

9 January 2018

Trust in water

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

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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) delivering 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 30 January 2018.

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this consultation on our website at www.ofwat.gov.uk, unless you indicate that you would like your response to remain unpublished.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 Tideway with a further general waiver notice in respect of contracts for the award of certain categories of social and other specific services under Regulations 90 to 93 and Schedule 2 of the Utilities Contracts Regulations 2016 (UCR). This includes education and vocational health services, health and social services, legal services and recreational, cultural and sporting services. If granted, the effect of this waiver will be that Tideway's normal procurement obligations under the Regulations will be waived in respect of this category of contract if the value of the contract is below a specified threshold (currently ££820,370). Above that amount, Tideway will have to conduct a light touch procurement. This will place Tideway in a similar position to undertakers and other utilities.

3. Overview of the regulatory framework for specified infrastructure projects

The Project 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:

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

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, the Secretary of State specified the Project under the Regulations by way of a [Project Specification Notice](#).

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 the IP to deliver the Project. Ofwat then consulted on its intention to award Tideway a project licence and Tideway was granted [a project licence](#) on 24 August 2015.

Proposal to issue a further waiver notice under the Regulations

3.1 The legal framework

The Regulations provide that an infrastructure provider (IP) must comply with a modified form of the UCR “unless the Authority otherwise allows by notice” (Regulation 6(8)). 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

We have already issued Tideway with four Waiver Notices. Some of these have been in respect of specific named contracts and some have been general in nature – ie applying to a defined category of contracts.

The first [waiver notice](#) was issued to Tideway on 24 August 2015, on the same day that we issued Tideway with its project licence. This first notice disappplied the procurement regime in the Regulations in respect of specified construction related contracts and the Project Management Contract. It also dis-applied the procurement regime in the Regulations in respect of some general categories of contracts – in particular it provided that Tideway should benefit from some of the exemptions that apply to all utilities under the UCR and it 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

¹ The current thresholds are £363,424 for a supply or a services contract, and £4,551,413 for a works contract.

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 second [waiver](#) in respect of certain professional services related to its financing arrangements and specific legal services contracts. On 25 November 2016 we granted a third [waiver](#) in respect of two software contracts. That waiver came into effect on 1 December 2016. On 18 October 2017 we issued a fourth [waiver](#) in respect of a software contract. From 20th November 2017 to 4th December 2017, we [consulted](#) on a proposal to issue Tideway with a fifth Waiver Notice in respect of contracts with Thames Clippers for river boat tours. We anticipate issuing a further waiver notice in respect of Thames Clippers in the near future.

4.3 Application for further waiver

Tideway has now requested a further waiver which we have considered and propose granting, subject to any consultation responses we may receive.

Tideway has requested that the higher threshold that applies to contracts for “social and other specific services” should be extended to it. Currently Tideway must put out to tender contracts for these services if those services fall above the threshold of £363,424. For other utilities, to whom the UCR apply, there is a higher threshold of £820,370 and above that higher threshold a “light touch” procurement regime applies.

Granting Tideway’s request under this heading would mean 1) excluding the application of the modified UCR regime for contracts for social and other specific services listed in Schedule 2 of UCR that fall below the higher threshold for these services (£820,370);

and 2) extending the light-touch regime set out in the UCR to Tideway for all contracts for social and other specific services above that threshold. We propose doing this by importing (with some modification) the processes in Regulations 91 and 92 of UCR 2016 to Tideway for above threshold contracts.

4.4 Proposal to grant a further Waiver Notice

The first waiver notice that was issued to Tideway extended a number of the general exemptions to Tideway. However, when granting the first waiver we did not extent the general exemption in relation to the award of social and other specific services as we considered that to do so would have resulted, due to relevant legislation applicable at the time, in Tideway effectively being placed in a better position than regulated utilities. This was because the legislation at the time did not exempt utilities entirely but rather required them to carry out at least a basic tender process in respect of the award of these contracts. The legislation has now changed and we now consider that extending this exemption to Tideway will put it in an equivalent position to other undertakers (rather than a better position).

In line with the principle that, where appropriate, Tideway should have the same procurement obligations as water and sewerage undertakers, we are minded to grant this request, subject to considering any responses received to this consultation.

5. Next steps

This consultation ends on **30 January 2018**.

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.