



EU rules on awarding concession contracts - Q and A

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On 15 January 2014 MEPs will vote on draft rules setting out minimum EU requirements for the award by public authorities of "concession" contracts to procure works or services from private suppliers. These contracts are typically high-value, complex and long-term. These Q&A deal with certain aspects of the draft text which was negotiated with the Council in June 2013 and confirmed by EP Internal Market Committee on 5 September.

The proposed "concessions" directive is part of a package of four legislative proposals on public procurement tabled by the European Commission in 2011: three directives ("classic", "utilities" and "concessions") and one regulation ("third market access" or "reciprocity").

The public procurement package is in turn part of the "Single Market Act I", package of proposed measures in twelve areas, designed to unlock the single market's potential.

As public authorities spend 18% of GDP on goods, works and services, it is important to ensure that public tendering rules are straightforward but flexible enough to enable public authorities and their suppliers to conclude transparent, competitively-priced contracts so as to secure the best value for money.

The proposed concessions directive aims to guarantee effective access to the concessions market for all EU firms, including small and medium-sized enterprises, by establishing at EU level a clear legal framework governing the operation of public-private partnerships..

Contact

Gediminas VILKAS

BXL: (+32) 2 28 46396

STR: (+33) 3 881 64504

PORT: (+32) 498 98 33 30

EMAIL: imco-press@europarl.europa.eu

TWITTER: EP_SingleMarket

Background

What is a concession contract?

Public authorities use concession contracts to engage private firms to supply services or to perform works. Examples include building roads, bridges, sports arenas or supplying energy or waste disposal services.

The key feature of concession contracts is that the private firm must bear a substantial part of the economic risk stemming from executing the contracted works or services. The firm does not usually acquire property rights to the infrastructure object that it builds or operates, but it may receive revenue from it and even an additional annual payment from the public authority.

Background

- Why is there a need for EU regulation?

The lack of clear EU-wide rules governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services across the Union. It also causes distortions in the functioning of the single market. As a result, economic operators, in particular small and medium enterprises, are being deprived of their rights within the single market and miss out on important business opportunities. An appropriate legal framework for the award of concessions would ensure that all EU economic players have effective and non-discriminatory access to the EU market. It would also provide greater certainty as to the law, which would in turn encourage more public investment in infrastructure and strategic services for the citizen.

Background

- Will the new rules force public authorities to award public service supply contracts to the private sector?

No. MEPs included a provision that *"this 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 to outsource such provision by delegating it to third parties"* .

Member states remain free to decide how they want public works and services to be performed. If they wish to keep them in house, they may of course continue to do so. However, if a public authority decides to outsource service supply (e.g. to a private company) and concludes a contract with such an entity, the provisions of the new directive would apply.

Background

- Which sectors will be excluded from the scope of draft directive?

MEPs proposed to exclude certain sectors, due to their specificity: lotteries resulting from exclusive rights, civil defence and protection, hazard prevention, air transport services and certain types of audiovisual services. In addition the Council proposed to exclude financial services, political campaign services and legal services from the scope of the directive.

MEPs acknowledged the particular importance of water as a public good and therefore accepted the exclusion of the water sector (the production, transport or distribution of drinking water to the public) from the scope of the directive. However they also ensured that the Commission will assess the economic effect of this exclusion on the single market three years after the new directive has been transposed into the national laws of member states.

Background

- What are the award criteria?

The award criteria are those used by a contracting authority to assess the quality of an offer and to award a contract.

MEPs backed the view that the concession award criteria should be "objective" in order to help public authorities to identify an overall economic advantage. Parliament's negotiators ensured that award criteria may include environmental, social, gender-equality or innovation-related considerations. Therefore tenders which favour for example waste minimization, resource efficiency, the recruitment of disadvantaged persons or promote equality of women and men at work could stand a better chance of winning the contract.

In addition MEPs ensured that public authorities will have the option of refusing to grant concession contracts to economic operators who repeatedly fail to comply with environmental, social or labour law obligations.

Background

- What is the award procedure?

MEPs sought to make the award procedure more robust by stipulating only two mandatory stages for awarding the concession: to publish the call for tenders at the start and the award notice at the end. This should give the authorities more flexibility to negotiate the best deal.

Background

- Are there any provisions on subcontracting?

Yes. MEPs made it possible for public authorities to ask tenderers to indicate any share of the concession they might intend to give to subcontractors. This will show more clearly how the future economic operator envisages executing works or providing services.

Background

- Threshold?

Only concessions worth more than a certain amount will be subject to this directive. MEPs approved a threshold of €5,000,000, but secured a possibility for the Commission to review this threshold three years after the new directive has been transposed into member states' national laws. Concessions equal to or above the €5,000,000 limit will have to be published in the EU Official Journal.

Background

- Next steps?

The full House will vote on the draft rules on 15 January 2014, thus allowing the Council to give its final formal agreement later on. After the rules enter into force member states will have two years to transpose them into their national laws.