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**From:** Trudi Craggs  
**Sent:** 04 July 2007 18:11  
**To:** Matthew Crosse  
**Subject:** RE: Utilities Agreements  
**Attachments:** Minutes CEC Legal Agreement 30.05.07.doc

**Importance:** High

Matthew

I thought it might be useful to let you have my views just in case we don't get chance to speak.

This has been ongoing for some time. At the outset the Council were slow to come back to tie with their views on the issue and what their concerns were. However on 5 April they did respond and confirmed the following:-

*It would appear that the Council officials have had no input to the purported agreement between Scottish Power, tie and the Council. There is an important point of principle involved in this issue, one which has not, as far as I can determine, been raised with Councillors. There is a distinct lack of consistency in contractual arrangements across the Tram Project as a whole. Some contracts are between tie and a third party, whilst others seek to involve the Council. Is there a rationale for this approach which I am missing ?*

*Returning to the outcome of the meeting held earlier this week, it was agreed that this is of such significance ( and potential risk to the Council) that elected members need to be advised on the issue. Given that national and local elections are due within a month it does not look as if a report on the matter will be considered until the new Council is established. For the avoidance of doubt, the general power to give indemnities or guarantees is not delegated to Council officers. Such matter would have to be reported to the Council, along with an explanation of risks involved, before any decision is taken on whether the Council is a party to any such contracts ( from the present one under discussion to Tramco and Infraco ) or alternatively guarantees are given.*

I emailed Andrew Fitchie on 27 April:-

*I apologise for the delay in getting back to you. After several months of chasing, we have received a response from the Council which states as follows:-*

*"It would appear that the Council officials have had no input to the purported agreement between Scottish Power, tie and the Council. There is an important point of principle involved in this issue, one which has not, as far as I can determine, been raised with Councillors. There is a distinct lack of consistency in contractual arrangements across the Tram Project as a whole. Some contracts are between tie and a third party, whilst others seek to involve the Council. Is there a rationale for this approach which I am missing ?*

*Returning to the outcome of the meeting held earlier this week, it was agreed that this is of such significance ( and potential risk to the Council) that elected members need to be advised on the issue. Given that national and local elections are due within a month it does not look as if a report on the matter will be considered until the new Council is established. For the avoidance of doubt, the general power to give indemnities or guarantees is not delegated to Council officers. Such matter would have to be reported to the Council, along with an explanation of risks involved, before any decision is taken on whether the Council is a party to any such contracts ( from the present one under discussion to Tramco and Infraco ) or alternatively guarantees are given."*

*This was in response to my emails - I also gave CEC copies of the Telewest and Scottish Power Agreements which Phil forwarded to me so that they could see their terms.*

*In relation to the first paragraph, are you able to respond to that? I was not involved in the formation of the procurement/contract strategy but I assume you can explain the rationale. I think Geoff may have already queried this?*

*I don't know what involvement CEC has had otherwise in the drafting of these Agreements and it may be that they have taken this approach without fully considering or understanding the implications of the obligations in these Agreements. That said, I would agree with Colin's position in relation to the indemnities/guarantees especially full indemnities in respect of loss or damage although having said that I don't know if all the indemnities are fully backed off to AMISS and this may make a difference to the position he has taken.*

*If the SUCs simply wanted to ensure that CEC would underwrite tie given that the grant is payable to CEC rather than tie then this may be more acceptable to CEC although the existing drafting would need to be amended.*

*I also wonder if the definition of Authorised Undertaker also caused Colin concern especially as CEC is not in control of many of the obligations imposed on it. Despite the drafting of the definition of Authorised Undertaker CEC may feel that they would be the party with the necks on the line if there was a breach rather than tie.*

Andrew responded on the issues (if you want copies of these emails let me know) and subsequently there was a meeting set up with CEC on 30 May to deal with this. I did not attend this meeting but understand that Andrew Fitchie, Susan and Alan Squair, from the Council's legal department all attended. Duncan Fraser may also have attended but I'm not sure. The feedback from Susan was that it went well.

I have attached the minutes of this meeting which may be helpful. I don't know if the information requested by CEC was passed to CEC or if tie approached the SUs to see if a financial covenant would be sufficient in the circumstances. Susan or Graeme may be able to give you an update.

Re the other side agreements which CEC have entered in to, CEC is the contracting party and where D&W drafted and negotiated the side agreements, CEC were involved in the negotiations. In addition from memory I think only one of the Agreements (Forth Ports) has an indemnity in it and this is in relation to the sea wall. There were no open ended indemnities for direct or indirect loss and no guaranteeing of third party obligations. In each case D&W prepared a report to CEC on the terms of the agreement highlighting risks of signing or not signing and issued a duty of care letter to CEC. This was in accordance with the protocol agreed with CEC.

Coincidentally Andy Conway raised this with me today and asked what would happen if the agreements weren't in place for Tuesday. He wondered if some of the works would take place anyway or if all the works would be postponed. If this is not resolved then I assume that this will trigger a compensation event and a claim from AMIS. Depending what has been done to date following the CEC meeting there may still be ways to resolve this. If the SUCs will not back down and it needs to go to a full Council meeting, the next meeting is not until August.

Andy will raise this at the DPD - I assume that it is highlighted in the papers as a risk?

If I can be of any further assistance let me know. Happy to discuss.

Trudi

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**From:** Matthew Crosse  
**Sent:** Wed 04/07/2007 16:21  
**To:** Trudi Craggs  
**Subject:** FW: Utilities Agreements

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Project Director - Tram

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**From:** Willie Gallagher  
**Sent:** 04 July 2007 16:16  
**To:** david\_mackay@[REDACTED] Andrew Holmes; Steven Bell; Matthew Crosse  
**Cc:** Graeme Barclay; Susan Clark; Alasdair Sim

**Subject:** FW: Utilities Agreements  
**Importance:** High

I find it unbelievable that this is not resolved – we are due to start work next Tuesday! Can someone please brief me of how we get this fixed. The lady will not be for turning!

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**From:** Alasdair Sim  
**Sent:** 04 July 2007 15:53  
**To:** Graeme Barclay  
**Cc:** Willie Gallagher  
**Subject:** FW: Utilities Agreements  
**Importance:** High

Graeme,

You have a clear understanding of what these agreements contain, I unfortunately do not. Would you please contact Alan Squair – CEC Legal [REDACTED] to discuss?

Thanks  
Alasdair

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**From:** Alan Squair [mailto:Alan.Squair@edinburgh.gov.uk]  
**Sent:** 04 July 2007 15:30  
**To:** Alasdair Sim; Colin MacKenzie  
**Cc:** Andy Conway; Gill Lindsay  
**Subject:** RE: Utilities Agreements

Alasdair

As I mentioned in my recent e mail, I met with the Council Solicitor this morning to discuss this. In summary, our view is that rather more information and advice on the Council's exposure to risk in terms of Scottish Power and Telewest is required and that as and when these risks can be identified and quantified and the issue as to whether cover for these risks can be obtained has been explored, the matter should then be the subject of a Report to Members.

We would require to have a better understanding of why SP and Telewest wish CEC to be party to their Agreements and particularly what specific liabilities they consider not to be addressed by other contractual and/or insurance arrangements. Not having been involved in the apparently lengthy and detailed negotiations which have taken place to bring the Agreements to their present form, we are not aware of the areas of concern.

Accordingly, we could not at this stage recommend that the Council sign these Agreements.

I would however stress that the above would be our recommendation and advice but that we are urgently seeking instructions from the Director of City Development.

Regards

Alan

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**From:** Alasdair Sim [mailto:Alasdair.Sim@tie.ltd.uk]  
**Sent:** 04 July 2007 10:13  
**To:** Alan Squair; Colin MacKenzie  
**Subject:** Utilities Agreements

Good morning Gents,

Could I ask how we are progressing with the sign off for these utilities agreements with Scottish Power and Virgin Media please?

Thanks  
Alasdair

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