

Consultation to issue a further waiver notice to Bazalgette Tunnel Limited (trading as Tideway)

About this document

This document seeks comments on Ofwat's proposal to issue a further waiver notice to Bazalgette Tunnel Limited (trading as Tideway), the infrastructure provider (IP) appointed by Thames Water to deliver the Thames Tideway Tunnel Project (the Project).

Since issuing Tideway with a project licence, on 24 August 2015, we have issued [four] notices under regulation 6(8) of the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 (the Regulations) dis-applying to a limited extent Tideway's obligations to apply the procurement provisions set out in the Regulations. Tideway has now requested a further waiver which we have considered and propose granting, subject to any consultation responses we receive.

1. Responding to this consultation

We welcome your responses to this consultation by close of business on 4th December 2017.

You can email your responses to Richard.Barton@ofwat.gsi.gov.uk or post them to:

The Thames Tideway Tunnel Project

Ofwat

Centre City Tower

7 Hill Street

Birmingham B5 4UA.

We will publish responses to this consultation on our website at www.ofwat.gov.uk, unless you indicate that you would like your response to remain unpublished. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with access to information legislation – primarily the Freedom of information Act 2000 (FoIA), the Data Protection Act 1998 and the Environmental Information Regulations 2004.

If you would like the information that you provide to be treated as confidential, please be aware that, under the FoIA, there is a statutory ‘Code of Practice’ which deals, among other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that we can maintain confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on Ofwat.

2. Consultation question

We invite comment on our intention to issue a further waiver notice to Tideway in respect of:

- the hire of vessels from Collins River Enterprises Limited (Thames Clippers) to provide river-based tours of Tideway's foreshore construction sites as part of its project induction and stakeholder programme.

3. Overview of the regulatory framework for specified infrastructure projects

The Project is of unprecedented scale, size and complexity in the water sector in England and Wales, and is the first project to be delivered under a new regulatory framework. That framework allows for certain large and complex infrastructure projects to be delivered by infrastructure providers that are:

- selected by the incumbent undertaker following a competitive procurement; and
- regulated by Ofwat under a project licence.

This new framework was introduced by the Flood and Water Management Act 2010 which, among other things, amended the Water Industry Act 1991 ('the Act or WIA91') by inserting a new part ('Part 2A – Regulation of Provision of Infrastructure'). The Regulations were made under Part 2A of the Act on 27 June 2013 and came into force on 28 June 2013.

The Regulations apply a modified version of the general duty imposed on Ofwat under section 2 of the Act¹. This modified duty provides that in exercising its powers conferred by virtue of the Regulations (which includes the power to grant a waiver notice), Ofwat will do so in a manner which it considers is best calculated to:

- further the consumer objective;
- secure that the functions of a water undertaker, a sewerage undertaker and an IP are properly carried out;

¹ The Water Act 2014 adds a new duty to our primary duties: to 'further' the resilience objective which can be summarised as securing the resilience of both water systems and services, in the long term, making clear that this not only includes issues of supply but also embraces demand. However, as the Regulations came into effect before the Water Act 2014 was passed, this new duty does not apply to our regulation of infrastructure providers. Any amendments to the WIA91, which are introduced after the Regulations came into effect, will require a consequential amendment to the Regulations if those WIA91 amendments are to apply to the regulation of infrastructure providers.

- secure that companies holding appointments under Chapter 1 of Part 2 of the Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions;
- secure that the functions of a licensed infrastructure provider are properly carried out; and
- secure that relevant licensed infrastructure providers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions.

For the purpose of regulating specified infrastructure projects, the Regulations introduce new provisions into the Act and also apply particular provisions of the Act with or without modification (referred to below as 'the modified Act').

The Regulations allow the Secretary of State or Ofwat to specify an infrastructure project as a project that must be put out to competitive tender. On 4 June 2014, following a public consultation, the Secretary of State specified the Project under the Regulations. The [Project Specification Notice](#), which sets out the scope of the Project, and the [Preparatory Work Notice](#), which sets out what Thames Water is required or permitted to do in relation to the Project, came into effect on 5 June 2014.

At a high level, the Project Specification Notice describes the Project as including:

- the design, construction, testing and commissioning of the Thames Tideway Tunnel and associated infrastructure; and
- once constructed and accepted, the operation and maintenance of certain IP-owned structures.

In line with its obligation to put the specified project out to tender, Thames Water conducted a competitive procurement for an IP to deliver the Project. On 14 July 2015 Thames Water announced Tideway as the preferred bidder to be appointed as an IP to deliver the Project. Ofwat then consulted on its intention to award Tideway a project licence and on 24 August it granted Tideway [a project licence](#).

4. Proposal to issue a further waiver notice under the Regulations

4.1 The legal framework

The Regulations apply a procurement regime to specified projects which the incumbent water or sewerage undertaker (in this case Thames Water) and the licensed IP must follow in circumstances where the Utilities Contracts Regulations 2006 (the UCR) or the Public Contracts Regulations 2015 do not impose a requirement to conduct a competitive tender process. However, the Regulations permit Ofwat to issue a notice to disapply this requirement in relation to the licensed IP. We refer to this modified procurement regime below, as the “modified UCR regime”. When we refer to a Waiver Notice we are referring to a notice disapplying the requirement on the IP to comply with the procurement regime set out in the Regulations.

4.2 Issue of previous Waiver Notices

In July-August 2015 we [consulted](#) on our intention to issue a waiver notice to the IP under the Regulations, and on 24 August 2015, we issued Tideway with a [waiver notice](#) dis-applying the procurement regime in the Regulations in respect of specified construction related contracts and the Project Management Contract. In addition, Ofwat dis-applied the procurement regime in the Regulations in respect of some general categories of contracts – in particular, all contracts below a specified threshold value. In granting that waiver the principle was accepted by Ofwat that Tideway should, in appropriate circumstances, be treated in an equivalent way to a medium sized water company, which would be subject to the UCR and would therefore benefit from exemptions under the UCR. While the modified UCR regime applies some provisions of the UCR to the IP, it does not include the various exemptions.

On 28 January 2016 we granted a further [waiver](#) in respect of certain professional services related to its financing arrangements and specific legal services contracts. On 25 November 2016 we granted a further [waiver](#) in respect of two software contracts. That waiver came into effect on 1 December 2016. On 18 October 2017 we issued a further waiver in respect of a software contract. We consulted prior to issuing the first three waiver notices but we did not consult prior to issuing the last two waiver notices (for various software contracts) 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.

4.3 Application for further waiver

Tideway has now requested a further waiver which we have considered. Tideway hires vessels from Collins River Enterprises Limited (Thames Clippers) to provide river-based tours of the Project's foreshore construction sites as part of its project induction and stakeholder programme.

The project induction tour takes three hours and covers all of Tideway's foreshore sites between the Thames Barrier and Putney. Tour attendees are provided with general information about the project as well as site specific information. The tour is attended by all Tideway and project manager staff, as well as attendees from all of the main works contractors. It is a key element of Tideway's internal communications strategy and ensures that key personnel are fully briefed on critical elements of the project and the project's vision.

Tideway also hires a smaller vessel from the Thames Clippers fleet, the Orion Clipper, which is used to provide project tours to key stakeholders (including elected representatives) and investors. This vessel can achieve close access to the project sites and can be hired at different times of the day and week to suit stakeholder availability.

To provide the river based tours, Tideway requires a vessel that can:

- undertake the full tour within 3 hours (to enable two tours per day to be run if necessary);
- access all of the project's foreshore sites at all states of tide, including being able to comply with under keel clearance at low tide and air draft clearance to bridges at high tide; and
- provide capacity of at least 100 places per tour to allow Tideway to induct the high number of people required to work on the project.

The Thames Clippers fleet provides a high-speed service to all parts of the river at all states of tide. The vessels in the Thames Clippers fleet have a maximum capacity of 150 passengers.

Tideway says that it is satisfied that there are no other firms operating vessels on the River Thames capable of fulfilling the requirements for the river-based site tours. While it is aware of at least one other vessel that has sufficient passenger capacity (circa 200 passengers), this vessel is unable to clear all London bridges at all states of the tide and would be unable to complete the tour within 3 hours. The level of demand from Tideway is unlikely to be sufficient to encourage non-London based operators to establish operations on the Thames.

Tideway says that it will continue to monitor the market and will reconsider its use of Thames Clippers should alternative vessels become available. Where requirements enable it, it will also ensure that alternative suppliers for site tours are considered. For example, it has engaged Woods River Cruises on multiple occasions for investor relations activities.

4.4 Proposal to grant a further Waiver Notice

Regulation 50(1)(c) of the UCR provides an exemption “where the works, supplies or services can be supplied only by a particular economic operator.” As a general principle, we have approached previous applications from Tideway for a waiver

under regulation 6(8) of the Regulations with a view to putting Tideway in an equivalent position to undertakers, where this is appropriate. If Tideway is correct that there are no other London based operators capable of providing this service, we consider that the requirements of regulation 50(1)(c) would have been met had Tideway been a utility regulated by the UCR. We therefore consider that Tideway has presented a good case for a waiver of its procurement obligations in respect of this contract.

5. Next steps

This consultation ends on **24 December 2017**.

We will then consider the responses received to this consultation and decide whether to proceed with our proposal to grant the requested waiver.

If we decide to issue the proposed Waiver Notice we will, in accordance with section 195A of the Act, set out the reasons for our decision.

Ofwat (The Water Services Regulation Authority) is a non-ministerial government department. We regulate the water sector in England and Wales. Our vision is to be a trusted and respected regulator, working at the leading edge, challenging ourselves and others to build trust and confidence in water.

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