

# **WATER SERVICES REGULATION AUTHORITY**

## **WATER INDUSTRY ACT 1991, SECTION 13(1)**

### **Modification of the Conditions of Appointment of Southern Water Services Limited**

**Made on 26 January 2021**

**Coming into effect on 1 February 2021**

The Water Services Regulation Authority, in exercise of the power conferred on it by section 13(1) of the Water Industry Act 1991 (the "Act"), after giving notice as required by section 13(2) of the Act, hereby makes the modifications described in the Schedule attached hereto to the Conditions of the Appointments of Southern Water Services Limited (the "Appointee") as a water and sewerage undertaker under Chapter I of Part II of the Act, the Appointee having consented to these modifications.

**Signed for and on behalf of the  
Water Services Regulation Authority**

*Keith Mason*

**Keith Mason  
Senior Director**

## Schedule

1. **Condition A** is amended by:

1.1 Inserting the following definitions into paragraph 3 of Condition A at the appropriate alphabetical place:

**“Approved CAP Agreement”** means a CAP Agreement that has been consented to by Ofwat in accordance with sub-paragraph U5.1 of Condition U;

**“CAP”** means a limited company who has been competitively appointed to be the provider in accordance with a DPC Procurement Process in respect of a DPC Delivered Project;

**“CAP Agreement”** means an agreement between the Appointee and a CAP in respect of a DPC Delivered Project;

**“CAP Charges”** means all those sums that become due to a CAP from the Appointee pursuant to an Approved CAP Agreement;

**“DPC Allowed Revenue”** means, in relation to any Charging Year, the total of the CAP Charges due to be paid to one or more CAPs by the Appointee in that Charging Year (and any such other amounts) that are recoverable in accordance with a DPC Allowed Revenue Direction;

**“DPC Allowed Revenue Direction”** has the meaning set out in sub-paragraph U6.1 of Condition U;

**“DPC Delivered Project”** means such project and associated activities that are so designated from time to time by Ofwat in accordance with paragraph U1 of Condition U and which designation has not been revoked in accordance with sub-paragraph U1.1.3 of Condition U;

**“DPC Procurement Process”** means a procurement process undertaken by the Appointee - the intended result of which is the award of one or more CAP Agreements;

**“Independent Technical Adviser”** means the person appointed pursuant to sub-paragraph U11.1 of Condition U;

**“Ultimate Controller of the CAP”** means any person who, whether alone or jointly and whether directly or indirectly, is in a position to control or in a position to materially influence the policy or affairs of the CAP or any Holding Company of the CAP;

- 1.2 Deleting the definition of “Reference Notice” and replacing it with the following definition:

**“Reference Notice”** means a notice given to Ofwat under paragraphs 11, 14 or 15A of Condition B;

2. **Condition B** is amended by:

- 2.1 Inserting the following sub-paragraph after sub-paragraph 1.6:

“1.7 To permit the Appointee to levy charges for the purpose of collecting any DPC Allowed Revenue for the relevant Charging Year.”

- 2.2 Deleting the definition of “Interim Determination in paragraph 2 and replacing it with the following definition:

**“Interim Determination”** means a determination by the Water Services Regulation Authority of the relevant questions pursuant to a reference by the Appointee under paragraph 14 or pursuant to paragraphs 15 or 15A or, as the case may be, a determination by the Competition and Markets Authority of the relevant questions or of a disputed determination subject to a reference to it pursuant to paragraph 16 that relates to a reference by the Appointee under paragraph 14 or a determination pursuant to paragraphs 15 or 15A;

- 2.3 Deleting sub-paragraph 9.1 and replacing it with the following:

“9.1 The Appointee shall levy charges in a way best calculated to:

- (1) comply with the Price Control or Price Controls determined by the Water Services Regulation Authority pursuant to sub-paragraph 9.3 or sub-paragraph 9.4; and

- (2) collect any DPC Allowed Revenue (which shall not be included in the Price Control or Price Controls).”

2.4 Deleting sub-paragraph 9.4(1) and replacing it with the following;

“(1) In respect of the Appointed Business's Water Resources Activities, Bioresources Activities, Network Plus Water Activities and Network Plus Wastewater Activities except for those activities for which there are Excluded Charges or, to the extent that CAP Charges are recoverable in accordance with a DPC Allowed Revenue Direction, those activities that constitute a DPC Delivered Project, the Water Services Regulation Authority shall determine separate Price Controls in accordance with this sub-paragraph (having regard to all the circumstances which are relevant in the light of the principles which apply by virtue of Part I of the Water Industry Act 1991 in relation to the Water Services Regulation Authority’s determinations, including, without limitation, any change in circumstance which has occurred since the last Periodic Review or which is to occur).”

2.5 Inserting the following new sub-paragraph after sub-paragraph 10.1:

“10.2 The Appointee may from time to time be required to publish charges fixed for the purposes of demonstrating how the Appointee is collecting any DPC Allowed Revenue. Such requirement shall be made by way of a notice from the Water Services Regulation Authority to the Appointee specifying the information to be provided, the method of publication, the time by which publication is required (being a reasonable period of time) and the period for which the published charges are to be effective. The Appointee shall comply with the said requirement by notice and adhere to the charges accordingly published.”

2.6 In sub-paragraph 14.2(3)(i), deleting the word ‘or’ from the end of sub-paragraph 14.2(3)(i)(C); replacing the word ‘and’ with the word ‘or’ at the end of sub-paragraph 14.2(3)(i)(D); and adding the following new sub-paragraph 14.2(3)(i)(E) after sub-paragraph 14.2(3)(i)(D):

“(E) any costs, receipts or savings that are associated with a DPC Delivered Project; and”

2.7 Inserting the following new paragraph 15A after paragraph 15 of Condition B:

“15A Interim Determinations relating to DPC Delivered Projects

15A.1 The Appointee may refer to the Water Services Regulation Authority for determination by it the questions set out in sub-paragraph 15A.2. Such reference shall be made by notice to the Water Services Regulation Authority and, unless the Water Services Regulation Authority otherwise consents, shall be given not later than the fifteenth day of September immediately preceding the first of the Charging Years in respect of which the Appointee wishes the change to the level of a Price Control or Price Controls to take effect.

15A.2 All of the following:

- (1) whether a DPC Event has occurred;
- (2) if so, whether, under sub-paragraph 15A.4, the DPC Event has or will have a relevant effect on the Appointed Business;
- (3) if the DPC Event has or will have a relevant effect on the Appointed Business, what change to the level of a Price Control or Price Controls over the period beginning with the first of the Charging Years referred to in sub-paragraph 15A.1 (in a case where a Reference Notice has been given to the Authority under this paragraph) or sub-paragraph 15A.3 (in any other case) until the first of the Charging Years for which the next Periodic Review falls to be carried out is appropriate as a consequence of the DPC Event.

15A.3 The Water Services Regulation Authority may, having given notice to the Appointee of its intention to do so no later than the fifteenth day of September immediately preceding the first of the Charging Years in respect of which it proposes the change to the level of a Price Control or Price Controls to take effect, determine the questions set out in sub-paragraph 15A.2.

15A.4 For the purposes of sub-paragraph 15A.2(2), an effect will only be regarded as relevant if the questions set out in sub-paragraph 14.2 (after excluding sub-paragraph 14.2(3)(i)(E)) were to be asked in

relation to the DPC Event and the Materiality Amount was equal to or exceeded the lesser of £10 million or two per cent of the turnover attributable to the Appointed Business in the latest financial year for which accounting statements have been prepared and delivered to the Water Services Regulation Authority under Condition F, as shown by those accounting statements, and for this purpose where the Materiality Amount is a negative figure it shall be treated as though it were a positive figure.

15A.5 For the purposes of sub-paragraph 15A.2 a single reference may be made, and a single notice may be given, in respect of any number of DPC Events and sub-paragraph 15A.2 shall be construed accordingly.

15A.6 For the purposes of this paragraph a “DPC Event” is any of the following:

- (1) where a DPC Procurement Process is, for reasons outside the reasonable control of the Appointee, no longer in the best interests of customers;
- (2) where the designation of a DPC Delivered Project has been modified pursuant to sub-paragraph U1.1.2 of Condition U or revoked pursuant to sub-paragraph U1.1.3 of Condition U;
- (3) where a DPC Allowed Revenue Direction has been revoked pursuant to sub-paragraph U6.4 of Condition U;
- (4) the termination or expiration of an Approved CAP Agreement.

15A.7 In determining the question set out in sub-paragraph 15A.2(3) in circumstances where an Approved CAP Agreement has been terminated or has expired, the Authority must, without limitation, consider what change to the level of a Price Control or Price Controls is appropriate in relation to CAP Charges payable as a consequence of the termination or expiration of the Approved CAP Agreement to the extent that those CAP Charges have not been included as part of the Appointee’s DPC Allowed Revenue.

15A.8 References in this Condition to Relevant Changes of Circumstance, Notified Items and Relevant Items shall be taken, for the purposes of any Interim Determination, to exclude any item notified by the Water Services Regulation Authority to the Appointee as not having been allowed for (either in full or at all) in making a Relevant Determination to the extent that the Water Services Regulation Authority could allow for that item in making a determination of the questions set out in sub-paragraph 15A.2. ”

2.8 Amending paragraph 16.1(2) to insert “or paragraph 15A” after the first reference to “paragraph 14”.

2.9 Deleting sub-paragraph 16.2 and replacing it with the following:

“Where the Appointee requires the Water Services Regulation Authority to make a reference to the Competition and Markets Authority under sub-paragraph 16.1 in the case referred to in section (3) of that sub-paragraph, the Appointee shall levy charges in a way best calculated to comply with the Price Control or Price Controls determined by the Water Services Regulation Authority (and to continue to collect any DPC Allowed Revenue) as if a reference had not been made until the Competition and Markets Authority makes its determination following such reference. The determination made by the Competition and Markets Authority shall then take effect as if it had been made by the Water Services Regulation Authority.”

3. The following new Condition U is inserted after Condition S:

**“Condition U: Direct Procurement for Customers (DPC)”**

Introduction

This Condition requires that, where the Appointee plans, procures, manages and carries out activities in respect of a DPC Delivered Project, the Appointee must:

- (1) obtain relevant consents from Ofwat; and
- (2) take appropriate steps to ensure its customers are protected.

U1. Designation of a DPC Delivered Project

U1.1 Ofwat may, with the consent of the Appointee, by direction from time to time:

U1.1.1 designate an infrastructure project as a DPC Delivered Project;

U1.1.2 modify the designation of a DPC Delivered Project (designated pursuant to sub-paragraph U1.1.1); and

U1.1.3 revoke the designation of a DPC Delivered Project (designated pursuant to sub-paragraph U1.1.1 or any modified designation of a DPC Delivered Project modified pursuant to sub-paragraph U1.1.2).

U1.2 As part of any direction issued pursuant to sub-paragraphs U1.1.1 or U1.1.2, Ofwat will set out in writing the scope (or, if applicable, the modified scope) of the DPC Delivered Project.

U1.3 In this paragraph U1 “infrastructure” means infrastructure relating to:

U1.3.1 the provision of a system, or part of a system, of water supply, or the securing of supplies of water; or



U1.3.2 the provision of a system, or part of a system, of sewers, or the provision of means for emptying, or dealing effectually with the contents of, sewers.

## U2. Procuring a DPC Delivered Project

U2.1 Save to the extent otherwise approved in writing by Ofwat, the Appointee must:

U2.1.1 put a DPC Delivered Project (including the financing of such a project) out to tender in accordance with paragraph U4; and

U2.1.2 appoint a CAP (or more than one CAP) to undertake a DPC Delivered Project in accordance with sub-paragraph U5.1.

## U3. Appointee's Responsibilities

U3.1 The designation of a DPC Delivered Project, any consent issued by Ofwat (or failure to issue such consent) pursuant to this Condition U and the appointment of a CAP to undertake a DPC Delivered Project does not diminish the responsibilities, obligations or liabilities of the Appointee as a relevant undertaker in respect of the DPC Delivered Project (including, without limitation, pursuant to the Appointment).

U3.2 The Appointee's procurement of a DPC Delivered Project and its management of any Approved CAP Agreement must ensure that the Appointee is and continues to be able to carry out its functions as a relevant undertaker.

## U4. DPC Procurement Process

U4.1 The Appointee must not, without the prior written consent of Ofwat, commence or undertake any DPC Procurement Process. Any such consent from Ofwat may be issued in stages, with consent issued for a prescribed stage of the DPC Procurement Process only. Further, any such consent may be conditional and, in carrying out a DPC Procurement Process, the Appointee must comply with any conditions imposed by Ofwat in commencing or undertaking any DPC Procurement Process.

U4.2 Ofwat may withhold consent under sub-paragraph U4.1, including where it considers that a DPC Procurement Process (and any relevant proposed procurement documents, any proposed selection and evaluation criteria, any proposed procurement plans and the form and provisions of the proposed CAP Agreement to be put out to tender) is not likely to achieve best value for customers.

U4.3 The Appointee must notify Ofwat in writing as soon as practicable if it considers it is unable to complete a DPC Procurement Process or intends to suspend or abandon (whether in whole or in part) a DPC Procurement Process. Any suspension or abandonment of a DPC Procurement Process will not automatically result in the revocation of the designation of a DPC Delivered Project.

U4.4 The Appointee must notify Ofwat in writing as soon as practicable in the event of any legal challenge (or threatened legal challenge) of any nature related to the DPC Procurement Process.

#### U5. CAP Agreement

U5.1 The Appointee must obtain Ofwat's prior written consent before entering into a CAP Agreement.

U5.2 The Appointee must:

U5.2.1 comply in all material respects with the terms of any Approved CAP Agreement; and

U5.2.2 notify Ofwat in writing as soon as practicable of any material breach or non-compliance with any Approved CAP Agreement by the Appointee or the CAP.

U5.3 For the purposes of sub-paragraph U5.2, a "material breach" or a failure to "comply in all material respects" shall include any instance of payment default or late payment other than an instance of payment default or late payment that is trivial in nature by reference to its significance for the CAP.

- U5.4 In undertaking any action or making any omission related to an Approved CAP Agreement (including undertaking its obligations (or failing to do so) or in exercising (or not exercising) or waiving its rights) thereunder, the Appointee must at all times use all reasonable endeavours to ensure it achieves best value for customers.
- U5.5 The Appointee must not, without the prior written consent of Ofwat, assign, novate or transfer its interest in an Approved CAP Agreement (whether in part or in whole).
- U5.6 Save where Ofwat agrees otherwise, the Appointee must notify Ofwat in writing in the event that an Approved CAP Agreement is (whether in whole or in part):
- U5.6.1 materially amended;
  - U5.6.2 suspended; or
  - U5.6.3 extended.
- U5.7 Any suspension, amendment or extension of an Approved CAP Agreement will not give rise to an automatic increase in DPC Allowed Revenue (except as expressly permitted in accordance with the DPC Allowed Revenue Direction). Where the Appointee seeks an increase in DPC Allowed Revenue as a result of any amendment, suspension or extension of an Approved CAP Agreement, the Appointee will be required to comply with the requirements of the DPC Allowed Revenue Direction, which may include obtaining Ofwat consent.
- U5.8 The Appointee must ensure that any Approved CAP Agreement requires the CAP to give to the Appointee all such information as may be necessary to enable the Appointee to comply with the requirements of the conditions of this Appointment (and any requirements for information related to any DPC Allowed Revenue Direction).
- U5.9 Unless the contrary intention appears, references in this Condition U to an Approved CAP Agreement include any modification of that Approved CAP Agreement.

U6. DPC Allowed Revenue Direction

U6.1 Ofwat, having consulted the Appointee, will issue a direction in relation to an Approved CAP Agreement setting out those amounts that the Appointee can collect from customers (whether related to CAP Charges or certain other amounts (“DPC Allowed Revenue Direction”). Such direction may include, without limitation, those matters described in sub-paragraph U6.2 in relation to an Approved CAP Agreement.

U6.2 Any DPC Allowed Revenue Direction may (amongst other things) set out:

U6.2.1 the period of time for which the DPC Allowed Revenue Direction will subsist (and any conditions for extension of that period);

U6.2.2 those matters that will require a report from the Independent Technical Adviser;

U6.2.3 any forecast and outturn reporting that the Appointee is required to provide (and the process and Information requirements for such forecasts and outturn reports) in respect of the CAP Charges;

U6.2.4 any adjustment to the DPC Allowed Revenue to reflect the time value of money;

U6.2.5 the commencement date (and/or the method for determining the commencement date) for the collection of DPC Allowed Revenue;

U6.2.6 arrangements in respect of any over/under collection of the relevant DPC Allowed Revenue by the Appointee;

U6.2.7 those categories of CAP Charges (and any other amounts) eligible for inclusion as part of the Appointee’s DPC Allowed Revenue;

U6.2.8 those categories of CAP Charges (and any other amounts) that may be eligible for inclusion as part of the

Appointee's DPC Allowed Revenue provided that relevant amounts are approved by Ofwat from time to time (as well as the process that Ofwat will apply when considering such CAP Charges);

U6.2.9 any Information or evidence (including reports by the Independent Technical Adviser) that Ofwat may require prior to agreeing any amounts as part of the Appointee's DPC Allowed Revenue;

U6.2.10 those categories of CAP Charges that will not be eligible to be included in the Appointee's DPC Allowed Revenue.

U6.3 Ofwat may, with the consent of the Appointee, by direction, modify a DPC Allowed Revenue Direction issued pursuant to sub-paragraph U6.1 from time to time. The Appointee's consent will not be required for any decisions Ofwat takes pursuant to and in accordance with a DPC Allowed Revenue Direction.

U6.4 Where the period for which a DPC Allowed Revenue Direction is stated to subsist (as set out in a DPC Allowed Revenue Direction) has expired, Ofwat may (having consulted the Appointee and the relevant CAP) by direction, revoke the relevant DPC Allowed Revenue Direction. For the avoidance of doubt, when Ofwat is conducting a Periodic Review the circumstances which are relevant in the light of the principles which apply by virtue of Part I of the Water Industry Act 1991 include, without limitation, any CAP Charges that are payable as a consequence of the termination or expiration of an Approved CAP Agreement to the extent that these CAP Charges have not been included as part of the Appointee's DPC Allowed Revenue.

#### U7. Ultimate Controller of the CAP

U7.1 The Appointee must maintain and keep up to date and in written form, accurate information about the Ultimate Controller(s) of the CAP.

U7.2 The Appointee must inform Ofwat in writing where it becomes aware that:

U7.2.1 arrangements are in progress or in contemplation which, if carried into effect, may lead to a change to the Ultimate Controller(s) of the CAP; or

U7.2.2 arrangements have been put into effect which might be considered to have led to a change to the Ultimate Controller(s) of the CAP.

#### U8. Termination of an Approved CAP Agreement

U8.1 The Appointee must notify Ofwat in writing where any Approved CAP Agreement is terminated.

U8.2 The Appointee must notify Ofwat in writing as soon as practicable if any circumstances arise which may reasonably be considered likely to lead to the termination of an Approved CAP Agreement.

U8.3 If an Approved CAP Agreement is terminated for any reason, Ofwat may, having consulted the Appointee and the relevant CAP, direct the Appointee as to the treatment of any revenue collected by the Appointee in accordance with the relevant DPC Allowed Revenue Direction that it has not already passed on to the relevant CAP, and the Appointee must comply with any such direction.

U8.4 The direction given by Ofwat under sub-paragraph U8.3 may relate to all revenue collected by the Appointee in accordance with the relevant DPC Allowed Revenue Direction but not yet passed on to the relevant CAP at the date the relevant Approved CAP Agreement terminates, and any revenues subsequently collected by the Appointee under the DPC Allowed Revenue Direction.

U8.5 The termination of any Approved CAP Agreement will not automatically result in a revocation of any designation of a DPC Delivered Project or a DPC Allowed Revenue Direction.

#### U9. Associated Companies

U9.1 The Appointee must not, without the prior written consent of Ofwat:

U9.1.1 bid in its own DPC Procurement Process;

U9.1.2 permit an Associated Company to bid in the Appointee's DPC Procurement Process; or

U9.1.3 award a CAP Agreement to an Associated Company.

U9.2 For the purposes of sub-paragraph U9.1 to "bid in the Appointee's DPC Procurement Process" includes each of the following:

U9.2.1 submitting a bid in its own name;

U9.2.2 being part of any consortium or group of entities submitting a bid; or

U9.2.3 being named (including as a contractor or sub-contractor of any tier) in any bid as the entity undertaking the DPC Delivered Project (or any part thereof).

U9.3 Save where Ofwat consents in writing to any alternative arrangement, the Appointee must not and must procure that any Associated Company does not undertake any DPC Delivered Project (or any part thereof) as a contractor (or sub-contractor of any tier).

#### U10. Information

For the purposes of this Condition and Condition M, the definition of "Information" in paragraph 3 of Condition A has effect as if references to information that the Appointee "holds" or "can reasonably obtain" includes all information that any CAP holds or can reasonably obtain, provided that the Appointee shall not be in breach of this paragraph 10 or Condition M (insofar as such paragraph and condition impose obligations that relate to Information held by the CAP or that the CAP can reasonably obtain) where it has used all reasonable endeavours to obtain any Information the CAP holds or can reasonably obtain.

#### U11. Independent Technical Adviser

U11.1 In relation to each DPC Delivered Project the Appointee (whether jointly with the CAP or otherwise) must appoint an Independent Technical Adviser, approved by Ofwat.

- U11.2 Any Information furnished to Ofwat in connection with a DPC Allowed Revenue Direction must, if Ofwat so requires, be accompanied by a written report from the Independent Technical Adviser verifying the Information.
- U11.3 The report referred to in sub-paragraph U11.2 must be in such form and address such substance as may be specified by Ofwat and must be consistent with any guidelines issued by Ofwat.
- U11.4 The Appointee must enter into a written contract of engagement with the Independent Technical Adviser which must:
- U11.4.1 set out that the responsibility for the costs associated with any services provided by the Independent Technical Adviser must be paid by the Appointee and/or the CAP;
  - U11.4.2 set out that the Independent Technical Adviser has a duty of care to Ofwat (such right must be directly enforceable by Ofwat);
  - U11.4.3 include a term that the Independent Technical Adviser will act in accordance with good industry practice;
  - U11.4.4 subject to reasonable exceptions set out in the contract of engagement, require the Independent Technical Adviser, its employees and agents to keep confidential and not to disclose, except to Ofwat, the Appointee and the CAP or as required by law, any information which the Independent Technical Adviser obtains in the course of preparing its report;
  - U11.4.5 where required by Ofwat under sub-paragraph U11.2, require the Independent Technical Adviser to submit reports to Ofwat; and
  - U11.4.6 include a term that the Independent Technical Adviser will provide such further Information, explanation or clarification in respect of any report furnished to Ofwat, as Ofwat may reasonably require.



U11.5 The Appointee must (and must include a requirement in any Approved CAP Agreement that the CAP must) co-operate fully with the Independent Technical Adviser to enable it to prepare any report, including without limitation, so far as is necessary for that purpose:

U11.5.1 subject to reasonable prior notice, giving to the Independent Technical Adviser access at reasonable hours to any assets and to any premises occupied by the Appointee (or the CAP) in relation to the DPC Delivered Project; and

U11.5.2 subject to reasonable prior notice, allowing the Independent Technical Adviser at reasonable hours:

- (a) to inspect and make copies of, and take extracts from, any books and records of the Appointee (or the CAP) maintained in relation to the DPC Delivered Project;
- (b) to carry out inspections, measurements and tests on or in relation to any such premises or assets; and
- (c) to take on to such premises or on to or in to any assets such other persons and such equipment as may be necessary for the purposes of preparing and completing their report.

U11.6 Nothing in paragraph U11.5 will require the Appointee or the CAP:

U11.6.1 to do anything which is outside its reasonable control; or

U11.6.2 to allow the Independent Technical Adviser to do anything which would materially disrupt the Appointee's (or CAP's) business or the DPC Delivered Project (unless it is essential that that thing be done to enable the Independent Technical Adviser to prepare its report)."