



New developments in the access of SMEs to public tenders

Resolution No. 173/2016 of the Catalan Court of Public Sector Contracts (TCCSP) of 4 November 2016 and Report of CNMC of 1 September 2016

Background

Some of the obstacles that SMEs frequently come up against when accessing public tenders are, for example, the non-division of the purpose of the contract into batches or the requirement of economic solvency related to business size.

Recently, regulatory changes have been introduced and suggestions published to overcome these difficulties. We analyse one of the regulatory changes below, explaining how it is being applied by the courts, in addition to the content of the aforementioned suggestions.

The division of contracts into batches

Pursuant to Directive 2014/24/EU, the general rule is to divide contracts into batches and the administration is required, where appropriate, to appropriately justify the grounds for not doing so.

On 18 April 2016, the deadline for transposing the Directive elapsed without the provisions having been included in the Spanish legal framework. The Contracts Advisory Boards hastily stated that Article 46 of the Directive, concerning the division of the purpose of contracts into batches, was directly applicable. The aforementioned TCCSP resolution favours its direct application.

In its resolution, the TCCSP examined procurement proceedings organised after 18 April 2016, as part of which the purpose of the contract had not been divided into batches.

The TCCSP, directly applying Article 46 of the Directive, reverted the actions as part of said procurement proceedings back to the time at which the specifications were approved, even though the contract had already been awarded, as it deemed that if the administration did not want to divide the purpose of the contract into batches, the procurement body should have justified the grounds for not doing so in the specifications or via a specific report.

Suggestions in relation to the requirement of demonstrating sufficient economic solvency

Concerning the aforementioned requirement, a CNMC report has been issued proposing measures to facilitate the participation of SMEs in public tenders. In its report, the CNMC reflects on the suitability of using turnover as a parameter for assessing economic solvency.

According to the Commission, turnover is more indicative of the size of a business than its financial soundness. The CNMC asserts that said economic solvency would be better demonstrated by other criteria set out in Article 75 of the Consolidated Public Sector Contract Law (TRLCSP), such as net equity or average period for payment to suppliers. The CNMC itself recognises that said recommendation exceeds the scope of the Report issued, but that it is an opinion that could undoubtedly be taken into consideration by the legislator, which is currently amending the draft law on Public Sector Contracts.