

To: Edmund Ward[Edmund.Ward@ofgem.gov.uk]
From: Marcus Porter
Sent: 2016-11-01T18:40:14Z
Importance: Normal
Subject: FW: NIRHI Admin Arrangement : Urgent response to DETI [OFFICIAL Internal Only]
Received: 2016-11-01T18:40:16Z

From: Keith Avis
Sent: 16 October 2012 14:57
To: Marcus Porter; Ruth Lancaster; Mary Smith
Subject: NIRHI Admin Arrangement : Urgent response to DETI

Marcus, Ruth cc: Mary

Please find below, the updated suggested response to DETI. This should reflect the wording agreed at our meeting, suffice to say if you have any suggestions to the wording (rather than comments please) grateful if you could flag this to me by return. I do need to get this to DETI this evening, so a quick response would be much appreciated.

1. We note that it is an informal agreement without the status of a legally binding document. That being the case, if GEMA was to breach any provision or were to terminate the Agreement, DETI would have no legal recourse. We are not entirely comfortable with this position. Grateful if you could outline your reasoning for adopting this informal approach and also advise us of the position for the GB RHI and for the NIRO (as you are aware we have not been able to have sight of either of these Agreements).

We agreed that the Administrative Arrangement should be an informal arrangement. As is standard practice between Government bodies our relationship is not a commercial contract. The roles derive from statute which is based around one body carrying out functions arising under that legislation which that other Department would otherwise have to carry out itself.

2. Clause 1.1 – Definitions of “Administration Costs” and “Ancillary Activities”

This appears to give GEMA the right to pass through all costs associated with the scheme without exclusion. We are not content with this position. Firstly we need clarity in exactly how NI costs are going to be calculated going forward. For example, we would like a list of the various costs you anticipate and precise information on how DETI costs will be calculated - will it be actuals relating to the NI installations, or will it be a percentage of overall costs? We consider this to be an important area given recent conversations between Fiona and Matthew which have highlighted the unreliability of the estimates contained in the feasibility study and the current difficulty in providing robust projections. Just to be clear, we are going to need some degree of certainty going forward. I am sure you can appreciate we would be unable to agree to a 'carte blanche' on charging which this currently appears to be.

We anticipate providing you with cost estimate assumptions that are based around 3% of GB RHI costs. We will additionally set out a change request process to provide for agreement on unanticipated costs. This will be covered in a separate letter.

3. Under 'ancillary activities' GEMA appears to have an unfettered right to perform any duties it deems appropriate. This would not be acceptable and we would need to see a list of anticipated ancillary activities and would have thought that any additions to this list in the future would need agreement of both parties (and would need to be costed in advance). As discussed, examples of possible "ancillary activities" covered by this definition include, ad-hoc IT issues; ad hoc issues with fraud and compliance team; additional training (specific to smooth running of the operation); more detailed liaison across other parts of Ofgem.

4. Clause 2.2 GEMA's responsibilities

Under (a) (i) – 'in such a manner as it thinks best' – this should presumably be with the agreement of DETI. You agreed to consider the indication of "ancillary activities" (above) before a decision is made whether to delete "in such a manner as it thinks best".

5. **Clause 3 (e)** – grateful for clarity on what is meant by 'matters of common interest and common concern' – we are content to consult GEMA on matters relating to the administration of the NI RHI. Are you thinking wider than this? We confirmed that this would not extend beyond the boundaries of the NIRHI. You subsequently confirmed that the wording should remain as it stands.

6. Clause 5 – Payment of the Administration Costs

We note that you propose that any billing disputes in relation to Administration Costs (i.e. the costs to GEMA of performing the Conferred Functions and the Ancillary Activities) are not adjudicated by an independent party and are decided by GEMA's Chief Operating Officer. This causes us concern particularly when read in conjunction with Clause 1.1. We would require some form of dispute resolution process iro Administration costs and would wish third party involvement where agreement cannot be reached.

We agreed to re-word arrangement so that all efforts are made to resolve disputes between accounting officers – if this was not possible then the cases would need to be put up the management chain for adjudication between officials in our respective organisations. We will need to bear in mind that "deadlock" could arise and that, if it did so, the outcome could conceivably be termination of the arrangements.

7. Clause 7& 8

We will obviously need to agree review dates, breakpoints/notice for termination. Meanwhile, grateful if you could advise exactly what you are suggesting we would have a right of access to in terms of - data, metadata, systems, documentation etc. in the event of termination. Given our investment we would want to be clear on what we can

expect.

In broad terms, the information that would be provided would be that which is sufficient to allow you to operate the scheme, examples here would be installations approved, payments made, applications received.

8. Clause 9.3

Have you some specific examples in mind? DETI would probably want to be informed before such disclosure. We passed on the NAO and Inland Revenue as examples and note that you were content.

9. Clause 12.1 e

DETI would wish the appointment of Counsel to be agreed between GEMA and DETI. Is there any reason why GEMA would be unhappy with this?

We agreed to remove the need to jointly appoint counsel, however the stages covering the provision for joint dispute resolution would remain.

10. We would need the Agreement to include some detail on performance targets, remedies and safeguards in place for underperformance. I cannot see anything on these issues in the current draft.

As there is not a standard contractual arrangement between us, performance reporting from one party to another would not be appropriate. This is consistent with the arrangements in place for the other schemes that we operate. Of course, we do recognise that you will wish to track scheme progress and we would be happy to agree the communications and information sharing necessary to ensure the appropriate ongoing operation of the scheme.

11. We will also require a right of audit entry to be included – this was discussed some months ago.

In line with other comments about the contractual arrangement, the right of audit entry does not sit well with our statutory roles. Again, it is recognised that you will wish to track scheme progress and we would suggest that senior managers/Directors should discuss the communications and the exchange of information that will be most beneficial to support scheme delivery

Keith Avis

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[Internal Only]

To: Edmund Ward[Edmund.Ward@ofgem.gov.uk]
From: Marcus Porter
Sent: 2016-11-01T18:40:30Z
Importance: Normal
Subject: FW: NIRHI Admin Arrangement : Urgent response to DETI [OFFICIAL Internal Only]
Received: 2016-11-01T18:40:31Z

From: Marcus Porter
Sent: 17 October 2012 10:20
To: Keith Avis; Ruth Lancaster; Mary Smith
Subject: RE: NIRHI Admin Arrangement : Urgent response to DETI

Keith

Sorry not to have managed to get back to you yesterday evening, though you'll forgive me I hope for pointing out that we do have other urgent commitments to meet in addition to NI RHI and that both Ruth and I regularly work well in excess of our conditioned hours. Moreover if optimum outcomes are to be secured we do need to be able to spend an adequate amount of time considering what should be our legal advice before we provide it.

Ruth and I have now discussed and our suggested amendments appear below in bold.

From: Keith Avis
Sent: 17 October 2012 08:41
To: Marcus Porter; Ruth Lancaster; Mary Smith
Subject: RE: NIRHI Admin Arrangement : Urgent response to DETI

Marcus cc: Ruth

Can I please have your comments/clearance on my suggested reply (below). As I have reflected the points that we discussed at our meeting yesterday lunchtime I was of the impression that this would be a quick turnaround. I really need to get back to DETI asap here. Sorry to be a pain and chase but I need to move this forward.

Many thanks
Keith

From: Keith Avis
Sent: 16 October 2012 14:57
To: Marcus Porter; Ruth Lancaster; Mary Smith
Subject: NIRHI Admin Arrangement : Urgent response to DETI

Marcus, Ruth cc: Mary

Please find below, the updated suggested response to DETI. This should reflect the wording agreed at our meeting, suffice to say if you have any suggestions to the wording (rather than comments please) grateful if you could flag this to me by return. I do need to get this to DETI this evening, so a quick response would be much appreciated.

Introduction

We have carefully considered the various points raised by you in relation to the first draft of the administrative arrangements and, following internal discussion, can now respond to each in turn as follows below:

1. We note that it is an informal agreement without the status of a legally binding document. That being the case, if GEMA was to breach any provision or were to terminate the Agreement, DETI would have no legal recourse. We are not entirely comfortable with this position. Grateful if you could outline your reasoning for adopting this informal approach and also advise us of the position for the GB RHI and for the NIRO (as you are aware we have not been able to have sight of either of these Agreements).

We agreed that the Administrative Arrangement should be a **non-legally binding arrangement setting out at a high level the principles on which the working relationship between our respective organisations in relation to the scheme will be based. an informal arrangement. As is standard practice between Government bodies our relationship is not a commercial contract. The roles derive from statute which is based around one body carrying out functions arising under that legislation which that other Department would otherwise have to carry out itself.**

2. Clause 1.1 – Definitions of "Administration Costs" and "Ancillary Activities"

This appears to give GEMA the right to pass through all costs associated with the scheme without exclusion. We are not content with this position. Firstly we need clarity in exactly how NI costs are going to be calculated going forward. For example, we would like a list of the various costs you anticipate and precise information on how DETI costs will be calculated - will it be actuals relating to the NI installations, or will it be a percentage of overall costs? We consider this to be an important area given recent conversations between Fiona and Matthew which have highlighted the unreliability of the estimates contained in the feasibility study and the current difficulty in providing robust projections. Just to be clear, we are going to need some degree of certainty going forward. I am sure you can appreciate we would be unable to agree to a 'carte blanche' on charging which this currently appears to be.

We anticipate providing you **separately with a cost estimate and a set of cost assumptions that are based around**

3% of GB RHI costs. We will additionally set out a change request process ~~for to provide for~~ ~~unanticipated costs~~ ~~agreeing revised budgets setting out the process for dealing with changes and unanticipated costs.~~ **This will be covered in a separate letter.**

3. Under 'ancillary activities' GEMA appears to have an unfettered right to perform any duties it deems appropriate. This would not be acceptable and we would need to see a list of anticipated ancillary activities and would have thought that any additions to this list in the future would need agreement of both parties (and would need to be costed in advance). As discussed, examples of possible "ancillary activities" covered by this definition include, ad-hoc IT issues; ad hoc issues with fraud and compliance team; additional training (specific to smooth running of the operation); ~~more detailed liaison across other parts of Ofgem/DN~~ meaning unclear, so substitute something else, e.g. "running NI RHI enquiry line".

4. Clause 2.2 GEMA's responsibilities

Under (a) (i) - 'in such a manner as it thinks best' - this should presumably be with the agreement of DETI. ~~You agreed to consider the indication of "ancillary activities" (above) before a decision is made whether to delete "in such a manner as it thinks best". You were going to get back to us with your views on whether or not this should be retained in the light of our previous discussion.~~

5. **Clause 3 (e)** - grateful for clarity on what is meant by 'matters of common interest and common concern' - we are content to consult GEMA on matters relating to the administration of the NI RHI. Are you thinking wider than this? We confirmed that this would not extend beyond the boundaries of the NIRHI, ~~matters affecting the scheme or affecting the Authority in its role in relation to the Scheme.~~ You subsequently confirmed that the wording should remain as it stands.

6. Clause 5 - Payment of the Administration Costs

We note that you propose that any billing disputes in relation to Administration Costs (i.e. the costs to GEMA of performing the Conferred Functions and the Ancillary Activities) are not adjudicated by an independent party and are decided by GEMA's Chief Operating Officer. This causes us concern particularly when read in conjunction with Clause 1.1. We would require some form of dispute resolution process iro Administration costs and would wish third party involvement where agreement cannot be reached.

We agreed to re-word ~~the arrangements~~ so that all efforts are made to resolve disputes between accounting officers - if this was not possible then the cases would need to be put up the management chain for adjudication between ~~senior~~ officials in our respective organisations. We will need to bear in mind that "deadlock" could arise and that, if it did so, the outcome could conceivably be termination of the arrangements.

7. Clause 7& 8

We will obviously need to agree review dates, breakpoints/notice for termination. Meanwhile, grateful if you could advise exactly what you are suggesting we would have a right of access to in terms of - data, metadata, systems, documentation etc., in the event of termination. Given our investment we would want to be clear on what we can expect.

~~In broad terms, the information that would be provided would be that which is sufficient to allow you to operate the scheme, examples here would be installations approved, payments made, applications received. This is provided for in paragraph 7.4 of the administrative arrangements. The provision is very wide with a view to being as helpful as possible. In broad terms we would aim to provide you with sufficient information to enable you to operate the scheme. However consideration would need to be given at the time to exactly what this would encompass, having regard to any relevant legal constraints.~~

8. Clause 9.3

Have you some specific examples in mind? DETI would probably want to be informed before such disclosure. We ~~passed on discussed examples such as~~ the NAO and Inland Revenue ~~as examples~~ and note that you were content ~~with the paragraph as drafted.~~

9. Clause 12.1 e

DETI would wish the appointment of Counsel to be agreed between GEMA and DETI. Is there any reason why GEMA would be unhappy with this?

We agreed to ~~delete paragraph 12(1)(e) of the arrangements remove the need to jointly appoint counsel,~~ however the stages covering the provision for joint dispute resolution ~~up to and including Senior Civil Service and Director level~~ would remain.

10. We would need the Agreement to include some detail on performance targets, remedies and safeguards in place for underperformance. I cannot see anything on these issues in the current draft.

Given that the relevant primary legislation here envisages that, under the arrangements to which it refers, the Authority will effectively assume the role of DETI in relation to the exercise of the relevant functions, the Authority, in order to ensure that it complies with general administrative law requirements, is obliged to act independently in the exercise of its discretion when administering the scheme and without accountability to DETI, ~~As there is not a standard contractual arrangement between us,~~ so performance reporting from one party to another would not be appropriate. ~~This is consistent with the arrangements in place for the other schemes that we operate.~~ Of course, we ~~do~~ recognise that you will wish to ~~track scheme~~ be aware of the progress of the scheme and we would be happy to agree the ~~processes~~ for communications and liaison to establish in more detail how we will work together for the benefit of the scheme. This is consistent with the arrangements we have in place for other schemes that we ~~operate~~ information-sharing necessary to ensure the appropriate ongoing operation of the scheme.

11. We will also require a right of audit entry to be included - this was discussed some months ago.

In line with ~~other~~ our comments above about the nature of our legal obligations under the Energy Act 2011, ~~contractual arrangement,~~ the right of audit entry does not sit well with our respective statutory roles. Again, it is recognised that you will wish to track need to be aware of scheme progress and, as with the previous point, we suggest that processes for communications about the operation of

the scheme are agreed – involving senior managers and Directors as appropriate. we would suggest that Senior Managers/Directors should discuss the communications and the exchange of information that will be most beneficial to support scheme delivery

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