

Contractual Interpretation – No.13 Defects Obligations



Purpose	Position Paper
Version:	1
Date:	5 June 2013
Status	Draft
Author(s):	Richard Blanchfield
Approver:	Andy Scott

Item: 13

Category: Contractual Interpretation

Issue: What defects obligation does CEC have to SW as the Authorised Undertaker?

Summary Proposal

From a review of statute and the SW/CEC Agreement there is no documented acceptance process agreed between the parties. CEC propose that acceptance will be achieved when the agreed scope has been completed and the agreed handover documents are provided for the individual assets. In terms of a defect obligation CEC propose that the acceptance of the works at contract handover would trigger a defects period which CEC would provide to SW. The defects period would be based on the particular utility contract terms and conditions agreed between CEC and the utility contractor. In other words SW would be provided the same level of defects protection as is afforded CEC through the utility works contract. In the example of the McNicholas contract this would be 2 years from the issue of contract completion to McNicholas. This proposal is based on the simultaneous acceptance of the individual utility asset's by SW and CEC.

Background

This paper addresses the above issue between City of Edinburgh Council (CEC) and Scottish Water (SW) with respect to the handover of water and wastewater asset diversions from the trams project.

There is some ambiguity as to what acceptance and defects obligations CEC have, and also at what point asset transfer takes place. These issues need to be addressed with respect to CEC's obligations as the Authorised Undertaker. They are dealt with in position papers No.12, 13 and 14 respectively, in order to make a proposal for discussion and agreement between the parties on defining CEC's obligations.

Authorised Undertaker

CEC are defined as the "Authorised Undertaker" in the Edinburgh Tram Act 2006 and are empowered as follows:

- Clause 1.3(e) which is the power to alter the position of other undertakers' apparatus, including water mains and sewers, etc.

These are based on model clauses from the UK Transportation (Tramways & Light Rail) Act 1997 which also, in sections 224 to 227, confers the, "Power to extinguish rights of statutory undertakers, etc."

The New Roads & Streetworks Act (NRSWA) then extends the powers in Section 150(1), in defining that these authorised "Transport Undertakings" should be considered the "Authority" in respect of the rest of the Act. Section 143 and various other provisions of NRSWA require that the Undertakers cooperate with the Authority to carry out the "necessary measures" (i.e. in the same way that SW and the roads authority would work together on any project).

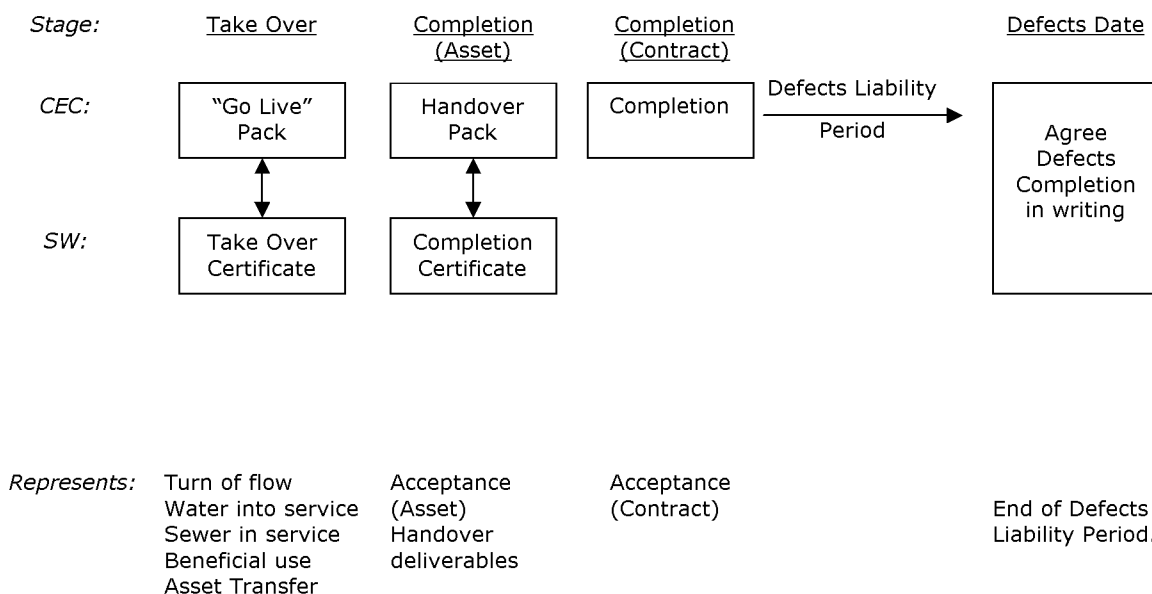
Unfortunately, neither of the above pieces of legislation defines any specific acceptance, defects or O&M transfer obligations between the parties.

Defects Obligations

There is also no specific defects liability obligation set out in the CEC-SW Agreement.

The absence of specific guidance leads to a proposal for a reasonable interpretation, and CEC would cite a precedent for this in the Agreement Clause 8.4.4, which offers SW the same protection as they would ordinarily expect to be indemnified under any contract entered into by it with a contractor to carry out diversionary works. CEC would offer to SW the same level of protection as is provided to CEC within the terms of the individual delivery contract.

Therefore through the ongoing cooperation between SW, CEC and Turner and Townsend, the following process has been developed:



In relation to the question of the defects liability period, we could draw on one of two precedents from other SW relationships as follows, either:

- With Developers: where the Sewers for Scotland 2nd Edition and Water for Scotland 2nd Edition both define a Defects Liability Period of 12 months after the Completion of Works; or
- With SW capital works contractors: where SW Standard Contract Terms & Conditions define a Defects Liability Period of 104 weeks after the Completion of Works.

In this respect CEC will offer SW the defects liability period that it has been provided through the execution of the particular utility works contract. This will vary however in the case of the McNicholas contract this is 2 years from the issue of Completion under the NEC Option E contract.