



Directive on the award of concession contracts

Lukasz Rozanski

Directorate General Internal Market and Services

Overview

- Definition
- Scope
- Calculation of the value
- Exclusions (water, exclusive rights, transport)
- Duration
- Outline of procedural rules
- Procedural guarantees
- Award criteria

Definition

- Concession - same as a public contract but consideration consists in the right to exploit the work or services (sometimes with payment)
 - right to exploit implies a transfer of operating risk
 - transfer of risk is deemed to take place where no guarantee to recoup the investments and costs.
 - risk can be limited by regulation, but always real exposure to possible loss, not merely nominal or negligible
 - demand or supply risk or both

- Clear delimitation from other situations such as licenses, authorizations and land lease/public domain contracts

Scope

- Both works and services concessions covered
- Both classic and utilities sectors are covered (contracting authorities = classic; contracting entities = utilities)
- Threshold of 5 186 000 € for all concessions

Calculation of the value

- Calculation of the value
 - Based on the total turnover of the concessionaire
 - What do we factor in?
 - What if the actual value of the award differs from the estimate?

Exclusions

- Drinking water (supply or distribution)
- Certain concessions awarded to holders of exclusive rights (*e.g.* distribution of gas and electricity)
- Certain lotteries
- Public passenger transport services (Reg. 1370/2007)
- Light regime for social and other specific services

Focus on exclusions: transport

Concessions for passenger transport services by rail and by road:

- Services concessions covered by Reg. 1370/2007 but
- Definition of the directive applies
- Directive also applies to works concessions and to services concessions in the field of transport not covered by the Regulation e.g. transport tourists, transport of goods

Focus on exclusions: exclusive rights

- Definition of exclusive rights (Art. 2.1(12))
- Exemption of concessions awarded to contracting authorities on the basis of exclusive rights
- Exemption of concessions awarded on the basis of exclusive rights granted in compliance with EU secondary legislation notably in the field of distribution of gas and electricity
- Exemption of concessions awarded on the basis of exclusive rights granted in a non-competitive manner in the field of lotteries

Duration

- General principle for concessions lasting more than 5 years
- Shall not exceed time necessary to recoup investments made for operating works/services with return on invested capital
- Possibility to take into account investments at beginning and during life of concession and those necessary to achieve specific contractual objectives.

Procedural rules: overview

- Publication of notices in OJEU (ex post & ex ante)
- Electronic notification and availability of concession documents
- No specific procedures – negotiations always possible
- Qualitative selection and exclusion grounds
- Award Criteria
- Minimal time limits

Focus on procedural guarantees

- Using objective criteria while reducing the number of candidates
- Disclosing the envisaged organization of the procedure and keeping all interested parties informed about any changes
- Ensuring appropriate recording of the procedure
- Prohibition to modify the award criteria, subject matter of the concession and the minimum requirements throughout the procedure

General standards on award criteria

- Social, environmental or concern innovation
- Objective, linked to the subject matter, must permit to identify the overall economic advantage and do not confer unrestricted freedom of choice
- Compulsory ranking in descending order of importance

Other procedural issues

- Selection criteria and causes of exclusion
 - Technical and professional ability & financial and economic standing
 - The list of compulsory and facultative criteria same as in the PP Directive
 - No restriction on the means of evidence
- Functional and technical requirements
- Provisions on the conflict of interest

After the award

- Regime on modifications of contracts
- Extension of judicial protection → Remedies Directives

Focus on modifications (I)

- "de minimis": below 10% **and** below threshold;
- Concessions may be modified without new procedure if:
 - **clearly provided for** (options etc.)
 - **additional works, services and supplies – change significantly inconvenient – 50% limit (only for contracting authorities)**
 - **unforeseen circumstances – 50% limit (only for contracting authorities)**
 - **change of contractors (provided for or part of succession)**
 - **any modification that is not substantial**

Focus on modifications (II)

- Explicit criteria for when modifications are substantial:
 - **other participants / winners**
 - **changes economic balance in favour of contractor**
 - **extends scope considerably**
 - **unwarranted change of contractor**