



The new Law on Public Procurement

The Spanish Parliament approves the Law on Public Procurement in its session of 19 of October of 2017

Background

On its session of 19 of October of 2017, the Spanish Parliament approved the new Law on Public Procurement. This approval finishes the process of incorporation into Spanish law of the Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council, of 26 of February of 2014. The reform is approved long after the expiration of the deadline that the Member States had in order to transpose the mentioned Directives, which expired on 18 of April of 2016.

The lack of compliance with such deadline has posed a challenge for legal practitioners from the point of view of legal certainty during the last year and a half. During all this time, the documents prepared by the public contracts advisory boards ("Juntas Consultivas de Contratación") in Spain and by several members of the administrative courts of contractual appeals have served as a guide in the task of applying the provisions which are established as directly binding for the Member States by the Directives.

In general terms, the law seeks to implement in Spain a regulation which makes public procurement more transparent, quality-oriented, open to competition, focused on pursuing certain social objectives and less bureaucratic. Not everything has been achieved, but important developments that we will comment below have been introduced.

More transparency

The new law on public procurement aims to make the procurement procedure more transparent. To this end, it establishes new obligations for the contracting authorities. The most important obligation is the introduction of a new specific cause of invalidation of the procedure as a result of the non-publication of the contract notice in the buyer's profile or in similar information services of the Regional authorities, in the Official Journal of the European Union (OJEU) or in any platform in which the publication of such notice is mandatory.

In addition, the new Law significantly expands the content of the information that must be published in the buyer's profile. Therefore, as a novelty, the following documents must be publicized:

- the justificatory report of the contract;
- the justification of the procedure used (when it is different from the open or restricted procedure);
- the report of evaluation of the awarding criteria which are measurable by means of value judgment; and
- the reports of the offers which are considered abnormally low.



Fight against corruption

The contracting authorities must take the appropriate measures to fight against fraud, favouritism and corruption and to prevent, detect and effectively resolve conflicts of interest that may arise in the tenders in order to avoid any distortion of competition and to ensure transparency in the procedure and equal treatment of all candidates and tenderers.

The law defines a conflict of interest as any situation where the staff members of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of the procedure, have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure. This duty extends to those persons or entities that are aware of a possible conflict of interest, which must immediately notify such conflict to the tender authority.

A more quality-oriented regulation of public tenders

In the new law, the concept of "the most economically advantageous tender", which has traditionally prevailed in our legal system, has been disregarded. The new legal text establishes as a general principle that contracts will be awarded ordinarily using a plurality of award criteria based on the principle of "best value for money". This principle will be evaluated according to economic and qualitative criteria.

The law determines the following as qualitative aspects to be taken into account in order for the contracting authority to evaluate the tender: its quality, its aesthetic and functional characteristics, its accessibility, its marketing conditions, as well as the environmental, social and innovative aspects of the tender that are linked to the object of the contract. Also, the organization, qualification and experience of the staff who will execute the contract is an element to take into account especially when said staff can significantly affect the best performance of the contract.

If justified by the contracting authority, contracts may be awarded according to criteria based on an approach that meets a better cost-effectiveness, on the basis of price or cost, such as the calculation of the life cycle cost.

Another important novelty that must be highlighted is the obligation imposed on the contracting authorities to include in the procurement documents the objective parameters that allow identifying the cases in which an offer is considered abnormally low.

The regime established in order to control abnormally low offers has been changed and according to the new law, the contracting authority is obliged to reject, in any case, offers that are abnormally low because they violate the subcontracting regulations, or because they do not comply with the applicable national or international environmental, social or labour requirements, including non-compliance with sectorial collective agreements.



Improvement of access by Small Medium – sized Enterprises (SMEs) to Public Procurement Contracts

The law establishes various changes to the previous regulation which are aimed at creating more competition and allowing SMEs to develop their growth and innovation potential. Administrative courts have already been implementing (since the expiration of the deadline to transpose the Directives), the general principle that the contract should be divided into lots. If the contract is not divided into lots, the contracting authority must justify it in the dossier.

Another novelty is that it is forbidden to request newly created companies to prove their technical ability by showing previous experience in similar contracts. Newly created companies are those which are less than 5 years old.

Novelties in the procurement procedures

The most relevant developments in relation to the procurement procedures foreseen in the previous law are the elimination of the negotiated procedure without publication related to the value of the contract and the introduction of two new procurement procedures: the simplified open procedure and the innovation partnership procedure.

The elimination of the negotiated procedure without publication due to the value of the contract is a consequence of the greater transparency of the procurement procedure pursued by the new regulation. However, the negotiated procedure without publication subsists in relation to other cases not linked to the mere economic value of the contract.

Likewise, and to optimize the procedure, a new simplified open procedure is created with the

aim of obtaining a faster and simpler procedure both regarding the preparation of the tender as well as its resolution. In relation to services and supply contracts, it will be compulsory to use the simplified procedure provided that the estimated value of the contract is equal to or less than 100,000 euros and that among the award criteria there is no criterion subject to a value judgment or, in case there is such criterion, its importance in the tender does not exceed 25 percent of the total.

Any company who participates at a tender that falls into the scope of the simplified procedure must register in the Official Register of Tenderers and Classified Companies of the Public Sector, or where appropriate, in the Official Register of the corresponding Autonomous Region, for which they will be granted a period of ten months from the entry into force of the law.

Finally, the innovation partnership procedure is incorporated as a contracting mechanism for those cases in which it is necessary to carry out research and development activities regarding works, services and innovative products, which subsequently have to be acquired by the administration.

Novelties regarding the type of contracts

The new law does not introduce major reforms or developments in relation to service contracts, construction works or supplies, except for very specific aspects, but it does introduce significant changes in the regulation of the public service management contract.

In fact, it abolishes the contract for the management of public services and redirects the typical object of these contracts into two different contractual modalities: the services contract and the services concession contract.



The criterion to distinguish one from another lies in the assumption (or not) of the operational risk derived from the management of the public service, so that when the risk is transferred to the contractor, the contract will be qualified as a services concession contract, and if on the contrary the risk is assumed by the contracting Administration, the contract will be qualified as a services contract.

It is understood that the operational risk is assumed when it is not guaranteed, in conditions of normal functioning, that the contractor will recover the investment or cover the costs incurred for the execution of the contract.

Review of the decisions of the contracting authorities

The main novelty in relation to the appeal against certain decisions of the contracting authorities is that the possibility of filing the so-called “special appeal” (“recurso especial en materia de contratación”) is dissociated from the fact that the act intended to be appealed is part of a contract which is subject to harmonized regulation. The previous law established that only acts referring to contracts subject to harmonized regulation could be challenged through the “special appeal” on procurement, as well as acts related to certain services contracts and management of public services contracts.

With the new law, the possibility to challenge a resolution through the “special appeal” is conditioned to the fact that the contract related to the resolution exceeds certain economic thresholds, lower than those that are necessary to consider the contract as subject to harmonized regulation. In this sense, even if the necessary thresholds for the contract to be subject to harmonized regulation are not

reached, this judicial challenge may be used if the services contract or the supply contract exceeds 100,000 euros, or if the construction works contract, concession of works or service concession contract exceeds 3 million euros.

Another remarkable novelty of the special appeal is that it allows the challenge of new resolutions. In particular, it is allowed to challenge not only the decisions of exclusion of tenders, as it has been the case until now, but also the decisions of admission of offers, and the decisions of admission or non-admission of candidates or tenderers.

Moreover, it also opens the possibility of using this appeal for decisions or acts subsequent to the awarding. Therefore, it is admitted to file an appeal against decisions to modify the content of the contracts, orders within the administration as regards the use of the own resources of the administration, and the rescue of concession contracts. All of them are acts subsequent to the award, thus the control in the execution phase of the contract is reinforced.

Entry into force

We conclude this analysis with a comment regarding the entry into force of the law, which will take place four months after its publication in the Official State Journal (BOE), except for a few provisions of secondary importance that will come into effect ten months after its publication and others few provisions concerning the consulting bodies in the field of public procurement, which will come into force the day after its publication in the BOE.