



The procedure to be followed when there is reasonable suspicion of collusive behaviour in public tenders

The Law on Public procurement amended by the General State Budget Law for 2023

Introduction and background

The General State Budget Law for 2023 includes a final provision that introduces a series of amendments to the Spanish Law on Public Procurement (LCSP, according to its Spanish acronym). One particular amendment stands out: for the first time, the law regulates the procedure to be followed in the event that the contracting authority has well-founded indications of collusive behaviour in a public tender.

Article 150.1 LCSP, in its original version of 2017, already stipulated that if the contracting entity had well-founded indications of collusive behaviour, it had to inform the Spanish National Markets and Competition Commission (CNMC, according to its Spanish acronym) before awarding the contract so that the CNMC could issue the relevant report. However, the application of this provision was subject to the subsequent regulatory development of a procedure that had not yet been defined. For this reason, this provision of Article 150 LCSP had not entered into force.

Until now, the Central Administrative Court of Contract Appeals (see Resolution 60/2021) held that, although contracting authorities could request a report from the CNMC if they found evidence of collusive behaviour, such a report was optional and not mandatory. In practice, without a clear procedure, the application of this clause was very limited. From now on, the situation will be different: as from 1 January

2023, the procedure set out in Article 150.1 LCSP is in place and contracting authorities will be obliged to follow it if there are indications of collusive behaviour.

The procedure

Broadly speaking, the procedure is as follows:

- (i) The contracting authority notifies the CNMC (or equivalent regional body) of the reasonable grounds for suspecting collusion. The CNMC will issue a report within 20 working days. The tender procedure is suspended without informing the tenderers. If the report is not issued within such time-limit, the contracting authority may continue the tender procedure or initiate the adversarial procedure mentioned below.
- (ii) If the report concludes that there is no substantiated evidence of collusion, the procedure is resumed (without informing the tenderers). Conversely, if the report concludes that there is substantiated evidence of collusion, the suspension of the bidding process will be notified and published, and the parties will be given 10 working days to respond.
- (iii) Following this hearing, the contracting authority may, within 3 working days, request any reports it deems appropriate from the CNMC (or equivalent regional body).



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(iv) In the light of the allegations, evidence and reports in the file, the contracting authority shall decide within 10 working days whether or not there has been a collusive behaviour. It shall take into account the measures taken by the undertakings to avoid future infringements. If collusion is found, companies concerned will be excluded from the tender procedure and the file will be processed further. If no collusion is found, the bidding process continues as normal.

This notification to the CNMC may result in the initiation of disciplinary proceedings and the imposition of prohibitions on contracting for the companies concerned.

Collusion in public procurement: practical tips.

Finally, it is worth recalling the circumstances which, according to the CNMC itself, are indicative of collusive behaviour (see the CNMC's own "Guide against fraud in public tenders of July 2020"):

- Low number of bidders, including competitors (possible market sharing).
- Inconsistent bids (the same company submits bids with unjustified significant differences compared to other tenders of the same type in which it has participated).
- Suspicious similarities between the financial and technical offers of several bidders.
- Suspicion of boycott (bidders unjustifiably refrain from bidding in order to obtain a change in the terms of the tender).
- Non-competitive bids (bogus or "side bids", which that are clearly not intended to win the contract, but are made to appear competitive).

- patterns of behaviour among bidders (one company being awarded the same contract, lots and/or territories or there is rotation among awarding companies).
- Unjustified subcontracting by one bidder to another competing bidder.
- Bids submitted by the same natural persons in respect of different companies.
- Financial offers with identical wording, identical format, wording or errors.
- Creation of joint ventures between competing bidders without apparent justification.

With the prospect of increased scrutiny of collusive behaviour in public procurement, these practices should be kept in mind in order to avoid engaging in such anti-competitive behaviour. The importance of having good regulatory compliance programmes is also reinforced. The same LCSP foresees that these programmes can be used to avoid contracting prohibitions, mitigate potential sanctions, and to be considered within the procedure set out in Article 150.1 LCSP.