

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 III

RULES ON PERFORMANCE OF CONCESSIONS

Article 43

Modification of contracts during their term

1 Concessions may be modified without a new concession award procedure in accordance with this Directive in any of the following cases:

- a where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession;
- b for additional works or services by the original concessionaire that have become necessary and that were not included in the initial concession where a change of concessionaire:
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial concession; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority or contracting entity.

However, in the case of concessions awarded by a contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II, any increase in value shall not exceed 50 % of the value of the original concession. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

- c where all of the following conditions are fulfilled:
 - (i) the need for modification has been brought about by circumstances which a diligent contracting authority or contracting entity could not foresee;
 - (ii) the modification does not alter the overall nature of the concession;
 - (iii) in the case of concessions awarded by contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II, any increase in value is not higher than 50 % of the value of the initial concession. Where several successive modifications are made, this limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;
- d where a new concessionaire replaces the one to which the contracting authority or the contracting entity had initially awarded the concession as a consequence of either:

- (i) an unequivocal review clause or option in conformity with point (a);
 - (ii) universal or partial succession into the position of the initial concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or
 - (iii) in the event that the contracting authority or contracting entity itself assumes the main concessionaire's obligations towards its subcontractors where this possibility is provided for under national legislation;
- e where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting authorities or contracting entities having modified a concession in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex XI and shall be published in accordance with Article 33.

2 Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, concessions may equally be modified without a new concession award procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

- (i) the threshold set out in Article 8; and
- (ii) 10 % of the value of the initial concession.

However, the modification may not alter the overall nature of the concession. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

3 For the purpose of the calculation of the value referred to in paragraph 2 and points (b) and (c) of paragraph 1, the updated value shall be the reference value when the concession includes an indexation clause. If the concession does not include an indexation clause, the updated value shall be calculated taking into account the average inflation in the Member State of the contracting authority or of the contracting entity.

4 A modification of a concession during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the concession materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

- a the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure;
- b the modification changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession;
- c the modification extends the scope of the concession considerably;

- d where a new concessionaire replaces the one to which the contracting authority or contracting entity had initially awarded the concession in other cases than those provided for under point (d) of paragraph 1.

5 A new concession award procedure in accordance with this Directive shall be required for other modifications of the provisions of a concession during its term than those provided for under paragraphs 1 and 2.