

Award of concession contracts

2011/0437(COD) - 26/02/2014 - Final act

PURPOSE: to ensure better access to the market for all economic operators and ensure legal certainty in the award of concessions contracts.

LEGISLATIVE ACT: Directive 2014/23/EU on the award of concession contracts.

CONTENT: the Directive is part of a legislative package for modernisation of public procurement in the EU, which is also made up of:

- [a Directive on public procurement](#) (replacing Directive 2004/18/EC) ; and
- a [Directive on procurement](#) by entities operating in the utilities sectors: water, energy, transport and postal services (replacing directive 2004/17/EC).

Ensure legal certainty: public authorities have more and more recourse to public-private cooperation instruments, such as concessions, so that they might provide people with crucial services such as waste collection, motorways, airports and ports, under the best possible conditions.

The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. The new Directive establishes **a clear and transparent framework for awarding concessions** in order to ensure effective and non-discriminatory access to the market for all EU economic operators, as well as legal certainty. At the same time, Member States will retain the freedom to define and specify the characteristics of the services to be provided.

Specificity of concessions: the definition of concession and specificity of concessions as compared to public contracts is clarified: a concession means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities entrust the execution of works or provision of services to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both.

Threshold and methods for calculating the estimated value of concessions: the Directive shall apply to concessions the value of which is equal to or greater than **EUR 5 186 000**.

The value of a concession shall be the **total turnover of the concessionaire generated over the duration of the contract, net of VAT**, as estimated by the contracting authority.

That estimate shall be valid at the moment at which the concession notice is sent or, in cases where such notice is not provided for, at the moment at which the contracting authority commences the concession award procedure.

Specific exclusions in the field of water: the Directive shall not apply to concessions awarded to: (a) provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; (b) supply drinking water to such networks.

It shall also not apply to concessions on: (i) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations; or (ii) the disposal or treatment of sewage.

The Commission should **assess the economic effects** on the internal market resulting from the application of the thresholds and from the exclusion on water taking into account the specific structures of the water sector and report to the European Parliament and the Council **by 18 April 2019**.

Limited duration: the Directive provides that the duration of concessions will be limited, estimated on the duration on the basis of the works or services requested.

For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital.

General principles and procedural guarantees: the Directive affords **freedom of choice** to contracting authorities and also gives them considerable choice with regard to award criteria. The procedure for awarding contracts must observe the **principles of equality of treatment, non-discrimination and transparency**. The award criteria may include, amongst other things, environmental, and social criteria, or criteria relating to innovation.

In the performance of concession contracts economic operators must comply with applicable **obligations in the fields of environmental, social and labour law** established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Contracting authorities must offer by **electronic means** unrestricted and full direct access free of charge to the concession documents from the date of publication of a concession notice.

Contracting authorities must also take appropriate measures to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy **conflicts of interest** arising in the conduct of concession award procedures.

Sub-contracting: the Directive aims to ensure some transparency in the subcontracting chain.

It also provides that the observance by subcontractors of applicable obligations in the fields of environmental, social and labour law must be ensured through appropriate actions by the competent national authorities within the scope of their responsibilities and remit, such as labour inspection agencies or environmental protection agencies.

ENTRY INTO FORCE: 17/04/2014.

TRANSPOSITION: 18/04/2016.

DELEGATED ACTS: the Commission is empowered to adopt delegated acts in order to adapt to rapid technical, economic and regulatory developments. The power to adopt such acts is conferred on the Commission for **an indeterminate period from 17 April 2014**. The European Parliament or the Council may object to a delegated act within two months from the date of notification (which may be extended by two months.) If the European Parliament or Council express objections, the delegated act will not enter into force.