

Executive Summary

1 Introduction

The MUDFA programme of works has been underway since March 2007. The complexities and difficulties that have beset the programme have been considerable and have resulted in substantial delay. It is evident that the work load and programme duration was wholly underestimated by the MUDFA Contractor and to an extent by tie.

The programme is now circa xx% complete, the 1A section at Ocean Terminal and the residual works at the Airport represent xx% of the works to go.

For performance, quality and cost reasons it is now considered that the timing is right to close the MUDFA programme, while recognising that there is still an outstanding workload to complete. The tie MUDFA team have reviewed the options available and these are discussed in some detail in the attached option paper.

2 Commercial

There are a number of key commercial issues presently with Carillion, who have found the contract for measure agreed and signed to be disadvantageous to them and in their view does not recognise the additional scope and complexity they have required to deal with and accordingly a number of claims for extension of time, and monthly claims on delay and disruption have been lodged. In tie's view the impoverished performance, particularly in the earlier stages of the contract, has been causal in large measure of the delays experienced. Discussions are ongoing on these issues, there is little doubt however commercially that the earlier this contract is concluded the better.

3 Benefits

- The Carillion contract and programme carries a Preliminaries based staffing of 64, with a net cash cost of £350,000 per month. While there are ancillary tasks that remain to be completed including appropriate documentation, drawings etc, and these tasks will require to be fully understood and dealt with, the tie view is that for the works remaining the Preliminaries staffing is excessive. This staffing will be in place, under contract terms, till the conclusion of the Carillion programme, by concluding the programme and moving the discrete packages of work to other suppliers it is believed that this per month of this cost will be reduced by up to £500k.
- Carillion are currently making claims for between £1m and £1.5m per month for delay and disruption, and while tie in no way accepts the quantum of these claims it is clear that the that the longer the programme runs, the greater this disputed sum will be.
- The performance of Carillion has reflected a lack of quality and experience in their approach to this task, they openly admit that the complexity of moving utilities to this scale and variety had been underestimated substantially by them. It is felt that the moving of discrete packages of work to other suppliers will afford the opportunity, in the current tough market conditions, for some improvement in the financial terms aside from the benefits outlined above and also an opportunity to improve the quality, timescales and delivery of the

remaining works. We believe it is likely that there may be cost reductions on the work undertaken by using this approach to completion but these will be subject to market proving. Full review of the associated liabilities and the effect of these transfers will be undertaken prior to the award of any package.

Recommendations

1. The MUDFA programme is closed down by no later than 31st July 2009 and the required consolidation of the tie MUDFA resources to the Infraco programme to commence and conclude in June 2009.
2. MUDFA Utility diversion works required at Section 1A Ocean to be removed from the Carillion MUDFA scope and procured/ awarded to a suitable contractor following a competitive tender (as detailed in Ocean Terminal Option 4 of the attached paper). The works to be awarded under a form of NEC Contract, the exact form to be finalised and agreed dependent upon the tender submissions returns and negotiations with the prospective contractors.
3. MUDFA utility diversion works required at Section 7 within BAA land, having previously been removed from the Carillion MUDFA scope of works and transferred to the tie Infraco team, are procured/awarded and delivered by one of the three existing BAA approved framework/term contractors following a competitive tender process (as detailed in Section 7 BAA Option 3 of the attached paper). The works to be awarded under a form of NEC Contract, the exact form to be finalised and agreed dependent upon the tender submissions returns and negotiations with the prospective contractors. The procurement and delivery process to be managed by the tie Infraco team.
4. MUDFA utility diversion works remaining post 31st July 2009 to be removed from the Carillion MUDFA scope and procured/ awarded to either the individual utilities (subject to the scope and the availability and willingness of the SUC's to carry out the works) or a suitable contractor following a competitive tender (all as detailed in Remaining Works Post 31st July 2009 Options 3 & 4 of the attached paper).
5. A report and associated programme to be produced by the Tie Commercial team by end May 2009 on the status of the Carillion contractual obligations by way of required remedial work, documentation (including redline drawings) and ancillary decommissioning items including removal from the MUDFA site.
6. It is recommended that a tie task team is formed to drive forward the decommissioning of the Carillion Mudfa programme, comprising members of the existing Mudfa team together with tie Infraco resources and commercial staff.

Clearly the above are subject to the requisite governance arrangements being in place as detailed within the attached option paper.

Approval

Approval is sought for the tie MUDFA teams proposals as summarised above and detailed within the attached options report.

1 Background

The MUDFA programme of works has been underway since March 2007. The complexities and difficulties that have beset the programme have been considerable and have resulted in substantial delay. It is evident that the work load and programme duration was wholly underestimated by the MUDFA Contractor and to an extent by tie.

In addition to the difficulties aforementioned there have been significant issues with the performance of Carillion on this programme and this necessitated an audit of the position in August 2008, following which the Carillion Programme Director was removed and replaced and tie took measures to increase the management control framework on the programme. These measures have improved the position substantially but even yet the performance can only be considered as sub-optimal.

The programme is now circa xx% complete, the 1A section at Ocean Terminal and the residual works at the Airport represent xx% of the works to go.

There are residual work elements remaining in the Mudfa Programme which will still require completion, however it is the tie management view that closure of the existing programme and effecting transfer, where possible, of these remaining elements to other suppliers and under the control of the consolidated Mudfa and Infracore tie teams would ensure optimal synchronisation of the overall programme aims. It is envisaged that a tie task team will be formed comprising tie MUDFA, INFRACO and commercial resources to drive forward the decommissioning of the Carillion MUDFA programme and the consolidation of the tie teams.

2 Transfer for completion from Carillion to other suppliers

2.1 Works At Ocean Terminal (Section 1A)

Scope of works to transfer : all utility diversions in the section plates 1 to 10 inclusive the majority being Scottish Power cables

Estimated programme duration based upon receipt of the IFC details from SDS end of April and completion by 9th October 2009.

.Estimated Cost of utility diversion works by CUS	£1.8m
.Estimated Prelims Cost based upon 19 weeks and an assessed reduction in CUS delivery staff	£0.85m
Total anticipated CUS cost	£2.655m

Anticipated difference if transferred to others

The programme duration is assumed to be the same for comparison basis, however experience to date would strongly suggest the transfer of the works to others would result in a reduced delivery and construction period, the extent of the reduction cannot be established until receipt of indicative programmes and productivities from prospective contractors.

Estimated cost of the utility diversion works by others is anticipated to be less than the £1.8m CUS costs based on experience to date and could be in the region of a 10 to 20% reduction however the true extent of the reduction cannot be established until receipt of the priced tender submissions from prospective contractors.

Estimated prelims costs is anticipated to be significantly reduced from the anticipated CUS cost as a result of a smaller site team/set-up to deliver one work section and the associated low number of staff required we would anticipate a cost in the region of £350k to £500k resulting in a potential saving of up to £500k however the true extent of the reduction cannot be established until receipt of the priced tender submissions from prospective contractors.

Anticipated potential reduction in costs from others delivering Section 1A are something between £430k and £860k for at worst the same duration as CUS.

2.2 Works Post 31/7/09 excluding Section 1A

Scope of works to transfer based upon CUS meeting the current programme dates prior to 31/7/09 in all other areas:

- Baltic Street Junction to Tower Street (1432 mtrs) - Commence 09th June 2009 to 17th September 2009 (14 weeks) (Assessed 614mtrs remaining post 31/07/09)
- Casino Square (plate 15) (328 mtrs) - Commence 09th June 2009 to 17th September 2009 (14 weeks) (Assessed 141mtrs remaining post 31/07/09)
- Casino Square Side Entry manholes (plates 13-15) - (2 ongoing post 31/07/09)
- Constitution Street Side Entry manholes - target completion 29th September 2009 (4 no. planned to start post 31/07/09 with a further 2 ongoing post 31/07/09)
- Broughton Street Junction (BT chamber 6 weeks, Water & Comms - circa 200mtrs) (targetting work to commence 22nd of June 2009 for 8 weeks - dependent on TM approval on whether we get to work through August embargo - unlikely but if we do completion date would be 14th August 2009, if not completion date would be 11th September 2009). (Assessed 40mtrs remaining post 31/07/09)

Estimated programme duration based upon the assumption that the works will all run concurrently is anticipated to be a total of 8 weeks

.Estimated Cost of utility diversion works by CUS	£660k
.Estimated Prelims Cost based upon 8 weeks.	£360k
Total anticipated CUS cost	£1.02m

Anticipated difference if transferred to others

The programme duration is assumed to be the same for comparison basis, however experience to date would strongly suggest the transfer of the works to others would result in a reduced delivery and construction period, the extent of the reduction cannot be established until receipt of indicative programmes and productivities from prospective contractors.

Estimated cost of the utility diversion works by others is anticipated to be less than the £660k CUS costs based on experience to date and could be in the region of a 10 to 20% reduction however the true extent of the reduction cannot be established until receipt of the priced tender submissions from prospective contractors.

Estimated prelims costs is anticipated to be significantly reduced from the anticipated CUS cost as a result of a smaller site team/set-up to deliver one work section and the associated low number of staff required. The basis of the CUS prelims costs being that these works are in isolation to the delivery of Section 1a if however the CUS delivery was included and concurrent with CUS completing section 1a and the remaining works post 31st July the prelims cost solely associated with post 31st July would be approx £40k on the £855 prelims cost for section 1a. We have separated the prelims to two stand alone issues on the basis that Section 1a will be delivered by others and the delivery of both sections maybe by one contractor resulting in either an individual reduction in the stand alone 31st July figures and a reduction in the cumulative.

Therefore the anticipated potential reduction in costs from others delivering the works post 31st July are between £140k and £240k for at worst the same duration as CUS.

Section 7 BAA

Note: Because Carillion have no collateral warranty with BAA these works have already been transferred to Infracore.

Appendix 1

Rationale on each of the options considered:

Following a review of the utility diversion works to complete and taking into consideration the delay in the production of the design for Section 1A, the actual progress and resource availability currently provided by Carillion (the MUDFA Contractor), the potential claims for additional cost and expense from Carillion to complete all the remaining works and the prevailing current economic climate - options for the delivery of two discrete elements of the utility diversion works and the delivery of any other remaining utility diversion works post 31st July 2009 have been considered as follows:

Ocean Terminal (Section 1A) - the design for these works are considerably later than anticipated in the rev 7.9 programme the final IFC design is not expected to be issued until mid April (plates 6 to 10) end of April (plates 1 to 5).

Option 1 - CUS continue and deliver the required works under the MUDFA Agreement

Due to the actual measured works progress currently achieved by CUS, the resources available (both in terms of number and quality) from CUS, the potential claims value related to prolongation and associated prelims costs from CUS for the delivery of this section it is not considered the optimal delivery option if other options are available and acceptable from a procurement perspective.

Option 2 - The required works are delivered under the Infraco Contract as a variation to the fixed price lump sum

Due to issues experienced to date associated with the establishment and agreement of potential variations to the Infraco Contract and on the basis that the Infraco Contractor will sub let/subcontract all the elements of the potential works, adding a considerable cost/OH percentage addition (circa 30%) to the base subcontract costs this is not considered to be an option with any tangible benefit to Option 1 above.

Option 3 – The required works are delivered by Forth Ports, the land and utility owners, as per the IFC design

The MUDFA Agreement allows for the delivery of any of the utility diversion by the owners of the utility. This would involve agreement with Forth Ports to either award the works to a suitable framework contractor, if they have one, or for Forth Ports to carry out a procurement process and delivery of the required utility diversions to Forth Ports procurement policy. This approach could potentially result in minimal procurement time, reduced construction delivery period from that intimated by CUS and potentially lower outturn costs all as a result of the current economic environment and the resultant availability and competitiveness of suitable contractors keen to maintain work load/turnover etc. The potential draw backs with this approach include:

- Willingness of Forth Ports to enter into a suitable and acceptable agreement with tie

- Opportunity for Forth Ports to require/bargain with potential additional diversions to accommodate their future developments (costs circa £1m), in addition to that required to accommodate the tram within IFC's.
- Potential lack of suitable resources within Forth Ports to manage the procurement and delivery of the required utility diversions – project management resource from Forth Ports has previously been seconded into tie to assist in the delivery of Infraco and the tram. Tie could however provide the project management resource to deliver the required diversion works on behalf of Forth Ports, but this would be subject to agreement.
- Potential coordination / project management issues between tie/Forth Ports/contractor with control and contractual link between Forth Ports and contractor. Tie could provide the project management resource to act on behalf of Forth Ports and deliver the required diversions; this would require acceptance and agreement with Forth Ports as per bullet points 1 and 2 above.

From initial informal discussions there appears little or no appetite within Forth Ports to deliver the required utility diversions in this manner. In addition the establishment of an acceptable agreement within the budget allowance is highly unlikely based upon the bullet points above and the protracted nature of previous agreements reached with Forth Ports. This option is not considered to be an option with any tangible benefit to Option 1 above.

Option 4 - The required works are procured and awarded to a suitable contractor following a form of competitive tender. Contract to be awarded under a form of NEC contract (exact form to be agreed dependent upon the tender submission and negotiations)

The appointment of Carillion under the MUDFA Agreement was the result of a competitive public procurement tender process following the procurement requirements for a project of this size. The MUDFA Agreement contemplates all the utility diversion works required to accommodate the Tram project to be undertaken either by the appointed Framework Contractor or the individual statutory utilities for which CUS shall use reasonable endeavours to allow the execution of the works and coordinate the MUDFA works with the utilities (Clause 3.9).

This approach could potentially result in a delayed commencement on site to accommodate a tender process but the minimal procurement time is anticipated as the proposed works would be below the EU procurement regulations limit (£3.8m for works based upon the Euro/Sterling exchange rate at 17/12/08), reduced construction delivery period from that intimated by CUS s delivered by Kier Construction in the limited utility diversion works undertaken by BAA in Section 7 on behalf of tie and potentially lower outturn costs. All of the above as a result of the current economic environment, the resultant availability and competitiveness of suitable contractors keen to maintain work load/turnover and the reduction in preliminaries for an isolated element of the works compared to the site set-up required by CUS to manage a full programme of works across a number of work sites simultaneously etc.

The potential issues/draw backs with this approach include:

- Potential procurement challenge from within CEC, SUC's, third parties and Carillion. Tie procurement procedures are covered by the following company procedures

- Procurement Ethics Policy CP 6257 under review
- Procurement Procedure CP 7410 under review
- Delegated Authority Rules (DARS) CP 7414 Rev 1.2 approved 17/12/08

The procurement ethics policy and procedure are currently under review but the principles, as understood by the MUDFA project team, will be followed. The DARS Section 5.0 confirms departures from the company procedures require approval from the Project Director and consultation if required with the tie Chairman. Sections 6.1 and 9.0 of DARS also confirm:

- the authority of the Tram Project Director to make new contractual appointments on construction contracts up to a value of £2m subject to the commitment being within approved scope, budget and funding – the proposed works are currently included in the scope, budget and funding for MUDFA project this merely a transfer of the works from the existing MUDFA Contractor to a new Contractor.
- The approval of both the Project Director and tie Chairman are required if the works are greater than 50% of the relevant EU procurement regulations limit (greater than £1.9m based upon the Euro/Sterling exchange rate at 17/12/08). The anticipated value of the proposed transferred utility works in Work Section 1 will be on close to the £1.9m sum and such will require approval from the tie Chairman.

There is no defined requirement within the tie procedures for the transfer of work scope to be referred to the Tram Project Board and on the basis that approval is sought and received from both the Project Director and the tie Chairman it would add weight to this position. However, the decision to inform the Tram Project Board would be prudent on the basis that within Section 16.6 B) Legal and Insurance Matters of DARS the tie operating procedure confirms powers reserved to CEC which include **explicit prior approval of the Tram Monitoring Officer** for any proposal which assigns, transfers, novates any rights or obligations under any contractual arrangement which the Council has approved and to which tie is a party. Approval will therefore be required from CEC for the proposal; approval would also negate any potential procurement challenge from CEC.

To reduce the prospect of any procurement challenge from Third Parties a competitive tender process will be followed to a limited number of suitably qualified, competent and experienced contractors agreed with the SUC's. **Note** Scottish Water have requested tie to consider Scottish Water Contracting their internal construction resource for any water related diversions required as the downturn in the economy, especially new build housing, has resulted in spare capacity – tie are investigating if this is the position with the other utilities. Following discussions with the SUC's we do not expect any challenge on the basis that the works will be competitively tendered and the potential reduction in SUC contributions as detailed below.

- There may be a potential challenge from CUS to the potential procurement and transfer on the basis of the contract, however this is considered unlikely. Irrespective of the likely hood of a challenge the MUDFA Agreement is re-measurable and the scope of works to be undertaken is dependent upon a work order procedure detailed in Clause 8 of the MUDFA Agreement there is no guarantee of work load/quantity of utility diversion works. The completion of the works by the SUC's, i.e. others, is also contemplated within the MUDFA Agreement therefore any challenge on this basis is considered unlikely and unsustainable.
- Potential claim from CUS for loss of turnover/profit/opportunity/cost of relocating in-house staff earlier than anticipated etc. Although the MUDFA Agreement contemplates elements of the utility diversion works being undertaken by the SUC's and there is no guarantee of work load and no work order, based on the Issued For Construction design, has been issued there is a potential justification for additional costs associated with relocation of staff and resources dependent upon the timing of the confirmation of the decision to transfer the works from CUS to others. The original intention was to continue with the MUDFA arrangement and run the procurement process in parallel leaving the options open to tie for the delivery, the programme requirements and completion of other work sections by CUS may not accommodate the original intention and this will need to be monitored or alternatively a decision to either transfer or not to transfer would remove this potential issue.
- The SUC Agreements between tie and the individual SUC's, although containing nuances to meet the requirement of each SUC, are all based on the appointment of a Framework Contractor following a public procurement competitive tender process. This co-ordinated programme and framework contractor approach was seen to deliver the minimum disruption to the public and minimum out turn costs. The Scottish Power and Virgin Media Agreements actually name Alfred McAlpine, now Carillion, as the Framework Contractor. The feedback from informal discussions with the SUC's confirms the SUC's would not be adverse to the appointment of a suitably qualified Contractor other than Carillion to carry out the utility diversions in accordance with the utilities specifications. In order to close this issue out a side agreement or minute of variation to the SUC Agreements will be required between the SUC's and tie; this would also cover any potential works undertaken as part of the Infraco Works.
- The individual SUC Agreements take cognisance of the New Roads & Street Works act which involve the SUC's contributing to the cost of the utility diversion works undertaken based on the actual costs incurred in carrying out the required diversionary works. Following informal discussions with the SUC's, if tie procured the delivery of the utility diversions through an alternative route involving a form of competitive tender and appointed a suitably competent contractor to deliver the required diversions this would be acceptable to the SUC's, formal agreement will be pursued. The reason being potential reduction in cost and time, as demonstrated by the works by the works undertaken by Kier Construction through BAA in Section 7 on behalf of tie, the impact of the current economic climate and the removal/reduction of the potential claims and additional cost issues with CUS. All of the potential

reductions in actual outturn cost potentially reduce the MUDFA AFC and also the SUC's contributions.

- Potential lack of suitable resources left within the MUDFA Project team to manage the delivery of the required utility diversions – project management resource are planned to migrate to the Infraco Project team. Tie could however provide the project management resource to deliver the required diversion works through the Infraco Project team.
- Potential delayed commencement of the utility diversions from that proposed by CUS due to the period required for a competitive tender. The anticipated time period for a competitive tender process may delay the current proposed commencement of the works by circa 3 to 4 weeks however the anticipated saving in actual construction time associated with the appointment of a new contractor for a small defined package of works in a discrete work section are expected to result in an earlier completion for the work section. This view is based upon the actual progress and programme reduction achieved by Kier Construction for the works carried out through BAA in Section 7 on behalf of tie.

In light of all the factors listed above Option 4 is considered to be a viable and pursuable option subject to achieving the required agreements/approvals detailed above, all of which can run in parallel with the procurement process if approved by the Project Director and tie Chairman. In order to achieve the most advantageous position for tie it is proposed to carryout the procurement process and the continuation under the existing MUDFA arrangement in parallel. If the proposed transfer is both acceptable and approved there is a potential to reduce the outturn costs by a sum in the region of £300k to £700k based upon a quick assessment by tie commercial team which considers the following but without the benefit of the returned tender documentation or sight/view of the CUS claim/final account etc.

Section 7 BAA – As a result of a collateral warranty issue with Carillion which prevents Carillion from carrying out the required utility diversions within the Edinburgh Airport (BAA) owned land it has been agreed that works will not be delivered by CUS. The works must be delivered by a contractor with the collateral warranty required by BAA.

Remaining utility diversion works post 31st July 2009 – As result of progress achieved to date and potential claims related issues associated with potential delay and disruption the transfer of the delivery of any remaining utility diversion works post 31st July 2009 is considered. The works remaining after 31st July 2009 are considered to be small localised elements to complete and connect onto works previously installed by CUS.

Option 1 - CUS continue and deliver the required works under the MUDFA Agreement

As in Ocean Terminal option.

Option 2 - The required works are delivered under the Infraco Contract as a variation to the fixed price lump sum

As in Ocean terminal option.

Option 3 – The required works are delivered by the SUC's as per the IFC design

The MUDFA Agreement allows for the delivery of any of the utility diversion by the owners of the utility. This would involve agreement with SUC's to carry out the works post 31st July 2009. This approach could potentially result in minimal procurement time, reduced construction delivery period from that intimated by CUS, potentially lower outturn costs and removal of SUC's concerns re quality and performance of CUS all as a result of the current economic environment and the resultant availability of SUC resources particularly Scottish Water as a result of the down turn in new build housing. The potential issues/draw backs with this approach include:

- Willingness/availability of the SUC's to undertake the works on the basis that the MUDFA Agreement is for a multi utility delivery model rather than individual utilities – there are considerable coordination issues with the individual utilities carrying out their own works in the same trenches, in close proximity to each other and agreeing availability with the SUC's for the same period of time.
- Potential lack of available resources within the SUC's to manage the delivery of the required utility diversions. Tie could provide the project management resource to deliver the required diversion works, but this would be subject to agreement.

From initial informal discussions there appears little or no appetite within the SUC's, with the exception of Scottish Water to deliver the required utility diversions in this manner. In addition the coordination of the individual utilities to meet the programme requirements is considered highly unlikely which was one of the key drivers in establishing a multi utility framework delivery model for one contractor to carry out all the works thus negating these very issues. This option is however worth considering dependent upon the extent of the actual works to be completed post 31st July 2009 and the potential availability of the SUC's to carryout piecemeal, localised works which will require further investigation with the SUC's, i.e. the requirement for service connections from Scottish Water and SGN mains and the resultant abandonments of the diverted utilities could be undertaken by both Scottish Water and SGN, subject to traffic management approval/provision etc.

Option 4 - The required works are procured and awarded to a suitable contractor on the basis of a set of indicative rates procured through a form of competitive tender. Contract to be awarded under a form of NEC re-measurable contract

The appointment of Carillion under the MUDFA Agreement was the result of a competitive public procurement tender process following the procurement requirements for a project of this size. The MUDFA Agreement contemplates all the utility diversion works required to accommodate the Tram project to be undertaken either by the appointed Framework Contractor or the individual statutory utilities for which CUS shall use reasonable endeavours to allow the execution of the works and co-ordinate the MUDFA works with the utilities (Clause 3.9).

This approach could potentially result in a delayed commencement on site to accommodate a tender process but the minimal procurement time is anticipated as the proposed works would be

below the EU procurement regulations limit (£3.8m for works based upon the Euro/Sterling exchange rate at 17/12/08), reduced construction delivery period from that intimated by CUS s delivered by Kier Construction in the limited utility diversion works undertaken by BAA in Section 7 on behalf of tie and potentially lower outturn costs. All of the above as a result of the current economic environment, the resultant availability and competitiveness of suitable contractors keen to maintain work load/turnover and the reduction in preliminaries for an isolated element of the works compared to the site set-up required by CUS to manage a full programme of works across a number of work sites simultaneously etc.

The potential issues/draw backs with this approach include:

- Potential procurement challenge from within CEC, SUC's, third parties and Carillion. Tie procurement procedures are covered by the following company procedures
 - Procurement Ethics Policy CP 6257 under review
 - Procurement Procedure CP 7410 under review
 - Delegated Authority Rules (DARS) CP 7414 Rev 1.2 approved 17/12/08

The procurement ethics policy and procedure are currently under review but the principles, as understood by the MUDFA project team, will be followed. The DARS Section 5.0 confirms departures from the company procedures require approval from the Project Director and consultation if required with the tie Chairman. Sections 6.1 and 9.0 of DARS also confirm:

- the authority of the Tram Project Director to make new contractual appointments on construction contracts up to a value of £2m subject to the commitment being within approved scope, budget and funding – the proposed works are currently included in the scope, budget and funding for MUDFA project this merely a transfer of the works from the existing MUDFA Contractor to a new Contractor.
- The approval of both the Project Director and tie Chairman are required if the works are greater than 50% of the relevant EU procurement regulations limit (greater than £1.9m based upon the Euro/Sterling exchange rate at 17/12/08). The anticipated value of the proposed transferred utility works will not exceed the £1.9m sum and as such approval is not required.

There is no defined requirement within the tie procedures for the transfer of work scope to be referred to the Tram Project Board. However, the decision to inform the Tram Project Board would be prudent on the basis that within Section 16.6 B) Legal and Insurance Matters of DARS the tie operating procedure confirms powers reserved to CEC which include **explicit prior approval of the Tram Monitoring Officer** for any proposal which assigns, transfers, novates any rights or obligations under any contractual arrangement which the Council has approved and to which tie is a party. Approval will therefore be required from CEC for the proposal; approval would also negate any potential procurement challenge from CEC.

To reduce the prospect of any procurement challenge from Third Parties a competitive tender process will be followed to a limited number of suitably qualified,

competent and experienced contractors agreed with the SUC's. **Note** Scottish Water have requested tie to consider Scottish Water Contracting their internal construction resource for any water related diversions required as the downturn in the economy, especially new build housing, has resulted in spare capacity – tie are investigating if this is the position with the other utilities. Following discussions with the SUC's we do not expect any challenge on the basis that the works will be competitively tendered and the potential reduction in SUC contributions as detailed below.

- There may be a potential challenge from CUS to the potential procurement and transfer on the basis of the contract, however this is considered unlikely. Irrespective of the likely hood of a challenge the MUDFA Agreement is re-measurable and the scope of works to be undertaken is dependent upon a work order procedure detailed in Clause 8 of the MUDFA Agreement there is no guarantee of work load/quantity of utility diversion works. The completion of the works by the SUC's, i.e. others, is also contemplated within the MUDFA Agreement therefore any challenge on this basis is considered unlikely and unsustainable.
- Potential claim from CUS for loss of turnover/profit/opportunity/cost of relocating in-house staff earlier than anticipated etc. Although the MUDFA Agreement contemplates elements of the utility diversion works being undertaken by the SUC's and there is no guarantee of work load there is a potential justification for additional costs associated with loss of turnover/opportunity/relocation of staff and resources etc as the works are covered by Work Order Confirmation notices and CUS have resourced accordingly. There is the argument that the prelims/staff resources are agreed to reduce in line with the programme requirements and therefore if the proposal is discussed and agreed with CUS as soon as possible the potential costs will be limited or so great as to make the option unacceptable. We believe the removal of the works post 31st July 2009 may be an acceptable option to CUS but we are unable to ascertain what the commercial impact/recompense CUS would seek. We would also require a form of agreement for the commercial issues such as valuation/cost of the remaining works and liability for same, defect liability/defects rectification/retention bond etc associated with works to be carried out post 31st July 2009 to ensure tie's commercial and contractual positions are maintained.
- The SUC Agreements between tie and the individual SUC's, although containing nuances to meet the requirement of each SUC, are all based on the appointment of a Framework Contractor following a public procurement competitive tender process. This co-ordinated programme and framework contractor approach was seen to deliver the minimum disruption to the public and minimum out turn costs. The Scottish Power and Virgin Media Agreements actually name Alfred McAlpine, now Carillion, as the Framework Contractor. The feedback from informal discussions with the SUC's confirms the SUC's would not be adverse to the appointment of a suitably qualified Contractor other than Carillion to carry out the utility diversions in accordance with the utilities specifications. In order to close this issue out a side agreement or minute of variation to the SUC Agreements will be required between the SUC's and tie; this would also cover any potential works undertaken as part of the Infraco Works.

- The individual SUC Agreements take cognisance of the New Roads & Street Works act which involve the SUC's contributing to the cost of the utility diversion works undertaken based on the actual costs incurred in carrying out the required diversionary works. Following informal discussions with the SUC's, if tie procured the delivery of the utility diversions through an alternative route involving a form of competitive tender and appointed a suitably competent contractor to deliver the required diversions this would be acceptable to the SUC's, formal agreement will be pursued. The reason being potential reduction in cost and time, as demonstrated by the works by the works undertaken by Kier Construction through BAA in Section 7 on behalf of tie, the impact of the current economic climate and the removal/reduction of the potential claims and additional cost issues with CUS. All of the potential reductions in actual outturn cost potentially reduce the MUDFA AFC and also the SUC's contributions.
- Potential lack of suitable resources left within the MUDFA Project team to manage the delivery of the required utility diversions – project management resource are planned to migrate to the Infracore Project team. Tie could however provide the project management resource to deliver the required diversion works through the Infracore Project team.
- Potential coordination/interface issues between any appointed Contractor to deliver the required utility diversion and the works undertaken by CUS – potential issues with the location and quality/specification compliance etc with works undertaken by CUS and contractual/commercial liability for same.
- Potential contractual liability “over lap” issues between the works carried out by CUS and any works carried out by another appointed Contractor re liability for rectification of defects during the defects liability period – because the proposed transfer of utility diversions are contained within a clear and discreet section of work the interfaces can be clearly defined both to CUS and the appointed to ensure tie maintain the current level of contractual coverage.
- Potential interface and contractual issues related to the final decommissioning and disconnection of utility apparatus post the completion of the CUS works i.e. redundant/diverted gas/water mains and telecoms apparatus related to service connection works and cabling works respectively.

In light of all the factors listed above Options 3 (subject to the scope and the availability and willingness of the SUC's to carry out the works) and 4 are considered to be viable and pursuable options.