



Cabinet Office



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Consultation Document

UK Transposition of new EU Procurement Directives

Concession Contracts Regulations 2016

Executive Summary

1. This consultation document concerns the UK transposition of the new Concession Contracts Directive, one of the three EU Directives on Public Procurement, which came into force in April 2014 with Member States being allowed two years to transpose into national law. The Public Sector Directive has already been transposed by the Public Contracts Regulations 2015 (PCR 2015). The Government is now consulting on the draft Regulations transposing the (new) Concession Contracts Directive with the aim of bringing these into effect by April 2016. Consultation on the draft Regulations transposing the Utilities Directive will be conducted in parallel.
2. Acting on behalf of the Minister for the Cabinet Office the Crown Commercial Service has UK policy responsibility for transposing the new procurement Directives.
3. This document focuses on the draft regulations for the new Concession Contracts Directive. Many of the provisions in the Public Sector Directive are analogous to provisions in the Utilities and Concession Contracts Directives. We have already consulted on generic matters that are applicable to all three Directives. The results of this previous consultation¹ have been carried through where applicable to these Regulations. The application in these Regulations of decisions on policy choices following the previous consultation is set out in Annex B.
4. Respondents to this consultation document are invited to consider the draft Regulations, and respond to the particular consultation questions listed. Respondents are also welcome to comment more generally on any aspect.
5. This consultation document contains the following key sections:
 - Part 1 sets out the background, scope and general instructions on how to respond;
 - Part 2 introduces the draft Regulations and seeks responses on various technical, drafting and other issues.
6. We welcome your input by 18 September 2015. Please direct any responses to: transposition@crownccommercial.gov.uk

¹ <https://www.gov.uk/government/consultations/transposing-the-2014-eu-procurement-directives>

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Part 1: Background Information and Instructions for Responding

Purpose

7. The purpose of this document is to consult on the draft transposing Regulations and to confirm whether they transpose the new Concession Contracts Directive (2014/23/EU) effectively and do so in the best way.

Background

8. In December 2011, the European Commission brought forward proposals to replace the 2004 EU public procurement Directives to provide for a streamlined and more flexible set of procurement rules, so that member States can obtain high quality goods and services while delivering value for money for the public purse.

9. Following 2 years of intensive scrutiny and debate, the European Parliament and the Council adopted three new Directives (Public Sector Contracts, Utilities Contracts, and Concession Contracts) on 26 February 2014. The Directives were 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 until 18 April 2016 to transpose the new Directives in national legislation.

10. The new Directives are:

- a) Directive 2014/24/EU² on public procurement, replacing the 2004 Directive for Public Sector Contracts;
- b) Directive 2014/25/EU³ on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts; and
- c) Directive 2014/23/EU⁴ on the award of concession contracts, which does not directly replace a previous directive.

11. The Directive on public procurement (2014/24/EU) has been transposed by the Public Contracts Regulations 2015, the majority of which came into force on 26 February 2015. Many of the provisions in the Public Sector Directive, which the Government has already consulted upon, have analogous provisions in the Concession Contracts Directive. The application in these Regulations of decisions on policy choices following the previous consultation is set out in Annex B.

12. The draft Concession Contracts Regulations have been prepared in the light of those policy positions, which also take account of the UK's general approach of maximising flexibility in the rules, deregulating where possible, and avoiding gold-plating.

² http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG

³ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG

⁴ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG

Scope of Consultation

13. The consultation applies principally to those jurisdictions to which the Public Contract Regulations apply, i.e. England, Wales and Northern Ireland. They will extend to and apply in Scotland in relation to transposition which is for the UK Government. The drafting will be adjusted to give effect to that intention.

14. The consultation seeks comments on the draft Regulations transposing the Concession Contracts Directive, to ascertain whether the draft Regulations effectively transpose the Directive, and whether they do so in the best way.

15. Comments are invited from relevant stakeholders. That primarily includes those engaged in procurement within the Public Authorities, Utilities, and other industry representatives, and may also be of interest to suppliers and advisors, and various others.

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16. There is only very limited scope for the Government and other UK stakeholders to influence the substantive content of the UK's transposing Regulations. Most of the provisions of the Directives are mandatory for member States to transpose, so we cannot alter the substance in transposition. In addition, the Government's policies on "copy-out" of European Directives (where available) and avoidance of "gold-plating", further limit the extent to which we can deviate from the wording of the Directives when casting the national UK transposing Regulations.

Consultation Principles

17. This consultation complies with the Government's Consultation Principles⁵, and formally concludes a long-running period of continuous UK stakeholder engagement that commenced in 2011 when the Commission's own consultations began. A 4 week consultation period is considered appropriate and proportionate given the limited scope and impact of the remaining issues on which to consult.

Process

18. This consultation runs for 4 weeks from 21 August 2015 to 18 September 2015.

19. This consultation document is issued directly to a number of known stakeholders and is also made available publicly on the Cabinet Office Consultations page on the GOV.UK website [here](#).

20. This consultation has seven specific questions, which are summarised in paragraph 26. Please state clearly in your response which question or questions you are answering. Please direct responses, or any other questions on the consultation, to:

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf

By email:

transposition@crowncommercial.gov.uk

Or by post:

Crown Commercial Service Helpdesk
Cabinet Office
Rosebery Court
Norwich
NR7 0HS

Tel: 0345 410 2222

Handling of Information

21. The information you send may need to be passed to colleagues within the Cabinet Office or other Government departments, and may be published in full or in a summary of responses.

22. All information in responses, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be acceded to only if it is appropriate in the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Cabinet Office. Contributions to the consultation will be anonymised if they are quoted.

Contact for comments or complaints about the process

23. Your opinions are valuable. Thank you for taking the time to read this document and respond. If you have comments or complaints about the consultation process itself, please contact the:

Better Regulation Unit
Cabinet Office
Rosebery Court
Norwich
NR7 0HS

Email: bruinqueries@cabinetoffice.gov.uk

Part 2 – Technical Issues and Questions

Introduction

24. This section of the consultation document introduces a number of issues and questions on which stakeholder feedback will support the UK in making a clear and successful transposition of the Concession Contracts Directive. In particular, it introduces:

- a) The draft Regulations (Annex A) – general feedback is welcome on any aspect of the draft; and
- b) Key issues in the draft Regulations to which stakeholders' attention is drawn and feedback is specifically requested.

25. We therefore invite stakeholders to consider the changes and questions raised and respond accordingly. Stakeholders are invited not only to offer their views, but also the reasons for coming to those views, which will be useful in analysing the feedback and drawing conclusions.

Summary of Consultation Questions

26. A list of the consultation questions is set out below. Question 1 asks for general comments about the approach to drafting the Regulations, which generally follows the copy out approach that was adopted for the Public Contracts Regulations 2015. The following two questions ask for any detailed comments on the drafting of particular sections of the Regulations. Apart from the questions concerning the drafting, there are six other questions that are introduced in more detail in paragraphs 31 to 40 below:

Question	Subject
1	Draft Regulations We invite general comments on the drafting of the Regulations.
2	We invite stakeholders' comments on this proposed regulation on Governance.
3	We seek stakeholders' comments on, but strictly limited to, whether the proposed drafting of the remedies rules achieves our objective of sewing the existing remedies provisions into the new concession contract rules framework in a satisfactory way.
4	We invite comment on the cost and benefit assumptions in the Impact Assessment.
5	We invite comments on whether it would be possible to monetise any of the other benefits.
6	Do stakeholders consider the new Regulations will speed up the procurement of a concessions contract? Information to support comments would be welcome.
7	Stakeholders that currently follow utilities sector concessions regime are invited, to provide specific comments on the description of the benefits of the new Regulations as detailed in Annex C.
8	Stakeholders are invited, as part of this consultation, to provide specific comments on the likely extent of the impact of the new procedures on the potential loss of profit and extent of familiarisation costs.
9	Stakeholders are invited to comment on the assumption that there will be no more than one successful challenge to a concession every five years on the basis that there have been a low number of challenges on concessions to date.

The Draft Regulations

27. We have produced an entirely new set of Concession Contracts Regulations. These do not replace any existing set of Regulations except for regulations 36 and 37 of the Public Contracts Regulations 2006. Those two regulations cover the award of works concessions (only) under the previous public sector directive, and remain in force under the transitional provisions of the “new” PCR 2015 until the new Concession Contracts Directive is transposed.

28. The Regulations at Annex A are structured in the following way:

- a) Part 1 transposes general provisions, and Part 2 sets out the scope of the Regulations;
- b) Part 3 transposes rules on the award of concession contracts;
- c) Part 4 transposes rules on the performance of concession contracts (covering sub-contracting, modification and termination);
- d) Part 5 transposes the obligations under Title IV of the Concession Contracts Directive, amending the Remedies Directives for the purposes of concession procurement;
- e) Part 6 includes reporting and review requirements;
- f) Part 7 contains consequential amendments to the Public Contracts Regulations 2015 and will be expanded to include consequential amendments to other legislation and transitional provisions related to concessions awarded before the draft Regulations come into force.

Question 1. We seek general comments on the drafting of the draft Regulations.

Governance

29. In order to ensure that the Government can fulfil its obligations to provide the Commission with information, regulation 65 contains a similar obligation on contracting authorities and utilities to that in regulation 84(6) of the PCR 2015, to provide the Cabinet Office with information on request.

Question 2. We invite stakeholders' comments on this proposed regulation.

Remedies and Standstill

30. Part 5 of the Regulations derives from the Remedies Directive transposed by the UK in 2009. The UK remedies policy is not being reopened during this consultation process. The standstill and remedies regulations have simply been moved from the existing UK Procurement Regulations into the proposed new

Regulations, with some minor drafting or technical changes to reflect the requirements of the Concession Contracts Directive.

Question 3. We seek stakeholders' comments on, but strictly limited to, whether the proposed drafting of Part 5 achieves the objective of sewing the existing remedies rules into the new concession contract rules framework in a satisfactory way.

Impact assessment confirmation

31. In preparing for transposition, the Cabinet Office produced an impact assessment (IA) addressing the costs and benefits and impacts on business of the new Directive. For the Impact Assessment information was gathered from Tenders Electronic Daily (TED) the online version of the Official Journal of the EU, Contracts Finder, and studies by the European Commission and the European Investment Bank (EIB).

32. The number of above threshold concessions advertised by UK bodies over the past three years is 78 (26 per year), yielding an annual value of service concession of £7.8m. A study for the European Commission⁶ estimates that EU-wide competition for public contracts can, as a result of competitive pressures, reduce prices to authorities by around 2.5%, more in some cases, and that savings because of competition tend to be higher for services and works (than supplies).

33. The benefit of bringing service concessions in scope, in the form of savings to public sector and utilities sector concession awarding bodies, is estimated to be £5.07m per year (26 x £7.8m x 2.5%).

34. The IA set out the additional benefit which was not monetised that there will be a reduction of over 40% when compared to the current rules for Works concessions in the statutory minimum time limits that suppliers have to respond to advertised procurements and submit tender documents. This should help to speed up the procurement process, to the potential benefit of concession-awarding bodies and suppliers. The benefits are likely to be low because of the small number of works concessions awarded in a year, however any information that stakeholders can provide as part of their response will be welcome.

35. The main benefit to utilities sector concession awarding bodies comes from the savings delivered through increased competition created by the new rules (see paragraph 33). This comes from bringing them into scope for the first time for both works concessions and service concessions procurements. Stakeholders that currently follow the current utilities concession regime are invited, as part of this consultation, to provide specific comments on the description of the benefits of the new Regulations as detailed in Annex C.

⁶ http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/evaluation/index_en.htm

36. However there are expected to be additional costs to concession awarding bodies as a result of the new Regulations. These are:

- a. Additional procurement process costs. This has been estimated to be £0.41m per year ($26 \times £7.8m \times 0.2\%$) for UK concession awarding bodies;
- b. Additional costs of remedies provisions. This has been estimated to be £2.34M total in the 10 year period covered by the IA (2 successful challenges $\times £7.8M \times 15\%$) equating to £0.23m per year;
- c. Familiarisation costs.

37. These new rules will increase competition, and reports for the European Commission and EIB suggest a potential value to UK businesses due to increased cross-border concession awards of between £25m and £50m.

38. Offsetting these benefits to business are potential additional costs. It is expected that suppliers bidding for concession contracts in the UK will also generate familiarisation costs as this will be a new procedure. Concession awarding bodies are likely to be able to improve a number of competitive aspects of the concession awarding process, for example by maximising competitive pressures leading to lower prices tendered by bidders. This will have a knock on impact on bidders who are likely to see a reduction in their profits/benefits from bidding for concession contracts.

39. Above threshold service concessions will be subject to the remedies provisions, which could lead to challenges before the courts and possible requirements to terminate a procurement. Although there are no collated figures available on the number of challenges being brought, anecdotal evidence suggests that the number of successful challenges under the existing remedies provisions for public contracts (including works concessions) is low. On this basis, it is estimated there will be no more than one successful challenge to a service concession every 5 years. This will involve legal fees, a re-procurement process, and costs of damages (loss of profit) and delays estimated to total 15% of the concession value. Stakeholders are invited to comment on these assumptions.

40. How these figures were estimated is set out in Annex C.

Question 4. We invite comment on the cost and benefit assumptions in the Impact Assessment (See Annex C).

Question 5. We invite comments on whether it would be possible to monetise any of the other benefits.

Question 6. Do stakeholders consider the new Regulations will speed up the procurement of a concession contract? Information to support comments would be welcome.

Question 7. Stakeholders that currently follow utilities sector concessions regime are invited to provide specific comments on the description of the benefits of the new Regulations as detailed in Annex C.

Question 8. Stakeholders are invited, as part of this consultation, to provide specific comments on the likely extent of the impact of the new procedures on the potential loss of profit and extent of familiarisation costs.

Question 9. Stakeholders are invited to comment on the assumption that there will be no more than one successful challenge to a concession every five years on the basis that there have been a low number of challenges on concessions to date.

Annex A Concession Contracts Regulations

A1. Please follow the link below to the Cabinet Office Consultations page to access the Draft Concession Contracts Regulations 2016.

A2. [Transposing the 2014 EU Procurement Directives](#)

Annex B Policy Choices

Introduction

B1. The Directives permit a limited number of choices to be made on whether or how to transpose particular provisions. The earlier consultation on the PCR 2015 covered the policy options on these choices for all three directives, where applicable. (A number of choices in the Public Contracts and Utilities Directives do not apply in the Concession Contracts Directive). The decisions applicable to concessions following that consultation are set out below.

Social, Environmental and Labour Law

B2. Policy choice. What “appropriate measures” should the UK take to ensure suppliers comply with social/environmental/labour laws (Article 30(3) of the Concession Contracts Directive)?

B3. The policy decision was to transpose by administrative measures, using guidance to make it policy to mirror these obligations in contract clauses, supported by a standard contract condition.

Group participation of economic operators

B4. Policy choice. Whether, and if so how, the UK should establish standard terms for how groups of economic operators meet requirements for financial standing and technical capacity (Article 26(2) of the Concession Contracts Directive).

B5. The policy decision was not to transpose. This is consistent with the Government’s policy on avoidance of gold-plating.

Reserved Contracts for Sheltered Workshops

B6. Policy choice. Whether to allow contracts to be reserved for sheltered workshops (Article 24 of the Concession Contracts Directive).

B7. The policy decision is to transpose, to provide flexibility for concession awarding bodies. We will provide separate guidance on how to interpret ‘disabled persons’, ‘disadvantaged persons’, ‘sheltered workshop’, and ‘sheltered employment programme’, applicable to all three directives.

Electronic (“e”) communication and e-procurement choices

B8. The policy choices related to concessions were whether the Regulations should:

- a) Mandate the means of communication and information exchange in concession award procedures, or leave the choice to individual concession-awarding authorities and utilities (Article 29(1)); and
- b) Mandate the use of electronic means of communications (beyond those made obligatory in Articles 33(2) and 34) (Article 29(1)).

B9. The policy decision is that the choice of communication should be left to individual concession-awarding bodies, and we should not make the use of electronic communications mandatory.

Conflicts of interests, exclusion and related matters

B10. The choices are how the UK should transpose the options on exclusion of economic operators from public procurement for various offences, failures and misdeeds, including whether to:

- a) Mandate exclusion for certain offences failure or misdeeds, or leave to the discretion of contracting authorities and utilities (Article 38(5), 38(7) and 38(8) of Concession Contracts Directive);
- b) Allow possible derogation from mandatory exclusion for overriding reasons or where exclusion would be disproportionate (Article 38(6) of the Concession Contracts Directive);
- c) Prohibit exclusion of economic operators in certain cases, or leave to discretion of authorities and utilities (Article 38(7)(b) of the Concession Contracts Directive);
- d) Elaborate the grounds for (mandatory) exclusion (Article 38(4) of the Concession Contracts Directive);
- e) Elaborate the requirement to avoid conflict of interest (Article 35 of the Concession Contracts Directive); and
- f) To decide the duration of both mandatory and discretionary exclusion (Article 38(10) of the Concession Contracts Directive).

B11. The policy decisions are:

- a. This is left to the discretion of the concession-grantor (contracting authority or utility);
- b. To allow a discretion for overriding reasons in the public interest or where exclusion would be disproportionate;
- c. This is left to the discretion of concession grantors;

- d. This is elaborated by reference to the offences listed in the draft Concession Contracts Regulations at regulation 38(1);
- e. This requirement is not elaborated;
- f. The durations are set out the draft Concession Contracts Regulations at regulation 38(12) and (13).

Subcontracting

B12. Policy choice. Whether it should be compulsory for contracting authorities and utilities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and the details of any proposed subcontractors (Article 42 of the Concession Contracts Directive).

B13. The policy decision is not to mandate this.

B14. Policy choice. Whether the Concessionaire should be directly obliged to provide information about its subcontractors and supply chain (Article 42 of the Concession Contracts Directive).

B15. The policy decision is to leave it to the individual contracting authorities and utilities to make the decision per procurement, based on the individual circumstances and requirements of each case.

B16. Policy choice. Whether the basic requirement (being the requirement for the Concessionaire on works contracts or contracts for services to be provided at a facility under oversight of the contracting authorities to provide contact information of subcontractors to the contracting authority) should be extended to a wider scope of contract or a wider scope of subcontractors (i.e. further down the supply chain) (Article 42 of the Concession Contracts Directive).

B17. The policy decision is not to mandate this and leave to the discretion of individual concession grantors.

B18. Policy choice. Whether contracting authorities and utilities should be required to verify whether there are mandatory or discretionary grounds for exclusion of any subcontractors and, if such verification is undertaken and the response shows that there are discretionary grounds for exclusion, whether contracting authorities and utilities should be obliged to require that the economic operator find a replacement subcontractor (Article 42 of the Concession Contracts Directive.)

B19. The policy decision is that should remain as an option for contracting authorities to enforce via procurement and contract documentation where proportionate and necessary, but should not be mandated by the UK Regulations.

Termination of Contracts

B20. Policy choice. How to ensure that contracting authorities are able to terminate contracts in certain circumstances (Article 44 of the Concession Contracts Directive).

B21. The policy decision is that contracting authorities must include a contract condition allowing them to terminate if any of the three grounds for termination apply. This is set out in the draft Concession Contracts Regulations at regulation 45. The draft regulation also provides a deeming provision to ensure the possibility to terminate is available in all cases.

Annex C Estimates of costs and benefits for the Impact Assessment

C1. As set in paragraphs 31 to 40 above, we would like to test estimates concerning the benefits and costs of the new Directive and to see whether certain other benefits can be monetised. The estimates were based on the following assumptions.

Assumptions on which the estimates are based

C2. Greater competition for concession contracts through an EU-wide advertised process should lead to lower bid prices than would otherwise be the case. This benefit accrues primarily to concession-awarding bodies and to concession end-users. A study for the European Commission (http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/evaluation/index_en.htm) estimates that EU-wide competition for public contracts can, as a result of competitive pressures, reduce prices to authorities by around 2.5%, more in some cases, and that savings because of competition tend to be higher for services and works (than supplies).

C3. The benefit of bringing service concessions in scope, in the form of savings to all UK concession awarding bodies, in the public sector and utilities sector, is therefore estimated to be £5.07M per year (26 contracts x £7.8M (mean annual value) x 2.5%).

Wider benefits

C4. The EU concessions market will be opened-up to full EU competition by this new Directive. As a result, improved cross-border access to concessions opportunities could benefit UK businesses bidding for concession contracts elsewhere in the EU.

C5. Studies for the European Commission and the European Investment Bank suggest that between €5bn - €10bn worth of concessions per year in the EU could be opened-up to competition. Another European Commission study suggests that approximately 3.5% by value of contracts is awarded to cross-border suppliers. UK businesses are reported as winning 17% of total EU cross-border contracts.

C6. If these figures were realised on service concessions, this suggests potential value to UK businesses of approximately £25M - £50M per year of direct cross-border concession awards which might not otherwise be available.

Costs

Those bodies in scope of the current regime

C7. Works concessions are covered by the current rules and the same €5.186M threshold. There will not be any additional costs on public sector concession awarding bodies as a result of these contracts now falling under the new Directive.

C8. Bringing service concessions in scope creates costs for public sector concession awarding bodies. These come from two sources. First, from additional procurement process costs. Second, from additional costs caused by more concessions contracts being brought in scope of the current remedies regime, where suppliers seek legal redress for failure to comply with the rules in individual procurements.

C9. There are also likely to be some small familiarisation costs, estimates for which are being sought as part of this consultation.

Those bodies outside the scope of the current regime but now in scope of the new regime

C10. Works concessions procured by utilities sector concession awarding bodies are not covered by the current rules. There is no evidence to suggest there is any appreciable number of works concessions being awarded by such bodies. We therefore estimate that bringing them into scope will not cause any additional costs on utilities sector concession awarding bodies.

C11. Service concessions procured by utilities sector concession awarding bodies are also not covered by the current rules. Bringing them in scope creates costs for such bodies. These come from the same two sources as for public sector concession awarding bodies. First, from additional procurement process costs. Second, from additional costs caused by such concessions contracts being brought in scope of the current remedies regime, where suppliers seek legal redress for failure to comply with the rules in individual procurements.

C12. There are also likely to be some small familiarisation costs, estimates for which are being sought as part of this consultation.

Private Sector 'bidders'

C13. Greater competition for concessions contracts through an EU-wide advertised process could have a knock on impact on the private sector suppliers who bid for such contracts. Concession awarding bodies are likely to be able to improve a number of competitive aspects of the concession awarding process, for example by maximising competitive pressures leading to lower prices tendered by bidders. This will have a knock on impact on bidders who are likely to see a reduction in their profits/benefits from bidding for concession contracts.

C14. We do not expect the demand for concessions contracts to fall, as the reduction in potential profits are only likely to be small, although we do expect there to be a small cost placed upon these suppliers. We would welcome estimates of the likely extent of these costs, if any. We would also welcome views on whether the cost to these suppliers can be classed as 'indirect' under current 'One-in, Two-out' rules based on this being a pro-competition measure.

C15. There are also likely to be some small familiarisation costs, estimates for which are being sought as part of this consultation.

Estimates

C16. The estimates that follow are our best estimates at this stage and we would welcome views on them.

Additional Procurement Process Costs

C17. The costs of running concessions procurements will apply to any properly undertaken procurement exercise, whether or not subject to specific EU rules. The net cost of running a rules-compliant public procurement exercise compared with a simple “sub-threshold” (largely rules exempt) public contract has been calculated by European Commission studies (http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/evaluation/index_en.htm) as being on average 0.2% of contract value for contract awarding bodies and suppliers combined.

C18. Additional procurement process costs caused by bringing service concessions in scope are therefore estimated to be £0.41M per year (26 contract x £7.8M (mean annual value) x 0.2%) for UK concession awarding bodies.

Additional Costs of Remedies Provisions

C19. The new Directive also makes above threshold service concessions subject to the remedies provisions, which could lead to challenges before the courts and possible requirements to terminate a procurement. The cost will depend entirely on the number of challenges, the value and nature of such concessions which are subject to a challenge, and the success rate of the challenges which are brought. This depends both on suppliers’ willingness to mount challenges, and the extent to which UK concession-awarding bodies comply with the rules.

C20. Although there are no collated figures available on the number of challenges being brought, anecdotal evidence suggests that the number of successful challenges under the existing remedies provisions for public contracts (including works concessions) is low. On this basis, it is estimated there will be no more than one successful challenge to a service concession every 5 years. This will involve legal fees, a re-procurement process, and costs of damages (loss of profit) and delays estimated to total 15% of the concession value.

C21. Additional costs caused by the remedies provisions are therefore estimated to be £2.34M total in the 10 year period covered by the Impact Assessment (2 successful challenges x £7.8M x 15%). This equates to £0.23M per year. We assume the challenges would take place in the 3rd and 8th year of the 10 year period.