



Challenging the specifications of a tender does not represent an impediment to participation

Ruling 17/2016 of 11 February 2016, of the Catalan Court of Public Sector Contracts

Background

The ruling of the Catalan Court of Public Sector Contracts addressed below was issued as part of a special appeal on contracting brought against the specifications of a tender procedure that sought to award a contract for the supply of medicinal products.

The appeal brought challenged, amongst other aspects, a very common clause in tender specifications, which establishes that the submission of a bid entails an unconditional acceptance of the specifications. Specifically, said clause is covered by Article 145 of the consolidated text of the Public Sector Contract Law.

The rationale employed by the appellant in filing the challenge was that the clause in question limited free competition, by placing bidders in the position of having to choose between (i) participating in the tender, the stipulations of which were considered as inconsistent with law, or (ii) refraining from participating and challenge said clauses, with the risk of failing to be awarded the contract in the event that the appeal was rejected.

It is possible to bid whilst launching a challenge

The Court does not share the appellant's assertion that the clause in question entails an obligation to choose between two exclusive alternatives.

On the contrary, according to the Court, there is no impediment to an interested company responding to a tender, whilst challenging the specifications, precisely in order to avoid a situation in which, should the appeal fail, the appellant is deprived of the opportunity to be awarded the contract. The Court believes that anybody with an interest in participating in a tender has to be able to do so, even when the content of a number of the clauses or requirements in the specifications appear inconsistent with law, as otherwise, the right of those who do not agree with the content of a clause or requirement to participate in a tender would be limited, despite boasting all the skills required to submit a bid.

The Court bases its decision specifically on the interpretation of Article 145 of the TRLCSP, which, it must be noted, constitutes the legal support of the challenged clause. According to the Court, whilst Article 145 of the TRLCSP imposes the unconditional acceptance of the clauses of the tender specifications by the participant, such an imposition only takes effect when a final decision has been taken, whether because no appeal was filed before the corresponding deadline or because the appeal filed was rejected.

As a result, there is no obstacle to anybody that wishes to challenge the specifications from participating in the tender, as the unconditional acceptance of the specifications cannot be required from the bidder until a ruling is issued concerning the appeal filed.