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# Procurement Act 2023 guidance: concession contracts

Technical guidance on concession contracts.

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# What are concession contracts?

1. Under a concession contract, the supplier receives at least part of their remuneration from users of the works or services they are providing. As such, suppliers are exposed to a potential loss on their investment due to demand fluctuations.
2. There are 2 different types of concession contracts:
  - a. a concession contract for the supply of works; for example for the construction and operation of a toll road where the supplier would receive income directly from users of the toll road, and
  - b. a concession contract for the supply of services; for example, a contract to operate a leisure centre where the supplier would receive income directly from customers using the centre.
3. This guidance deals only with the specific provisions that apply to concession contracts. Where there are no specific provisions, there is no difference for concession contracts and reference should be made to relevant other guidance on various aspects of the Procurement Act 2023 (the Act).

# What is the legal framework that governs concession contracts?

4. The procurement rules governing concession contracts in the UK are contained in the Act, which replaces the repealed Concession Contracts Regulations 2016. Concession contracts are defined at section 8 of the Act.
5. The general rule is that the Act will apply to concessions in the same way as it applies to other procurement. However, there are exceptions to the general rule

and in some instances specific provisions provide additional flexibility for concessions. These are set out at Annex A.

6. Section 10 of the Act provides for situations where a mixed procurement contains concession and non-concession elements which, if procured separately, would be subject to different thresholds and rules. It provides for when those contracts are to be treated according to the rules that reflect the special nature of one element (i.e. when they are to be treated as a 'special regime contract' as defined in section 10), or when they are to be treated as subject to the standard rules in the Act.

## What has changed?

7. Whereas concession contracts were previously regulated separately, the Act amalgamates the concession contracts regime into the same set of common rules covering other types of contracts. This consolidation serves to reduce the overall volume of procurement legislation and simplifies the rules for contracting authorities.

## Key points and policy intent

### Application

8. Concession contracts are often of high value and deliver essential infrastructure or services. It is therefore appropriate that they are open to competition in the same way as other types of public contracts for the supply of works or services to ensure best value for money.

- a. The specific rules on concession contracts apply to concession contracts

that are public contracts. A concession contract is public contract where:

- i. the estimated value of the contract exceeds the threshold value for concession contracts, and
- ii. the contract is not an exempted contract as defined in the Act (see guidance on exempted contracts).

9. The provisions in Part 6 of the Act relating to 'regulated below-threshold contracts' do not apply to concessions contracts.

## What is a concession contract?

10. Concession contracts are defined in section 8 of the Act. This guidance relates to concessions contracts that are public contracts.

11. As with other types of public contracts, a concession contract must be for pecuniary interest, which can encompass monetary and non-monetary consideration. However, the definition of concession contract has a number of specific features:

- a. a concession contract must only be for the supply of works or services to a contracting authority. The definition does not include contracts for the supply of goods
- b. at least part of the consideration must be the right to exploit the works or services. For example, the supplier may be entitled to receive income from public users rather than solely payment from the contracting authority. The supplier can still receive some payment from the contracting authority but must also be entitled to exploit the works or services as part of the consideration;
- c. under the contract, the supplier must be exposed to a real operating risk. The risk must be 'real', i.e. it should not be hypothetical or nominal. An operating risk is defined as a risk that the supplier will not be able to recover its costs in connection with the contract. In other words, there must be a risk

that the supplier may not break even on the contract. The factors giving rise to the operating risk must:

- i. be reasonably foreseeable at the time the contract was awarded, and
- ii. arise from matters that are outside of the control of the contracting authority and the supplier. For example, it cannot arise from factors such as poor performance or contract breaches.

For example, a concession contract to run a canteen might carry the risk that turnover would be insufficient to cover expenses and expose the supplier to the risk of not making a return on the investments made and costs incurred.

## **What are the financial thresholds for concession contracts?**

12. The award, entry into and management of a concession contract with an estimated value exceeding the relevant threshold that is not an exempted contract (i.e. that is a public contract) will be 'covered procurement' under the Act. The thresholds in Schedule 1 of the Act reflect those in place at the time the Act received Royal Assent and will be updated prior to the Act coming into force. The threshold figure for concession contracts, defence and security contracts that are a concession contract and light touch contracts that are a concession contract that has applied since 1 January 2024 is £5,372,609.

13. There is no difference in the threshold for a concession contract for the supply of works and a concession contract for the supply of services.

14. The thresholds reflect the thresholds in our international obligations and are adjusted on the first of January of every even year to reflect currency fluctuations and inflation.

15. Section 10 of the Act sets out the rules for mixed procurements for 'special regime contracts', which are relevant when a concession contract is combined

with an element of goods or non-concession services or works or procured with another special regime contract such as a light-touch services or utilities contract. Please see the guidance and related flowcharts on mixed procurement for further information on how to apply these rules.

## **What exemptions are available to contracting authorities?**

16. The exemptions, where the rules relating to covered procurement in the Act do not apply, for all public contracts, including concession contracts, are set out in Schedule 2. Three exemptions are specific to concession contracts as set out below, although other types of exempted contracts may also be relevant. Please refer to the guidance on exempted contracts for further information.

17. Water services Schedule 2, paragraph 35 of the Act exempts concession contracts for the carrying out of certain water services. This is to ensure that the exemptions for a utilities contract for such water services also apply where the contract is a concession contract.

18. Scheduled air services (restricted public service obligations) Schedule 2, paragraph 36 of the Act makes provision for an exemption for concession contracts for scheduled air services for specified periods within the UK or the UK and Gibraltar and which are operated under an exclusive licence and subject to minimum service requirements. These types of contracts are known as restricted public service obligations (PSOs) and are separately regulated by Regulation 1008/2008. Under this regulation, the Secretary of State for Transport (SoS) can impose a PSO in respect of scheduled air services between an airport in the UK and an airport serving a peripheral or development region of the UK or on a route which is considered to be vital for the economic and social development of the region. When a PSO has been imposed, any qualifying air carrier is allowed to commence scheduled air services meeting all the requirements of the PSO. This is known as an 'open' PSO and does not involve the award of a contract. If no qualifying air carrier has commenced or can demonstrate that it is about to

commence sustainable scheduled air services on a route in question in accordance with the PSO then the SoS can limit access to the scheduled air services to only one qualifying air carrier for a period of up to four years. This is known as a 'restricted' PSO. The right to offer the services for a restricted PSO must be offered by public tender under Regulation 1008/2008. The exemption in paragraph 36 covers concession contracts for restricted PSOs.

19. Public passenger transport services Schedule 2, paragraph 37 of the Act sets out this exemption.

## Valuation of a concession contract

20. In addition to any payments to the supplier from the contracting authority, a concession contract must also include the right to exploit the works or services during the contract period. Therefore, the value calculation for a concession contract must take into account the full range of potential consideration to be received by the supplier over the length of the contract, including any renewals or extensions.

21. The estimated value must be based on the expected maximum value and calculated in accordance with Schedule 3, paragraph 3, of the Act which lists amounts the supplier may expect to receive under a concession contract. For example, the contracting authority must include the total revenue likely to be received, including income receivable from the contracting authority or from the exploitation of the services or works, such as charges levied on users. Revenue is not estimated profit and should not be reduced by factoring in costs expected to be incurred by the supplier. Other remuneration such as premiums, fees, commissions, receipt of assets, sale of assets must also be incorporated into the valuation.

22. The list in Schedule 3, paragraph 3 is non-exhaustive but instructive in interpreting the other forms of amounts receivable that must be taken into



account when estimating the value of a concession contract.

23. In the same way as all public contracts, the estimated value should be calculated inclusive of value added tax (VAT) and follow the rules in Schedule 3 on anti-avoidance and cases where an estimate is not possible.

## **What other guidance is of particular relevance to this topic area?**

Contracting authorities awarding concession contracts will need to understand the whole of the Act, as the same provisions (for example, relating to competitive tendering procedures, conditions of participation and award criteria) as apply to contracting authorities awarding other contracts apply. The only exceptions and flexibilities are set out in this guidance. The suite of guidance published on the Act is therefore relevant, although the following guidance is of particular relevance to concession contracts:

- Guidance on mixed procurement
- Guidance on valuation of contracts
- Guidance on exempted contracts
- Guidance on thresholds

## **Annex A: Summary of specific concessions contract provisions in the Procurement Act 2023**

### **Section 3: Public contracts**

Section 3(4) provides that a concession contract is a public contract for the

purpose of the Act provided it is not an exempted contract and has an estimated value above the applicable threshold set out in Schedule 1 (as it is amended).

## **Section 5: Mixed procurement: above and below threshold**

Section 5(5) makes clear that concession contracts with an estimated value below the application threshold are below-threshold contracts.

## **Section 8: Concession contracts**

Section 8(1) defines a concession contract as a contract for the supply, for pecuniary interest, of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services that are the subject of the contract and where, under the contract, the supplier is exposed to a real operating risk. A contract for the provision of goods is not a concession contract.

Section 8(2) defines an 'operating risk' for the purpose of section 8(1). An operating risk is the risk that the supplier is not able to recover its costs relating to the supply and operation of the works or services during the contract period, and the factors creating the risks were reasonably foreseeable at the time of award and arise from issues outside the control of the contracting authority and the supplier.

## **Section 10: Mixed procurement - special regime contracts**

Section 10(6) explains that concession contracts are a type of special regime contract for the purpose of the Act. Section 10(3) provides that a contract is not to be treated as a special regime contract if some of the goods, services or

works could reasonably be supplied under a separate contract which would not be a special regime contract and would have an estimated value of not less than the relevant threshold for that type of contract.

## **Section 34: Competitive award by reference to dynamic markets**

Section 34(7) provides that concession contracts, other than those which are also utilities contracts, cannot be awarded under dynamic markets.

## **Section 45: Frameworks**

Section 45(8)(a) provides that concession contracts cannot be awarded under a framework.

## **Section 52: Key performance indicators**

Section 52(6)(c) sets out that the obligation to set and publish key performance indicators under this section does not apply in relation to concession contracts.

## **Section 68: Implied payment terms in public contracts**

Section 68(1) provides that payment terms implied into contracts by this section are not implied into concession contracts.

## **Section 69: Payments compliance notices**

Section 69(6)(d) provides that the obligation to publish payments compliance

notices does not apply to concession contracts.

## **Section 70: Information about payments under public contracts**

Section 70(4)(b) provides that the obligation to publish information about payments under public contracts does not apply to concession contracts.

## **Section 73: Implied payment terms in sub-contracts**

Section 73(6)(a) provides that terms implied into sub-contracts are not implied into subcontracts that are for the purpose of carrying out all or any part of a concession contract.

## **Section 84: Regulated below threshold contracts**

Section 84(1)(b) defines a regulated below-threshold contract as not including a below threshold contract that is a concession contract.

## **Schedule 1: Threshold amounts**

The thresholds in Schedule 1 of the Act reflect those in place at the time the Act received Royal Assent and will be updated prior to the Act coming into force. The threshold figure for concession contracts, defence and security contracts that are a concession contract and light touch contracts that are a concession contract that has applied since 1 January 2024 is £5,372,609.

## Schedule 2: Exempted contracts

Paragraph 35 provides that concession contracts for utility activities relating to water services described in Schedule 4, paragraph 3(1) or (2) are exempted contracts.

Paragraph 36 provides that concession contracts for scheduled air services for specified periods within the UK or the UK and Gibraltar and which are operated under an exclusive licence and subject to minimum service requirements are exempted contracts. These types of contracts are known as restricted public service obligations (PSOs) and are separately regulated by Regulation 1008/2008. Under this Regulation, the Secretary of State for Transport (SoS) can impose a PSO in respect of scheduled air services between an airport in the UK and an airport serving a peripheral or development region of the UK or on a route which is considered to be vital for the economic and social development of the region. When a PSO has been imposed, any qualifying air carrier is allowed to commence scheduled air services meeting all the requirements of the PSO. This is known as an 'open' PSO and does not involve the award of a contract. If no qualifying air carrier has commenced or can demonstrate that it is about to commence sustainable scheduled air services on a route in question in accordance with the PSO then the SoS can limit access to the scheduled air services to only one qualifying air carrier for a period of up to four years. This is known as a 'restricted' PSO. The right to offer the services for a restricted PSO must be offered by public tender under Regulation 1008/2008. The exemption in paragraph 36 covers concession contracts for restricted PSOs.

Paragraph 37 provides that concession contracts for the provision of public passenger transport services are exempted contracts.

## Schedule 3: Estimating the value of a contract

Paragraph 3(1) makes it clear that the valuation rules in paragraph 1 do not apply to the valuation of a concession contract.

Paragraph 3(2) obliges the contracting authority to estimate the value of a concession contract as the maximum amount the supplier could expect to receive as a result of the contract, reflecting the requirement that some revenues must be estimated to come from sources other than payments by the contracting authority.

Paragraph 3(3) sets out a list of the types of consideration a supplier could expect to receive, which must be taken into account in estimating the value of a concession contract. This includes amounts received from users of the works or services and could be monetary or nonmonetary. The value of any goods, services or works provided by the contracting authority under the contract must also be included in the valuation. VAT payable on the supply of services or works, the value of any options included in the contract for additional services or works or for extension or renewal of the contract are all to be valued, plus any premiums, fees, commission or interest that the supplier could receive in delivering the contract and amounts received on the sale of assets held by the supplier. The list in paragraph 3(3) is not exhaustive and amounts may be received from other sources or take other forms.

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