

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Text with EEA relevance)

TITLE I

SUBJECT-MATTER, SCOPE, PRINCIPLES AND DEFINITIONS

CHAPTER I

Scope, general principles and definitions

Section I

Subject-matter, scope, general principles, definitions and threshold

Article 1

Subject-matter and scope

- 1 This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8.
- 2 This Directive applies to the award of works or services concessions, to economic operators by:
 - a Contracting authorities; or
 - b Contracting entities, provided that the works or services are intended for the pursuit of one of the activities referred to in Annex II.
- 3 The application of this Directive is subject to Article 346 TFEU.
- 4 Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or contracting entities or groupings of contracting authorities or contracting entities, and which do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive.

Article 2

Principle of free administration by public authorities

- 1 This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

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Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators.

2 This Directive does not affect Member States' systems of property ownership. In particular it does not require the privatisation of public enterprises providing services to the public.

Article 3

Principle of equal treatment, non-discrimination and transparency

1 Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

2 Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.

Article 4

Freedom to define services of general economic interest

1 This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the way in which the Member States organise their social security systems.

2 Non-economic services of general interest shall fall outside the scope of this Directive.

Article 5

Definitions

For the purposes of this Directive the following definitions apply:

- (1) 'concessions' means works or services concessions, as defined in points (a) and (b):
 - (a) 'works concession' 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 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;
 - (b) 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to

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exploit the 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 encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. 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;

- (2) 'economic operator' means any natural or legal person, or public entity, or a group of such persons or entities, including temporary associations of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;
- (3) 'candidate' means an economic operator that has sought an invitation or has been invited to take part in a concession award procedure;
- (4) 'tenderer' means an economic operator which has submitted a tender;
- (5) 'concessionaire' means an economic operator which has been awarded a concession;
- (6) 'written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information which is transmitted and stored by electronic means;
- (7) 'execution of works' means the execution, or both the design and execution, of works related to one of the activities referred to in Annex I or of a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority or contracting entity exercising a decisive influence on the type or design of the work;
- (8) 'a work' means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;
- (9) 'electronic means' means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- (10) 'exclusive right' means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity;
- (11) 'special right' means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties the effect of which is to limit the exercise of an activity to two or more economic operators and which substantially affects the ability of other economic operators to carry out such an activity;
- (12) 'concession document' means any document produced or referred to by the contracting authority or contracting entity to describe or determine elements of the concession or the procedure, including the concession notice, the technical

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and functional requirements, proposed conditions of concession, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

- (13) ‘innovation’ means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, inter alia, with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy.

Article 6

Contracting authorities

1 For the purposes of this Directive, ‘contracting authorities’ means State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law other than those authorities, bodies or associations which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities.

2 ‘Regional authorities’ includes all authorities of the administrative units listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council⁽¹⁾.

3 ‘Local authorities’ includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003.

4 ‘Bodies governed by public law’ means bodies that have all of the following characteristics:

- a they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- b they have legal personality; and
- c they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those bodies or authorities; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Article 7

Contracting entities

1 For the purposes of this Directive, ‘contracting entities’ means entities which pursue one of the activities referred to in Annex II and award a concession for the pursuit of one of those activities, and which are one of the following:

- a State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;
- b public undertakings as defined in paragraph 4 of this Article;
- c entities other than those referred to in points (a) and (b) of this paragraph, but which operate on the basis of special or exclusive rights, granted for the exercise of one of the activities referred to in Annex II.

2 Entities which have been granted special or exclusive rights by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute ‘contracting entities’ within the meaning of point (c) of paragraph 1. Such procedures shall include:

- a procurement procedures with a prior call for competition in conformity with Directive 2014/24/EU of the European Parliament and of the Council⁽²⁾ and Directive 2014/25/EU, Directive 2009/81/EC or this Directive;
- b procedures pursuant to other legal acts of the Union listed in Annex III, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

3 The Commission shall be empowered to adopt delegated acts in accordance with Article 48 concerning amendments to the list of the Union legal acts set out in Annex III where necessary because of the repeal or amendment of those acts, or because of the adoption of new acts.

4 ‘Public undertaking’ means any undertaking over which the contracting authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership thereof, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases, in which those authorities, directly or indirectly:

- a hold the majority of the undertaking’s subscribed capital;
- b control the majority of the votes attaching to shares issued by the undertaking;
- c can appoint more than half of the undertaking’s administrative, management or supervisory body.

Article 8

Threshold and methods for calculating the estimated value of concessions

1 This Directive shall apply to concessions the value of which is equal to or greater than [F¹EUR 5 350 000].

2 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.

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 or the contracting entity commences the concession award procedure, for instance by contacting economic operators in relation to the concessions.

For the purpose of paragraph 1, if the value of the concession at the time of the award is more than 20 % higher than its estimated value, the valid estimate shall be the value of the concession at the time of the award.

3 The estimated value of the concession shall be calculated using an objective method specified in the concession documents. When calculating the estimated value of the concession, contracting authorities and contracting entities shall, where applicable, take into account in particular:

- a the value of any form of option and any extension of the duration of the concession;

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- b revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity;
- c payments or any financial advantage in any form whatsoever made by the contracting authority or contracting entity or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;
- d the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession;
- e revenue from sales of any assets which are part of the concession;
- f the value of all the supplies and services that are made available to the concessionaire by the contracting authorities or contracting entities, provided that they are necessary for executing the works or providing the services;
- g any prizes or payments to candidates or tenderers.

4 The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of this Directive. A concession shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

5 Where a proposed work or service may result in concessions being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.

6 Where the aggregate value of the lots is equal to or exceeds the threshold laid down in this Article, this Directive shall apply to the awarding of each lot.

Textual Amendments

- F1** Substituted by [Commission Delegated Regulation \(EU\) 2019/1827 of 30 October 2019 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the threshold for concessions \(Text with EEA relevance\)](#).

Article 9

Revision of the threshold

1 Every two years from 30 June 2013, the Commission shall verify that the threshold set out in Article 8(1) 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 in accordance with this Article.

In accordance with the calculation method set out in the GPA, the Commission shall calculate the value of the threshold on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on 31 August preceding the revision with effect from 1 January. The value of the threshold thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the threshold in force provided for by the GPA, expressed in SDRs, is observed.

2 Every two years from 1 January 2014, the Commission shall determine the values, in the national currencies of the Member States whose currency is not the euro, of the threshold referred to in Article 8(1), revised pursuant to paragraph 1 of this Article.

In accordance with the calculation method set out in the GPA, the determination of such values shall be based on the average daily values of those currencies corresponding to the applicable threshold expressed in euro over the 24 months terminating on 31 August preceding the revision with effect from 1 January.

3 The Commission shall publish the revised threshold referred to in paragraph 1, its corresponding value in the national currencies referred to in the first subparagraph of paragraph 2, and the value determined in accordance with the second subparagraph of paragraph 2, in the *Official Journal of the European Union* at the beginning of the month of November following their revision.

4 The Commission shall be empowered to adopt delegated acts in accordance with Article 48 to adapt the methodology set out in the second subparagraph of paragraph 1 of this Article to any change in the methodology provided in the GPA for the revision of the threshold referred to in Article 8(1) and for the determination of the corresponding values in the national currencies of the Member States whose currency is not the euro, as referred to in paragraph 2 of this Article.

The Commission shall also be empowered to adopt delegated acts in accordance with Article 48 to revise the threshold referred to in Article 8(1) pursuant to paragraph 1 of this Article.

5 Where it is necessary to revise that threshold and time constraints prevent use of the procedure set out in Article 48 and therefore imperative grounds of urgency so require, the procedure provided for in Article 49 shall apply to delegated acts adopted pursuant to the second subparagraph of paragraph 4 of this Article.

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- (1) Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) ([OJ L 154, 21.6.2003, p. 1](#)).
- (2) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (see page 65 of this Official Journal).