

**Bilfinger Berger–Siemens– CAF
Consortium**

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Dear Councillors

ADVANCE COPY

Edinburgh Tram Network Infraco

For your confidential information, and without prejudice to the consortium's contractual rights, we write to you in your capacity as the representatives of the Council, which acts in its capacity as Financial Guarantor for the above Contract to Bilfinger Berger and Siemens.

We fully appreciate that over the coming days you will be required to make key decisions on the future of the Edinburgh Tram Project and the major investment to-date in the Project. Your decisions over the coming weeks will have an impact on the transport infrastructure of Scotland's capital city, and therefore it is imperative that we explore every solution to the current situation that will generate a sustainable solution in the long term for the City. We are writing in order to provide you with a brief insight into the current situation from the perspective of Bilfinger Berger and Siemens. We believe it would be remiss to take decisions based on only one version of the situation. We believe that it is important you receive both sides of the story so you have all the facts before making any decision. It is not our intention to apportion blame within this summary.

When the parties entered into a contract in May 2008, the contract established a mechanism where tie(CEC) retained responsibility for numerous unknown and un-priced elements of the Project outside Infraco's control. This included unknowns such as delayed utility work, changes in scope, certain key approvals, ground conditions and so on. These are specifically listed in Schedule Part 4 (Pricing) of the Contract, which lists in detail risks and liabilities which clearly remain with tie (CEC). Unfortunately such risks have materialised to a much greater degree than expected, and this has resulted in increased costs and delays for the Project. This is not a matter of apportionment of blame, but of apportionment of risk and responsibility. Consequently, the scope, availability of working areas and programming are all significantly changed from the basis on which the Contract was signed.

Central to the difficulties the Infraco Contract faces is the way in which the Contract has been interpreted. The respective contractual understandings have been tested through the Contract Dispute Resolution Procedure 15 times, 9 of which have been through Independent Adjudication. Of these 9, the Consortium has had 6 decisions in its favour, 2 split decisions (with the Principle found in favour of Infraco) and one decision in the favour of tie. There have also been a range of other disputes settled in mediation where a positive outcome has been achieved for the Consortium. In the interests of accuracy and transparency, if tie will agree, we have no objection whatsoever to the disclosure of all adjudication award texts to elected members in order that you can make your own judgement.

Consequently, from a legal perspective, the Consortium is confident of our understanding and interpretation of the Contract. It was hoped that the Adjudication process would have been completed on a select number of issues by January 2010, and the results of those adjudications would set a baseline for how the Contract would be administered going forward, sadly we are now in October and we are no

further forward in finding a breakthrough to the contractual differences. If the principles from adjudication are not then applied to equivalent factual scenarios, then it is difficult to see what logical and rational basis for progress there can be.

Most noticeably for the stakeholders in Edinburgh, the clearest effect is the significant delay in progress of the project works. The Contract protects tie against extra cost by providing that no work which results in extra cost is to be carried out until tie approves the cost of such work in advance of the work being undertaken. Unfortunately, this means that if tie does not approve the cost of such work, for whatever reason, justified or unjustified, the project works do not proceed.

We have consistently sought to work in a positive and cooperative manner to find the best way forward from the difficult situation we are all facing. We have proposed and participated in various initiatives over the last 2 years to find a breakthrough for the contractual difficulties and to move the Project forward, however no logical and rational solution has yet been found.

Over recent months we have engaged in discussions on 'Project Carlisle' to find a solution to move the Project forward and have additionally tried to demonstrate our seriousness in finding a solution to the problems by supporting discussions with efforts to undertake 'goodwill works' at various locations on the Project. These proactive efforts to by the consortium have been met in recent months by an aggressive and hostile contract management and payment strategy by tie. It is with reluctance that during last week we were faced with no other option than to stop those 'goodwill works', though we are proceeding with contracted works where the amount to be paid for such works has been agreed and where tie has not sought to prevent us working for any other reason.

Bringing trams to Edinburgh is still within the reach of the Council. We are more than willing to continue to engage with you and tie to help find a sustainable solution for the project and the City. However, a continued hostile approach by tie is likely to result in further delays and expense for the project, which will ultimately impact on you as guarantor of the project and undermine the viability of bringing trams to Edinburgh.

With tie's permission we would be willing to provide evidence and specifics on the issues outlined above, and are open and willing to discussing the situation directly with you.

Ultimately, we are seeking to ensure a fair hearing and that you have all the facts and information available to you, in making your decisions on the future of the project.



R J Walker
Chairman of Infraco
On behalf of Bilfinger Berger & Siemens
Beneficiaries of the CEC Guarantees

cc: Michael Flynn, Siemens