
Reasons for issuing a Waiver Notice in respect of a contract between Tideway and Microsoft

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 2016 (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 first 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 (the UCR financial threshold).¹

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

In June 2018 Tideway applied for a waiver in respect of services provided to Tideway by Microsoft in respect of software provided to Tideway and its project managers, CH2M Hill. We agreed to grant a further [waiver](#) on 1 October 2018, coming into effect on 2 October 2018.

In accordance with section 195A of the Water Industry Act 1991 (as applied by the SIP Regulations), this document sets out the reasons for granting this further Waiver Notice.

Reasons for issue of Waiver Notice

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

1. Services provided to Tideway by Microsoft in respect of software used by Tideway and its project managers, CH2M Hill.

On 25 November 2016 Ofwat issued a Waiver Notice: [Regulation 6\(8\) Notice No. 1 of 2016](#), which came into effect on 1 December 2016. That waiver was in respect of a contract for Microsoft software used by Tideway and its project managers, CH2M Hill. The relevant contract expired on 31 July 2018 and Tideway's application for a further waiver is in respect of the new contract it has entered into with a reseller of Microsoft software licensing and associated support services.

Tideway's application says that the Microsoft software is essential to its core day to day operations and the licensing covers a number of products including Microsoft Office, SharePoint, Azure and Skype telephony. The rationale for its request for a waiver is as follows:

“Having a common provider across these products ensures we have a supported and integrated IT ecosystem. Where alternative products are available (for document management or telephony, for example), both internal and external transition costs would be very high and would detract from the benefits of an integrated ecosystem.”

Tideway considers that for other water and waste water companies Microsoft licensing would fall within the scope of the exemption set out in Regulation 50(1)(c) of the UCR on the basis that the services can only be supplied by a particular economic operator for technical reasons and for the protection of intellectual property rights.

Establishing value for money

Prior to its last Microsoft contract terminating, Tideway conducted a review of Microsoft resellers across two different licensing models (enterprise agreement (EA) or cloud solution provider (CSP)). This review included a mini-competition between four accredited Microsoft resellers for both EA and CSP license options, which included a BAFO² round between the top three suppliers. This review found that the best value for money is offered through a CSP licensing model with Softcat pic. A CSP differs from an EA licensing model in that it does not require the same level of minimum licensing commitment. Charges flex up or down each month depending on the number of users and the commitment is for a 12-month rather than 3-year term.

Tideway considered that this flexibility would provide a key advantage as its licensing demand will reduce over the life of the project. The key disadvantage is that unlike an EA where pricing is fixed for three years, Tideway will be subject to Microsoft price increases. Weighing up the pros and cons, Tideway decided that the fixed pricing under an EA was not enough to outweigh the flexibility and commercial advantages of the CSP model.

Under a CSP the primary contractual relationship is with the reseller rather than Microsoft. According to Tideway, resellers are able to leverage the best reductions in unit costs from Microsoft due to the volume of agreements they place on Microsoft's behalf.

Softcat was selected as Tideway's preferred supplier as it offered the best pricing for a CSP licensing model, which was also better priced than the best ranked EA offer. Although Tideway's Microsoft licensing spend will not exceed the OJEU financial threshold over the initial 12-month commitment with Softcat, it will exceed the OJEU threshold if it renews with Softcat for a further year.

Conclusion

As we did not consult on issuing the first waiver in respect of Tideway's contract for Microsoft services, we see no reason to consult on this further waiver. We considered that the issue of the waiver notice was unlikely to be contentious.

We considered that Tideway has presented a good case that a competitive tender process will not represent better value for money in respect of the purchase of Microsoft software via Softcat and for this reason the waiver was granted.

² Best and Final Offer