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## Reasons for issuing a Waiver Notice

### Tideway's procurement provisions for certain professional services and legal services contracts

#### Introduction

On 21 August 2015 Ofwat granted a [project licence](#) to Bazalgette Tunnel Limited (trading as Tideway) to carry out all activities described in the [Project Specification Notice](#) apart from those activities that Thames Water Utilities Limited (Thames Water) is to carry out under the [Preparatory Work Notice](#) in respect of the Thames Tideway Tunnel Project (the Project).

At the same time, we issued a [notice](#) under regulation 6(8) of the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 ([the SIP Regulations](#)) dis-applying to a limited extent Tideway's obligation to apply the procurement provisions set out in the SIP Regulations (referred to below as a 'Waiver Notice').

In January 2016 Tideway applied for a further waiver in respect of certain professional services related to its financing arrangements and specific legal services contracts. After [consultation](#), we issued a [second Waiver Notice](#) on 29 February 2016 to take effect on 1 March 2016. In accordance with section 195A of the Water Industry Act 1991 (as applied by the SIP Regulations), this document sets out the reasons for our decision to issue a second Waiver Notice, also known as **Regulation 6(8) Notice No. 1 of 2016**.

#### Relevant background

The SIP Regulations apply a procurement regime to the Project which the incumbent water or sewerage undertaker (in this case Thames Water) or the designated licensed IP (in this case Tideway) must follow in circumstances where the Utilities Contracts Regulations 2006 (the UCR) or the Public Contracts Regulations 2015 (the PCR) do not impose a requirement to conduct a competitive tender process. However, regulation 6(8) of the SIP Regulations permits Ofwat to issue a notice to dis-apply this regime (or aspects of the regime) in relation to the licensed IP.

The second Waiver Notice was issued in accordance with regulation 6 (8) of the SIP Regulations and it waives the obligation on Tideway to conduct a competitive tender process:

- where the licensed IP seeks offers in respect of contracts for the provision of certain specified professional services required for Tideway's financing and corporate arrangements, to the extent that those services are not paid for by customers; and
- in respect of three specified contracts for legal services;

## **Reasons for issue of second Waiver Notice**

Tideway's application for a further waiver related to exemptions in respect of:

1. the procurement of services that relate to professional services related to its financing and corporate arrangements, that will be paid for by Tideway's shareholders, rather than by customers; and
2. three specified legal services contracts, some of which will be paid for by customers

## **Waiver in respect of Tideway's financing and corporate arrangements**

Having considered Tideway's request for a broad exemption in respect of professional and ancillary services not paid for by customers, we granted a narrower exemption which applies in respect of certain specified professional services relating to Tideway's financing and corporate arrangements and only to the extent that those services will be paid for by its shareholders rather than customers.

We are satisfied that customers will not be negatively affected by this second waiver, in that only services paid for by shareholders will be covered by this exemption. We also accept that the nature of these specialist services is such that a simpler and more direct procurement may be more appropriate than the more complex procurement required by the modified UCR regime.

Schedule 2 to the [Waiver Notice](#) lists the professional services in respect of which the waiver will apply:

- Banking services
- Investment banking services and related services
- Brokerage and related securities and commodities services

- Trust and custody services
- Financial consultancy, financial transaction processing and clearing-house services
- Foreign exchange services
- Loan brokerage services
- Legal advisory and representation services
- Legal documentation and certification services
- Legal advisory and information services
- Accounting and auditing services
- Fiscal services
- Business and management consultancy and related services

## **Waiver in respect of contracts with specified legal providers**

The UCR, which apply to other water and wastewater companies, provide an exemption for the appointment of legal advisers. In contrast, under the modified UCR regime, Tideway would need to carry out a OJEU (Official Journal of the European Union) process to procure legal services to the extent that the value of the contracts exceed the thresholds referred to in the [first Waiver Notice issued in August 2015](#).

Schedule 1 to the [Waiver Notice](#) lists the specified legal services providers with which Tideway has entered into contracts, and in respect of which the second Waiver Notice applies. They are:

- Berwin Leighton Paisner LLP
- Herbert Smith Freehills LLP
- Sharpe Pritchard LLP

We supported the grant of the waiver in respect of these contracts for the following reasons:

- We have reviewed the rates and terms and conditions which will apply to the agreement with Tideway, and consider them to be broadly reflective of market rates and accepted market terms and conditions. We therefore consider that the costs associated with carrying out a full OJEU tender process are likely to outweigh any benefit which might accrue to customers.
- Granting this waiver is broadly in line with the accepted principle of treating Tideway in a manner equivalent to a medium sized water and wastewater company in some circumstances.
- We consider that Tideway has made out a reasonable case that the three companies listed above are best placed to continue advising Tideway in the specified areas, including for reasons of efficiency.

## Conclusion

From 28 January to 25 February 2016, we [consulted](#) on our proposal to issue Tideway with a second Waiver Notice in respect of the above contracts or offers for contracts. We received [one response to this consultation from Thames Water](#) in support of the proposal to grant a further waiver in respect of certain contracts.

We issued Tideway with a [second Waiver Notice](#) on 29 February 2016 to take effect on 1 March 2016 and consider that nothing in this Notice shall prevent any further exercise by Ofwat of its powers under regulation 6(8) of the SIP Regulations.