

Information note:

The Concessions Directive

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Oifig um Sholáthar Rialtais
Office of Government Procurement



An Roinn Caiteachais Phoiblí
agus Athchóirithe
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1. National Public Procurement Policy Framework

The National Public Procurement Policy Framework consists of 5 strands:

- 1) Legislation (Directives, Regulations)
- 2) Government Policy (Circulars etc.)
- 3) Capital Works Management Framework for Public Works
- 4) General Procurement Guidelines for Goods and Services
- 5) More detailed technical guidelines, template documentation and information notes as issued periodically by the Policy Unit of the OGP

The framework sets out the procurement procedures to be followed by Government Departments and State Bodies under national and EU rules. The framework supports contracting authorities, including the OGP, the four key sectors (Health, Education, Local Government and Defence), individual Departments, Offices, commercial and non-commercial State bodies, and private entities which are subsidised which are subsidised 50% or more by a public body, when awarding contracts for works, goods and services.

This information note on the Concessions Directive forms part of Strand 5 of the Framework. The note will be subject to amendment and review periodically and the most up to date version will be published on the Office of Government Procurement's website www.ogp.gov.ie. The note is not intended as legal advice or a legal interpretation of Irish or EU law on public procurement. Legal or other professional advice should be obtained if there is any doubt about the correct procedure to be followed.

2. Legislative Background

The 2004 public procurement Directives contained a provision for concession contracts within the general procurement regime. These provisions were little understood and not referenced in this jurisdiction. Accordingly, the PPP-style contracts, in Ireland, which were entered since 2004, were procured under the standard procurement rules.

The EU Commission reviewed the concession contracts market in its consideration of new procurement Directives issued in 2014. The Commission decided in the final event to establish a separate procurement regime for concessions to reflect the particular circumstances of the concessive market and with the aim of more transparently identifying the incidence and dynamics of concessive contracts across Member States.

Unlike public contracts, which are regulated by Directives 2014/24/EU and 2014/25/EU, the award of concessions has not been subject to any clear and unambiguous provisions, being guided only by the general principles of transparency and equal treatment of the Treaty on the Functioning of the EU. This loophole has given rise to serious distortions of the Single Market such as direct awards of contracts without any transparency or competition (with associated risks of national favouritism, fraud and corruption) and generated considerable economic inefficiencies.

Therefore, in order to ensure benefits stemming from sound and efficient procurement, elimination of discrepancies and fragmentation among national regimes and homogenous understanding of the Treaty principles across Member States, a European framework for concessive-type contracts was considered necessary and the most appropriate way to overcome existing barriers to the EU-wide concessions market and to ensure convergence and a level playing field in the EU.

In 2014, the EU Commission issued a suite of three new Directives to reform the area of public procurement across the Member States. These Directives are:

- 2014/23/EU – on the award of concession contracts
- 2014/24/EU – on the award of public contracts
- 2014/25/EU - on the award of contracts by Utilities

The latter two Directives which, updated the previous public procurement Directives dating to 2004, were transposed into Irish law in May 2016 as SI 284 of 2016 and SI 286 of 2016.

The remaining Concessions Directive represented a new departure by the EU Commission in specifically regulating for the area of concessive-type contracts and as such differed from the other related Directives of the suite in a significant manner.

After a specific consultation process, the Concessions Directive was transposed in May 2017 as SI 203 of 2017.

3. Main elements of the 2014 Concessions Directive

- A clearer and precise definition of concession (building on the ECJ case law);
- Coverage of works and services concessions both in the utilities sector and in the classic sector (except for water services);
- Compulsory publication of concession notices in the Official Journal of the EU, when their value is equal to or greater than € 5,225,000;
- Modifications for dealing with changes to concessions contracts during their term, notably when justified by unforeseen circumstances;
- Selection and award criteria simpler and more flexible than similar provisions currently applicable to public contracts;
- No standard mandatory award procedures (negotiations always possible); and

- Application of the Remedies Directives to concessions covered by the Directive.

4. Concession Characteristics

Concessions typically involve high-value, complex and long-term contracts that require flexibility during the award procedure and subsequent implementation.

Concessions are partnerships between the public sector and mostly private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (ports, water distribution, parking garages, toll roads) or provide services of general economic interest (energy, water distribution and waste disposal for example). Concessions are the most common form of Public Private Partnerships (PPP).

The salient features of a concessive-type contract are the contractor must bear:

- (in whole or in part) the cost of construction (or service provision); and
- a level of market risk (for use of the asset or service).

A contract for a toll road or a bridge, in which the contractor builds (wholly or partly at its own cost) the asset but is entitled to recoup its investment by levying tolls for its use, is an example of a "works" concession.

The operation of a local bus service, pursuant to which the "operator" will charge the public fares, is an example of a "service" concession.

The distinction between a concession contract and a standard procurement contract lies in the right of the concessionaire to "exploit" the works or service as a means (in whole or in part) of obtaining payment for having undertaken the works or having delivered the service.

The value threshold for concession contracts is above €5.225m.

5. Economic role of Concessions

Concession contracts underpin an important share of the economic activity in the EU. However, the fact that Member States use different labelling for concessions and the current lack of transparency on their award makes systematic and precise measuring of their economic and social importance difficult. According to studies, over 60% of all PPP contracts in Europe are to be qualified as concessions.

The new rules will facilitate the conclusion of concessions and, therefore, of public-private partnerships (PPP), encouraging new investments, promoting a quicker return to sustainable economic growth and contributing to innovation and long-term structural development of infrastructures and services.

6. SME aspects to the Directive

The absence of a clear obligation to advertise service concessions across the EU has hampered the cross-border access of undertakings, particularly of SMEs, to business opportunities

7. Relationship between concessions and Public-Private Partnerships

Concessions involving private partners are a particular form of Public Private Partnership (PPP). Although PPPs have never been defined in EU Public Procurement legislation, they are usually understood to be cooperation between a public authority and a private partner, where the latter bears risks that are traditionally borne by the public sector and often contributes to financing of the project. Some PPPs are structured as public contracts, but, based on estimations by the Commission services, over 60% of all PPP contracts would qualify as concessions.

8. Application of Concession Contracts

In general, the new Concessions Directive is intended for large-scale, long-term complex contracts predominately in infrastructural development with significant risk transfer. The default position should be to consider the procurement as a service contract procured under the classic regime. Please read the separate Information Note on the Application of Concession Contracts before making any decision as to the use of this procedure.