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Concessions for Works or Services – an Over-Regulated Legal Institution

Koncesje na roboty budowlane lub usługi – przeregulowana instytucja prawna

ABSTRACT

The public sector in Poland is currently facing ever newer challenges related to the implementation of public tasks for which it is not always sufficiently prepared for. One of the possible legal forms of fulfilment of public tasks are concessions for works or services. The author reviews the legal regulations that govern the issue of concessions, coming to the conclusion that the less the legislature interferes in the regulation of the procedure for granting concessions for works or services, the greater the practical significance of the concession. He also points to the quality of the proposed legal regulations in this area and their intricateness. The article presents some thoughts on the future directions of change in the regulations regarding concessions for works or services.

Keywords: concession for works; concession for services; public sector; legal regulations; public tasks

INTRODUCTION

The aim of the article is to review emerging legislation governing the issue of concessions for works or services in terms of their practical application. The institution of concession for works or services at different times was regulated differently by the law, from the rudimentary provisions of the Act of 29 January

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2004 – Public Procurement Law[1] to the very intricate content of the Act of 21 October 2016 on concession contract for works or services.[2] It seems that the less the legislature intervenes in regulating the procedure for the award of a concession for works or services, the more practical significance of the concession is. To arrive at this conclusion, the different legal provisions relating to the institution in question should be examined, both in material and statistical terms.

The concept of concession is derived from the Latin word *concessio*, and in the original sense it was a grant to a private entity by the public authorities.[3] The beginnings of the institution of concession are found in Roman law in the form of activities of private entities collecting taxes for the benefit of the public authority in exchange for a certain consideration (*societates vectigalium*).[4] Also a form of concession, quite commonly used during the Roman Empire, was the lease of the right to collect municipal revenue, under which private entrepreneurs could earn certain income in exchange for the performance of assigned tasks, most commonly related to public infrastructure facilities.

It was not only the Romans who considered it reasonable to use concessions as a tool to carry out public tasks more efficiently for the benefit of society. As early as in the Middle Ages, monarchs were quite commonly used to introduce the royal prerogatives (*iuris regalia*) as a kind of contracts between the royal authority and certain chosen subjects. The royal privileges consisted in granting special rights to an individual or an organised community. The monarch then was able to find favour with his people. It was due to the granted regalia that private entities could carry out certain tasks, e.g. the right to build a road and then charge a toll. It was the period in which the concession starts to have an economic dimension.

The institution of concession was used most fully in France as a tool capable of providing financial resources to carry out a number of public tasks, and it was associated most often with the lack of sufficient financial resources for those tasks to be carried out solely by the entities associated with the centre of political power. Such actions contributed to the improvement of the state finances. The concessionaire very often used to be granted tax credits for the activities covered by the concession, which significantly increased the attractiveness of the concession.[5]

The pace of development of initiatives based on the involvement of private entities in the performance of public tasks (including concessions) has grown significantly from the end of the 18th century due to the opportunities available to private investors.

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[1] Journal of Laws 2004, no. 19, item 177, hereinafter: PPL.

[2] (Journal of Laws 2016, item 1920.

[3] A. Panasiuk, *Partnerstwo publiczno-prywatne*, Wrocław 2017, p. 19.

[4] P. Fisher, *Historic Aspects of International Concession Agreements*, [in:] *Studies in the History of the Law of Nations*, ed. C.H. Alexandrowicz, vol. 2, The Hague 1972, p. 225 ff.

[5] X. Bezançon, *Essai sur les contrats de travaux et de services publics – contribution à l'histoire administrative de la délégation de missions publiques*, Paris 1999, p. 29 ff.

The profits that had been accumulated from commerce in the past centuries enabled the emergence of big industry in Europe in the late 18th century. All of this enabled private capital to undertake tasks that, over time, became the usual tasks to meet the basic needs of the societies of the time. By the end of the 19th century, the volume of private equity-funded infrastructure investments had declined significantly, as public revenues from taxpayers were so large that the public authorities themselves could finance growing investment in infrastructural projects. Once the basic infrastructure-related needs had been met, the public authorities began to reduce the private sector's capability to carry out such projects. The rapid development of transportation, and notably railways, has forced all governments to engage in the maintenance and operation of transport infrastructure. It was not until the 20th century that the possibilities for interaction with the private sector began to be exploited not only in the field of linear infrastructural projects, but also in areas previously reserved as the exclusive dominion of the State, i.e. social infrastructure.[6] During the post-war period of the 20th century, countries needed to pay particularly high costs for welfare activities, which strained state budgets to a significant extent. When the first symptoms of the economic crisis began to appear in the world economy, related to the crisis in the fuel market and the collapse of the public finance sector of developed countries, it was already known that the state as such could not manage the efficient performance of public tasks it was obliged to carry out. Moreover, in the 1980s, the public sector experienced budgetary problems resulting from the recession and long-term structural imbalances between expenditure and expected revenues. Growing taxes and the decrease in public expenditure have been the reason for the reduction in public sector growth.[7] It was therefore necessary to find instruments allowing the economies of developed Western countries to overcome the crisis. All this forced the then decision-makers to redefine the role of the public sector in the delivery of public services, while forcing them to seek new sources of their funding.[8] In many countries, such a panacea for the deficiencies associated with scarce public funds for the implementation of public services was the cross-sector partnership, usually established in a concession formula.

Also in Poland, forms of public tasks based on inter-sectoral partnerships began to become more and more popular at the beginning of the 21st century. The first legal provisions setting out the basis for establishing inter-sectoral cooperation in practice were adopted as early as in the mid-1990s. The breakthrough was the

[6] There is a dynamic development of investments related to the implementation of state tasks in the field of science, education, culture, sport, or social rehabilitation. Private partners engage in projects related to the construction of schools, hospitals, and prisons, and then operate the facilities thus built.

[7] A. Erridge, R. Fee, J. McIlroy, *Involvement of SMEs in Public Procurement*, "Public Procurement Law Review" 1998, vol. 7, p. 37.

[8] *Partnerstwo publiczno-prywatne*, ed. A. Gajewska-Jedwabny, Warszawa 2007, p. 1.

adoption of the Act on public procurement, a quite modern one for these times. On the date of entry into force of the Act of 10 June 1994 on public procurement,[9] the process of creation of systematic mechanisms for public spending in the free-market economy era began. The Act on public procurement did not define the concept of concession yet. Despite the absence of a separate legal framework governing the award of concessions for works or services, projects based on public-private cooperation had already been established under special regulations, such as the Act of 27 October 1994 on toll motorways and the National Road Fund.[10] Moreover, cooperation could be established under general rules on the basis of the Civil Code,[11] where necessary with special administrative-law provisions such as the Act of 7 June 2001 on collective water supply and collective waste water collection.[12]

CONCESSION FOR WORKS IN THE PERSPECTIVE OF THE PUBLIC PROCUREMENT LAW

The introduction of concessions in Polish law was inspired by the relevant regulations of EU law entailing the need to implement them into national law. In EU legislation, the first to contain a concession, in the form of concession for works, was Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts.[13] However, a broader perspective of European lawmakers on concessions was only seen in Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts,[14] as the public works concession was regulated in more detail. In addition, Article 1 (d) of this Directive defines a public works concession as a public works contract with the difference that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment. The legal institution of concessions was then developed by a further package of directives coordinating public procurement procedures, adopted in 2004.[15] A particularly significant solution

[9] Journal of Laws 1994, no. 76, item 344, as amended.

[10] Journal of Laws 2004, no. 256, item 2571, as amended.

[11] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2020, item 1740, as amended).

[12] Journal of Laws 2001, no. 72, item 747, as amended.

[13] OJ L 210/1, 21.7.1989.

[14] OJ L 199/54, 9.8.1993.

[15] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134/114, 30.4.2004); Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134/1, 30.4.2004).

of this package of directives was the implementation of the concept of concessions for services, which nonetheless was only defined without introducing a broader legal regulation of this institution.[16] In such an environment of EU law, our national legislature was forced to implement the institution of public works concessions into the Polish national law. The institution of concession for works became a permanent feature of Polish law only with the passing of the Public Procurement Law of 29 January 2004. The concession for works was defined in Articles 128 to 131, while the concession for services was not initially included in the wording of the Polish legal regulation. The Public Procurement Law specified that one of the options for performing public tasks is by means of a concession for works. Although these regulations have been in place since 2004, the market for public works concessions remained unused. It was not a comprehensive legal regulation, as it only defined the concessions for works,[17] completely disregarding the concessions for services. In practice, therefore, we had two definitions of concessions for works set out in the Public Procurement Law, and rather general regulations on public services concessions included in the package of directives coordinating the procedures for the award of public contracts.[18] This was not a good solution, as it caused numerous difficulties in the practical use of the legal institutions in question, especially due to the rather blurred division line between a classic public contract and a concession. And this resulted in little use of concessions in practice. Apart from this rudimentary regulation in Public Procurement Law, a major problem in the practical use of concessions was the lack of government support on the one hand and the total lack of knowledge on the part of the public sector on how to conduct a concession contract procedure. Therefore, the issue of concessions for works granted under the Public Procurement Law was of little practical significance.

While noticing the opportunities provided by legal instruments enabling establishment of inter-sectoral cooperation, the legislature undertook subsequent legislative action aimed at adopting a separate legal regulation governing the sphere of cooperation between public and private entities in the implementation of public tasks. These actions resulted in the enactment of the first Polish Act on public-private partnership.[19] According to its original assumptions, the legal regulation in

[16] The concession for services was covered by the rules of the Treaty on the Functioning of the European Union and the Commission interpretative communication on concessions under Community law of 24 April 2000 and the case law of the Court of Justice of the European Union (including in judgments of: 7 December 2000, Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, formerly Post & Telekom Austria AG*; 30 May 2002, C-358/00, *Buchhändler-Vereinigung GmbH v Saur Verlag GmbH & Co. KG, Die Deutsche Bibliothek*; 1 March 2005, C-458/08, *Parking Brixen GmbH v Gemeinde Brixeni Stadtwerke Brixen AG*; 18 July 2007, C-382/05, *Commission of the European Communities v Italian Republic*; 21 July 2005, C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*).

[17] The concession for works has been defined in Articles 118 to 121 PPL.

[18] Directive 2004/18/EC.

[19] Act of 28 July 2005 on public-private partnership (Journal of Laws 2005, no. 169, item 1420).

question was supposed to broaden the possibilities of performing public tasks through the use of private capital and improve the quality of carrying out public tasks. However, no real effects of its functioning were observed during its first years in force. In the period it was in force, not a single public-private partnership contract was concluded, nor were there any actions aimed at signing such a contract in the form of even initiating the procedure to select a private partner. For these reasons, among other ones, the act in question was called a proud monument of Polish legislative thought without any practical relevance for the market.[20] Nonetheless, it has inspired further legislative activities in this area.

THE CONCESSION FOR WORKS OR SERVICES IN THE MEANING OF THE ACT ON CONCESSIONS FOR WORKS OR SERVICES

Facing the growing economic crisis in 2008, the public sector needed new tools to efficiently carry out public tasks. Independent performance of public tasks by public entities was not always sufficient. The financial crisis exacerbated difficulties in accessing financial resources for private businesses, especially in the implementation of large infrastructural projects. Therefore, at the end of 2008, the Act on public-private partnership[21] was adopted and the Act on concessions for works or services was passed, which was adopted on 9 January 2009.[22] It was a quite innovative legal regulation for its time, owing to which Poland joined the group of countries that had separate legal regulations governing concessions for works or services.[23] The intention of its authors was to create a transparent and non-formalized procedure for selecting a concessionaire, while providing with legal certainty the entities who use it. Therefore, the procedure aimed at selecting a concessionaire in the Act on concessions for works or services abandoned a number of detailed regulations known from Public Procurement Law, such as, e.g., a bid bond.

[20] M. Kulesza, M. Bitner, A. Kozłowska, *Ustawa o partnerstwie publiczno-prywatnym. Komentarz*, Warszawa 2006, p. 24.

[21] Act of 19 December 2008 on public-private partnership (Journal of Laws 2009, no. 19, item 100).

[22] Act of 9 January 2009 on concessions for works or services (Journal of Laws 2009, no. 19, item 101).

[23] Countries with separate legal regulations on concessions for works or services include, among others, France and Germany. In Spain, the first law was passed in 1972, regulating issues related to the award of motorway concessions and issues related to government guarantees for the construction of these motorways. But the legal act that brought a breakthrough in Spain was the Act on works concessions, which was passed in 2003 and which introduced the principles of risk-sharing between public and private entities. In 2007, in connection with the need to implement the provisions of European directives, the Act on public contracts was adopted, subsequently slightly amended in 2011. For more, see J.M. Vassallo, A. Ortega, M.A. Baeza, *What Was Wrong with the Toll Highway Concessions in the Madrid Metropolitan Area?*, "Canadian Journal of Civil Engineering" 2012, vol. 39(1), pp. 81–90.

The Act on concessions for works or services defined the rules and procedure for entering into concession contracts for works or services and the legal remedies available to participants in the concession award procedure. Based on the concession contract, the concessionaire undertook to perform the object of concession for a consideration, which in the case of a works concession is only the right to exploit the construction or such right together with payment by the grantor, and in the case of a services concession, only the right to use the service or such right with the payment by the grantor. The obligations of the concessionaire in a concession contract could include, in addition to the performance of the works themselves, also the subsequent provision of services based on the assets produced, or the concession could cover the "standalone" provision of services and the collection of fees from end-users. The introduction of regulations on concessions for works and concessions for services into the legal system has contributed to the expansion of the legal possibilities of implementing public tasks. The Act defined in a transparent and flexible manner the methods of selecting a private entity to perform a specific public task, while retaining the principles of fair competition. The basis for the selection of the procedure specified in the Act on concessions should always be the decision of the public entity, after prior analysis of who is to be the client of the public service, a determination of its financial, organisational and technical capabilities as well as the actual needs related to the provision of the public service in question. The Polish legislature used in the Act on concessions the legal solutions known to the Community law and the good practices applied in other EU countries.

Worth deserving is its simplicity, as the Act consisted of only 38 articles, which was a very good result, given the tendency to expand the proposed legal regulations far too much in the recent period. Concession contracts under the regime of the discussed legal regulation used to be concluded much more often than before 2009. Thus, in the period from the entry into force of the Act on concessions for construction works or services until the end of 2014, a total of 342 proceedings to select a concessionaire were initiated, 82 of which ended with the conclusion of a contract.[24]

The legal regulation in question was effective until the entry into force of the Act of 21 October 2016 on concession contract for works or services.[25] It implemented the provisions of Directive 2014/23/EU of 26 February 2014 on the award of concession contracts.[26]

[24] B. Korbus, D. Zalewski, R. Cieślak, M. Liżewski, A. Ferek, *Rynek partnerstwa publiczno-prywatnego i koncesji w Polsce w 2014 r. na tle stanu obowiązującego w latach 2009–2013*, http://www.mg.gov.pl/files/upload/23964/Raport_rynek_PPP_2014.pdf (access: 12.7.2015).

[25] Journal of Laws 2016, item 1920.

[26] The Act on concessions contract for works or services is to implement into the Polish legal order the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94/1, 28.3.2014).

THE CONCESSION FOR WORKS OR SERVICES IN THE MEANING OF THE ACT ON CONCESSION CONTRACT FOR WORKS OR SERVICES

The Act of 21 October 2016 on concession contract for works or services repealed the Act on concessions for works or services which had been in force for almost eight years. The introduction of the new law stemmed from the need to implement the regulations of the Directive of the European Parliament and of the Council 2014/23/EU of 26 February 2014 on the award of concession contracts into the Polish legal system. This is the first EU directive that comprehensively regulates the rules of concluding concession contracts for works or services; previously, the regulations of EU Member States concerning the granting of concessions were not harmonised at the EU level. The decision to attempt to regulate the institution of concessions at the level of EU hard law was taken in view of the risk of legal uncertainty related to divergent interpretations of the Treaty rules by national legislatures and the risk of significant discrepancies between the legislation of individual member states.[27] The issue of concessions for works or services has only been addressed in the area of EU soft law.[28] Soft law sources were used in particular to interpret and develop directional solutions in the areas of works and services concessions and cross-sector partnerships. This was mainly due to disagreement among EU Member States on the model of legal solutions in the area of concessions and the lack of unambiguous legal rules in EU law regarding the conduct of economic activity by public entities independently or jointly with private partners.

The legislature defined the concept of concession in the content of Article 3 of the Act on concession contract for works or services. The solution specified in Article 3 of this Act referred directly to the content of Directive 2014/23/EU. Thus, a concession for works is to be understood as a contract under which the contracting authority entrusts the concessionaire with the execution of works for remuneration constituting the exclusive right to exploit the construction covered by the contract, or such right together with payment. A concession for services is to be a contract by which the contracting authority entrusts the concessionaire with the provision and management of services for remuneration constituting the exclusive right to operate the services covered by the contract or such right together with payment. Leaving only such a definition without taking into account the elements of venture risk could

[27] A. Panasiuk, *Partnerstwo…*, pp. 73–85.

[28] The starting point for the discussion on aspects of the broader-sense public-private partnership was the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final) adopted by the European Commission on 30 April 2004. It was a document that showed the course and outcome of the debate of EU bodies on the application of EU law on public procurement and concessions. It was intended to show which EU rules are applicable at the stage of the selection of the private partner and at the subsequent stages of the implementation of public services.

result in a situation where in some cases it could be in fact a classic public contract. Therefore, a characteristic feature of concluding a concession contract is the transfer to the concessionaire of the economic risk related to the exploitation of the work or performance of the services and including the risk related to demand or supply.

The Act on concessions for works or services regulated in a simple manner the distribution of risks between the individual parties to the concession contract by introducing the principle of "essential risk". On the other hand, the solution adopted in Article 3 (3) of the Act on concession contract for works or services provides that the concessionaire bears the economic risk related to the exploitation of a work or a service and the risks related to demand and supply. Furthermore, the possibility of determining the scope of operational risk adopted in Article 3 (3) of the Act on concession contract for works or services for the risk related to demand or supply, or to both these areas of risk, will result in the public sector being more prone to determine the risks in the areas of supply and demand. Such action results from the high propensity of the public sector to shift excessive risks to the private sector. Incorrectly distributed risks can be a barrier to the actual implementation of a project, while leading to financial losses as a consequence of the parties being ill-prepared to perform their obligations. Furthermore, it may contribute to failure to achieve the expected financial result. Striving to transfer more risks to the private partner may in fact reduce effectiveness and thus cause a decrease in expected benefits, which will indirectly have a negative impact on the public partner in the light of public perception.[29]

The currently applicable Act on concession contract strongly points out the economic risk. Article 3 (4) of this Act defines it as a situation where, under normal operating conditions, the concessionaire is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services covered by the concession, and the risk transferred to him entails the exposure to market fluctuations to the extent that its estimated potential loss related to the execution of the concession contract may not be merely nominal or negligible. According to such an approach, economic risk should arise from factors beyond the control of the parties. With such an understanding of the concession risk, it should be noted that the parties are obliged to pay more attention to the structuring of the transaction and allocation of the risk associated with the planned project. Consequently, this may affect the costs of the entire project, because the greater the risk borne by one of the parties, the greater the costs paid by the other one. However, it should be noted that the way of interpretation of economic risk and its practical application will be of key importance for the acceptability of the project by the financing institutions.

[29] A. Panasiuk, *System zamówień publicznych. Zarys wykładu. Zamówienia klasyczne. Partnerstwo publiczno-prywatne*, Warszawa 2013, p. 249 ff.

Also, highlighting in the risk analysis the need to determine the actual losses, which are not only of a nominal nature, resulting from the concession contract performance, may affect the actual interest of private entities in applying for the concession. In view of the above considerations, in order to apply the provisions of the Act on concession contract in practice, not only should the sources of financing the concessionaire be indicated, but also the exposure to potential market fluctuations during the project duration must be carried out. Another difficulty will be the need to assess the economic risk by analysing the net present value of all investments, costs and revenues of the prospective concessionaire. Therefore, the extent of economic risk has now been extended compared to the previously applicable legislation, under which the concessionaire bore the economic risk of performance of the concession contract.[30] There may also be a situation that the entire economic risk of a particular project is borne by the private partner. Due to the fact that risk is something variable, as it is a process rather than a state, it is difficult to identify and define it at the very beginning of the procedure. The appropriate context regarding risk in concession projects will certainly be the uncertainty and the probability of occurrence of certain events or not.[31] However, the most common risk response in concession projects should be sharing the risk between partners or knowingly accepting the risk and making the right project-related decisions. Informed acceptance of the risk will depend on the degree of risk acceptable for the parties and on the relation of costs of implementation of risk response actions and benefits obtained from these actions. It can be noticed that with such a definition of economic risk in the Act on concession contract for works or services, this risk distribution will be significantly limited, which may affect, on the one hand, the decisions of potential private entities to apply for a concession, and, on the other hand, the decision of a public entity to select concession as the most advantageous method of implementing a particular public task.

The essence of concession defined in this way in the Act on concession contract for works or services does not result in the widespread use of this institution in practice. The illegibility of this legal regulation and excessive focus on detail also affect its practical application. It should be noted that its volume has doubled compared to the concession act of 2009, and currently it contains as many as 72 articles. All this translates into a small number of concession contracts. According to the information contained in the report of the President of the Public Procurement Office on the functioning of the system for 2020, the number of concession contract

[30] Article 3 (3) of the Act of 9 January 2009 on concessions for works or services (Journal of Laws 2009, no. 19, item 101).

[31] A. Panasiuk, *Wpływ rozwiązań przyjętych w dyrektywie 2014/23 UE na kształt pojęcia koncesji zdefiniowanego w ustawie o umowie koncesji na roboty budowlane lub usługi*, "Studia Prawno-Ekonomiczne" 2017, vol. 103, pp. 77–94.

announcements in 2017 was 4, while in 2018 there were 14 such announcements, and in 2019 only 7. There were even fewer concession contracts actually concluded: a total of 14 contracts were concluded in 2018, 5 in 2019, and 11 in 2020.

CONCLUSIONS

Although the institution of concession is known for many years, it is not a legal instrument commonly used in the operation of the public sector. This situation is a product of various factors. As discussed above, at a time when there was no specific legislation on concessions, public market operators used to point to the need to adopt a law exclusively devoted to concessions, which would provide greater legal certainty for the conclusion of such contracts. The adoption of the first regulation on concessions in 2009 provided the public sector with a simple and easy-to-use tool. As a result of the entry into force of this law, the number of concession contracts concluded has increased significantly. This situation lasted until 2016, when another act on concessions for works or services was adopted, repealing the previous legal regulations. The new approach to concessions caused an instability in the interpretation of basic concepts (such as the distribution of concession-related risk), and has stirred a sense of legal uncertainty in entities interested in concessions.

The Act on concession contract for works or services contains a number of norms directly copied from the EU directives coordinating public procurement procedures, in particular the Concessions Directive, which does not contribute to its transparency and simplicity of interpretation. Such thoughtless copying of legal constructs from directives into national law often results in the emergence of new legal concepts and constructs which were not previously known under national law. At the same time, the number of provisions in a given normative act increases significantly. To reduce the number of legal provisions, they must be accompanied by well-established rules of interpretation of the law and, above all, a proper legal culture in society. When adopting a new legislation, one cannot simply implement EU directives directly without reflection, but the process should follow genuine needs which are objectively based on realities and experience to date. Otherwise, the newly adopted regulations will at some point start to be of very poor quality.[32]

To sum up, the current rules governing the award of public works or service concessions have been over-regulated and the practical lessons learned over many years have been completely ignored. As a result, we currently have little interest in concessions in Poland. Yet the authors of the currently applicable regulation argued

[32] It seems that in the multitude of provisions and numerous legal regulations being adopted, one often looks at the needs to pursue particular interests of selected social groups, while forgetting about the objectives that are to be achieved by the legal norms in question.

in a number of newspaper articles and in the explanatory memorandum of the bill that the draft law was intended to "introduce clear and transparent rules (…) for the award of contracts by way of works or services concession contracts ensuring compliance with the applicable EU law".[33]

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[33] For example, see *MR chce ułatwień w zamówieniach koncesyjnych na roboty budowlane*, 11.4.2016, https://forsal.pl/artykuly/935122,mr-chce-ulatwien-w-zamowieniach-koncesyjnych-na-roboty-budowlane.html (access: 12.7.2022).

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ABSTRAKT

Sektor publiczny w Polsce staje obecnie przed coraz to nowymi wyzwaniami, związanymi z realizacją zadań publicznych, do których nie zawsze jest wystarczająco przygotowany. Jedną z możliwych form prawnych realizacji zadań publicznych są koncesje na roboty budowlane lub usługi. Autor dokonuje przeglądu regulacji prawnych normujących problematykę koncesji i dochodzi do wniosku, że im mniej ustawodawca ingeruje w regulację procedury udzielania koncesji na roboty

budowlane lub usługi, tym większy wymiar praktyczny ma koncesja. Zwraca uwagę również na jakość projektowanych regulacji prawnych w tym zakresie oraz na ich zbytnią kazuistykę. W artykule przedstawione zostały pewne przemyślenia dotyczące przyszłych kierunków zmian przepisów dotyczących koncesji na roboty budowlane lub usługi.

Słowa kluczowe: koncesja na roboty budowlane; koncesja na usługi; sektor publiczny; regulacje prawne; zadania publiczne