
Report: Amendment to Procurement Contract Procedure Rules

Appendix C – Procedural Note: Concession arrangements

Procedural Note: Concession arrangements

NOTE: This Procedural Note forms part of the Procurement and Contract Procedures and shall be read in conjunction with those Procedures and any associated Procedural Notes

Background

- 1 This Procedural Note shall apply in all situations where Concession arrangements are to be considered.
- 2 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.
- 3 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. Under the contract the supplier is exposed to a real operating risk, An operating risk is a risk that the supplier will not be able to recover its costs in connection with the supply and operation of the works or services, where the factors giving rise to that risk are reasonably foreseeable at the time of awards and arise from matters outside the control of the contracting authority and the supplier.
 - 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.
- 4 What is not a concession?
 - 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.
- 5 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.
- 6 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).

General

- 7 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.
- 8 The Council shall:
- i. Have regard to the importance of delivering value for money, maximising public benefit, sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions as well as acting with integrity 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 taking into account 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 into a concession – in doing so consideration of the Council’s Commercial Assurance Summary should also be applied, seeking to ensure that all relevant subject matter experts are engaged in the overall process.
- 9 At the time of advertising a Concession arrangement all required information is provided to enable due consideration by potential concessionaries to undertake related to any proposed submission, to include:
- i. Clearly setting 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.
- 10 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.
- 11 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.
- 12 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.
- 13 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.

Value of Concession at or above threshold

- 14 The Council shall observe and apply the Procurement Act 2023 where the values applies to concession contracts with a value greater than the threshold set out and calculated (inclusive of VAT) in line with Schedule 1 and Schedule 3 (3) of the Act, regardless of categorisation (works or services). [Procurement Act 2023 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2023/12/section/1)

Below Threshold Concessions

- 15 The principles set out in this Procedural Note shall apply for Concession arrangements not covered by the Procurement Act 2023 , with proportional consideration of Procurement Act 2023 requirements taken into account.

Other Points of Consideration

- 16 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.
- 17 Matters related to occupancy, leases and any implications on Tenancy and considerations on any Licencing matters shall be referred to Property Services.
- 18 Concession arrangements shall be considered in conjunction with both the Council’s Procedural Note: Commercial and Assurance Procedure.
- 19 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 Team
 - ii. Property Team
 - iii. Legal Services