

# THE 10 MAIN NEW FEATURES OF SPAIN'S NEW PUBLIC PROCUREMENT LAW

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Legal Briefings - By **Ignacio Paz, Miguel Riaño and Iria Calviño**

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Finally, on 9 November, Spain's Official State Journal (Boletín Oficial del Estado, or "**BOE**") published Public Procurement Law 9/2017, of 8 November 2017, which transposes into Spanish law the Directives of the European Parliament and Council 2014/23/EU and 2014/24/EU, of 26 February 2014.

The new law will enter into effect when four months have elapsed from its publication in the BOE, ie, on 9 March 2018, except for aspects related to public procurement governance, which will become effective on the day following publication in the BOE.

According to the first transitional provision of the new Public Procurement Law (*Ley de Contratos del Sector Público*, or "**LCSP**"), processes started and contracts awarded before the new law enters into effect will be governed by the former law.

The LCSP includes a large number of new features, which will be analysed in coming articles. Below, we summarise 10 of the main new features:

1. [Broader subjective scope](#)
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## 1. Broader subjective scope

The subjective scope of the LCSP is extended to include **political parties, trade unions, business and professional organisations, as well as foundations and associations linked to any of the above**. In order for the new law to apply to the above entities, the following must be met:

- they must have been created specifically to satisfy general interest needs that are not industrial or commercial in nature; and
- one or more bodies that qualify as a contracting authority, must:
  - finance most of their activity; or
  - control their management; or
  - appoint more than half of the members of their management or supervising body.

## 2. Modification of contract types

Section 1 of Chapter II of the Preliminary Title of the LCSP no longer recognises public service management contracts, as was traditionally the case in all previous iterations of the procurement law. Neither does it include public-private partnership contracts, as a result of their scant practical use shown since the former Law 30/2007 entered into effect.

One of the main new features of the LCSP is that it defines **two new contract types, works concession contracts and services concession contracts**, the nature of which differs from works and services contracts; the distinction is made as a result of operational risk being transferred from the public authorities to the concessionaire. It is precisely that transfer of operation risk that will determine whether we are faced with a works or services concession contract (where risk is transferred to the concessionaire) or simply a works or services contract (where it is not).

**Therefore, the spectrum of public sector contracts now encompasses:**

- Works contracts;
- Works concession contracts;
- Services concession contracts;
- Supply contracts;
- Services contracts; and
- Mixed procurement contracts.

### **3. Simplified procedure**

Another new feature of the LCSP is that it does away with the former amount-based unpublicised negotiated procedure (works contracts valued at less than €200,000 or other contracts with values lower than €60,000), which is replaced by **a new streamlined open award procedure**.

The streamlined open procedure provided for in article 159 LCSP may be used to award works, services and supply contracts that meet the following criteria:

- Their estimated value is lower than: (i) €2,000,000 in the case of works contracts; and (ii) €100,000 in the case of services or supply contracts; and
- The award criteria in the tender terms and conditions do not include a quantifiable to be made via a value judgement or, if so, that the weighting thereof does not exceed 25% of the total, except where the contract has considerations that are intellectual in nature – such as in the case of engineering or architectural services – in which case the weighting cannot exceed 45% of the total.

The aim is that the new streamlined procedure, due to its design, will become a fast-track procedure that will allow contracts to be awarded within one month from the invitation to tender. Formal steps are simplified as much as possible. For example, documentation is to be submitted in a single envelope; no provisional guarantee will be required; it will be mandatory to register in the Register of Tenderers; the investment commitment will be taxed at a single stage prior to the award.

#### **4. System for modifying contracts**

The LCSP changes the system for modifying contracts, restricting modifications in contracts that have been signed for reasons that have not been specifically provided for in the tender terms and conditions.

Contractual events of default now include modifications that, taken either in isolation or together, imply changes to the contract's price for an amount exceeding 20% of the initial price of the contract, excluding VAT.

Furthermore, there is no requirement to publish and notify resolutions passed to amend contracts. As a result, those agreements must be published on the tenderer's profile at the contracting authority within five days of being approved; in certain specific cases, it must also be published in the Official Journal of the European Union.

#### **5. Boost for innovation**

The LCSP includes a new procedure for awarding public contracts, called ***asociación para la innovación***, or **innovation partnership**. The aim is to encourage the development of innovative products, services and works and their subsequent acquisition or engagement provided that they meet the levels of performance and maximum costs agreed between the contracting bodies and the participating entities.

With this procedure, the contracting body is able to set up an innovation partnership with one or several partners to separately perform research and development. This award procedure will be used when the need for an innovative product or service cannot be satisfied by engaging the conventional products, services or works that are already available on the market.

#### **6. Free competition**

The new law also brings in measures aimed at safeguarding and guaranteeing free competition in public tender processes. Of those measures, article 150.1 confers powers on award boards, before a contract is awarded, to escalate sound evidence of tender collusion to Spain's Market and Competition Commission (CNMC) or other relevant regional competition authority. If so, those bodies would be able to open the new, fast-track proceedings – suspending the connected tender process – to render a decision on the matter. These proceedings will require further regulatory definition.

## 7. Incentives for SMEs

Another significant change made in the LCSP has to do with encouraging competition and support for SMEs so that they are able to access public contracts. To do so, the new law has brought in new provisions for dividing up works, services and supply contracts into parts (inverting the general rule used to date; justification must now be provided if the contract is not divided up into parts). By doing so, access to public procurement contracts will be opened up to a larger number of companies.

## 8. Increased access to special challenge

In a public tender scenario, a special challenge will automatically suspend the process provided that the award itself is being challenged, except in the case of contracts based on a master agreement or specific contracts in the framework of a dynamic acquisition system. Furthermore, **the special challenge may now be used for amounts that are lower than the EU's harmonised contractual amount**, in particular:

- In the case of works contracts, those with an estimated value higher than €3,000,000;
- In the case of services and supply contracts, those with an estimated value higher than €100,000; and
- In the case of works and services concessions, those with an estimated value higher than €3,000,000.

The LCSP also extends the material scope of the special challenge. Specifically, as well as those that already qualified, the following decisions or actions now also qualify for the application of the special challenge:

- Master agreements and dynamic acquisition systems aimed at executing works, services or supply contracts, as well as contracts based on any of them;
- Decisions by the award board or contracting authority to accept or reject candidates or tenderers, or offers, including those offers that are excluded for being abnormally low;
- Modifications foreseen or not foreseen in the special administrative terms and conditions of the tender, on the basis of which it is understood that they ought to have been the subject of a new award;
- Where contracts are awarded to the public entities if legal requirements are not met;

- Decisions where the public authorities reclaim concessions;
- Special administrative contracts, when, due to their nature, it is impossible to set a tender price or, otherwise, when their estimated value exceeds €100,000;
- Subsidised contracts subject to harmonised provisions;
- Contracts for which a price cannot be set or when that price, on the basis of the contracts' total term including extensions, is equal to or greater than €100,000.

## **9. New provisions for contract performance by public entities**

The LCSP includes a new nomenclature for what was known as "*medio propio*" (performance of public contracts by public sector entities). They are now referred to as "*encargos a medios propios*" or "performance by own resources".

This therefore provides for cases where works, services or supplies are engaged among public sector entities (direct performance of contracts by public authorities), distinguishing between a work, service or supply performed by a contracting authority itself, and a work, service or supply performed by another entity that is not a contracting authority. On the other hand, a distinction is made with the direct performance by the public authorities of works or services with the collaboration of private enterprises or through public sector entities that are separate from the public authorities themselves.

Equally, following the guidelines of the transposed EU procurement Directives, the requirements that those entities must meet have increased with the aim of preventing direct awards undermining free competition. Those requirements include: entities understood as constituting "own resources" must now have adequate human and material resources to perform the work, service or supply engaged, they must have obtained authorisation from the contracting authority on which they depend; they must not hold shareholding interests in a private company and they cannot be performing more than 20% of their activities freely on the market.

## **10. Enhanced transparency**

Article 115 LCSP makes it possible for contracting bodies to conduct market surveys and studies and to issue preliminary market consultations to economic operators active in those markets in order to prepare tenders properly and inform those operators of their plans and the requirements that they will have to meet to participate in the tender processes.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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