

## EDINBURGH TRAM NETWORK UTILITY COST CONTRIBUTIONS

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**tie** have requested clarification on issues concerning the contributions which may be payable by utilities for diversionary works carried out on street and which fall within the ambit of the New Roads and Street Works Act 1991 ("NRSWA"). Our understanding of the questions is as follows: -

1. Utilities encompassed by MUDFA - Should a payment mechanism be formally agreed between the utilities and **tie** in order to ensure the utilities make their applicable statutory cost allocation?
2. Utilities not encompassed by MUDFA - In the absence of finalised agreements with utilities not encompassed by MUDFA works, should **tie** write to these utilities setting out **tie's** / MUDFA's request for reasonable response and action times for utility works, and to avoid any doubt of eligibility to the statutory cost allocation?
3. How would the circumstances change if a developer or a construction company required utility diversions as such developer would not have statutory rights under NRSWA?

### NRSWA - On Road Works

Before addressing the questions set out above, this note briefly reviews the relevant legislation as it applies. It is important to emphasize that "diversionary works" under NRSWA only relate to apparatus on a road. Under NRSWA and the Regulations, there is no statutory right to a contribution for off-street diversionary works.

Section 144 of NRSWA provides that the "**allowable costs**"<sup>1</sup> of any measures needing to be taken in relation to a utility's apparatus as a consequence of major works for roads purposes, major bridge works or **major transport works**<sup>2</sup> shall be borne by the roads, bridge or **transport authority**<sup>3</sup> concerned *and* the utility in such manner as may be prescribed.

The relevant regulations which prescribe how the allowable costs are to be shared are: *The Road Works (Sharing of Costs of Works) (Scotland) Regulations 2003* (the "**Regulations**").

### Utility Carrying out Diversionary Works

Where the utility is carrying out the diversionary works, the Regulations provide that the **authority**<sup>4</sup> (**tie**) shall pay the utility:

- 92.5% of the allowable costs of such diversionary works for transport works; or
- 82% of the allowable costs of such diversionary works for **major bridge works**<sup>5</sup>.

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<sup>1</sup> "**allowable costs**" means, in relation to diversionary works, the sum of all the reasonable costs incurred in executing them, except -  
(a) costs incurred in preparing the initial set of plans and estimates in relation to those diversionary works (but not in preparing any further plans and estimates which the authority may require);  
(b) costs disallowed under regulation 6(3) which relate to a Utility's costs for having to carry out diversion works in respect of apparatus placed in the road after having received notice from the authority that they intend to carry out major works.

<sup>2</sup> "**major transport works**" means substantial works required for the purposes of a transport undertaking and executed in property held or used for the purposes of the undertaking.

<sup>3</sup> "**transport authority**" means the authority, body or person having the control or management of a transport undertaking.

<sup>4</sup> "**authority**" means a roads authority, bridge authority or transport authority.

Therefore the utility is responsible for 7.5% or 18% (as applicable ) of the allowable costs for works carried out by the utility. This discount is subject to **tie**'s payment being made in accordance with Regulation 8(1) which provides that **tie** is to pay 75% of the C4 estimate of the 92.5% or 82% of the allowable costs

- in a single lump sum before the diversionary works begin; or
- if the diversionary works are estimated to take longer than 3 months, in instalments of such amounts, payable at such times during the execution of the diversionary works, as **tie** and the utility agree.

After the diversionary works have been completed, Regulation 8(2) provides that the utility shall issue **tie** a final account of the amounts owing and **tie** shall within 35 days, pay any balance of the C4 estimate, plus any further sum equal to the amount by which the allowable costs exceed the C4 estimate. Regulation 8(3) provides that if the payments made by **tie** in accordance with the C4 estimate amount exceeds the relevant proportion of allowable costs, the utility shall refund **tie** the excess amount.

### **tie Carrying out Diversionary Works**

Where **tie** is carrying out the diversionary works, the Regulations provide that the utility shall pay **tie**:

- 7.5% of the allowable costs of such diversionary works for transport works; or
- 18% of the allowable costs of such diversionary works for major bridge works.

Therefore the utility is responsible for 7.5% or 18% (as applicable ) of the allowable costs for works carried out by **tie**. This discount is *not* subject to payment being made in lump sums or instalments. After the diversionary works have been completed, Regulation 8(2) provides that **tie** shall issue the utility an account of the sum owing and the utility shall within 35 days, pay **tie** such sum owing.

#### **1. Utilities encompassed by MUDFA - Should a payment mechanism be formally agreed between the utilities and tie in order to ensure the utilities make their applicable statutory cost allocation?**

A formal agreement may not be required between the parties to set out a specific payment mechanism, depending on how **tie** wishes to receive payment from the utilities. In determining the appropriate payment schemes from the utilities, **tie** will want to take into consideration the payment schemes provided under MUDFA.

The Regulations provide for a procedure for both **tie** and the utility's payment of each of its respective statutory cost contributions for works it carries out. Where there seems to be some discrepancy in the legislation regarding the payment mechanism is at Appendix C9 of the Code<sup>6</sup>. This Appendix sets out the invoicing, payment and financial monitoring procedures to be adopted, however such procedures seem to apply primarily to the invoicing and payment for the utility's works only (i.e. payment to the utility by **tie**). The Appendix sets out the form and detail of invoice to be presented, settlement of payment and final invoice, interest, reimbursement and monitoring and audit rights. Although the wording of this Appendix primarily contemplates the utility's invoice and settlement of account

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<sup>5</sup> "**major bridge works**" means works for the replacement, reconstruction or substantial alteration of a bridge. (where a road is carried or crossed by a bridge, any statutory right to place apparatus in the road includes the right to place apparatus in, and attach apparatus to, the structure of the bridge; and other rights to execute works in relation to the apparatus extend accordingly.)

"**the Code**" means the Code of Practice entitled "Measures Necessary where Apparatus is affected by Major Works (Diversionary Works)" dated June 1992, as revised and reissued from time to time.

against the authority, it does contemplate how to incorporate works (such as duct work and other civil engineering work) carried out by the authority on behalf of the utility.

Appendix C9 sets out that the **invoices presented by the utilities** should include the following information:

For each agreed invoicing period for advance payment made in instalments:

- A1 = itemised and detailed breakdown estimate of C4 costs for utility works
- A2 = itemised and detailed breakdown estimate of C4 costs for MUDFA works
- B = [92.5% or 82% as applicable of A1] - [7.5% or 18% as applicable of A2]
- C = 75% of B (to be paid to utility in advance of work commencing)
- D = 25% of B or the outstanding amount on finalisation of actual accounts, including allowances for deferment or renewal (Appendix E) and betterment (Appendix F).

The outstanding amount is due within 35 days of issue of such invoice.

#### **Recommended Means of Invoicing:**

Considering that the Code precedes the Regulations by more than 10 years and the utility diversions to be carried out by **tie** likely exceed works contemplated to be carried out by an authority in the Code, it may be useful for **tie** to consider a slightly different approach to invoicing works, but still basing such invoicing on the approach the Code suggests. Instead of one invoice coming from the utility for all cost sharing payments (i.e. for both **tie** payments and utility payments), it may be more useful if **tie** invoices the utility for the utility's applicable cost sharing allocation for the MUDFA works and the utility invoices **tie** for **tie**'s applicable cost sharing allocation for the utility works. Therefore, the suggested process would be as follows:

- A. Utility Invoices for the Carrying out of Diversionary Works by the Utility** - assuming advance payments are to be made by **tie** in instalments, as invoiced and payable at such times during the execution of the diversionary works as **tie** and the utility agree, the utility shall provide **tie** with *instalment invoices*, showing at a minimum:
  - A = itemised and detailed breakdown estimate of C4 costs for that instalment of utility works;
  - B = 92.5% (or 82% as applicable) of A; and
  - C = 75% of B (to be paid to utility in advance of that instalment of work commencing)

After the utility diversionary works have been completed the utility shall issue **tie** a *final invoice*, showing at a minimum:

- D = 25% of B; and
- E = total sum of all allowable costs *actually incurred* by the utility in carrying out the utility works, detailing all agreed variations from the original C4 estimate.
- F = 92.5% (or 82% as applicable) of E
- G = difference between F and B

- If F is greater than B → **tie** pays the utility the amount of excess within 35 days of invoice being issued.
- If B is greater than F → the utility refunds **tie** the amount of excess within 35 days of invoice being issued.

H = **tie** has further payment obligations as negotiated under the Utility Diversion Agreements (e.g. - payment of costs for providing C4 estimates, costs of performing future utility works in accordance with the **tie** programme for Tram, attending meetings, utility inspections and testing, etc)

**Late payment** -where payment is late, then interest (1% above the prevailing base rate) may be charged on the sum due on a daily basis for the period between 36 days from the invoice date until payment is received.

**Audit Rights** - The utility should provide **tie** with monthly reports on costs incurred and projected outturn. Reasonable facilities should be made available to permit either party to verify that the charges being made by the other party are allowable and reasonable.

**It is not likely that tie would have to enter into a separate side agreement with the utilities for this payment procedure, as the above simply sets out a process breakdown of what is already addressed in the Regulations. tie should however discuss and address such payment procedure in a letter to each utility, such letter to be acknowledged and signed off by the utility, to ensure the utilities understand the proposed structure. It would also be recommended that tie confirm that the interest and audit provisions set out in Code be reciprocal.**

**B. tie Invoices for the Carrying out of Diversionary Works by tie** - As there is no statutory obligation for the utility to make payments to **tie** in lump sum payments or instalments, **tie** will need to consider whether this is something it wants to agree to with the utilities.

In determining the appropriate payment schemes from the utilities, **tie** will want to take into consideration, the payment schemes provided under MUDFA. There are at least 3 options **tie** could consider when invoicing the utilities for their cost contributions:

**a. One Payment Upon Completion of Works**

If **tie** is satisfied with receiving one final payment from each of the utilities at the completion of the diversionary works, **tie** would provide the utility with a *final invoice*, showing at a minimum:

- A = itemised and detailed breakdown of allowable costs actually incurred for total SP works carried out by **tie**
- B = 7.5% (or 18% as applicable) of A
- C = any further costs attributable to **tie** from the utility for any betterment of the utility's apparatus, calculated in accordance with Appendix F of the Code
- D = any further costs attributable to **tie** from the utility as a result in a deferrals of the need to renew the utility's apparatus, calculated in accordance with Appendix E of the Code
- E = any other payments required from the utility (ex off-road betterment and deferral) as negotiated under the Utility Diversion Agreements

$$F = B + C + D + E$$

Utility would pay to **tie** the amount set out at F within 35 days of invoice being issued.

**It is not likely that tie would have to enter into a separate side agreement with the utilities for this payment procedure, as the above simply sets out a process breakdown of what is already addressed in the Regulations. tie should however discuss and address such payment procedure in a letter to each utility, such letter to be acknowledged and signed off by the utility, to ensure the utilities understand the proposed structure. It would also be recommended that tie confirm that the interest and audit provisions set out in Code, be reciprocal.**

#### **b. Payment in Instalments after Completed Stages of Work**

If **tie** prefers utilities to make payments in instalments based on completed stages of works being carried out, **tie** would provide the utility with *instalment invoices*, showing at a minimum:

A = itemised and detailed breakdown of allowable costs *actually incurred* for works carried out by **tie** during the applicable stage of work

B = 7.5% (or 18% as applicable) of A

Utility would pay to **tie** the amount set out at B within 35 days of invoice being issued.

After all the utility diversionary works have been completed **tie** would issue the utility a *final invoice*, showing at a minimum:

C = any further costs attributable to **tie** from the utility for any betterment of the utility's apparatus, calculated in accordance with Appendix F of the Code

D = any further costs attributable to **tie** from the utility as a result in a deferrals of the need to renew the utility's apparatus, calculated in accordance with Appendix E of the Code

E = any other payments required from the utility (eg. off-road betterment and deferral) as negotiated under the Utility Diversion Agreements

F = C + D + E

Utility would pay to **tie** the amount set out at F within 35 days of invoice being issued.

**tie should enter into a side agreement with the utilities if it wishes to proceed in this manner as there is no statutory obligation for the utilities to make payments in instalments.**

#### **c. Advance Payment in Instalments**

If **tie** prefers utilities to make advance payments in instalments based on stages of works being carried out, **tie** could follow the utility payment procedure set out above at **A. Utility Invoices for the Carrying out of Diversionary Works by the Utility**, changing the percentage figures where appropriate (for both the advance payment amount and the cost allocation amounts) and providing for any additional costs owed by the utility for off-road betterment and deferral.

**tie would have to enter into a side agreement with the utilities if it wishes to proceed in this manner as there is no statutory obligation on the utilities to make advance payments to tie.**

**2. Utilities not encompassed by MUDFA - In the absence of finalised agreements with utilities not encompassed by MUDFA works, should tie write to these utilities setting out tie's / MUDFA's request for reasonable response and action times for utility works and to avoid any doubt of eligibility of the statutory cost allocations?**

For utilities not encompassed by MUDFA, there will not be a Utility Diversion Agreement executed however such utilities are still governed by NRSWA to provide their applicable cost contribution towards the works it undertakes as part of the Tram project. It is recommended that tie enter into an agreement with these utilities, setting out provisions relating to the following (at a minimum):

- reinforcement that tie has been appointed by CEC to act as agent in respect of being the transport authority and authorised undertaker for purposes of NRSWA;
- the utility shall carry out all the advanced diversionary works for its apparatus relating to the Tram authorised works in accordance with tie's programme (a copy of this programme should be included, to be subject to change if applicable) and timescales;
- tie (as authorised undertaker) shall pay the utility 75% of the utility's C4 estimates of the applicable percentage of the allowable costs in instalments in order that tie will receive the 7.5% cost share contribution from such utility;
- the protocol for off-road diversionary scope of works; and
- any applicable invoicing procedure.

Upon instruction from tie as to which utilities are included under this ambit and the scope of the works to be provided by such utilities, we will be able to draft an appropriate agreement.

**3. How would the circumstances change if a developer or a construction company required utility diversions, as such developer would not have statutory rights under NRSWA?**

Our real estate department has indicated that normally a developer without statutory rights under NRSWA would go direct to the utility provider and agree matters between themselves, without recourse to a formal legal agreement. The developer would normally bear the full costs involved in carrying out the diversion, and these costs are likely to extend to the reasonable costs incurred by the utility provider in undertaking such works.

If the development was a major development, then a formal legal agreement may be entered into, however apparently this seldom happens.

**DLA Piper**

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