

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 II

RULES ON THE AWARD OF CONCESSIONS:

GENERAL PRINCIPLES AND PROCEDURAL GUARANTEES

CHAPTER I

General principles

Article 30

General principles

1 The contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive.

2 The design of the concession award procedure shall respect the principles laid down in Article 3. In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.

3 Member States shall take appropriate measures to ensure that in the performance of concession contracts economic operators 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.

4 The Commission shall be empowered to adopt delegated acts in accordance with Article 48 to amend the list in Annex X, where necessary, to add new international agreements that have been ratified by all Member States or where the existing international agreements referred to are no longer ratified by all Member States or they are otherwise changed, for instance in respect of their scope, content or denomination.

Article 31

Concession notices

1 Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice.

2 Concession notices shall contain the information referred to in Annex V and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.

3 Contracting authorities and contracting entities wishing to award a concession for social and other specific services listed in Annex IV shall make known their intention of planned

concession award through the publication of a prior information notice. Those notices shall contain the information set out in Annex VI.

4 By way of derogation from paragraph 1, contracting authorities or contracting entities shall not be required to publish a concession notice where the works or services can be supplied only by a particular economic operator for any of the following reasons:

- a the aim of the concession is the creation or acquisition of a unique work of art or artistic performance;
- b the absence of competition for technical reasons;
- c the existence of an exclusive right;
- d the protection of intellectual property rights and exclusive rights other than those defined in point (10) of Article 5.

The exceptions set out in points (b), (c) and (d) of the first subparagraph only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award.

5 By way of derogation from paragraph 1, the contracting authority or contracting entity shall not be required to publish a new concession notice where no applications, no tenders, no suitable tenders or no suitable applications have been submitted in response to a prior concession procedure, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Commission, where it so requests;

For the purposes of the first subparagraph, a tender shall be considered not to be suitable where it is irrelevant to the concession, being manifestly incapable, without substantial changes, of meeting the contracting authority or contracting entity's needs and requirements as specified in the concession documents.

For the purposes of the first subparagraph, an application shall be considered not to be suitable:

- a where the applicant concerned shall or may be excluded pursuant to Article 38(5) to (9) or does not meet the selection criteria set out by the contracting authority or the contracting entity pursuant to Article 38(1);
- b where applications include tenders which are not suitable within the meaning of the second subparagraph.

Article 32

Concession award notices

1 Not later than 48 days after the award of a concession, the contracting authorities and contracting entities shall, in accordance with the procedures laid down in Article 33, send a concession award notice on the results of the concession award procedure. For social and other specific services listed in Annex IV, such notices may however be grouped on a quarterly basis. In that case they shall send the grouped notices within 48 days of the end of each quarter.

2 Concession award notices shall contain the information set out in Annex VII, or in relation to concessions for social and other specific services listed in Annex IV, the information set out in Annex VIII, and shall be published in accordance with Article 33.

Article 33

Form and manner of publication of notices

1 Concession notices, concession award notices and the notice referred to in the second subparagraph of Article 43(1) shall include the information set out in Annexes V, VII and VIII and in the format of standard forms, including standard forms for corrigenda.

The Commission shall establish those standard forms by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 50.

2 The notices referred to in paragraph 1 shall be drawn up, transmitted by electronic means to the Publications Office of the European Union and published in accordance with Annex IX. The Publications Office of the European Union shall give the contracting authority or contracting entity confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of publication which shall constitute proof of publication. Notices shall be published not later than five days after they are sent. The costs of publication of the notices by the Publications Office of the European Union shall be borne by the Union.

3 Concession notices shall be published in full in one or more of the official languages of the institutions of the Union as chosen by the contracting authority or contracting entity. That language version or those language versions shall constitute the sole authentic text or texts. A summary of the important elements of each notice shall be published in the other official languages of the institutions of the Union.

4 Concession notices and concession award notices shall not be published at national level before publication by the Publications Office of the European Union unless publication at Union level does not take place 48 hours after the Publications Office of the European Union confirms receipt by the contracting authority or the contracting entity of the notice as referred to in paragraph 2. Concession notices and concession award notices published at national level shall not contain information other than that contained in the notices dispatched to the Publications Office of the European Union but shall indicate the date of dispatch of the notice to the Publications Office of the European Union.

Article 34

Electronic availability of concession documents

1 Contracting authorities and contracting entities shall 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 or, where the concession notice does not include the invitation to submit tenders, from the date on which an invitation to submit tenders was sent. The text of the concession notice or of these invitations shall specify the internet address at which the concession documents are accessible.

2 Where, in duly justified circumstances, due to exceptional security, or technical reasons or due to the particularly sensitive nature of commercial information requiring a very high level of protection, unrestricted and full direct access free of charge by electronic means to certain concession documents cannot be offered, contracting authorities or contracting entities shall indicate in the notice or the invitation to submit a tender that the concession documents

concerned will be transmitted by other means than electronic means and the time limit for the receipt of tenders shall be prolonged.

3 Provided that it has been requested in good time, the contracting authorities and contracting entities or competent departments shall supply to all applicants or tenderers taking part in the concession award procedure additional information relating to the concession documents not later than six days before the deadline fixed for the receipt of tenders.

Article 35

Combating corruption and preventing conflicts of interest

Member States shall require contracting authorities and contracting entities to 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, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or entity who are involved in the conduct of the concession award procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the concession award procedure.

With regard to conflicts of interest, the measures adopted shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified.

CHAPTER II

Procedural guarantees

Article 36

Technical and functional requirements

1 Technical and functional requirements shall define the characteristics required of the works or services that are the subject-matter of the concession. They shall be set out in the concession documents.

Those characteristics may also refer to the specific process of production or provision of the requested works or services provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives. The characteristics may for instance include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, terminology, symbols, testing and test methods, marking and labelling, or user instructions.

2 Unless justified by the subject-matter of the contract, technical and functional requirements shall not refer to a specific make or source, or a particular process which

characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific production with the effect of favouring or eliminating certain undertakings or certain products. Such a reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible. Such reference shall be accompanied by the words 'or equivalent'.

3 A contracting authority or contracting entity shall not reject a tender on the grounds that the works and services tendered for do not comply with the technical and functional requirements to which it has referred, once the tenderer proves in its tender, by any appropriate means, that the solutions it has proposed satisfied in an equivalent manner the technical and functional requirements.

Article 37

Procedural guarantees

1 Concessions shall be awarded on the basis of the award criteria set out by the contracting authority or contracting entity in accordance with Article 41, provided that all of the following conditions are fulfilled:

- a the tender complies with the minimum requirements set, where applicable, by the contracting authority or contracting entity;
- b the tenderer complies with the conditions for participation as referred to in Article 38(1); and
- c the tenderer is not excluded from participating in the award procedure in accordance with Article 38(4) to (7), and subject to Article 38(9).

The minimum requirements referred to in point (a) shall contain conditions and characteristics (particularly technical, physical, functional and legal) that any tender should meet or possess.

2 The contracting authority or contracting entity shall provide:

- a in the concession notice, a description of the concession and of the conditions of participation;
- b in the concession notice, in the invitation to submit a tender or in other concession documents, a description of the award criteria and, where applicable, the minimum requirements to be met.

3 The contracting authority or contracting entity may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria. The number of candidates or tenderers invited shall be sufficient to ensure genuine competition.

4 The contracting authority or contracting entity shall communicate the description of the envisaged organisation of the procedure and an indicative completion deadline to all participants. Any modification shall be communicated to all participants and, to the extent that they concern elements disclosed in the concession notice, advertised to all economic operators.

5 The contracting authority or contracting entity shall provide for appropriate recording of the stages of the procedure using the means it judges appropriate, subject to compliance with Article 28(1).

6 The contracting authority or contracting entity may hold negotiations with candidates and tenderers. The subject-matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations.

Article 38

Selection and qualitative assessment of candidates

1 Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject-matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject-matter of the concession and the purpose of ensuring genuine competition.

2 With a view to meeting the conditions for participation laid down in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing a commitment by those entities to that effect. With regard to financial standing, the contracting authority or the contracting entity may require that the economic operator and those entities are jointly liable for the execution of the contract.

3 Under the same conditions, a group of economic operators as referred to in Article 26 may rely on the capacities of participants in the group or of other entities.

4 Contracting authorities and contracting entities as referred to in point (a) of Article 7(1) shall exclude an economic operator from participation in a concession award procedure where they have established that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

- a participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA⁽¹⁾;
- b corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union⁽²⁾ and Article 2(1) of Council Framework Decision 2003/568/JHA⁽³⁾, as well as corruption as defined in the national law of the contracting authority or entity or the economic operator;
- c fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests⁽⁴⁾;
- d terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA⁽⁵⁾ respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
- e money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council⁽⁶⁾;
- f child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council⁽⁷⁾.

The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

Contracting entities other than those referred to in point (a) of Article 7(1) may exclude an economic operator from participation in a concession award procedure where they are aware that that economic operator has been the subject of a conviction by a final judgment for any of the reasons listed in the first subparagraph of this paragraph.

5 Contracting authorities and contracting entities as referred to in point (a) of Article 7(1) shall exclude the economic operator from participation in a concession award procedure where it is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority or contracting entity.

Furthermore, contracting authorities and contracting entities as referred to in point (a) of Article 7(1) may exclude or may be required by Member States to exclude from participation in a concession award procedure an economic operator where the contracting authority or entity can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

6 Member States may provide for a derogation from the mandatory exclusion provided for in paragraphs 4 and 5, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

Member States may also provide for a derogation from the mandatory exclusion provided for in paragraph 5, where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility to take measures as provided for in the third subparagraph of paragraph 5 before expiration of the deadline for submitting its application.

7 Contracting authorities or contracting entities may exclude or may be required by Member State to exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:

- a where it can demonstrate by any appropriate means any violation of applicable obligations referred to in Article 30(3);
- b where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations; the contracting authority or the contracting entity may, however, decide not to exclude or be required by the Member State not to so exclude an economic operator which is in one of the above situations where it has established that the economic operator in question will be able to perform the concession, taking into account the applicable national rules and measures on the continuation of business in the case of those situations;

- c where the contracting authority can demonstrate by any appropriate means that the economic operator is guilty of a grave professional misconduct, which renders its integrity questionable;
- d where a conflict of interest within the meaning of the second paragraph of Article 35, cannot be effectively remedied by any other less intrusive measure;
- e where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- f where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior concession or a prior contract with a contracting authority or with a contracting entity as defined in this Directive or in Directive 2014/25/EU which led to early termination of that prior contract, damages or other comparable sanctions;
- g where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is unable to submit the required documents supporting such information;
- h where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority or contracting entity, to obtain confidential information that may confer upon it undue advantages in the concession award procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award;
- i in the case of concessions in the fields of defence and security as referred to in Directive 2009/81/EC, where the economic operator has been found, on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the Member State.

8 Contracting authorities and contacting entities as referred to in point (a) of Article 7(1) shall at any time during the procedure exclude an economic operator where it turns out that the economic operator in question is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4 of this Article and the first subparagraph of paragraph 5 of this Article.

At any time during the procedure, contracting authorities and contacting entities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator in question is, in view of acts committed or omitted either before or during procedure, in one of the situations referred to in the second subparagraph of paragraph 5 and in paragraph 7.

9 Any economic operator that is in one of the situations referred to in paragraphs 4 and 7 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion. If such evidence is considered to be sufficient, the economic operator concerned shall not be excluded from the procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal

offence or misconduct. Where the measures are considered to be insufficient, the economic operator concerned shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by a final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

10 By law, regulation or administrative provision and having regard for Union law, Member States shall specify, the implementing conditions for this Article. They shall in particular, determine the maximum period of exclusion if no measures as specified in paragraph 9 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 4 and three years from the date of the relevant event in the cases referred to in paragraph 7.

Article 39

Time limits for receipt of applications and tenders for the concession

1 When fixing the time limits for the receipt of applications or of tenders contracting authorities or contracting entities shall take account in particular of the complexity of the concession and the time required for drawing up tenders or applications without prejudice to the minimum time limits set out in this Article.

2 Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession award documents, the time limits for the receipt of applications for the concession or for the receipt of tenders, shall be fixed so that all economic operators concerned may be aware of all the information needed to produce applications or tenders and, in any event, shall be longer than the minimum time limits set out in paragraphs 3 and 4.

3 The minimum time limit for the receipt of applications whether or not including tenders for the concession shall be 30 days from the date on which the concession notice was sent.

4 Where the procedure takes place in successive stages the minimum time limit for the receipt of initial tenders shall be 22 days from the date on which the invitation to tender is sent.

5 The time limit for receipt of tenders may be reduced by five days where the contracting authority or contracting entity accepts that tenders may be submitted by electronic means in conformity with Article 29.

Article 40

Provision of information to candidates and tenderers

1 The contracting authority or contracting entity shall as soon as possible inform each candidate and tenderer of decisions taken concerning the award of a concession, including the name of the successful tenderer, the grounds for any decision to reject his application or tender and the grounds for any decision not to award a contract for which there has been publication of a concession notice or to recommence the procedure.

Moreover, on request from the party concerned, the contracting authority or contracting entity shall as quickly as possible, and in any case within 15 days from receipt of a written request inform any tenderers that have made an admissible tender of the characteristics and relative advantages of the tender selected.

2 The contracting authority or contracting entity may decide to withhold certain information referred to in paragraph 1, regarding the contract, where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between such operators.

Article 41

Award criteria

1 Concessions shall be awarded on the basis of objective criteria which comply with the principles set out in Article 3 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority or the contracting entity.

2 The award criteria shall be linked to the subject-matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity. They may include, inter alia, environmental, social or innovation-related criteria.

Those criteria shall be accompanied by requirements which allow the information provided by the tenderers to be effectively verified.

The contracting authority or the contracting entity shall verify whether tenders properly meet the award criteria.

3 The contracting authority or the contracting entity shall list the criteria in descending order of importance.

Notwithstanding the first subparagraph, where the contracting authority or contracting entity receive a tender which proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent contracting authority or contracting entity, the contracting authority or contracting entity may, exceptionally, modify the ranking order of the award criteria to take into account that innovative solution. In that case, the contracting authority or the contracting entity shall inform all tenderers about the modification of the order of importance and shall issue a new invitation to submit tenders, in respect of the minimal time limits referred to in Article 39(4). Where the award criteria have been published at the moment of the publication of the concession notice, the contracting authority or entity shall publish a new concession notice, in respect of the minimum time limits referred to in Article 39(3).

The modification of the ranking order shall not result in discrimination.

- (1) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42).
- (2) OJ C 195, 25.6.1997, p. 1.
- (3) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54).
- (4) OJ C 316, 27.11.1995, p. 48.
- (5) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3).
- (6) Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).
- (7) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).