

## Contractual Interpretation – No.12 Acceptance Obligations



<b>Purpose</b>	Position Paper
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Item: 12

Category: Contractual Interpretation

Issue: What obligation do CEC have to obtain acceptance/handover from SW for the completion of the utility works as the Authorised Undertaker?

### Summary Proposal

From a review of statute and the SW/CEC Agreement there is no particular 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 provided for the individual assets. CEC acknowledges that H&S information relating to the tram infrastructure will be issued to SW when the tram asset is handed over to CEC however this should not affect acceptance of the individual utility assets. This proposal is based on the simultaneous acceptance of the individual asset by SW and CEC from the delivery contractor. The individual completion certificates will confirm acceptance against an agreed list of snagging works. Position paper 13 and 14 will deal with the specific requirements of defect obligations and asset transfer respectively.

### Background

This paper addresses the above issue between City of Edinburgh Council (CEC) and Scottish Water (SW) with respect to the handover/acceptance 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.

This is 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, defect or asset transfer obligations between the parties.

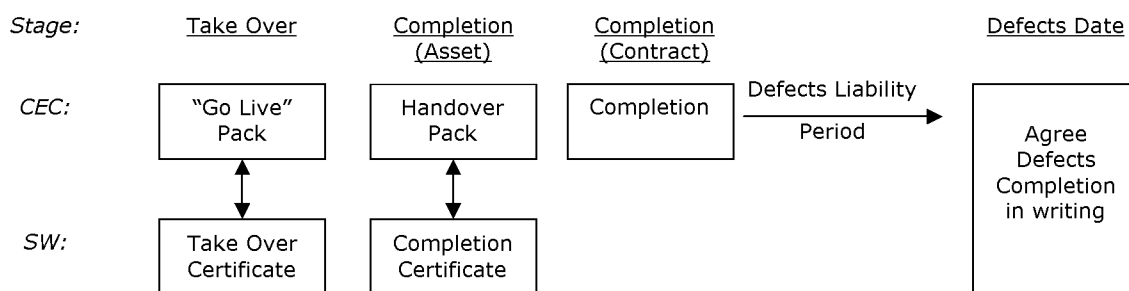
## Acceptance/Handover Obligations

The CEC-SW Agreement also does not set out any acceptance obligations, neither does CDM strictly apply between the parties because, as a 3<sup>rd</sup> Party, SW are not a duty holder in respect of the construction contract.

Notwithstanding the absence of guidance under the above legislation or agreements, in transferring assets between the undertakers post-completion, an agreed documented acceptance procedure is preferable and represents best-practice.

The absence of specific guidance opens up for making a reasonable interpretation, and CEC would cite a precedent for this in the 3<sup>rd</sup> Party 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:



<i>Represents:</i>	Turn of flow Water into service Sewer in service Beneficial use Asset Transfer	Acceptance (Asset) Handover deliverables	Acceptance (Contract)	End of Defects Liability Period.
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In line with this process, acceptance should comprise the following two elements:

- Completion of agreed scope; and
- Completion of handover deliverables.

### Completion of Agreed Scope

Scope definition flows from the details cross-referenced in various sections of the CEC-SW Agreement, such as:

- Section 4 – process for development of scope
- Section 2.7 – reference to SW Standards & Specifications
- Section 2.8 – Stray current protective measures
- Section 6.2 – Like for like replacement
- Etc.

On this basis, designs have been agreed by CEC and SW prior to works, and are contained in drawings, schedules and post-Agreement TQ's / records of approval (Change Control). CEC's

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position assumes that these constitute the Agreed Scope of Diversion Works and the “necessary measures” referred to in NRSWA.

#### Handover Deliverables

Contents of the Take Over and Completion Checklists have also been agreed. The legacy MUDFA works present issues in a number of these areas, however, the only item of dispute in relation to the post-September 2011 works is the SW request that the Health & Safety File contain’s details of the tram infrastructure in addition to the SW-CEC diversion works’ assets. In respect of this, CEC would point to:

- The fact that the 3rd Party Agreement pertains only to the Advanced Diversion Works defined in Clause 1.1.3;
- Both NRSWA and Clause 1.1.5 of the 3<sup>rd</sup> Party agreement defines the “apparatus” as the utility assets only;
- CEC acknowledges that H&S information will be issued to SW when the tram infrastructure is handed over to CEC and that this information should not be a material consideration in achieving handover and completion of the utility works.

As a result CEC propose that SW sign off the individual completion certificates on the basis of the utility information provided. Additional details relating to the tram infrastructure will be issued when the works are handed over to CEC.