

Award of concession contracts

2011/0437(COD) - 15/01/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 598 votes to 60 with 18 abstentions, a legislative resolution on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts.

Parliament adopted its position in first reading following the ordinary legislative procedure. The amendments adopted in plenary are the result of an agreement between Parliament and Council. They amend the proposal as follows:

A clear legislative framework applicable to the award of concessions: Parliament states that such a framework afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade.

The rules of the legislative framework applicable to the award of concessions should be clear and simple. They should duly reflect the specificity of concessions as compared to public contracts and should not create an excessive amount of bureaucracy.

Principle of free administration by public authorities: the Directive should not in any way affect the freedom of Member States and public authorities to perform works or provide services directly to the public or to outsource such provision by delegating it to third parties.

It does not affect the freedom of Member States to define, what they consider to be services of general economic interest. Non-economic services of general interest shall fall outside the scope of this Directive.

Specificity of concessions: Parliament clarified the definition of concession and its specificity in relation to public procurement. It means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works or the provision and the management of services to one or more economic operators the consideration for which consists either solely in the right to exploit the works or services 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. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

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.

Every two years from 30 June 2013, the Commission shall verify that the threshold corresponds to the threshold established in the World Trade Organisation Agreement on Government Procurement (the GPA) for works concessions and shall, where necessary, revise that threshold.

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 or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.

Duration of the concession: the duration of concessions shall be limited. The contracting authority or contracting entity shall estimate 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.

Exclusions: the Directive will not apply to:

- concessions which the contracting authority or contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution, where the concessions concerned are fully financed by that organisation or institution;
- concessions in the fields of defence and security as referred to in Directive 2009/81/EC which are governed by specific procedural rules pursuant to an international agreement or arrangement concluded between one or more Member States and one or more third countries;
- service concessions for:
 - i. the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services that are awarded by audiovisual or radio media service providers, or concessions for broadcasting time or programme provision, that are awarded to audiovisual or radio media service providers;
 - ii. civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations
 - iii. political campaign services
- service concessions for lottery services, which are covered by CPV code 92351100-7, awarded by a Member State to an economic operator on the basis of an exclusive right.

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.

Concessions for the disposal or treatment of sewage and for 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) should also be excluded in so far as they are connected with an excluded activity.

General principles: the contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with the Directive. The award procedure shall respect the principles of equal treatment, non-discrimination and transparency. Award criteria may include inter alia environmental, social or innovation-related criteria.

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.

Combating corruption and preventing conflicts of interest: contracting authorities must 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.

Subcontracting: 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.

The amended text stipulates that the conditions relating to the enforcement of observance of applicable obligations in the fields of environmental, social and labour law, must be applied whenever the national law of a Member State provides for a mechanism of joint liability between subcontractors and the concessionaire.