

## **EDINBURGH TRAM INQUIRY**

### **Supplementary submissions by SETE group October 2018**

In the evidence of the consortium Project Director Martin Foerder, which provides the principal basis for Bilfinger's subsequent submissions to the Inquiry <sup>1</sup>, blame for delays in progressing the design post contract close was laid squarely at the feet of TIE and CEC.

However in Bilfinger's monthly reports which have belatedly been made available, it is clear that Bilfinger contemporaneously reported that delays were due to re-design to suit Siemens proposals, in which both SDS and Siemens were considered to be at fault:

#### **October 2008 - BFB00112170\_0005, para 1.3.1**

"Subsequent revision of track/highways drawings to incorporate Siemens proposals, which requires Client agreement of any cost implications, is in progress but delayed by slow production of details by Siemens."

#### **November 2008 - BFB00112174\_0005, para 1.3.1**

"Progress in finalising approvals and consents for track and highway drawings by SDS has been poor and is threatening to delay commencement of works in Princes Street in January. Some progress has been made in securing Tie agreement for civil works enhancements to suit Siemens proposals, notably

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<sup>1</sup> TRI00000292\_0140 et seq

for a ground improvement layer under the track, but duct and OLE foundation designs remain delayed by Siemens late design finalisation.”

**January 2009 - BFB00112178\_0005, para 1.3.1**

“Some progress in finalising approvals and consents for track and highway drawings has been achieved by design of civil works enhancements to suit Siemens proposals, notably for a ground improvement layer under the track, duct and OLE foundation designs have been delayed by Siemens late design finalisation and protracted negotiations with Tie over payment for the design work. Additional resources are in place to address the significant design interface workload required.”

The latter point is reiterated in similar terms in the ensuing reports **BFB00112183\_0005** para 1.3.1 (February 2009), **BFB00112188\_0005** para 1.3.1 (March 2009), **BFB00112189\_0005** para 1.3.1 (April 2009).

**May 2009 – BFB00112190\_0005, para 1.3.1**

“Civil drawings, revised to incorporate Siemens design (trackform including vibration isolation, OLE foundations, substations) are further delayed by poor performance by the designer and late revision of information by Siemens.”

Whilst Bilfinger noted that client agreement was being sought over cost implications of these changes, and that “protracted negotiations” followed, under clause 81 of the Infraco contract any changes to SDS design to support Infraco requirements were a cost to be borne by Infraco and not by the client <sup>2</sup>. It has previously been noted that TIE had little visibility of the progress of the design following novation <sup>3</sup>. The SETE group likewise have no visibility of the extent to which the changes to design required by Siemens, as now highlighted in the Bilfinger reports, were at the time mischaracterised as TIE changes in terms of the numerous INTCs submitted by Infraco in the same period. However, as the Bilfinger reports refer to protracted negotiations with TIE of cost implications, the consortium must as a matter of inference have sought to characterise these changes as TIE changes. If not, there would have been no cost implications for the client, and no valid basis to negotiate payment, standing the terms of clause 81.

Members of TIE’s senior management, including those now in the SETE group, suspected at the time that many of the ongoing issues with design post contract close were likely to be due to design changes to suit Infraco proposals and thus properly a contractor liability. This suspicion underpinned their determination to seek substantiation for the large volume of changes intimated by Infraco under the INTC process, particularly where no detail was provided by the Infraco in support of the INTC notices. These suspicions now appear to have been well founded in light of the content of the Bilfinger reports.

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<sup>2</sup> CEC00036952\_0197

<sup>3</sup> e.g. TRI00000289\_C\_0036, TRI00000289\_C\_0044

Notably, Bilfinger's representatives at the Inquiry made much of the fact that Mr Foerder's evidence regarding the difficulties encountered in progressing the design through 2009 and 2010 was not challenged and therefore should be accepted by the Inquiry <sup>4</sup>. However both at the time of making these submissions, and at all times prior to that, Bilfinger was clearly aware of the true position, as elucidated by their own reports as highlighted above. It is therefore a matter of concern that Bilfinger originally withheld these reports from the Inquiry and latterly sought to interdict their disclosure to other Core Participants.

It is further noted that by June 2010, the design was said to be 98% complete <sup>5</sup> and that "Civil drawings, revised to incorporate Siemens design... are largely complete" <sup>6</sup>. This advanced degree of completion is difficult to reconcile both with the Infraco's claimed inability to progress the works and also with the large number of outstanding issues with design noted at the time of mediation nine months later <sup>7</sup>. The text from the June 2010 report is virtually unchanged up to and including the report for March 2011 but for a slight increase in the completion percentage, to 98.2% <sup>8</sup>.

Finally, it is noted that Bilfinger monthly reports for December 2008 and June – August 2009 have not been made available (nor any prior to September 2008). As such it is not known whether further pertinent information on this or other issues was contained in reports covering those months. The month of December 2008 would

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<sup>4</sup> TRI00000292\_0144

<sup>5</sup> BFB00112200\_0005 para 1.3.1

<sup>6</sup> *ibid*

<sup>7</sup> Which were very rapidly closed out once a deal had been struck, as previously discussed in SETE submissions at TRI00000289\_C\_0038

<sup>8</sup> BFB00112209\_0005 para 1.3.1

have been significant in terms of Bilfinger's preparations for Princes Street, which later led into the first significant contractual dispute. Furthermore, the summer months in 2009 would likewise have been significant given the abortive attempts at mediation and moves thereafter to commence the DRP process in that period. As such the lack of available reports for these months is a matter of further concern.