

Bill on concession contracts for construction works or services

On 24 May 2016, the Council of Ministers adopted the bill on concession contracts for construction works or services whose aim is to implement Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ("Directive"). The new act will introduce a wide range of regulations which have not been present in the act on concession contracts for construction works or services of 9 January 2009.

There are numerous changes that the bill introduces which need to be mentioned, such as (i) the definition of a concession contract for construction works or services, (ii) the need to transfer the operating risk related to operation of construction facilities or provision of services to the concessionaire, including demand- and supply-related risks, (iii) authorising utility contracting entities to enter into concession contracts for construction works or services, (iv) a threshold for applying the provisions of the act to contracts with a value equal to or exceeding €30,000, (v) mixed concessions that jointly comprise various types of concession contracts (construction works, services, social services and other special kinds of services), (vi) substituting the principle of concession procedure transparency, which involves provision of information on the procedure only in cases provided for in the law, for the present principle of the public nature of concession procedures and (vii) conferring the rights of the body competent for concession contracts for construction works or services to the Head of the Public Procurement Office.

Pursuant to the provisions of Art. 5.1 of the Directive, the notion of "concession" means a contract by which a contracting authority will entrust the execution of construction works or provision of services and the management thereof to an economic operator the consideration for which consists either solely in the right to operate the works or perform the services that are the subject of the contract or in that right together with payment.

The set of contracting authorities required to comply with the act on concession contracts for construction works or services of 9 January 2009 will be expanded to include utility contracting authorities, i.e. public finance sector entities, bodies governed by public law and public undertakings, which will be authorised to enter into concession contracts in order to conduct utility operations, as defined in the statute glossary, involving, among others, development of natural gas and crude oil and its natural derivatives, exploration, prospecting locations or development of brown coal, hard coal and other solid fuels or establishing networks to provide public services related to production, transmission or distribution of electricity, gas or heat or delivery of electricity, gas or heat to such networks or management of such networks.

The act will apply to concession contracts for public works or services with a value equal to or over the zloty equivalent of €30,000. The solution is consistent with the threshold applied in the public procurement act.

Furthermore, the bill also introduces a new definition of the estimated concession contract amount, which represents the total revenue of the concessionaire generated over the duration of the contract, net of VAT, contrary to the cost of works and the estimated total value of supplies with respect to the concession for construction works or the estimated cost of services provided in connection with the concession for services in the present concession act. It is proposed in the

bill that the estimated amount of the concession contract for construction works or services should be the total revenue of the concessionaire generated over the duration of the contract (net of VAT), as estimated by the contracting authority with due care in consideration for construction works or services, being the object of the concession, as well as for supplies incidental to such works or services.

The proposed regulations also provide that the concession documents should define the characteristics required of the works or services that are the subject-matter of the concession in terms of technical and functional requirements.

Importantly, a concession contract will only have a definite term, which is closely related to the nature of concession contracts, with a proviso that concession contracts are usually long-term arrangements. In the case of concession contracts with a term longer than five years, the concession duration may not exceed a period in which the concessionaire could reasonably expect to recoup the investment made for executing the works or services together with a return on invested capital, taking into account investment made to make calculations, which includes both initial investment and investment made during the duration of the concession.

The information above presents only a selection of objectives set out in the proposed act. It should be noted that the bill is being reviewed by the Council of Ministers and the said regulations can be modified during further stages of the legislative process.

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