



## The Challenge of non qualified procedural acts is already a reality

*Decision 64/2017, of 22 May 2017, of the Public Contracts Administrative Tribunal of Aragon*

### Introduction

As we anticipated in our Capsulas Newsletter No 181, April 2017, the regime of acts and resolutions from Public Contract Authorities that may be challenged has been altered by the Judgement of the European Court of Justice (ECJ), 5 of April of 2017 (Case C-391/2015).

This TACPA's Decision applies, for the first time in Spain, the doctrine settled by the ECJ, and resolves a challenge against the rejection of an alternative offer, using the aforementioned doctrine and explaining its incidence in the regime of challengeable acts in public procurement rules. In view of its relevance, we should now like to turn to the Decision.

### Object of the challenge before the TACPA

The decision has its origin in the challenge brought by a Temporary Business Association (known by its Spanish acronym UTE) which was participating in a bidding process with regards to a work contract promoted by the Health Authority of Aragon. The UTE challenged the decision of the Bureau of Procurement rejecting its alternative offer number 2 according to a technical report, which found such offer unfeasible and non subject to the statements of the invitation to tender.

The UTE filed a challenge against such a decision arguing that the Bureau Procurement had incurred in a manifest error assessing its alternative offer.

### The Decision of the TACPA

The TACPA begins its analysis stressing that, as a general rule in the Spanish legal system, procedural acts are not subject to challenge and that, only under exceptional circumstances, those named "qualified procedural acts" might be subject to challenge. These are acts that decide about the substance of the matter, determine about the impossibility to continue the proceeding or produce defenseless or irreparable harm to the bidders rights or legitims interest.

The Decision settles a challenge against an act which does not fall within any of this circumstances and, therefore, according to the doctrine previous to the ECJ judgement, the challenge should not be admitted. However, the TACPA found that by not admitting it, it would violate the criteria established by the ECJ, which considers contrary to European law the Spanish law that subordinates the possibility to challenge the act to the fact of reaching a certain stage in the procedure.

Thus, following the ECJ criteria, the TACPA admitted the challenge motion and moved on to analyze the merits of the case (which are not under analysis in this occasion), applying so, for the first time in Spain, the ECJ doctrine, which opens the door to challenging non-procedural acts, that in practice precludes the possibility of challenging important acts within the proceeding without forcing the bidders to wait up to a certain phase of the bidding procedure to exercise their rights.