

17 June 2019

Trust in water

**Consultation on simplifying various conditions  
of the project licence of Bazalgette Tunnel  
Limited (trading as Tideway)**

## About this document

This document invites comments on our proposal to modify various provisions of the project licence of Bazalgette Tunnel Limited (trading as **Tideway**). This follows the recent simplification and modernisation of the conditions of appointment of water and sewerage companies. We have worked with Tideway to identify where provisions of its licence could be simplified or clarified. This document summarises the proposed modifications we intend to make and invites comments on the proposed changes.

The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013<sup>1</sup> (**the SIP Regulations**) apply, modified or otherwise, the Water Industry Act 1991 (**the Act**) to the regulation of infrastructure providers.

Under section 171A of the Act (as applied by the SIP Regulations), we are able to modify the conditions of an infrastructure provider's licence if it agrees to the changes we are proposing to make. Tideway has provided its indicative consent to the changes proposed in this document.

This document and Annex A to this document constitute a Notice under section 171A(3) of the Act (as applied by the SIP Regulations).

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<sup>1</sup> (SI 2013/1582)

## Responding to this consultation

We invite stakeholders to comment on our proposed modifications by **16 July 2019**.

Responses can be emailed to: [richard.barton@ofwat.gov.uk](mailto:richard.barton@ofwat.gov.uk) or send by post to:

Ofwat  
Centre City Tower  
7 Hill Street  
Birmingham B5 4UA]

Attention: Richard Barton

We will publish responses to this document on our website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk), unless you indicate that you would like your response to remain unpublished.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 General Data Protection Regulation, the Data Protection Act 2018 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. As automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on Ofwat.

# 1. Introduction and Background

## Project licence

A company can be granted a project licence as an infrastructure provider enabling it to carry out a large or complex water or wastewater infrastructure project that has been specified under the SIP Regulations.

Tideway is the first infrastructure provider to be issued with such a [project licence](#). Under its licence it must design, construct, finance, test, commission, operate and maintain the Thames Tideway Tunnel (TTT) in accordance with a [specification notice issued by the Secretary of State](#).

An infrastructure provider must comply with its statutory duties and with the conditions of its project licence. We can take enforcement action using our powers under the Act (as applied by the SIP Regulations) if it fails to do so.

## The context to this work

Tideway's project licence came into effect on 24 August 2015. Tideway is not a water or sewerage company; it is an infrastructure provider. As such, its project licence comprises provisions that are specific to Tideway, and provisions which are similar to a water or sewerage company's conditions of appointment. In drafting Tideway's project licence, provisions that were specific to Tideway were included in appendices to its licence, with the body of the licence being very similar to the appointment conditions of water and sewerage companies. However, where possible and appropriate, a simplified format of water and sewerage companies' conditions was used. The appendices to Tideway's licence deal primarily with the construction period of the project. Once the Tunnel is constructed, Tideway will be regulated in a very similar way to water and sewerage companies and some of the appendices will fall away.

Subsequent to the grant of Tideway's licence, Ofwat agreed on extensive simplification changes to the conditions of appointment of all water and sewerage companies. Most of those changes came into effect on 1 January 2019, and the remainder came into effect on 1 March 2019. Tideway's licence was not amended in that exercise given that significant parts of its licence are bespoke. We have, however, now agreed simplification changes to Tideway's licence. Some of these replicate changes made to water and sewerage companies' conditions of appointment and some are specific to Tideway. None of the changes proposed introduce substantive changes or impose new obligations on Tideway. Rather they are designed to bring further clarity and simplicity to Tideway's licence and, where appropriate, align Tideway's licence with the licences of undertakers.

Ofwat is currently consulting on industry wide changes to introduce the [Board leadership, transparency and governance objectives](#). That consultation closes on

14 June 2019. Once we have considered representations received to that consultation and to this subsequent consultation, we propose implementing the changes to Tideway’s conditions simultaneously. For the avoidance of doubt, the two consultations deal with separate issues and are complementary.

### **Implications of this work**

We expect intangible effects from this exercise. Simplified conditions will set out important obligations of Tideway in a more direct and concise manner, providing it and other stakeholders with more clarity.

Tideway will find it easier to understand what is expected of it. We will find it easier to track its compliance. Finally, stakeholders will have a greater understanding of how we hold Tideway to account.

## **2. What are the changes that we are proposing?**

### **The conditions and provisions covered by this consultation**

The conditions and appendices which are covered by this consultation are set out below.

#### **Table 1 Conditions and Appendices in scope**

Condition F – Regulatory Accounts
Condition K – Regulatory ring-fence
Condition M – Provision of Information to the Authority
Appendix 1 – Calculation of Allowed Revenue
Appendix 2 – Non-Revenue Conditions
Appendix 4 – Defined Terms

### **Summary of proposed changes**

#### **Condition F (Regulatory accounting statements)**

The recent simplification of water and sewerage companies’ licences provided them with a new Condition F that focused solely on what the Regulatory Accounting

Guidelines (**RAGs**) may contain and the checks and balances for making and applying the RAGs. This was in contrast to the previous Condition F which contained a large amount of detailed accounting information which was required of companies. Much of this duplicated material was also in the RAGs. In the new Condition F, duplicated material has been stripped out and instead the Condition now sets the parameters for what the RAGs may contain.

Tideway and Ofwat consider that the new simplified Condition F should also apply to Tideway. We therefore propose replacing the existing condition with the new simplified version subject to minor consequential changes.

### **Condition K (Regulatory ring-fence)**

Tideway's Condition K sets out its ring-fencing obligations. However, when drafted, any information requirements in relation to ring-fencing were put in Condition M which dealt with information more generally. This has proved confusing and as Condition M is now being simplified, it has been decided to remove the information provisions around ring-fencing and put them in the ring-fencing Condition K.<sup>2</sup> This is in line with the approach followed in water and sewerage companies' conditions of appointment. None of the changes to Condition K are substantive.

### **Condition M (Provision of Information to the Authority)**

We propose replacing Tideway's Condition M with the simplified Condition M that, from 1 January 2019, now applies for all water and sewerage companies.

The revised Condition M introduced two substantive changes. It gave Ofwat a broader power to collect information from water and sewerage companies if that information is required to enable us to carry out our functions under any enactment (previously this only referenced our functions under the Water Industry Act 1991).

Previously, Condition M also included various exemptions, one of which was that we could not use Condition M for gathering information from companies for the purposes of section 27 of the Act. Section 27 places a duty on Ofwat to collect certain information (for the purposes of keeping the sector under review), but does not provide a power for doing so. Deleting the exception enables us to use Condition M for collecting information, consistent with our statutory duty under section 27.

The amendment also corrects an incorrect statutory reference.

### **Appendix 1 (Calculation of Allowed Revenue)**

The “**2014/14 RPI Adjustment Factor**” definition found in paragraph 1.1(iii) of the Appendix includes references to both “1/4” and “3/12” in calculation methods

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<sup>2</sup> Please note that it is proposed in the separate industry-wide consultation on the Board leadership, transparency and governance principles, that two of these paragraphs will be deleted.

contained therein. We propose standardising this by referring to “1/4” in both instances.

The last sentence of footnote 5 in paragraph 1.12 has now become redundant. We propose deleting it.

A calculation component of the “**Applicable Change in Cost Indices**” found in subsection (g) of paragraph 1.12 and subsection (g) of paragraph 1.22 relates to an index which is currently referred to without its full name. We propose correcting this error.

Paragraph 1.5 of Part A of the Appendix relates solely to a situation where the project licence award did not occur by 15 September 2015. We propose removing this paragraph as it is now redundant. Consequential amendments must therefore be made to paragraphs 1.2 and 1.6 of Part A.

### **Appendix 2 (Non-Revenue Conditions)**

Paragraphs 2.4 and 7.4 of the Appendix contain errors. We propose correcting them.

Paragraph 7.2 requires Tideway to pay fees on 1 April in any year. In line with the recent simplification changes introduced to Condition N of all water and sewerage companies, we propose amending this to allow for greater flexibility.

### **Appendix 4 (Defined Terms)**

The definition of “**Project Documents**” provides a list of the contracts governing the TTT project, that were in place at licence award. If new contracts are entered into, this definition must be amended. To future proof the definition, we propose adding another limb to cover any other agreement which Tideway and Ofwat agree to be a project document.

## **3. Next steps**

We would like responses to this document by **16 July 2019**.

Subject to comments received, we anticipate that the amendments to Tideway’s project licence will come into effect on **1 August 2019**.

## Appendix 1: Coverage of project licence conditions

Condition/Appendix	Coverage
Condition A	Interpretation and Construction
Condition B	Allowed Revenue
Condition C	[not used]
Condition D	[not used]
Condition E	[not used]
Condition F	Regulatory Accounts
Condition G	[not used]
Condition H	[not used]
Condition I	[not used]
Condition J	[not used]
Condition K	Regulatory ring-fence
Condition L	Disposal of Protected Land
Condition M	Provision of Information to the Authority
Condition N	Fees
Condition O	Revocation and Variation
Appendix 1	Calculation of Allowed Revenue
Appendix 2	Non-Revenue Conditions
Appendix 3	Direct Charging Conditions
Appendix 4	Defined Terms

## **Appendix 2: Proposed modification to project licence conditions**

### **New Condition F: Regulatory accounting statements**

#### **Introduction**

This condition requires the Infrastructure Provider to keep appropriate accounting records which are consistent with guidelines published by the Authority. The Authority will publish the guidelines and revise them, subject to certain procedural protections.

#### **The Regulatory Accounting Guidelines**

- F1 The Authority will publish the Regulatory Accounting Guidelines which will:
- F1.1 relate to the accounting records that must be kept by the Infrastructure Provider and the accounting Information that must be provided by it to the Authority; and
  - F1.2 have the purpose of ensuring that:
    - F1.2.1 the Authority may obtain all appropriate accounting Information in respect of the Licensed Business; and
    - F1.2.2 the financial affairs of the Licensed Business are recorded and reported on, and may be assessed, separately from any other business or activity of the Infrastructure Provider.
- F2 The Regulatory Accounting Guidelines may in particular include provisions in relation to:
- F2.1 the form and content of the accounting records that the Infrastructure Provider is required to keep;
  - F2.2 the form and content of the accounting statements, and any associated reports or analyses, that the Infrastructure Provider is required to prepare;
  - F2.3 any audit of the accounting records and statements that the Infrastructure Provider is required to procure, the terms on which that audit is to be procured, and the basis on which the record and conclusions of that audit must be provided to the Authority; and

- F2.4 the time by which the Infrastructure Provider is required to provide any accounting Information to the Authority and any requirement on the Infrastructure Provider to publish that Information.
- F3 The Regulatory Accounting Guidelines may not require the disclosure of Information which relates solely to a transaction wholly unconnected with the Licensed Business.
- F4 The Authority may, from time to time, revise the Regulatory Accounting Guidelines in any manner that it considers appropriate, provided that, before any revision takes effect, the Authority:
- F4.1 consults the Infrastructure Provider on a draft of the proposed revision;
  - F4.2 has regard to any representations made by the Infrastructure Provider;
  - F4.3 publishes a final version of the revision, incorporating any changes made to the draft following consultation; and
  - F4.4 gives reasonable notice (of at least one month) to the Infrastructure Provider of the date on which that revision will take effect.
- F5 The Infrastructure Provider may notify the Authority, within one month of receiving notice that a revision to the Regulatory Accounting Guidelines will take effect, that it disputes the revision, and in that case:
- F5.1 the question of whether the revision is appropriate shall (unless the Authority withdraws the decision to make it) be referred by the Authority to the Competition and Markets Authority for determination; and
  - F5.2 the revision shall not take effect unless and until the Competition and Markets Authority determines that it shall.

### **Compliance with the Regulatory Accounting Guidelines**

- F6 The Infrastructure Provider must:
- F6.1 prepare a set of regulatory accounting statements, in respect of the twelve month period ending on 31 March in each Charging Year, which are in accordance with the Regulatory Accounting Guidelines; and
  - F6.2 comply with all other requirements that are set out in the Regulatory Accounting Guidelines.

## **Condition K: Regulatory ring-fence**

### **A new paragraph 4.4A to be inserted after paragraph 4.4:**

“4.4A The Infrastructure Provider must publish with its audited accounts for each twelve month period a statement as to whether or not (as at the end of the period) the Infrastructure Provider has available to it sufficient rights and resources other than financial resources, as required by paragraph 4.4 above.”

**Paragraphs 4.1; 4.4; 4.5 and 5 from Condition M to be inserted after paragraph 8 of Condition K as new paragraphs 9 and 10.<sup>3</sup>**

## **New Condition M: Provision of Information to the Authority**

### **Introduction**

This condition requires the Infrastructure Provider to provide information to the Authority (subject to certain limitations) and to co-operate with certain investigations carried out by the Authority for purposes relating to standards of performance.

### **Duty to provide Information**

- M1 The Infrastructure Provider must provide the Authority with any Information that the Authority may reasonably require for the purpose of carrying out its functions under any enactment.
- M2 The Infrastructure Provider must provide any Information required by the Authority by such time, and in such form and manner, as the Authority may reasonably require.

### **Limits on the duty to provide Information**

- M3 The Infrastructure Provider is not required to provide the Authority with Information for the purpose of the Authority carrying out any function under section 17K or 201 of the Water Industry Act 1991<sup>4</sup>, but if the Authority requires

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<sup>3</sup> The consultation on the Board leadership, transparency and governance objectives proposes deleting paragraphs 4.2 and 4.3 of condition M.

<sup>4</sup> All references in this Condition to the Water Industry Act 1991, are references to that Act as applied by the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013.

it to do so the Infrastructure Provider must provide reasoned comments on the accuracy of any information or advice which the Authority proposes to publish under section 201 of that Act.

- M4 The Infrastructure Provider is not required to provide the Authority with any Information for the purpose of the Authority carrying out an enforcement function if the Infrastructure Provider could not have been required to provide that Information under section 203 of the Water Industry Act 1991.
- M5 The Infrastructure Provider is not required to provide the Authority with any Information that is protected by legal professional privilege.

### **Use of Information provided**

- M6 The Authority may use or disclose any Information which it has received from the Infrastructure Provider for the purpose of carrying out any of its functions under the provisions of any enactment, including its functions under sections 17K and 201 of the Water Industry Act 1991.

### **Relationship to other conditions**

- M7 Any duty on the Infrastructure Provider to provide Information to the Authority under any other Condition does not limit the duty of the Infrastructure Provider to provide Information under paragraph M1.
- M8 The requirement in paragraph M2, and the limits in paragraphs M4 and M5, also apply in any other Condition under which the Infrastructure Provider has a duty to provide Information to the Authority.

## Appendix 1: Calculation of Allowed Revenue

**Note:** underlined text below, is additional text. Text that has been struck through is deleted text.

### Subsection (iii) of paragraph 1.1 to be amended

- (iii) 1 + (the percentage movement in the RPI (All Items) index as published by Office for National Statistics for the period April to September in the calendar year in which Charging Year Yt-1 commenced) + (1/4 3/42 x Forecast RPI Adjustment Factor for the calendar year in which Charging Year Yt-1 commenced) + (1/4 x Forecast RPI Adjustment Factor for the calendar year in which Charging Year Yt-1 ends); and

### Footnote 5 in paragraph 1.12 to be amended

- <sup>5</sup> Explanatory note: The percentage value against each index represents the pre-agreed proportion of costs that will be subject to that index. These figures take into account the indexation that the IP faces on its construction contracts and other costs. For construction costs, the values are based on the proportions for each index included within the Construction Contracts, while RPI is used as the index for other remaining costs. A portion of costs is not be subject to indexation at all. ~~The specified percentages may be revisited during the procurement process.~~

### Subsection (g) of paragraph 1.12 to be amended

- (g) 3.5% linked to the Applicable Change in Construction Index in respect of the index for PAFI Series 3 Specialist Engineering Formulae Indices 3/E1 Electrical Labour;

### Subsection (g) of paragraph 1.22 to be amended

- (g) the index for PAFI Series 3 Specialist Engineering Formulae Indices 3/E1 Electrical Labour;

### Paragraph 1.2 of Part A to be amended

- 1.2. Subject to paragraphs ~~A 1.5~~ and A 1.6, the Allowed Revenue for any Charging Year Yt, will be calculated by 1 November and finalised by no later than 24 December of Charging Year Yt-1.

### Paragraph 1.5 of Part A to be deleted

## Paragraph 1.6 of Part A to be amended

1.6. In the event that:

1.6.1. Licence Award occurred by 15 September 2015;

~~1.6.2. the Incumbent Undertaker made no request referred to in paragraph A 1.5;~~

~~1.6.3. the Authority provided no estimate referred to in paragraph A 1.5; or~~

~~1.6.4. the Authority provided an estimate referred to under paragraph A 1.5, but Licence Award occurred on or after 1 April 2017,~~

~~(without prejudice to paragraph A 1.5.1(ii), if applicable)~~

the Allowed Revenue for the First Charging Year will be calculated by the Infrastructure Provider by 1 November and finalised by no later than 24 December, in each case, immediately prior to the commencement of the Second Charging Year, and will be payable in the Second Charging Year together with the Allowed Revenue for the Second Charging Year; provided that, where the Allowed Revenue for the First Charging Year and the Second Charging Year have not been calculated by 1 November and finalised by 24 December immediately prior to the commencement of the Second Charging Year, then the Allowed Revenue for the First Charging Year and the Second Charging Year will be calculated by 1 November and finalised by 24 December, in each case, immediately prior to the commencement of the Third Charging Year and will be payable in the Third Charging Year together with the Allowed Revenue for the Third Charging Year. The Allowed Revenue for the First Charging Year and (where the Allowed Revenue for the Second Charging Year is payable in the Third Charging Year in accordance with this paragraph A 1.6.4) the Allowed Revenue for the Second Charging Year will be subject to a net present value adjustment as follows:

$$AR Yt \times (1 + BWACC)^{(0.5 + \frac{PD}{2})}$$

where:

AR Yt means the Allowed Revenue for the First Charging Year or the Second Charging Year (as applicable);

PD means:

- (i) in respect of the First Charging Year, the proportion of the First Charging Year, calculated by reference to the number of days from Licence Award until the end of the First Charging Year (if the Allowed Revenue for the First Charging Year is payable in the Second Charging Year) or the Second Charging Year (if the Allowed Revenue for the First Charging Year is payable in the Third Charging Year); or

in respect of the Second Charging Year, the proportion of the Second Charging Year, calculated by reference to the number of days during the Second Charging Year.

## Appendix 2: Non-Revenue Conditions

### Paragraph 2.4 to be amended

- 2.4 The Infrastructure Provider shall ensure that the Business Plan submitted pursuant to paragraph 2.3 sets out, amongst other things, the operating expenditure the Infrastructure Provider forecasts it will be required to incur during each Charging Year following the Post Construction Review until (and including) 31 March following the First Periodic Review.

### Paragraph 7.2 to be amended

- 7.2 ~~In each year~~ ~~On 1 April in any year~~ in the Construction Period and in the Operational Period ~~and also, if the Authority so determines, on 1 January in any year in the Construction Period or in the Operational Period~~, the Infrastructure Provider must ~~will~~ pay to the Secretary of State Authority an amount or amounts, to be determined ~~in respect of each date~~ by the Authority, after consultation with the Infrastructure Provider, in respect of the costs estimated by the Authority as likely to be reasonably incurred by it in that Charging Year, or as already having been reasonably incurred by it in the preceding Charging Year (to the extent that such costs have not already been recovered under this paragraph 7.2) in the regulation, monitoring and enforcement of the Infrastructure Provider;

EXCEPT THAT the total of all payments made under this paragraph 7.2 may not exceed the Regulation Fee Cap.

### A new paragraph 7.2A to be inserted after paragraph 7.2

- “7.2A Where the Authority notifies the Infrastructure Provider of an amount which is payable under paragraph 7.2, the Infrastructure Provider must pay that amount no later than 30 days following the notification, provided that the Authority may not give such a notification more than twice ~~for~~in a Charging Year.”

### Paragraph 7.4 to be amended

- 7.4 Where a reference is made to the Competition and Markets Authority, under paragraph 12 of Part A, or paragraph 9 of Part B, of Appendix 1 (Calculation of Allowed Revenue) or paragraph 6 hereof, the Infrastructure Provider must pay an amount calculated in terms of paragraph 7.5 to the Secretary of State Authority within 30 days of receipt of an invoice for the same.

## Appendix 4: Defined Terms

### Definition to be amended

**“Project Documents”** means:

- (a) the Liaison Agreement;
- (b) the Interface Agreement;
- (c) the Alliance Agreement;
- (d) the Independent Technical Assessor Deed;
- (e) the Operation and Maintenance Agreement;
- (f) the Project Management Contract;
- (g) the System Integrator Contract;
- (h) the Main Works Contracts;
- (i) the Revenue Agreement; ~~and~~
- (j) the Property Documents; and
- (k) any other agreement that the Infrastructure Provider and the Authority agree in writing is a Project Document for the purposes of this Project Licence;

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.

Ofwat  
Centre City Tower  
7 Hill Street  
Birmingham B5 4UA

Phone: 0121 644 7500  
Fax: 0121 644 7533  
Website: [www.ofwat.gov.uk](http://www.ofwat.gov.uk)  
Email: [mailbox@ofwat.gsi.gov.uk](mailto:mailbox@ofwat.gsi.gov.uk)

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