

## Procedural Note: Concession arrangements

**NOTE: This Procedural Note provides support to the Contract Standing Orders and shall be read in conjunction with the Contract Standing Orders and any associated Procedural Notes.**

### Background

- 1) This Procedural Note shall apply in all situations where Concession arrangements are to be considered.
- 2) The purpose of the concession rules are set to provide clear rules so the concession market is open to competition, particularly to small and medium sized enterprises (SMEs).
- 3) In the consideration of Concessions the Council will be the “grantor” granting a person or supplier (the concessionaire) the right to operate - usually as the sole seller of certain goods or services – as a business within a premises or other asset belonging to the grantor in return for an appropriate fee. The concessionaire pays the grantor.

### Definition of a Concessions Contract

- 4) Concessions are broadly similar to "normal" contracts between contracting authorities/entities and suppliers, but with one key difference: the consideration in a concession contract consists in the right to exploit the work, or services, that are the subject of the contract, or that right to exploit together with a payment. Examples of concessions might include car parks built on local authority-owned land, or toll roads and toll bridges.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/528062/20160607\\_Handbook\\_for\\_the\\_Concession\\_Contracts\\_Regulations\\_2016\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/528062/20160607_Handbook_for_the_Concession_Contracts_Regulations_2016_final.pdf)

### What could be deemed a Concession Arrangement

- 5) The below are what could be considered as a Concession arrangement:
  - i. A concession contract is a mutually binding contract for buying works or services by the Grantor entrust the delivering of outcomes to one or more concessionaire.
  - ii. Consideration in a Concession arrangement consists in the right to exploit the work, or services, that are the subject of the contract, or that right to exploit together with a payment.
  - iii. The transfer to the concessionaire of the right to exploit the works or services shall always imply an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating those works or services. This means that under the contract, the

concessionaire should not enjoy a guarantee of breaking even on investments and costs incurred.

- iv. The concessionaire must be exposed to a potential loss on its investments and costs, and it should not be merely nominal or negligible risk.
- v. Concession arrangement may involve a transfer of ownership to the Council.
- vi. The Council will always obtain the benefits of the works or services in question rather than the concessionaire

### **What would not be deemed a Concession Arrangement**

6) Below are not a concession arrangements:

- i. Activities covered by other legislation for example the Public Contracts Regulations or Utilities Regulations;
- ii. An outsourcing contract or privatisation;
- iii. A land lease contract;
- iv. The financing for works or services i.e. a grant;
- v. If customers have a choice between providers that are delivering the same service;
- vi. Licenses where Government or public authorities (not contracting authorities) establish conditions and an economic operator can withdraw from provision of that service, are not concessions but would fall under Directive 2006/123/EC Service Directive.
- vii. When an economic operator has a right to exploit public domains such as maritime, inland ports or the airport sector. These involve general conditions for their use without the procurement of specific works and services.
- viii. An agreement that grants the right of way covering the utilisation of public immovable property, fixed lines or networks.
- ix. Where no payments are made but the contract is remunerated on the basis of regulated tariffs calculated to cover all costs and investments borne by the concessionaire for providing the service.
- x. A contract is not a concession if the contracting authority or utility relieves the concessionaire of any loss by guaranteeing minimal revenue equal or higher to the investment made and the costs the economic operator has to incur.

## General

- 7) There are several commercial drivers behind concessions considerations:
  - i. To seek or generate future commercial income or revenue for the Council.
  - ii. To derive community benefit or contribute to the quality of life for the people living in, or visitors.
  - iii. To sustain business and employment.
  - iv. To improve well-being by enabling people to use public open space.
  - v. To improve security of assets through public presence.
- 8) Examples of Concession arrangements are but not limited to catering (cafés, kiosks, restaurants, mobile catering) sports (water sports, tennis coaching, fitness classes, cycle speedway) play (miniature railway, crazy-golf,) and clubs (bowling, surf lifesaving, rowing, etc).
- 9) In consideration around whether to pursue a Concession arrangement relevant due diligence shall be undertaken to establish the scale of any opportunity and value of any possible concession, and as such this should include any relevant market research.
- 10) In pursuing a Concession arrangement, the Council shall:
  - i. Apply the principles of equal treatment, non-discrimination and transparency in its approach to consideration of concession arrangements, and in doing so assessing and managing any conflicts of interests.
  - ii. Maintain confidentiality in respect of consideration of potential concessionaire proposals and any resulting concession awarded, but in doing so not to prejudice wider requirements of disclosure of information, for example in provision of Notice of award in the case of the case of above threshold concessions, Transparency Agenda requirement to publish contract details and wider Freedom of Information (FOI) requirements.
  - iii. Seek to openly and proportionally advertise any proposed concession arrangement – and allow suitable time for potential concessionaires to submit any proposals considering complexities and risks.
  - iv. Whilst no duty on the Council to advertise outcomes of below threshold awards the Council shall seek to apply an approach where details are advertised and captured onto the Contract Register.
  - v. Undertake all necessary due diligence that it has the authority and jurisdiction to enter a concession – seeking to ensure that all relevant subject matter experts are engaged in the overall process.

- I 1) At the time of advertising a Concession arrangement all required information is provided to enable due consideration by potential concessionaires to undertake related to any proposed submission, to include:
- i. Clearly set out the subject matter of any proposed concession.
  - ii. Setting out any proposed conditions and caveats on potential concessionaires – including setting out any mandatory exclusion grounds related to entities looking to make a submission.
  - iii. Timeframes around any award, including options to extend.
  - iv. Details on the process to be followed and how concession submissions are to be considered and evaluated. The award criteria shall be proportional to the subject matter of the Concession arrangement.
  - v. Setting out risks and liabilities related to any resulting concession and where and how these are to be aligned in the granting of any concession.
- I 2) Ensure that where a concession is granted that it is supported by a formal contract. The contract shall include:
- i. Capture details set out in the concession pack and the submission (and any resulting clarifications) from the concessionaire.
  - ii. Details on term of the concession and termination including any grounds for early termination.
  - iii. Grounds and procedure to be followed in consideration of any moderation or variation under the contract – noting that any variation beyond 10% of the commercial value shall be deemed as a material change and not permitted under the current contract.
  - iv. Consideration of risks and liabilities seeking to reduce risk exposure for both parties.
  - v. Contract management arrangements need to be proportional.
- I 3) If a concession opportunity does not require investment from the concessionaire then the recommended maximum duration of the concession contract shall be no longer than 5 years.
- I 4) For concession contracts lasting more than 5 years, the maximum duration of the concession contract shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the service together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.
- I 5) The investments taken into account for the purposes of the calculation of the time period include both initial investments and investments during the life of the concession contract.

## Calculating the Value of a Concession Contract (Regulation 9)

- 16) The value of a concession is to be calculated on the basis of the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the utility, in consideration for the works and services that are the object of the concession as well as for the supplies required for such works and services. An example of the latter is if a concessionaire gains an economic benefit from providing the resources used in delivering the concession.
- 17) On occasions the estimated value of the concession contract pre-procurement may be different than the value established at the moment of the award. Typically, several parameters of the concession (fee to be expected from the users, duration, lump sum payments stipulated by the concessionaire) may be subject to competition of the bidders. Consequently a second calculation of the value of the concession contract is required before award. If the value of concession at the time of the award (i.e. post tender) is **more than 20% higher** than the estimated value pre competition, then the value to be taken into account is the value of concession at the time of the award.
- 18) If the original estimated value was below the threshold (e.g. £3m) and had not been advertised in OJEU, and the actual value of the modified concession amounts to more than 20% more than the original estimate (e.g. £4.5m) and takes the estimate over the threshold, the contracting authority/utility will need to cancel the award and re-compete it following the provisions of the CCRI6. It is, therefore, worthwhile considering advertising concessions close to the threshold in OJEU.
- 19) The estimated value of the concession must be calculated using an objective method. The choice of the method used to calculate the estimated value of a concession cannot be made with any intention of excluding it from the scope of the CCRI6.
- 20) The CCRI6 helpfully lists several costs and payments to take into account when calculating the estimated value. The list not only includes costs associated with the delivery of the concession contract, but also costs associated with the actual procurement and financing of the concession such as any prizes or payments to candidates/tenderers. Assessing the operating risk requires the net present value of all the investments, costs and revenues associated with the concession contract to be taken into account in a consistent and uniform manner.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/528062/20160607\\_Handbook\\_for\\_the\\_Concession\\_Contracts\\_Regulations\\_2016\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/528062/20160607_Handbook_for_the_Concession_Contracts_Regulations_2016_final.pdf)

### **Value of Concession at or above threshold**

- 21) The Council shall observe and apply the Concessions Contract Regulations 2016 (CCR16) where the values applies to concession contracts with a value greater than the threshold of as set out and calculated in line with Regulation 9 of CCR16— regardless of categorisation (works or services), see [http://www.legislation.gov.uk/ukxi/2016/273/pdfs/ukxi\\_20160273\\_en.pdf](http://www.legislation.gov.uk/ukxi/2016/273/pdfs/ukxi_20160273_en.pdf)
- 22) Concession thresholds for Services and Works can be found at the below: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/850566/PPN\\_for\\_New\\_Thresholds\\_2020\\_pdf.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/850566/PPN_for_New_Thresholds_2020_pdf.pdf)

### **Below Threshold Concessions**

- 23) The principles set out in this Procedural Note shall apply for Concession arrangements not covered by CCR16, with proportional consideration of CCR16 requirements considered.

### **Other Points of Consideration**

- 24) In the context of business premises, the key issue is whether or not the business occupation might attract the protection of the Landlord and Tenant Act 1954 (“LTA 1954”), either utilizing a protected or unprotected lease.
- 25) Matters related to occupancy, leases and any implications on Tenancy and considerations on any Licencing matters shall be referred to Property Services.
- 26) For more guidance please refer to the following documents in conjunction with this Procedural note:
  - i. The Public Contracts Regulations 2015
  - ii. The Concession Contracts Regulations 2016
  - iii. Handbook for the Concession Contracts Regulations 2016
- 27) To minimise risks and benefits for the Council, the Responsible Officer is responsible for consulting and seeking specialist support, the following service areas as a minimum are required to be consulted at the outset of any work in relation to Concession arrangements:
  - i. Procurement Service
  - ii. Property Team
  - iii. Legal Services