

Reasons for issuing a Waiver Notice

1. Introduction

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

The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 ([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 infrastructure provider (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 procurement regime that applies to the Project under the SIP Regulations is a modified form of the procurement regime in the UCR (the modified procurement regime).

At the same time that we issued a project licence to Tideway, we also issued a [notice](#) under regulation 6(8) of 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 particular, this Waiver Notice provided that Tideway should benefit from some of the exemptions that apply to all utilities under the UCR. It also provided that Tideway did not have to follow the modified procurement regime for contracts with a monetary value under a specified threshold. This threshold is the same threshold that applies to all utilities under the UCR.¹

On January 28 2016 we granted a further [waiver](#) in respect of certain professional services related to its financing arrangements and specific legal services contracts.

In October 2016 Tideway applied for a third waiver in respect of two software contracts. We agreed to grant this waiver and on 25 November 2016 issued a third Waiver Notice: **Regulation 6(8) Notice No. 1 of 2016**. This third Waiver Notice came into effect on 1 December 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 this third Waiver Notice.

¹ The current thresholds are £328,352 for a supply or a services contract, and £4,104,394 for a works contract

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3. Reasons for issue of third Waiver Notice

Tideway's application for a further waiver related to the following contracts for services:

1. Microsoft software used by Tideway to support its activities and those of its project manager; and
2. Computer Aided Design (CAD) software provided by Bentley Systems.

a. Waiver in respect of Microsoft software

Having considered Tideway's request for a waiver in respect of the Microsoft software to be used by Tideway and their project managers, CH2M Hill, we granted a waiver. Tideway is currently using Microsoft software and considers that the continued use of this software is essential to its business. While there are different providers of "software advisor" services which must be nominated in Microsoft agreements, all agreements are entered into directly with Microsoft and payments made directly to Microsoft. Tideway understand from software procurement experts that the selection of the software advisor would not impact the terms, conditions and prices applicable as between Tideway and Microsoft.

We are satisfied that granting a waiver in these circumstances is appropriate and represents value for money for customers.

b. Waiver in respect Bentley CAD software

Tideway gave two reasons why undertaking a procurement exercise for a potential replacement product for the Bentley software would not represent value for money:

1. Bentley software has been used to produce the design information that supported the Development Consent Order which consists of over a 100,000 records. There are also thousands of further records which Tideway holds in a data creation area, all of which would need migrating to a new system. There is an inherent risk of data corruption in the migration and translation process and the risk that the metadata supporting the records (including version control and document relationship hierarchy information) may be lost.
2. Although Tideway has not mandated the use of particular design software, the Main Works Contractors are also using Bentley software for information management and CAD authoring. The use of a common platform enables streamlined collaboration across the project.

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Again we consider that the request by Tideway makes a convincing case that a competitive tender process will not represent value for money in respect of the Bentley design software.

4. Why we did not consult prior to issuing this waiver notice

We did not consult prior to issuing this waiver notice as we considered that there was a very clear case for the waivers and the issue of the waiver notice was unlikely to be contentious. We consulted before issuing the first two waiver notices and only received one response to the first consultation and no response to the second consultation. Those waivers were more complex than this third waiver and we think it was appropriate that we consulted prior to issuing the waivers. If Tideway applies for further waivers, we will consult if we consider that the application raises issues that are likely to be complex or contentious.