

EDINBURGH TRAM INQUIRY

Revised supplementary submissions by SETE group November 2018

In the evidence of the consortium Project Director Martin Foerder, which provides the principal basis for Bilfinger's subsequent submissions to the Inquiry ¹, 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 finalisation and revision of 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

¹ 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 ². It has previously been noted that TIE had little visibility of the progress of the design following novation ³. 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. The SETE group notes that it is the position of both Siemens and Bilfinger that clause 81 does not apply in the case of any changes arising from agreed misalignments ⁴ under the contractual Development Workshop process, since such changes were mandatory TIE changes under clause 80. The SETE group does not dispute that this proposition is correct, however it does not address the principal issue. Whilst TIE did participate in the design workshops and did agree certain changes in respect of identified misalignments, the picture is significantly altered by Bilfinger’s internal admission that Siemens’ late production of design was a cause of delay. This was not made known to TIE at the time. Nor was it admitted

² CEC00036952_0197

³ e.g. TRI00000289_C_0036, TRI00000289_C_0044

⁴ The terms of clause 4.8 of the Novation Agreement are clear that mandatory TIE changes arising from the Development Workshops can only arise as a matter of consensus insofar as they must be set out in a report signed by each of the parties (CEC01370880_0008).

by Martin Foerder when giving evidence, *pace* what is said by Bilfinger in their supplementary submissions ⁵.

Neither did TIE have any visibility of the extent to which the delays by Siemens in the production of a finalised design, as noted above by Bilfinger, involved changes beyond any agreed alignment outputs. It is noted that Siemens' position as outlined in its supplementary submissions is that Development Workshops on trackform from November 2008 to February 2009 led to TIE issuing Change Order 20 ⁶, in respect of which no redesign works were undertaken by Siemens and no payments made to Siemens. Further, Siemens note that they did not seek payment for any of the ensuing INTCs 375 – 380 inclusive. The SETE group does not challenge these particular factual assertions ⁷. Nevertheless, the internal Bilfinger reports of the period noted (as highlighted above) that delays were being caused in this period by Siemens being late in finalising the design. Meanwhile in the section of the May 2009 report highlighted above, Bilfinger noted that revisions by Siemens at that time caused further delay. Whether or not Siemens claimed additional payment for particular design changes, the claims which both Bilfinger and Siemens made under the INTC process in the course of the project included substantial monetary claims for delay ⁸. It is noted that both Bilfinger and Siemens reiterate their previously stated position that delay in the project post contract close was primarily attributable to MUDFA rather than design. In response the SETE group refers to section 4B of its original written submissions.

⁵ Contrary to what is suggested by Bilfinger in their supplementary submissions, there was no reference by Martin Foerder to delays by Siemens in his oral evidence in the passage referred to (5th December 2017 pages 81 to 89) nor indeed in the paragraphs of his written statement also referred to (TRI0000095_C para 161-163).

⁶ CEC00771984_0029

⁷ However, the SETE group does not concede that the wider contractual interpretation put forward by both Siemens and Bilfinger in their supplementary submissions is correct, the contractual dispute having been extensively ventilated in the course of the Inquiry hearings and addressed in SETE's original written submissions.

⁸ As indeed highlighted by Siemens in its original written submissions (TRI00000290_C_1035, para 391).

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 Inquiry⁹. 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 highlighted above, namely that delays which Bilfinger openly blamed on TIE and CEC were in fact attributable to the actions and failings of its consortium partners. It is therefore a matter of concern that Bilfinger originally withheld these reports from the Inquiry¹⁰. As noted above, regardless of whether Siemens claimed additional payment for particular design changes, the monetary claims which Infracore made in the course of the project under the INTC process included very significant monetary compensation for delay¹¹. Payments in respect of delay thereafter formed a significant part of the consortium's proposals for settlement¹² at Mar Hall, a settlement which members of the SETE group have always maintained was excessive and unjustified¹³.

It is further noted from the Bilfinger monthly reports that by June 2010, the design was said to be 98% complete¹⁴ and that:

⁹ TRI00000292_0144

¹⁰ It has been noted as significant by the Inner House of the Court of Session [2018 CSIH 48 at paragraph 8] that these reports were not produced despite the Chairman's clear directions at the Preliminary Hearing on 6 October 2015 beseeching Core Participants to "draw to the attention of the Solicitor to the Inquiry any documents that they consider to be of significance that have been omitted. As we move forward, I would encourage parties to fulfil these obligations..." (Transcript of Preliminary Hearing, page 15 lines 21-24)

¹¹ See Section 4B of SETE's original written submissions (TRI00000289_C_0044 et ff)

¹² See the Infracore Phoenix proposal BFB00053258.

¹³ See in particular Section 10B of SETE's original written submissions (TRI00000289_C_0134). It is further noted that the recently released Bilfinger reports also disclose an extremely high ultimate profit margin of 21.2% (BFB00112249).

¹⁴ BFB00112200_0005 para 1.3.1

“Civil drawings, revised to incorporate Siemens design... are largely complete”¹⁵.

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 later¹⁶. 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%¹⁷.

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). The SETE group notes that Bilfinger’s explanation is that no reports existed for these months. The month of December 2008 would 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 unfortunate.

¹⁵ *ibid*

¹⁶ Which were very rapidly closed out once a deal had been struck, as previously discussed in SETE submissions at TRI00000289_C_0038

¹⁷ BFB00112209_0005 para 1.3.1