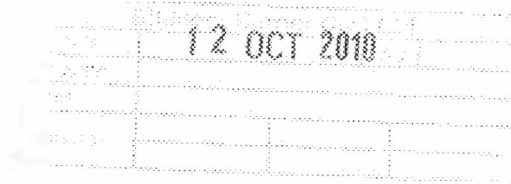
Our ref: 25.1.201/KDR/6950
Your ref: INF CORR 5959

Bilfinger Berger-Siemens- CAF
Consortium

12 October 2010

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Phone [REDACTED]
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For the attention of Steven Bell – Project Tram Director

Dear Sirs

**Edinburgh Tram Network Infraco
Infraco Contract: Alleged Remediable Termination Notices (Bilfinger Berger/ SDS Provider Minute
of Agreement)**

We refer to your letter dated 1 September 2010 (INF CORR 5959).

For the avoidance of doubt this letter does not nor is it intended to constitute a rectification plan. If and to the extent the Infraco considers it necessary or appropriate notwithstanding the views expressed in this letter such a plan will be sent under separate cover.

As at the date of writing you have served Remediable Termination Notices in respect of another 8 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 all 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 a breach or breaches of contract by Infraco.
2. The alleged breaches or breaches do not materially and adversely affect the carrying out and/or completion of the Infraco Works.
3. The Notice does not therefore identify an Infraco Default (a).
4. Your letter does not therefore constitute valid Remediable Termination Notice.
5. Any attempt to terminate the Infraco Contract on the basis of this alleged Notice will be entirely without contractual basis.

1. No Breach of Contract

Neither Infraco nor any of the Infraco Members have entered into an agreement with SDS amending the terms of the SDS Agreement.

Accordingly, there has been no breach of Clause 11.5 of the Infraco Contract.

We do not deny that since the signing of the Novation Agreement Infraco has been in constant dialogue with the SDS Provider in respect of the completion of the design for the Infraco Works and that as part of that dialogue arrangements have been made to procure that the design is delivered in accordance with both Infraco's obligations under the Infraco Contract and SDS and Infraco's obligations under the SDS Agreement. We have also acted to mitigate our exposure (both in the interim and pending final determination of the many disputes and changes under this project) as a result of tie's complete failure to perform its duties in relation to the management of (and to deliver in accordance with) the contractual mechanisms for Notified Departures and Compensation Events, as admitted by you in your letter of 9 August 2010 (INF CORR 5770).

To be clear, there is no provision in the Infraco Contract or SDS Agreement which prevents us from protecting our position in this manner. In fact, allegations of a failure to manage SDS activity and mitigate delay to the project have been a persistent and recurring theme in much of the correspondence received from tie on the issue of SDS performance and design delivery.

Finally, you assert in the notice various breaches of Clauses 6, 7 and 80, without providing any detail of why you believe we have breached these provisions. Making various assumptions about your position we would respond as follows.

- * Clause 6.2/ 6.3.1/6.3.4 – the obligations in these provisions do not operate so as to interfere with our rights under the Infraco Contract or arranging our affairs in whatever manner we consider to be necessary to perform our obligations or exercise our rights. The dialogue with SDS and any arrangements we have made with them to ensure we are able to perform our obligations under the Infraco Contract do not breach these provisions
- * Clause 6.3.6, 7.5.5, 73 and 80.7.1 – we take the allegations of fraud implicit in paragraphs 1.2.4 and 2.3 extremely seriously. We reiterate. Since the signing of the SDS Agreement we have sought to manage the SDS design activity to mitigate design delay and cost. This is not fraudulent behaviour, merely the arrangement of our affairs to procure insofar as practicable the performance of our obligations under the Infraco Contract.

2. **Carrying out and/or Completion of the Infraco Works not materially and adversely affected**

You assert that the alleged unapproved and undisclosed Minute of Agreement has had a material and adverse effect on the carrying out and completion of the Infraco Works.

There has been no agreement amending the SDS Agreement. Arrangements between Infraco and/or the Infraco Members and the SDS Provider have been agreed with a view to mitigating the impact of the various Notified Departures and other changes/ Compensation Events on the carrying out and completion of the Infraco Works and have certainly not had a material and adverse effect on those works. There is no reason why Infraco would enter into an agreement or arrangement with SDS which "contractualises" an adverse effect on the carrying out and/ or completion of the Infraco Works. This denies all logic. The rights of tie as client have not been interfered with. tie's rights are at a fundamental level to have the Infraco Works completed in accordance with the contractual Programme adjusted for delay which tie is responsible for under Schedule Part 4 for a price which has been determined on the basis of Schedule Part 4 and the Clause 80 mechanism.

SDS do not have any entitlement to payment under the Infraco Contract. Infraco's sole entitlement to compensation and extension of time under the Infraco Contract is as determined

through the Clause 80 mechanism. Arrangements with SDS in respect of the carrying out and completion of the SDS Agreement do not establish any additional entitlement.

Finally we note your comments in respect of previous correspondence on related issues. We reiterate, we have not entered into an agreement amending the SDS Agreement which requires tie's prior approval in accordance with Clause 11.5 of the Infraco Contract.

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 Infraco Contract Schedule Part 1, contrary to your assertion.

4. Letter INF CORR 5959 is not a valid Remediable Termination Notice

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

5. No right to Terminate

No grounds for termination can arise from this alleged Notice.

6. Rectification Plan

We note your request for a rectification plan. As there is no agreement in existence which breaches Clause 11.5 we cannot provide you with a rectification plan. In any event, even if there had been an agreement amending the SDS Agreement in breach of the provisions of Clause 11.5 this would be a breach not capable of remedy, notwithstanding the classification of Infraco Default (a) as a Remediable Termination Notice.

We invite you to withdraw your purported Notice served with letter INF CORR 5959

Yours faithfully


M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

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