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# New public procurement: faster, more transparent and in pursuit of quality

***Draft law on Public Sector Contracts, transposing Directives 2014/23/EU and 2014/24/EU into Spanish law***

## Objectives of the new law

The draft of this new law seeks, first and foremost, to fulfil the obligation to incorporate into Spanish law Directives 2014/23/EU of 26 February 2014 on the award of concession contracts and Directive 2014/24/EU of 26 February 2014 on public procurement.

The deadline for transposing the aforementioned Directives expired on 18 April 2016. For the time being, Spain continues to fail fulfilling is obligation to transpose, as we currently only have a draft law; however, we can at least sense the legislator's intention of transposing the Directive. Meanwhile, we will continue to abide by the recommendations and reports issued by the Procurement Advisory Boards with regards which of the provisions of the aforementioned Directives are directly applicable in Spain since 18 April 2016.

The main objectives of this draft law are greater transparency and better value for money. To this end, the draft law encourages contracting authorities to prioritise quality, environmental aspects, social aspects and innovation, without forgetting about the price or costs of the life cycle of the subject-matter of the procurement.

The draft also seeks to simplify proceedings and establish a simpler bidding process, reducing administrative burdens of procurement procedures. To fulfil this objective, the situations in which affidavits may be used have been extended, and their content is regulated in more detail.

## New features of the draft law

*(i) Regulation on different types of contracts*

The most important new feature affects concessions. The draft law removes the concept of the "public service management contract" and all regulations on the different indirect public service management modalities. The new "concession of public services' contract" takes its place.

In this new concession of public services' contract there is a transfer of operational risks from the Public Authorities to the concessionaire. That is to say, even in the normal functioning of the concession, the concessionaire assumes all risk and there is no guarantee that it will recover the investment made or cover the costs incurred as a result of the operation of the service to which the concession applies.

The transfer of operational risks represents the new boundary between the concession of public services' contract and the services contract.

If the risk is assumed by the contractor, the contract shall be considered a public service concession contract, whereas if the operational risk is assumed by the Public Authorities, it shall be considered a services contract. Otherwise, the draft law establishes a similar system for both types of contracts with regard to the regulation of the provision of the services.

Thus, the indirect management of public services is simplified, as up until now, it is subject to different contractual modalities (concession, government-controlled agreement, stakeholder management or partially government-owned company), each of which has its own system for transferring operational risk.

*(ii) Special appeal on procurement matters*

The scope of the special appeal on procurement matters has been extended. On the one hand, issues concerning the nullity of contracts must be handled under the special appeal on procurement matters. On the other hand, the issues that may be appealed have been extended, as the draft law contemplates the possibility of appealing contractual amendments made in breach of the regulations for amendment of contracts, on the basis that amendments must be subject to a new bidding and award process.

Furthermore, these appeals are no longer optional, as they are under the current regulations, and must precede all claims before administrative courts.

Finally, the draft law introduces a restriction on automatic suspension that currently applies whenever the award resolution is appealed. The draft law introduces an exception to said automatic suspension, which applies when the measure challenged entails the award of contracts based on a framework agreement or specific contracts under a dynamic purchasing system.

*(iii) The procurement procedures*

Concerning procurement procedures, the new provisions of the law will introduce a new procedure known as "innovation partnership" and a new simplified open procedure, a sub-type of the already existing open procedure, applicable up to certain thresholds.

The new procedure of "innovation partnership" is created with a view to favouring the most innovative companies and is designed for instances in which, prior to acquisition by Public Authorities, research and development activities must be undertaken concerning the works, services or products being acquired. It is therefore designed for instances in which the solutions available on the market fail to satisfy the needs of the contracting body, and research and development must be carried out prior to the works, service or products to be acquired by the contracting body.

The purpose of the simplified open procedure is to provide a very simple option that should make it possible to award the contract in a period of one month from the invitation to tender, without neglecting the need for publicity and transparency. Procedures are simplified to the maximum and particularly noteworthy is that documentation will be submitted in a single envelope; under no circumstances will the constitution of a provisional security be sought; and spending commitments will be audited in a single instance, prior to the award.

Furthermore, aiming to improve transparency, the possibility of using the negotiated procedure without publicity for complementary services and work, or on the basis of the amount of the contract is removed in the draft law. Said procedure, although often used on account of its speed, lacks transparency as no publicity is necessary, increasing the risk of generating inequalities.

Public-private partnership contracts have also been eliminated.

*(iv) Abnormal low bids and prohibitions on contracting*

The provisions on so-called abnormal low bids are tightened in the draft law and as a result, contracting authorities shall reject all tenders that are disproportionately low if it is demonstrated that the tender fails to fulfil applicable environmental, social or labour laws, even if the tenderer has justified that the conditions of its proposal makes it possible to offer such disproportionately low prices or costs.

A new provision of the draft law that is also worth a mention is the introduction of a new specific rule to fight corruption and to prevent conflicts of interests, which calls on all contracting authorities to take the appropriate measures to fight against fraud, favouritism and corruption, in addition to preventing, detecting and remedying any conflicts of interests that may arise; such conflicts of interest are construed as any instance in which any individual associated with the contracting authority participating in the bidding process or that may influence its result, has a direct or indirect financial, economic or personal interest that may compromise his/her impartiality and independence in the context of the tender procedure.

In line with the measures introduced to fight corruption, a new regulation is also introduced that increases the instances in which a prohibition on contracting may be declared and modifies the authorities to make such a declaration in the draft law, the procedure and the effects of such a declaration.

*(v) Scope of application*

The main new feature in terms of the scope of application of the new draft law is that its subjective scope has been expanded with a view to applying the provisions of the draft law to entities not subject to the current regulations. Political parties, trade unions and business associations have been included, as have foundations and associations linked to any thereof, provided that they fulfil certain conditions such as receiving the majority of their financing from public authorities and with regard to contracts to which harmonised regulation applies.

*(vi) Social, environmental and innovation and development considerations*

The draft law forces contracting authorities to introduce social, environmental and innovation and development considerations into public contracts, although it allows them to decide whether to include such considerations in specifications as award criteria or as special performance conditions.

In any case, the validity of social, environmental and innovation and development considerations is dependent on them being related to the purpose of the contract to be executed.

In terms of the environment, bidding companies will be required to submit the corresponding environmental management certificates to demonstrate their technical solvency. With regards to social matters, the stipulation concerning contracts reserved for special employment centres or that are executed under the framework of sheltered employment programmes is maintained in the draft, although the reservation is extended to insertion companies. Additionally, the draft law requires that all the aforementioned entities employ a specific percentage of disabled workers, as set out in the corresponding regulations.


In terms of disabilities, the criterion remains that, in order to enter into contracts with public-sector companies, companies with 50 or more employees must employ, at least, 2% of disabled persons.

*(vii) Support measures for SMEs: division into lots and on-time payment*

As a support measure for SMEs, the draft law seeks to completely change the system for dividing the purpose of the contract into lots. Is reverted into a new general rule currently in place on refraining from dividing up the contract into lots is reverted into a new general rule that actually encourages the division of contracts, forcing contracting authorities to justify their decision when they choose not to divide the contract into lots. By promoting the division of contract into lots, the draft law seeks to facilitate access to public procurement to a larger number of companies.

Furthermore, as a measure to protect SMEs, the rule introduces a new solvency criterion that requires the successful tenderer to demonstrate that it complies with the terms set out in the law concerning payments to its suppliers, thus helping that SMEs to which the successful tenderer outsources work to receive payment on time.

*(viii) Defence of competition*

The draft law also contains provisions on defence of competition in order to ensure that it is more effective. Amongst these measures, the duty to provide the National Markets and Competition Commission (CNMC) with more information on public contracting is worth particular mention, as is the provision that contract award committees may inform the CNMC or the competent regional authority, prior to the award, of reasonable suspicions in terms of collusive behaviour in the contracting procedure. The procedure for processing said complaints will be accelerated and if the CNMC decides to open a case, this will cause the suspension of the contracting procedure.

*(ix) Profile of the contracting party and notices*

The draft law also sets out more detailed regulations concerning the profile of the contracting party, that is to say the site on the official website of the public authority that may be accessed and used by the contracting party in its dealing relating a tender, giving it more prominence in terms of the publicity of the different acts and phases of the contracting process.

Finally, and in terms of the publication of tender notices, the draft law seeks to simplify the existing system and introduces a standardised form including the information that must appear in the different notices that must be published.