

**EXPLANATORY MEMORANDUM TO**  
**THE CONCESSION CONTRACTS REGULATIONS 2016**

**2016 No. 273**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 This instrument implements the new Directive 2014/23/EU on the award of concession contracts<sup>1</sup> (“the Concessions Directive”), which provides rules for the award of concession contracts above certain thresholds by public authorities and utilities. These Regulations also implement Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts<sup>2</sup> and Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors<sup>3</sup> (“the Remedies Directives”) so far as they apply to remedies and review procedures for the procurement of concession contracts.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 The Cabinet Office’s general approach to drafting this instrument has been to use the ‘copy-out’ technique, where available. So far as was considered practical, the text of these provisions has been conformed to UK standards of legislative structure and drafting. But, on the whole, this instrument retains the key operative phrases that the Concessions Directive uses to express the obligations which are to be imposed on contracting authorities and utilities. This approach to transposing the Concessions Directive has mirrored that taken for Directive 2014/24/EU on public procurement<sup>4</sup>, which was implemented by the Public Contracts Regulations 2015<sup>5</sup> (see paragraph 3 of the Explanatory Memorandum accompanying that instrument). This approach also mirrors that taken to Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors<sup>6</sup>, which is being implemented

---

<sup>1</sup> OJ No L 94, 28.3.2014, p1.

<sup>2</sup> OJ No L 395, 30.12.1989, p33, last amended by Directive 2007/66/EC and the Concessions Directive.

<sup>3</sup> OJ No L 76, 23.3.1992, p14, last amended by Directive 2007/66/EC and the Concessions Directive.

<sup>4</sup> OJ No L 94, 28.3.2014, p65.

<sup>5</sup> S.I. 2015/102.

<sup>6</sup> OJ No L 94, 28.3.2014, p243.

by the Utilities Contracts Regulations 2016. All three Directives comprise a package of measures to improve public procurement processes as explained further at paragraph 7. Therefore, so far as possible, provisions that are common with the Public Contracts Regulations 2015 have been aligned to ensure consistency of application and to avoid any ambiguity.

#### *Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

#### **4. Legislative Context**

- 4.1 The award of public works concessions is currently subject to the basic rules of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts<sup>7</sup>; while the award of service concessions with a cross-border interest is subject to the principles of the Treaty on the Functioning of the European Union (TFEU). There is a risk of legal uncertainty related to divergent interpretations of the Treaty principles and wide disparities among the legislations of various Member States. By introducing a common understanding of the transparent and non-discriminatory procedures, this Directive principally aims to ensure that economic operators from across the Single Market benefit fully from the basic freedoms in competing for concession contracts.
- 4.2 Provisions on legal review procedures and the remedies that are available when the rules are breached are contained in the Remedies Directives (one applying to the public sector, one to the utilities sector, both of which were heavily amended and expanded by a later directive in 2007)<sup>8</sup>.
- 4.3 In January 2011 the European Commission published a Green Paper consultation on the modernisation of EU public procurement policy<sup>9</sup>. Cabinet Office, with inputs from various UK stakeholders, coordinated and published the UK's response in July 2011. The Commission concluded that there was an urgent need for a streamlined and flexible set of procurement rules including rules for concession contracts so that Member States can award concession contracts that deliver value for money for the public purse, facilitate equal access and fair participation for SMEs and support the achievement of sustainable public policy objectives.
- 4.4 The Commission came forward with draft proposals for modernisation in late 2011 through three new directives covering public sector contracts, utilities sector contracts, and concession contracts.
- 4.5 Cabinet Office submitted an Explanatory Memorandum on 17 January 2012 on 18960/11 "Proposal For A Directive Of The European Parliament And Of The Council On The Award Of Concession Contracts". The Commons European Scrutiny Committee recommended a Reasoned Opinion on subsidiarity (Report No 57 Session 2010/2012); the Reasoned Opinion motion was debated and agreed by the House of Commons on 6 March (Hansard 6 March 2012 Columns 749-767). European Scrutiny

---

<sup>7</sup> OJ No L 134, 30.4.2004, p114.

<sup>8</sup> Directive 89/665/EC (public sector); Directive 92/13/EEC (utilities sector); Directive 2007/66/EC (amending the public sector and utilities sector remedies directives)

<sup>9</sup> [http://ec.europa.eu/growth/single-market/public-procurement/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm)

Committee cleared these as legally and politically important in report 12 on 17 June 2013, following correspondence between the Chairman and Cabinet Office Ministers.

- 4.6 The Lords Select Committee on the EU sifted the Explanatory Memoranda to sub-committee B (Sift 1454 Session 10/12) and cleared it on 28 May 2012 following correspondence between Lords Roper and Boswell and the Minister for the Cabinet Office.
- 4.7 Following intensive scrutiny and debate between the EU Council, Commission and European Parliament, a package of three new Procurement Directives was published in the Official Journal of the EU on 28 March 2014 and came into force on 17 April 2014. The UK and other EU Member States have 2 years from this latter date (i.e. by 18 April 2016) in which to implement the new directives in national legislation.
- 4.8 The three new Directives are:
  - Directive 2014/24/EU on public procurement, replacing the 2004 Directive for Public Sector Contracts;
  - Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts;
  - Directive 2014/23/EU on the award of concession contracts.
- 4.9 The instrument that this memorandum accompanies transposes the third of these three instruments, the Concessions Directive.
- 4.10 The instrument contains a number of ambulatory references to EU legislation, which will give effect in UK law to technical updates to relevant EU legislation, respecting the principle of “copy out” by avoiding inadvertent gold plating while ensuring that UK legislation will remain up to date as technical changes are made at EU level. These references appear in regulations:
  - 4.10.1 2(1), which sets out the definition of ‘common technical specification,’ ‘CPV’ (the Common Procurement Vocabulary);
  - 4.10.2 5(3)(b) which refers to legal acts listed in Annex III to the Concessions Directive. The listed legal acts provide for procedures which, if followed, would mean that certain entities are not “utilities” for the purpose of that Directive;
  - 4.10.3 9 (1) and (2) which sets the threshold amounts for the purposes of the Regulations by reference to the Concessions Directive. These thresholds are routinely revised every 2 years by the Commission in accordance with Article 9 of that Directive, to reflect fluctuations in currency exchange rates;
  - 4.10.4 10, 11(2), 13(5)(a) and (b) which cross-refer to technical definitions in various directives which set out the scope of exemptions from the regulations for certain services concession contracts;
  - 4.10.5 33(1) and 60(4) which refer to the Commission Implementing Regulation establishing standard forms for the publication of notices in the field of public procurement<sup>10</sup>;
  - 4.10.6 38(16)(a) which refers to Annex X to the Concessions Directive, which lists international environmental, social and labour law provisions breach of which

---

<sup>10</sup> OJ No L296, 12.11.2015, p1.

will permit a contracting authority or utility to exclude a tenderer from bidding for a contract.

4.11 A transposition note is submitted with this Explanatory Memorandum.

## **5. Extent and Territorial Application**

5.1 The extent of this instrument is England and Wales and Northern Ireland.

5.2 The territorial application of this instrument is England and Wales and Northern Ireland.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

### *What is being done and why*

7.1 The Government is committed to a strategy of reforming UK public procurement processes, to stimulate economic growth. The Government negotiated successfully in Brussels to simplify and modernise the existing framework of EU procurement directives, to make public procurement faster, less costly and enable better value outcomes for government and industry.

7.2 This instrument is needed to implement the legal provisions contained in the new Concessions Directive. This new Directive introduces a balanced and flexible legal framework of procurement rules that apply to concession contracts awarded by public sector authorities and utilities.

7.3 Part 5 of this instrument transposes the sections of the public sector Remedies Directives that are relevant to concession contracts. The Remedies Directives cover review procedures and remedies available for breaches of the procurement rules. However, we have taken the opportunity to provide for the remedies to be available not only to economic operators from non-EEA countries where covered by the WTO Agreement on Government Procurement (which the previous Public Contract Regulations 2006<sup>11</sup> did) but also to those from other third countries where required by any other international agreement by which the EU is bound.

7.4 Implementation of the new Concessions Directive is mandatory, though certain aspects of the provisions permit Member States some flexibility in deciding how, or in some cases whether, to implement them. There are also some policy issues to consider where the Directive is silent and so there is further flexibility in determining the method of implementation in this regard.

7.5 The award of service concessions was not subject to any clear and unambiguous provisions as they were guided simply by the general principles of the TFEU of transparency and equal treatment. Introducing EU legislation therefore was seen as the most appropriate way to overcome existing barriers to the EU-wide concession market and to ensure convergence and a level playing field in the EU, ultimately guaranteeing the free movement of goods and services in all Member States.

---

<sup>11</sup> S.I. 2006/5.

- 7.6 The most significant aspects of the new regime include the following:
- 7.6.1 A clearer and more precise definition of a concession (building on the EU Court's case law).
  - 7.6.2 Coverage of award of works and services concessions both in the public sector and in the utilities sector.
  - 7.6.3 Compulsory publication of concessions in the Official Journal of the EU, when their value is equal to or greater than €5,225,000 (£4,104,394).
  - 7.6.4 Pragmatic solution for dealing with changes to concession contracts during their term notably when justified by unforeseen circumstances.
  - 7.6.5 Establishment of a minimum deadline for the submission of applications for the concession.
  - 7.6.6 Establishment of certain obligations with respect to the selection and award criteria to be applied by the contracting authorities and utilities when awarding concessions. These rules aim at ensuring that such criteria are published in advance, are objective and not discriminatory. In general, they are less rigid than similar provisions currently applicable to public contracts.
  - 7.6.7 No specific award procedures but instead definition of certain general principles aimed at ensuring transparency and equal treatment with particular reference to negotiation.
  - 7.6.8 Application of the Remedies Directives to all concessions above the threshold.
  - 7.6.9 A light-touch regime for concession contracts for certain social and health and some other services. The scheme necessitates notification to the market of relevant concession contracts via a simpler notification procedure than other categories.
  - 7.6.10 The establishment of equal access and fair participation throughout the concession award process should encourage SME participation. A simple process of assessing bidders' credentials, involving the use of supplier self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status. A consortium bidding is facilitated by the possibility for a candidate to rely on the capacities of other entities.
- 7.7 These changes support UK Government priorities of economic growth and deficit reduction by making the process for the award of concession contracts open and transparent and more effective for business and procurers alike.

#### *Consolidation*

- 7.8 Consolidation is not relevant to this instrument.

### **8. Consultation outcome**

- 8.1 Cabinet Office has maintained a longstanding programme of involving stakeholders in the rule-modernisation process, since the publication of the original European legislative proposals in 2011. The results of this process informed the Government's negotiating strategies and more recently the national implementation plans.
- 8.2 Consultation on the draft Concession Contracts Regulations took place from 21 August to 18 September 2015. The previous consultation on the Public Contracts

Regulations in 2014 had covered many of the issues, such as policy options, that were common to both the Public Contracts Directive and the Concessions Directive. As a result, there were fewer issues to consult on, but the 8 responses, received from a range of stakeholders including government departments, local authorities, business and industry groups, law firms and utilities, confirmed that the draft Regulations were fit for purpose. In particular, there was agreement concerning the use of the copy out approach. The outcome was published on 3 February 2016 at: <https://www.gov.uk/government/consultations/transposing-the-eu-procurement-directives-concessions-contracts-regulations>.

## **9. Guidance**

- 9.1 The Government has developed guidance specifically covering the award of concession contracts. The guidance will be published on Gov.uk.

## **10. Impact**

- 10.1 The impact on business is that concession awarding bodies in the utilities sector who are outside the scope of the current regime and will be brought into the new, lighter touch concessions regime for works and service concessions. This is an increase in the regulation placed upon these bodies. There is no impact on charities and voluntary bodies.
- 10.2 The impact on the public sector is that the new Directive increases regulatory requirements on concession awarding bodies by regulating service concessions, creating additional procurement process costs and additional costs in relation to remedies.
- 10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website.

## **11. Regulating small business**

- 11.1 This regulation applies to activities that are undertaken by small business.
- 11.2 No specific action is taken to minimise regulatory burdens on small business. This instrument sets out to establish a transparent and fair concessions process, which should be of general benefit to small business, and many of the stages have been designed with the specific intention of encouraging SMEs to participate.
- 11.3 Small businesses were consulted as part of the public consultation, see paragraph 8.2 above.

## **12. Monitoring & review**

- 12.1 The intended outcomes of this instrument are:
- 12.1.1 To implement the new Concessions Directive in national law;
  - 12.1.2 To transpose the provisions of the Remedies Directive so far as they now apply to concession contracts covered by the Concessions Directive;
  - 12.1.3 To publish a review of these Regulations within 5 years of their implementation.
- 12.2 The European Commission is required to review the economic effects of the internal market in terms of the following factors reporting to the European Parliament and the Council by 18 April 2019:

- 12.2.1 The cross-border award of contracts and transaction costs resulting from the application of the thresholds set in Article 8;
- 12.2.2 The exclusions set out in Article 12 taking into account the specific structures of the water sector.
- 12.3 The European Commission is also required to review the functioning of the Directive and report to the European Parliament and the Council by 18 April 2021, and every five years thereafter based on information provided by the Member States in accordance with Article 45(3).

### **13. Contact**

- 13.1 Lois Devey at the Cabinet Office Telephone: 07834 172021 or email: [lois.devey@crownccommercial.gov.uk](mailto:lois.devey@crownccommercial.gov.uk) can answer any queries regarding the instrument.