

IN THE MATTER OF THE EDINBURGH TRAM INQUIRY

SUBMISSION ON BEHALF OF BILFINGER CONSTRUCTION UK LIMITED ("BCUK")

22 OCTOBER 2018

1. This submission is made in accordance with the Note by the Chairman to Core Participants dated 9 October 2018 concerning supplementary written submissions.
2. At this stage, BCUK does not wish to make any further submissions in relation to the monthly reports, or the supplementary statement of Mr David Gough [TRI00000295]. BCUK considers that the witness statement of Mr Gough provides satisfactory clarification of certain financial issues identified in the monthly reports and answers specific queries raised by the Inquiry.
3. BCUK does wish to make a supplementary submission in response to the supplementary submissions made on behalf of the SETE Group dated October 2018 [TRI00000296].
4. In particular, BCUK wishes to address the following:
 - 4.1 The apparent (mistaken) belief made by those representing SETE that BCUK sought to have the BCUK monthly reports redacted due to

information contained therein in relation to alleged delay in design post-contract;

- 4.2 The continued failure by the SETE group to properly acknowledge the nature of the Infraco Contract which TIE entered into, now more than 10 years ago.

Reason for BCUK seeking to redact certain information contained in the BCUK Monthly Reports

5. The SETE group's supplementary submission is littered with references to BCUK 'belatedly' producing these reports and that BCUK 'latterly sought to interdict their disclosure to other Core Participants' because it would appear, SETE consider, that the reports show that BCUK was aware of the 'true position' 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'.
6. Not only is the SETE Group's understanding incorrect contractually (see below), they have completely misunderstood the basis on which BCUK sought to have certain parts of the monthly reports redacted. This is surprising given that SETE's legal representatives were present in Court at both the initial and the appeal hearings in relation to BCUK's Petition to restrict certain information.
7. BCUK did not seek to have redacted any of the information now quoted by SETE (being paragraph 1.3.1 in the monthly reports for October 2008 [BFB00112170] and November 2008 [BFB00112174], and

January 2009 [BFB00112178], February 2009 [BFB00112183], March 2009 [BFB00112188], April 2009 [BFB00112189] and May 2009 [BFB00112190]). BCUK was content at all times for that information to be made public.

8. As was well reported at the time, and would have been apparent to SETE's legal representatives, the key issue which BCUK was concerned about in the Court proceedings was the publication and disclosure of sensitive and confidential commercial information. BCUK strongly refutes any suggestion that BCUK sought interdict for any other reason than that which was expressly stated to the Inquiry and the Court. BCUK's only concern in relation to the disclosure of the monthly reports was in relation to that sensitive commercial information (both the data itself and the Bilfinger method of reporting this data).
9. Accordingly, to the extent that it is now implied that BCUK sought to withhold information about the alleged 'true position' in relation to the problems with design, this is categorically rejected by BCUK. BCUK was and is content for the passages quoted by the SETE group to be made publicly available.
10. For the avoidance of doubt, the SETE group do not need to be 'further concerned' about the absence of reports prior to September 2008, or for December 2008 and June - August 2009. BCUK objects strongly to the very clear accusation that it has sought to withhold information which would be relevant to the Inquiry. These reports have not been produced because they do not exist, never having been prepared in the first

place. BCUK have already explained this to the Inquiry by email dated 2 March 2018 timed at 16:06 from Louise Forster to Nicholas Duffy. For the avoidance of any doubt, the reasons for the unavailability of reports in these periods are:

- 10.1 There are no reports available prior to September 2008, as this was the startup period of this large project and reports were not produced during that time.
- 10.2 No report exists for December 2008, due to the New Year break.
- 10.3 For June and July 2009, it was agreed between BCUK and Bilfinger Germany to stop reporting for the two months of June and July 2009. This was a result of a change of personnel in the Cost Control Management team, allowing time for the new personnel to get an overview prior to recommencing the form of reporting.

Reasons for Design Delay

11. As noted above, BCUK have not sought to withhold internal information in relation to the reasons for delay. In fact, the Inquiry has already heard evidence about SDS' poor performance and the fact that Siemens' design of the trackform had to be integrated into the Issued for Construction Deliverables. BCUK have never sought to hide this information.
12. What the SETE Group's submissions do, however, is demonstrate their confusion on two issues:

- 12.1 First, that changes to the SDS design to support Infraco Requirements were a cost to be borne the by Infraco and not the client;
- 12.2 Second, the submissions seek to make some sweeping statements on causes of delay which are not supported by the evidence.

Integration of SDS design, Infraco Proposals and Employer's Requirements

13. To expand upon the first of these points, the Inquiry has before it, a huge amount of evidence that at the time the Infraco Contract was entered into, the design as prepared by SDS was incomplete (including from the BBS Design Due Diligence Report of February 2008 [DLA00006338] that 40% of the detailed design information was unavailable and that not a single design element had been finalised and issued for approval [DLA00006338]). Many third party consents were outstanding, and the MUDFA works were very far from being complete. In addition, the design prepared by SDS to that point in time had not been integrated with the Infraco Proposals and Employer's Requirements. Further work was required to allow the design to reach the stage where Issued for Construction drawings were available which would allow the Infraco to proceed with its work. The solution to this, given TIE's stated desire to enter into the Infraco Contract, was Schedule Part 4 [USB00000032]. BCUK does not want to expand on the extensive submissions already made in this regard and in particular, in relation to the pricing assumptions contained therein. However, it should be noted that Pricing Assumption 3 is in the following terms:

"The Deliverables prepared by the SDS Provider prior to the date of this Agreement comply with the Infraco Proposals and the Employer's Requirements".

14. This was an assumption which the parties to the Infraco Contract knew to be incorrect at the point of entering into the Infraco Contract – clause 3.2.1 of Schedule Part 4 makes that abundantly clear. As a consequence, if the Deliverables produced by the SDS Provider prior to the date of the Infraco Contract did not comply with the Infraco Proposals and the Employer's Requirements, then any further work required to make them comply would be a Notified Departure, entitling the Infraco to additional time and money. It should also be noted that the Siemens element of the design would always have gone through a detailed design phase to allow it to be integrated with the SDS design, which itself would need to be developed and finalised to meet Siemens' trackform requirements. This is expressly acknowledged in the Novation of System Design Services Agreement [**CEC01370880**], which provided:

*"4.7 As soon as reasonably practicable, the Parties shall commence and expeditiously conduct a series of meetings to determine the development of the Infraco Proposals and any consequential amendment to the Deliverables (the "**Development Workshops**"). The matters to be determined at the Development Workshops shall be those set out in the report annexed at Part C of Appendix Part 7 (the "**Misalignment Report**"), together with any items identified as "items to be finalised in the SDS/BBS alignment workshops" in*

Appendix 4 to be dealt with in the following order of priority and objective unless otherwise agreed:

- 1. Roads and associated drainage and vertical alignment with the objective of minimising the extent of full depth reconstruction for roads thus minimising cost and construction programme duration*
- 2. Structures value engineering, including track fixings to structures with the objective of enabling BBS to realise the Value Engineering savings for the structures identified in Schedules 4 and 30 of the Infraco Contract (Pricing and Infraco Proposals respectively)*
- 3. OLE Design with the objective of identifying and agreeing the actions, responsibilities and programme to enable Infraco to implement their proposals for OLE as identified in the Infraco Proposals*
- 4. Trackform with the objective of completing an integrated design to enable BBS to implement their proposals for trackform...*

4.8 The product of the Development Workshops shall be a report signed by each of the Parties to detail the conclusions in respect of each matter and the payments to be made to the SDS provider in respect of the work to be carried out by the SDS Provider as a result of the conclusions set out in the report. Any consequential tie Change

Orders or instructions shall be appended to such report as and when the same are issued. tie shall pay the SDS Provider for the work required for the Development Workshop on an hourly rate basis in accordance with the hourly rates set out in Appendix Part 8 and the SDS Provider agrees that the Infraco shall not be liable to make such payments to the SDS Provider. For the avoidance of doubt, the Infraco and tie agree that any amendment to the Deliverables completed prior to the date of this Agreement as set out in this report will be a Mandatory tie Change under the Infraco Contract, and a Client Change under the SDS Agreement."

15. There can be no doubt that all parties - TIE, Infraco and Parsons Brinckerhoff - were fully aware of the need for these Development Workshops to allow Siemens' design proposals to be integrated with the SDS design.
16. Far from hiding this, the Inquiry already has evidence on this issue. At paragraph 120 of his Witness Statement [TRI00000095_C], Martin Foerder's evidence was as follows:

*"The other main issue was the SDS design for the overhead electrification poles. TIE had accepted the Infraco proposals for this and certain elements of the Siemens design had to be incorporated with the original SDS design. There were alignments required to adapt the designs to each other. This was not instructed by TIE in time so that caused delay in the construction, and complaints from our subcontractors. This was all covered in the PSSA....**Although we were***

obliged to make sure that the original SDS design and the Siemens design were aligned, this was again a pricing assumption where the cost consequences of this lay with TIE." (emphasis in bold added)

17. This is reference to Pricing Assumption 3 as quoted above. This is also referenced in paragraph 10.10 of Mr Foerder's original Witness Statement provided to the Inquiry [TRI00000118_50-62], and in BCUK's Closing Submissions as being one of the key pricing assumptions [TRI00000292_0082].

18. The SETE Group are therefore wholly incorrect in terms of their statement at the top of page 3, that clause 81 of the Infraco Contract should have been engaged in respect of any changes to the SDS design to support Infraco requirements and that such cost was one to be borne by Infraco and not by the client. It should be noted that clause 81.1 is in the following terms:

*"If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, (**which does not fall within any of the other categories listed in Clause 79.1, save for Clause 79.1.2**) the Infraco shall notify tie...."*

19. Clause 79.1 is headed Management of Variations, and lists the different ways in which the Infraco Works can be varied. Clause 79.1.1 provides that TIE Changes shall be dealt with in accordance with Clause 80 (tie Changes). In turn, clause 3.5 of Schedule Part 4 to the Infraco Contract makes it clear that where a Notified Departure occurs, then it will be a

deemed Mandatory tie Change and requires to be dealt with under Clause 80.

20. Given that all of the quotes included by the SETE group on pages 1 and 2 of its supplementary submission relate to the integration of the SDS design with the Siemens design (and in particular, the type of issue which was intended to be dealt with in the Development Workshops arranged post contract specifically for this purpose – see BCUK Closing Submissions [TRI00000292_0144]), then these are clearly Notified Departures and BCUK was absolutely correct to assert that these required to be dealt with under Clause 80 which required the submission of Estimates and agreement of those Estimates with TIE (with all of the problems which that resulted in and which are well rehearsed elsewhere).

21. It may be that that the lawyers acting for the ex-TIE executives currently represented in the SETE Group have misunderstood the provisions of the Infraco Contract, but BCUK would expect, quite reasonably, that the ex-TIE executives would have been well aware of this matter. Further, although it is now stated by the SETE Group that TIE had little visibility of the progress of the design following novation, TIE were in fact involved in and attended the Development Workshops referred to above. It is and has been one of BCUK's core submissions in this Inquiry, that TIE's failure to acknowledge how the Infraco Contract and Schedule Part 4 was intended to operate, was one of the major reasons contributing to the delay to the Project.

22. BCUK would also note that reference is also made in at least 2 of the quotations given by the SETE Group, to the Siemens proposals on the ground improvement layer. Martin Foerder provided a Supplementary Witness Statement on this issue when it arose during the course of the public hearing [TRI00000183] and as noted in the BCUK Closing Submissions (paragraph 341), the ground improvement layer was a Notified Departure [TRI00000292_0198], and as such engaged Clause 80 of the Infraco Contract and not Clause 81.
23. In summary, all of the re-design issues noted in the monthly reports as quoted by SETE, were Notified Departures, the costs of which were to be borne by TIE.

Delay

24. BCUK does recognise that the quotations from pages 1 and 2 of the SETE Group supplementary submission do acknowledge delay in the production of part of the SDS design, and that reference is also made to Siemens' design being late in certain areas. None of this is new to the Inquiry and none of this has been hidden by BCUK. In particular:
25. Richard Walker was highly critical of the SDS Provider's (Parsons Brinckerhoff) performance in certain key respects, calling their performance 'inadequate' and 'abysmal' [TRI00000072_C_0061 at paragraph 107 and **Public Hearing Transcript, 15 November 2017**, pages 14 to 16];

26. Both design issues with SDS and Siemens were discussed in the 'leaked' email from Pinsent Masons to BCUK [**CEC00328711**] about which the Inquiry has also heard evidence. There was clearly a concern on the part of BCUK that ultimately delay could have been caused to the Project, if the design did not keep up with progress. That was the reason for BCUK entering into the supplementary agreement with SDS which has been discussed by witnesses, including Martin Foerder [**TRI0000095_C** at paragraphs 161 to 163 and **Public Hearing Transcript, 5 December 2017**, pages 81 to 89].
27. Ultimately however, delays by SDS and Siemens were never the critical delay to the Project. In its supplementary submissions, SETE cherry pick statements which they consider show that there was delay by these other parties and that BCUK has been trying to cover it up. What they cannot do, because there is no evidence to this extent, is establish that in fact, design delays by SDS and Siemens were critical delays to the Project.
28. It is BCUK's position that the critical cause of delay throughout the Project was the delay to the MUDFA works. There has been a great deal of evidence to this extent, which is summarised in BCUK's Closing Submissions [**TRI00000292_0128-0140**]. There is limited evidence to the contrary before the Inquiry, and this has also been addressed in BCUK's closing submissions [**TRI00000292** at paragraphs 229 - 235A]. In relation to SDS' performance, Martin Foerder accurately summarised the position in his Voluntary Witness Statement to the Inquiry as follows [**TRI00000118_0062** paragraph 10.43]:

"Whilst there were a number of issues between Infraco and SDS (as would be expected in a project of this size, scale and complexity), there were no disputes between the parties. SDS always managed to provide sufficient design information so as not to delay the Programme."

29. Richard Walker's position, as clearly set out in his witness statement, was that, *"... SDS were never the critical delay on the project, albeit they were also delayed by the continued presence of utilities, etc and the need to complete their design out of sequence. The continued presence of the utilities ... was the critical delay."* [TRI00000072_C_0055, paragraph 100] Similarly, Axel Eickhorn's evidence was equally clear, that he could not recollect any instance where delay to design caused delay to the Project [**Public Hearing Transcript, 6 December 2017**, pages 162 to 164].

30. Indeed, if the SETE Group were to consider this issue properly, it would explain the difficulties they express in the second paragraph of page 4 of their submission [TRI00000296_0004]. It is stated that the monthly reports show that in June 2010, the design was noted as being 98% complete with the percentage of design completion barely changing between June 2010 and March 2011. This advanced degree of completion is said to be difficult to reconcile with Infraco's claimed inability to progress the works. The SETE Group appear not to recognise that it is in fact correct that it was not the completion of design per se which was holding up the Infraco Works, but the incomplete MUDFA Works (albeit that Third Party approvals and other approvals to design were still outstanding). This is a matter which was

confirmed when Julian Weatherley of Turner & Townsend gave evidence at the public hearing on 7 December 2017. When asked if there were any design issues impeding progress after mediation, he confirmed that other than redesign necessitated by utilities works, the design issues never held up the programme [summarised in BCUK's Closing Submission at paragraph 227, **TRI00000292_0134 – 0136**].

31. With reference to footnote no. 7 in SETE's submission [**TRI00000296_0004**], it is correct that outstanding design issues were quickly resolved post mediation. BCUK has addressed this matter fully in its Closing Submissions [**TRI00000292_0216-0221** at paragraphs 373 to 380], with reference to the evidence of Tony Glazebrook [**Public Hearing Transcript, 5 October 2017**, page 29], Steve Reynolds [**Public Hearing Transcript, 12 October 2017**, page 125], and Alan Dolan [**Public Hearing Transcript, 12 October 2017**, pages 209 to 211]. In summary, the rapid close-out of design issues was the result of the active, productive engagement by CEC and third party stakeholders, and crucially, the removal of TIE from the Project (Martin Foerder, Voluntary Witness Statement, [**TRI00000118_0111**] paragraphs 21.2.3 b), c) and d)).

Conclusion

32. The SETE Group's supplementary submission may have intended to show that BCUK have been deeply concerned that production of the BCUK monthly reports would reveal the 'true position' in relation to delays to the Project. This is absolutely not correct on any level, and

BCUK did not seek redaction of the paragraphs from the reports now referred to by SETE.

33. Beyond this, SETE's submissions seek to cherry-pick a few paragraphs from the reports which show that BCUK did note delays by both SDS and Siemens design at the time. However, there is no evidence that these matters were critical delaying matters for the Project, and a great deal of evidence of other factors which did cause delay (including most notably, the MUDFA delays and outstanding Third Party approvals). The SETE submissions appear to be a last ditch attempt by the former TIE executives to divert attention from the clear failings of the TIE organisation, which contributed greatly to the difficulties encountered on the Project.
34. The SETE Group make some serious allegations about the Infraco seeking to mischaracterise changes and seek payment that it was not entitled to. BCUK objects in the strongest terms to such allegations which are simply untrue. BCUK and Infraco only sought recovery of sums that they were contractually entitled to. If TIE had acknowledged this from the commencement of the Project, then a great deal of time (and therefore money) would have been saved. Indeed, it is BCUK's position that the submissions made by SETE in relation to the operation of Clauses 80 and 81 continue to demonstrate one of the major difficulties encountered on the Project: namely, TIE's continued refusal to acknowledge the nature of the contract that they freely entered into with the support of legal advisors, and then to properly operate it according to its terms.