2nd June 2008

Ref: CID/SP/033155/00001L/JF/TP

TIE limited
Citypoint,
65 Haymarket Terrace
Edinburgh
EH12 5HD

Scottish Water
Watermark
Livingston
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For the attention of Mr. Graeme Barclay

By: Recorded Delivery

Dear Graeme

Investment Programme: **Capital Investment Delivery**
Project: **Tie**
Autocode No: **033155**

TIE Proposed TEL Agreement

We refer to your proposed TEL agreement (The Agreement) handed to Scottish Water on 30 April 2008 at the C17a meeting, and comment as below.

The Agreement is not acceptable to Scottish Water (SW), and requires a major re-drafting prior to debating any of the individual clauses.

It was our understanding that the Agreement was to minimise SW concerns regarding some apparatus being left within the Exclusion Zone. It is very disappointing therefore; that instead of the Agreement minimising these concerns it actually exacerbates them.

A non-exhaustive list of examples of SW's concerns are set out below, following which, brief details are given in the appendices attached to this letter. These details contrast SW rights and obligations under the Utilities Agreement and the New Roads and Street Works Act 1991 (NRSWA) with the Agreement.

Further issues *not* specifically covered in the comments below are noted below, in green text to reflect new issues following this 2 June 2008 letter.

tie email dated 23 July 2008 enclosing the revised TEL agreement

1) Item 5 tie contend under its email dated 30/6/08 (actually 01/07/08) that *'SW accept access arrangements to manholes (mid track) pose no additional constraint on existing arrangements' as such there will not be any additional cost incurred by SW.*

2) The 30/6/08 tie email does not mention anything about additional costs. Moreover, as given within SW reply email dated 6 July 2008, SW states this is *"all subject to putting costs to one side; to address later; SW advised must be cost neutral"*

Comments from SW internally

3) The loading and vibration effects from the Tram require formalising and agreeing.

4) Particular consideration needs to be given to where new connections are being made to a sewer. Whilst the connection costs may be paid by the person requiring the connection, SW will still require the Tram being stopped in the location of the new connection for some time, due to the presence of other services and the need to break out the Tram slab. The TEL agreement does not cover this.

5) There is a requirement to agree standard method statements - thereby avoiding operatives having to refer to the lengthy TEL agreement.

7) Notes relating to definition of emergency within Appendix 7 below.

8) Within its email dated 1 July 2008 tie contends that there is no requirement to extend the side shaft of the side entry manholes full length. SW email 6 July 2008 replies to this noting that this is subject to tie addressing SW safety issues. tie email dated 7 July 2008 requests SW to outline the safety issues. Under the CDM Regulations there is a requirement to "design-out" risks, which is why the side shaft will need to go its full depth.

9) The Recital A should make reference to SW being required *by Statute* to carry out inspection and maintenance.

Further matters in L6 meeting minutes

10) SW requested what would be tie stance in the event of any SW over-run, with the action that this needs to be reviewed. Consideration of any over-run is not included within the July TEL agreement. (L6-3.10)

11) Build over agreements will be required in addition to the TEL Agreement where the location of the Tram is not covered under NRSWA. (L6-3.13)

12) Agreement does not cover Tram slowed down or stopped for work near the DKE but outwith the affected zone. (L6-3.19)

13) Stray current issues are still outstanding (L6-3.26)

Other matters

14) Works to Grade 5, 4 and (possibly Grade 3 sewers) will give benefit to tie in that there will be a reduced downtime of the Tram network. The extent and sequencing of these works to interface with Infraco works needs to be finalised.

The Agreement: -

Generally

1) Requires a "tie-in" agreement or some wording in the Agreement which links the tie existing Utilities Agreement (Utilities Agreement) with this TEL Agreement.

See details below

2) Significantly erodes the protection for SW under the Utilities Agreement.

In general the TEL agreement still only envisages planned works, whereas all SW works are reactive maintenance.

See details below

Imposition on SW of *additional* costs and liabilities

3) Adds significant additional costs and restrictions in addition to those normally expected under the current legislation, with no end date and no reimbursement of these additional costs.

See details below

Imposition on SW of matters which conflict with its statutory obligations

4) Is at variance with SW statutory obligations

See details below

Matters set out in the Agreement are incorrect giving SW a much greater risk profile

5) Incorrectly alleges that there is a nine year period in which SW will not carry out any Inspection and Maintenance works.

See details below

6) Reduces the exclusion zone from 2m each side of the DKE to 1.1m each side of the DKE.

See details below

7) Has no definition of emergency.

See details below

Disputes

8) Does not include an adequate mechanism for resolving ambiguities.

See details below

9) Has dispute provisions at variance to the statutory adjudication provisions

See details below

10) Includes for related disputes to be included, creating significant additional risk for SW.

11) Includes excessive measures of irrevocably waiving disputes for failure to meet deadlines

See details below

12) Includes unilateral choice of mediator by TEL if CEDR ceases to exist.

See details below

Please note that the comments above are not intended to be exhaustive, and are presented only to demonstrate some examples of matters that SW find unacceptable.

We look forward to the re-drafted Agreement. In this regard we believe that 14 days is a reasonable period of time, and look forward to receiving the revised draft by 16th June 2008.

Upon receipt of the redrafted Agreement and our subsequent perusal, we will contact you with a view to discussing and finalising this Agreement.

In the event that you are unable to commence the re-draft of the Agreement to address the issues detailed herein please be advised that Scottish Water will be inclined to move towards the internal resolution procedures and mediation.

Please contact the undersigned if you have any queries.

Yours faithfully

Gus Conejo-Watt
Delivery Manager

Cc: Louise Adamson
John Flett
Campbell Connor
Peter Farrer
Helen Day
Mark Stayt
Tim Porter
Andy Brown

Investment Programme: Capital Investment Delivery
Project: Tie
Autocode No: 033155
Letter Ref: CID/SP/033155/00001L/JF/TP
Subject: TIE Proposed TEL Agreement

APPENDIX 1

1 **The agreement requires a "tie-in" agreement or some wording in the Agreement which links the tie existing Utilities Agreement (Utilities Agreement) with this TEL Agreement.**

1.1 As many of the issues within the Utilities Agreement relate to matters within the Agreement, a "tie-in" agreement is required.

1.2 In this way SW are protected to the extent that matters within the Utilities Agreement (with tie) affect the Agreement (with TEL)

tie have introduced a new Clause 1.9 to rectify this.

However, under Clause 1.9 the terms of Utility Agreement only take precedence when diversionary works carried out by Tram Contractor as defined in Utilities agreement ????]

Clause 1.8 still remains when diversionary works are not carried out by Tram Contractor otherwise giving this TEL agreement priority over the Utilities agreement.

The TEL Agreement should be subject to the Utilities agreement and SW Statutory obligations and rights as applicable.

1.3 Examples of these matters (inter-alia) are:

1.3.1 Where sewers are within the exclusion zone, but should have been moved were it not for delayed sewer surveys

1.3.2 Where pipework could be prematurely corroded due to inadequate stray current measures

1.3.3 Where the SW installations are non-compliant with the specification.

APPENDIX 2

2 The Agreement significantly erodes the protection for SW under the Utilities Agreement.

2.1 Under the Utilities Agreement SW were protected against tie's indirect costs and costs resulting from tie defaults. The Agreement should be similarly worded.

2.2 Agreement-Clause 1.8 gives the Agreement priority over the Utilities Agreement, thereby sweeping away these protections. .

See note under the new Clause 1.9 within Appendix 1 above.

2.3 Specific examples (inter-alia) where SW is protected under the Utilities Agreement, and should be similarly protected under the TEL Agreement are listed below, following which the details are set out:

2.3.1 Liability of tie

2.3.1.1 SW should be reimbursed for its losses (ordinarily expected) resulting from tie's default

2.3.1.1.1 Utilities Agreement-Clause 8.4 gives SW rights to claim for its losses ordinarily expected resulting from tie's default. With the "tie-in" agreement SW would be able to claim for these defaults as they affect the Agreement.

See notes on Clause 1.9 within Appendix 1 above

2.3.1.1.2 This is particularly relevant in relation to the matters in paragraph 1.3 above, relating to sewers within the Exclusion zone, corroded pipework, or pipework outwith the specification.

2.3.1.1.3 In addition to the extent that TEL insisted on the excessive resources required from SW detailed in Section 3 (which is a TEL default) - SW would require recompense for these excessive costs. i.e. extra over costs for working to tie restrictions.

2.3.1.1.4 In contrast the Agreement-Clause 5.1 requires SW to carry out all Inspection and Maintenance at its own cost, and despite clause 6.2, it is not clear that relief may be available where these costs may be significantly higher due to TEL / tie's defaults.

[Clause not updated as requested in L6 meeting item 3.1]

2.3.2 Liability of SW

2.3.2.1 SW should not be liable for tie's indirect losses

2.3.2.1.1 Utilities Agreement-Clause 8.3 affords SW protection against tie's indirect costs in the event of any SW default.

2.3.2.1.2 In contrast the Agreement-Clauses 4.9, 5.2 and 6.3 requires SW to reimburse *all* TEL costs (including direct and indirect costs) associated with the Inspection and Maintenance.

Clause 5.2 still expressly sets out *all* expenses and costs, Clause 4.10 (originally 4.9) still notes the full cost, and Clause 4.5 notes the full cost therefore any indirect costs are not caught within Clause 6.3 in *"save where expressly set out"* - as Clauses 5.2 and 4.10 does expressly set out

Moreover where all / full costs are mentioned it should be the additional costs.

2.3.2.1.3 This is a significant change in emphasis from that within the Utilities Agreement to that within the Agreement, and it is not acceptable to SW.

2.3.2.1.4 This is particularly inequitable where sewers are constructed within a reduced exclusion zone (As Section 6 below) - giving considerable potential for both additional SW and TEL costs due to the resources to access these works so close to the Tram network.

2.3.2.2 If culpable - SW should only be liable for tie's direct losses (not caused by any tie default)

2.3.2.2.1 As above, should SW be culpable, it should only be liable for *direct* losses excluding any caused by a tie default.

2.3.2.2.2 In contrast the Agreement-Clauses 4.9, 5.2 and 6.3 requires SW to reimburse *all* TEL costs (including direct and indirect costs) associated with the Inspection and Maintenance, regardless of whether they are losses directly arising or not.

See notes on Clause 5.2 and 4.10 above.

See notes on full costs above.

This is a significant change in emphasis from that within the Utilities Agreement to that within the Agreement, and it is not acceptable to SW.

2.3.2.2.3 This is particularly inequitable in the case of sewers within the exclusion zone noted above,

and / or when any damage is an inevitable part of the works.

APPENDIX 3

3 The Agreement adds significant additional costs and restrictions in addition to those normally expected under the current legislation, with no end date and no reimbursement of these additional costs.

3.1 NRSWA-Clause 140 sets out SW responsibility to maintain its apparatus, and to afford facilities for TEL to ascertain it is so maintained.

3.2 NRSWA-Clauses 118 and 119 require that both TEL and SW co-operate with each other in the interests of safety, to minimise inconvenience and to protect the Tram and SW apparatus.

3.3 In contrast the Agreement specifically requires:

3.3.1 Planning of the works

3.3.1.1 SW to present planned maintenance for 25, 5 and 1 year periods.

[SW carry out reactive maintenance as [L6 minutes–item 3.6]

3.3.1.2 In regard to the 5 year and 1 year periods, SW should have new pipework in the Exclusion zone, and the sewers should either have been relocated or repaired.

3.3.1.3 In regards to the 25 year period this is a significant look forward, and SW do not carry out detailed planning this far ahead. (Clause 3.2)

[This has been taken out]

3.3.1.4 SW to forward its planned work 60 days in advance to request an access permit – which may be unilaterally rejected by TEL (Clause 4.2.1)

Only *"reasonably"* added in – no mention of SW rights and obligations under NRSWA, Sewerages Act and Water Act and associated technical agreements as [L6 minutes-item 3.6]

3.3.2 Meetings

3.3.2.1 SW to attend monthly meetings to review the Agreement (Clause 2.8)

[Periods of meetings can be agreed – parties to act reasonably]

3.3.2.2 SW to attend any meetings required by TEL. This makes no mention of meetings required by SW (Clause 2.11)

[No changes made]

3.3.3 Constraints on the Inspection and Maintenance

3.3.3.1 TEL can carry out works at the same time as SW (Clause 4.7)

[No additional costs in agreement]

3.3.3.2 SW to carry out the works between 00:30 and 05:00. (Clause 3.6)

[No additional costs in agreement]

3.3.3.3 SW to confirm that its Investigation and maintenance works will not adversely affect the Tram - despite that the adverse affects may be unavoidable or due to tie default. (Clause 4.3.5)

[This clause has not been changed as requested in L6 minutes-3.9]

3.3.3.4 SW to notify completion of the works within 3 hours of completion (Clause 4.8)

[If SW working up to 05:30 – how will this 3 hour notice work?? – Trams will want to start before 08:30

3.3.4 Costs

3.3.4.1 SW to reimburse TEL for any of its costs necessitated by SW carrying out its maintenance works. There is no such provision for the reimbursement of TEL within NRSWA unless there has been some default. (Clause 4.5)

3.3.4.2 SW may be responsible for direct and indirect TEL costs caused by the Inspection and Maintenance - despite that the adverse affects may be unavoidable, or due to tie default.

L6 Minutes-item 3.9 states *"no adverse effects on the tram even if inherent in the works is not acceptable to SW."* This has not been addressed.

Clause 4.5 notes the full cost therefore any indirect costs are not caught within Clause 6.3 in "save where expressly set out" - as Clause 4.5 does expressly set out

Moreover where all / full costs are mentioned it should be the additional costs.

Again there is no such provision for the reimbursement of TEL (or SW costs) within NRSWA unless there has been some default. (Clause 4.9)

tie has noted that *all* costs for damage to the Tram (even if inherent) to be paid by SW. L6 Minutes-item 3.9 states *"no adverse effects on the tram even if inherent in the works is not acceptable to SW."* This has not been addressed.

An additional Clause 4.11 has been added stating if there is any breach of this Agreement, SW to pay unless covered by TEL insurance. As the Agreement is not acceptable so similarly is liability for breach of same likely not to be acceptable.

There is no reciprocal wording to allow SW to recover monies for TEL defaults.

3.3.4.3 Whilst on the subject of indirect losses, there is no definition of the number 2 footer in agreement-Clause 1.1.17

3.3.4.4 SW to finance the negotiation and execution of the Agreement. As this Agreement is primarily for the benefit of TEL, SW should not have to finance the negotiation and execution of the Agreement. (Clause 11.8)

[Clause 11.8 changed to reflect this]

3.3.5 Insurance

3.3.5.1 SW to obtain insurance for all damages and claims. SW should not be expected to obtain insurance for damages resulting from tie defaults. In addition there is no express requirement for TEL to have adequate insurances. (Clause 6.4)

[Clause 4.3.8 covers self insuring.]

There should be a reciprocal requirement for TEL to self-insure and/or ensure its contractors or parties working on behalf of TEL insure

3.4 Neither the inordinately high level of SW resources to manage the foregoing, or the reimbursement of TEL for all its expenses are requirements under NRSWA.

[There should be recompense for SW for the high level of resources to manage the interface of SW with TEL.] Should be cost neutral as L6 minutes-item 3.9

3.5 Moreover all of these requirements of Scottish Water are open ended, with no end date written in.

There should be a review of TEL agreement at certain intervals.

In particular Lines 1 and 2 of the Tram as defined in Clauses 1.1.12 and 13 should not include *"as such route may be further developed and/or amended"* as this is open-ended. To the extent these Lines are updated this should be the subject of a variation to the TEL agreement, particularly if the updated route significantly clashes with SW apparatus. (L6-3.15)

APPENDIX 4

4 The Agreement is at variance with SW statutory obligations

4.1 Minimum works within the Agreement

4.1.1 Agreement-Clause 3.1 calls for objectives such as minimum loss of tram revenue, minimum works with minimum out-turn costs.

4.1.2 SW statutory obligations may well require *more* than the minimum works (with the associated minimum out-turn costs and minimum loss of tram revenue) to be carried out to satisfy SW's obligations.

[This has not been addressed]

4.1.3 In addition to the minimum disruption of the Tram, there needs to be acknowledgement to minimise disruption to the provision of water and sewerage services.

[Clause 3.1 now includes for this]

4.2 SW having to seek, and can be denied, permission to carry out works

4.2.1 Whilst SW do need to interface with TEL in carrying out its Inspection and Maintenance obligations as given within NRSWA Clauses 118,119 and 140 and paragraphs 3 and 3.1 above, the level of permissions required from TEL under Agreement-Clauses 3 and 4 are excessive.

[The requirement for reasonableness has been added to many of the clauses – as the track changes document shows.]

However there is still a requirement for 60 days notice – which is in direct conflict with SW reactive maintenance as L6 minutes-item 3.6

4.2.2 Moreover, under the Agreement-Clauses 2.4 and 3.4 TEL can effectively reject its approval for SW Inspection and Maintenance – which would then conflict with SW statutory obligations.

[A requirement of reasonableness has been added in on Clause 3.4]

4.3 The definition of Inspection and Maintenance needs to widened

4.3.1 The definition of "Inspection and Maintenance works" under Agreement-Clause 1.1.22 needs to be widened to include all of our statutory duties in relation to sewerage and water.

[Any access has been added to Clause 1.1.22-why not just state access for SW to carry out its Statutory duties?

4.3.2 In regard to sewerage it should include "cleansing, emptying, ventilating, refurbishing, upgrading, repair and renewing" in addition to the inclusions listed.

[Any access has been added to Clause 1.1.22-why not just state access for SW to carry out its Statutory duties?

4.3.3 In regard to water it needs to include “refurbishing, upgrading, repair, altering, renewing or removing” in addition to the inclusions listed.

[Any access has been added to Clause 1.1.22-why not just state access for SW to carry out its Statutory duties?

APPENDIX 5

5 The Agreement incorrectly alleges that there is a nine year period in which SW will not carry out any Inspection and maintenance works

5.1 SW has not at any time agreed to an Inspection and Maintenance moratorium.

Clause 3.4 still does not address the wording in the Utilities agreement. The wording in Clause is:

"tie shall consider for inclusion….multi-utility crossings…which tie considers would safeguard…against the need for SW, within a period of nine years from the date of the Agreement to initiate works likely to disrupt…the Edinburgh Tram Network"

This is only *tie considering, not SW agreeing* – and will be dependant on the extent to which *tie* has successfully (or otherwise) utilised the multi-utility under track crossings as they affect the SW works.

APPENDIX 6

6 The Agreement reduces the exclusion zone from that which was in the Utility Agreement.

6.1 Utility Agreement / Clauses 4.1 and 4.4 call for surveys 2m either side of the DKE, and this 2m zone is where the interface with the tram is particularly critical.

6.2 Agreement / Clauses 3.2 and 1.1.16 state that Inspection and maintenance under the TEL agreement is within an exclusion zone of 2m from the *inside* rails – which is only 1.1m either side of the DKE.

6.3 This reduction in exclusion zone limits the SW pipework which has the protections that are supposed to be present for SW within the Agreement.

6.4 In particular Note 5 of the Utility Agreement drawing states that deep excavations may necessitate the provision of vehicle restraints. Sewers of over 4m deep, within 1.1m of the Tram lines would create significant difficulties for SW.

6.5 To the extent some sewers are left within the 2m exclusion zone, the associated SW costs and reputational issues will need to be reflected in the Agreement.

6.6 Please forward the information from the Agreement drawing-Notes 2 (HMRI) and 3 (DfT) that you are relying on to justify the reduced 1.1m exclusion zone.

tie contend in its The footnote to Clause 1.1.16 states that 1.1m either side of the DKE was agreed – SW have not agreed to this, and require the information as requested directly above.

In particular SW will want to see details of how this reduced distance is affected when the Tram is turning corners – with the corners of the Tram sticking out past the 1.1m line calculated on a straight line.

6.7 As it currently stands TEL are requiring a smaller exclusion zone, but are still looking to charge all associated costs it incurs to SW, and for SW to incur all the additional costs caused by this reduced exclusion zone – the purpose of which is to benefit tie.

APPENDIX 7

7 There is no definition of emergency.

7.1 There is no definition of the term "Emergency" in the Agreement. The term "Emergency works" is already within NRSWA-Clause 111, and this definition together that within OCIP will require further discussion.

The definition for Emergency is now in as the NRSWA definition, which is reflected in Clause 1.1.15

However, as SW maintenance and repair works are reactive only, and NRSWA-Clause 111(3) requires SW to prove an emergency there should be a clarification that: -

SW dealing with any leakage, connection, collapse or blockage and the restoration of normal service should be specifically agreed as an "emergency"

APPENDIX 8

8 The Agreement does not include an adequate mechanism for resolving ambiguities

8.1 Agreement-Clause 1.2 states that in the event of any ambiguity the parties shall agree how to resolve this. This is an agreement to agree, and as such is completely uncertain, and unenforceable.

Clause 1.2 (apart from “Parties” changing to “parties”) has remain unchanged

APPENDIX 9

9 The Agreement has dispute provisions at variance to the statutory adjudication provisions

9.1 Scheme Adjudication provisions would apply

9.1.1 Agreement-Clause 7.11.1.2 only allows for a party to take a dispute to Adjudication if the Internal Resolution Procedure has not resolved the matter.

9.1.2 This is not qualified by referring to the Agreement-Schedule-Part 1-Clause 1, wherein it states that the power to adjudicate will be either under the Agreement or the statutory right within the Housing Grants Construction and Regeneration Act 1996 (HGCRA)

9.1.3 To the extent that the dispute covers in part or in whole Construction Operations in terms of HGCRA, then this provision will cut across the HGCRA requirement that a party has the right to take a dispute to Adjudication at any time.

9.1.4 The effect of this would be that the Scheme Adjudication provisions would apply in place of the Adjudication provisions set out at Schedule Part 1, and the parties would *not* have to go through the Internal Resolution Procedure before Adjudication.

The wording within Clause 7.2 appears covers this.

9.2 The Agreement cannot prevent parties suspending performance

9.2.1 To the extent that the works in part or in whole are Construction Operations in terms of HGCRA, then this provision will cut across the HGCRA requirement that a party can suspend its works in the event of non-payment under the prescribed circumstances. This would also cut across common law remedies such as retention and both positions are unacceptable to SW

The wording within Clause 7.5 has not been amended

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APPENDIX 10

10 The Agreement includes for related disputes to be included, creating significant additional risk for SW.

10.1 Under Agreement-Schedule-Part 1-Clause 42, to the extent that the works are not Construction Operations - TEL can force SW to refer a dispute to Adjudication as Referring Party only on the basis that TEL think SW may be considering doing so anyway.

10.2 This forces SW into raising an Adjudication that they may not actually intend raising and committing them to the associated management time and expense.

10.3 This is not acceptable to SW

The wording under clauses 41 – 43 now state that any party to the Agreement can request for a related dispute to be heard at the same time as a Dispute.

However, it is far more likely for TEL to invoke this for its benefit than SW – and in this regard appears to be inequitable.

APPENDIX 11

11 The Agreement includes excessive measures of irrevocably waiving disputes for failure to meet deadlines

11.1 Agreement-Clause 7.8 states that any failure to meet a deadline in a dispute resolution procedure means that the dispute is deemed irrevocably waived.

11.2 Although the other party can waive any such failure, in disputes they seldom do. The provision is unnecessary and excessive as the person conducting the dispute procedures can address any failure to meet deadlines.

This has not been addressed - Minutes L6- item 3.23 states this is for review

APPENDIX 12

12 The Agreement includes unilateral choice of mediator by TEL if CEDR ceases to exist

12.1 Agreement-Clause 7.12 calls for TEL to unilaterally choose a mediator in the event that CEDR ceases to exist.

12.2 In this situation it should be for the parties to agree a mediator – failing which an independent person should decide for them.

In the event CEDR ceases to exist then Clause 7.12 now states both parties to agree

However there is no default position in the event that the parties cannot agree as for example there is under adjudication under Agreement-Part 1-Clause 5.3