

THE GOVERNMENT  
PROCUREMENT  
REVIEW

SEVENTH EDITION

Editors

Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

THE  
GOVERNMENT  
PROCUREMENT  
REVIEW

SEVENTH EDITION

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# PREFACE

It is our pleasure to introduce the seventh edition of *The Government Procurement Review*.

Our geographic coverage this year remains impressive, covering 17 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

It is frankly depressing to have to refer in the future tense to Brexit for the third successive edition. However, it remains the case that the United Kingdom continues to recognise the importance of procurement law both during and beyond any ratified transitional period. Her Majesty's Government has pronounced itself committed to the need for continued regulation of procurement, and has secured approval from the World Trade Organisation for the United Kingdom to become party to the Agreement on Government Procurement (GPA) in its own right, rather than through the European Union, once Brexit happens.

In the UK and EU we are starting to see increasing use of the national legislation emerging from the Concessions Directive and there is also a growing body of case law on the Hamburg exception.

UK practitioners are coming to terms with the Court of Appeal's landmark decision in the *Faraday* case, which has called into question the use of what had become reasonably widely utilised approaches to avoid the application of the procurement rules where a developer initially had a right (rather than an obligation) to carry out works. That case will continue to have wide-ranging implications for real estate development affected by procurement law.

Looking further afield, it is clear that law and policy on government contracting continue to be shaped by political developments at national and international level:

- a* with GPA parties giving formal approval in October, Australia joined the (revised) GPA on 5 May 2019;
- b* new international agreements on government procurement have emerged in the US, Mexico, Canada Trade Agreement (USMCA), executed in December to replace NAFTA, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force between Canada, Australia, Mexico, Japan, New Zealand and Singapore in December;
- c* US sanctions against Venezuela constrain US financing for Venezuelan public bodies and the state-owned Petroleos de Venezuela, with the future outlook for government purchasing and procurement policy very much dependent on the outcome of the current political situation; and

- d* Brazil, under a liberal political agenda, has launched a programme of privatisation involving the sale of public assets and the award of contracts for the management of public services across a range of economic sectors.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this seventh edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than the sixth edition and we trust you will find it to be a valued resource.

**Jonathan Davey and Amy Gatenby**

Addleshaw Goddard LLP

London

May 2019

# SPAIN

*José Alberto Navarro Manich*<sup>1</sup>

## I INTRODUCTION

Spain is a party to the WTO's Agreement on Government Procurement (GPA) and a member of the European Union. Therefore, the GPA and the public procurement Directives are applicable in Spain and its authorities are bound by them.

On 9 March 2018, Law 9/2017 of 8 November on public sector contracts came into force. This law transposes the 2014 Public Contracts Directive into Spanish law, as well as the 2014 Concession Contracts Directive. Law 9/2017 is the comprehensive regulation in public procurement in Spain and focuses on works, supplies, services and concession contracts. This Law applies to all the awarding entities in the different levels of government (the central government, the 17 autonomous regions and the local authorities – mainly municipalities) and the entities related to them.

The 2014 Utilities Contracts Directive has not yet been transposed into Spanish law. The current regulation in force is Law 31/2007 of 30 October on the procurement procedures in the water, energy, transport and postal services sectors (which transposed the 2004 Utilities Directive).

Also worthy of note is Law 24/2011 of 1 August on defence and security public sector contracts, which sets forth a specific public procurement framework in this sensitive sector.

Finally, public procurement in Spain is bound by the principles of freedom of access to tenders, publicity and transparency of the procurement proceedings, and non-discrimination and equal treatment between bidders. Also of paramount importance is the principle of efficient use of public funds in the execution of works, the acquisition of goods and the hiring of services, for which the needs of the awarding entity have to be previously defined, the free competition needs to be protected, and the best tender needs to be selected. All of these principles are directly applicable to any public procurement procedure.

## II YEAR IN REVIEW

The main development in 2018 has been Law 9/2017 entering into force on 9 March 2018. Law 9/2017 is a very extensive and detailed regulation that has introduced significant innovations into Spanish public procurement regulation. In particular, Law 9/2017 introduces the works concession contract and the services concession contract in transposition of the 2014 Concession Contracts Directive with important differences with the former public works concession and public services concession contracts, as is discussed in Section III.

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### III SCOPE OF PROCUREMENT REGULATION

#### i Regulated authorities

In accordance with Law 9/2017, public procurement regulations apply to three different categories of awarding entities, which belong to the public sector. These regulations will apply to differing degrees depending on the category of awarding entity (the closer to the core of the public sector, the greater the degree of regulation that will apply).

##### *Public authorities in the narrow sense*

These are the authorities that have been created by the Constitution and the law in order to exercise public powers and prerogatives in order to achieve purposes of public interest. The main public authorities are classified in three different levels (from a territorial perspective): (1) the central government; (2) the 17 autonomous regions; and (3) the local authorities. The Spanish Constitution and the law attribute each of these authorities with different powers in accordance with the principle of subsidiarity, by which every power or action will be carried out by the level of government that is more adequate and efficient to do so in each case. Each level of government will be responsible for the provision of different public services or the promotion of different infrastructure.

There are other public authorities in the narrow sense, such as public universities; public entities or agencies with a special autonomy recognised by law, which have been entrusted with external regulatory or control duties in a given sector or business activity; and public entities related to, or dependent on, other public authorities for which their main activity is not to produce goods or services for the market, or that are not financed primarily by income from an activity in the market.

The tender proceedings of these public authorities will be bound by more strict procedural requirements. In addition, these authorities will award 'administrative contracts', governed by 'administrative law', which means that very strong prerogatives of the public authority will apply to the performance, modification and termination of the contracts.

##### *Awarding entities*

These are the contracting authorities as defined in the EU directives. This category includes (1) the public authorities in the narrow sense (as explained above); and (2) any other entity (of a public law or private law nature) established for the specific purpose of meeting the needs of the general interest, which does not have an industrial or commercial purpose, provided that public authorities finance most of their business, control their management, or appoint more than half of the members of the governing, management or supervisory boards.

These awarding entities include private companies or corporations controlled or financed by public authorities. In addition, political parties, labour unions, business organisations and foundations will also be considered to be awarding entities if they meet the above-mentioned requirements of being financed by public authorities in most of their activity.

The awarding entities are also bound by the strict procedural requirements of the public procurement regulations. However, the awarding entities that are not public authorities in the narrow sense will execute private contracts subject to private law and without the strong prerogatives of public authorities.

### ***Other entities in the public sector***

Finally, there are some entities, not included in any of the above categories, with links with the public sector that would not fulfil the definition and requirements to be considered a public authority in the narrow sense, or an awarding authority. An example would be a private company with more than 50 per cent of its shares owned by a public authority, which is not controlled or financed in most of its activity by that public authority.

These entities will apply the simplified procedural requirements of the public procurement regulations and will grant private contracts (i.e., with no public prerogatives of public authorities regarding the performance, modification and termination of the contracts).

### **ii Regulated contracts**

Law 9/2017 identifies works contracts, supply contracts and services contracts as the typical regulated contracts (as regulated in the 2014 Public Contracts Directive). In addition, two new categories of contracts have been introduced in Spanish law in order to transpose the 2014 Concessions Contracts Directive: works concession contracts and services concession contracts (these contracts replace the former public works concessions and public services management contracts, previously regulated in the Spanish public procurement regulations). In both cases, the remuneration of the contract consists in the carrying out the construction project or service (alone or together with the payment of a price). The defining element of these concession contracts is the transfer of operational risk to the concessionaire, which may cover the demand risk, the supply risk or both. The definition of supply risk refers to the supply of the works or services object of the contract, in particular the risk that the provision of the services does not meet the demand. This supply risk is what has traditionally been called the risk of availability of infrastructure. Law 9/2017 establishes that the transfer to the concessionaire of the operational risk must imply that it is not guaranteed that, under normal operating conditions, the concessionaire will recover the investments made or cover the costs incurred as a result of the exploitation of the works. Thus, any estimated potential loss incurred by the concessionaire cannot be 'merely nominal or negligible'.

The Spanish legislator has transposed the EU Directives by creating a specific category of contracts that are subject to harmonised regulation. In order to fall within this category, the contracts have to exceed an economic threshold and be bound by the most strict requirements of the EU Directives. Therefore, the Spanish legislator has decided to apply the European public procurement requirements to this specific category of the contracts subject to harmonised regulation, and apply less strict requirements to the contracts that have a lower economic threshold. The contracts subject to a harmonised regulation are: (1) works contracts, works concession contracts and service concession contracts with a value above €5,548,000; (2) supply contracts and service contracts with a value above €144,000 (if the contract is awarded by the central government or several entities related to it) or to €221,000 (if the contract is awarded by other contracting entities).

Nevertheless, it has to be noted that public procurement regulations do not apply to the authorisations and concessions to use goods and properties in the public domain (such as the coast, beaches, streets and public infrastructure) and transactions over goods and properties owned by a public authority, which are areas regulated by their own respective pieces of legislation.

Public contracts can be modified if the modification complies with the strict requirements established by Law 9/2017 (if the contract had been awarded before 9 March 2018, the modification of the contract would be governed by the public procurement law in force

at the moment of its award and by the EU law restrictions that are applicable in any case). In the event that the required modification of the public contract did not comply with the mentioned requirements, the contract would have to be terminated and a new public procurement procedure would have to take place to award a new contract. As regards these restrictions to modify a contract, Law 9/2017 differentiates between two situations:

- a* modifications foreseen in the contract awarded: These modifications need to be specifically established in the contract and cannot exceed 20 per cent of the initial price, introduce new unanticipated unit prices, or alter the overall nature of the contract;
- b* modifications not foreseen in the contract awarded, or that were foreseen but do not comply with the restrictions mentioned above: These modifications must be limited to introducing the necessary variations to address the objective cause that makes them necessary. In addition, one of the following requirements need to be fulfilled: (1) it is necessary to add new works, supplies or services and it is not possible to change the contractor for economic or technical reasons, and the modification does not exceed 50 per cent of the initial price; (2) an unforeseen and unpredictable circumstance for a diligent awarding entity occurs, the modification does not exceed, jointly or separately with other unforeseen modifications, 50 per cent of the initial price, and does not alter the overall nature of the contract; or (3) it is not a substantial modification (i.e., it does not introduce conditions that if known would have allowed another bidder to be chosen or attracted more bidders, it alters the economic balance for the benefit of the contractor in a manner not provided for in the contract or it significantly expands the scope of the contract).

Public contracts can be transferred to other contractors and that will not imply the termination of the contract, as a general rule. However, this possibility has to be expressly foreseen in the tender documentation, and it needs to be authorised by the contracting authority. This authorisation will only be granted if: (1) the contract has been performed for at least 20 per cent of the price or one-fifth of the duration for concessions (unless the contractor is in a insolvency situation and meets specific legal requirements); and (2) the new contractor has the capacity and solvency required at the specific phase of performance of the contract (which requires that the contractor is not in a 'prohibition to tender' situation). For concession contracts, the Law introduces what is known as a step in right of the pledge or mortgage creditors. Thus, it provides that, if it has been foreseen in the specifications, the creditor can, at any moment, request the assignment of the concession in favour of a third party if it proves its non-viability (at present or in the future) and provided that this third party meets the other requirements.

#### **IV SPECIAL CONTRACTUAL FORMS**

##### **i Framework agreements and central purchasing**

Framework agreements establish a stable framework of contractual conditions that may have a duration of up to four years. The contracts that are entered into during that period of time with the companies incorporated into the agreement must comply with the pre-established scheme, in particular with regard to prices. These conditions cannot be substantially modified in the contracts signed.

A dynamic system for the purchase of works, supplies and services that are ordinarily offered in the market can be used. This system only employs electronic means. The awarding

entity will publish the notice of the start-up of the system, indicating the nature of the contracts in the specifications that may be entered into and the information necessary to be incorporated into the system, in particular that relating to the electronic equipment used and to the technical arrangements or specifications of the connection.

Central purchasing consists in the creation of a specialist contracting body that awards and manages works, services and supplies contracts that have essentially homogeneous characteristics and are needed in a very large scale (for example, the acquisition of furniture or other goods).

## **ii Joint ventures**

Public–public joint ventures established between awarding entities will not be subject to the public procurement regulations if they do not have the essential elements of a public contract (the provision of works, supplies or services and an onerous nature). However, if the relationship has the object and onerous nature of a public contract, public procurement regulations will apply, and a public procurement procedure will need to be called. An example of these public–public joint ventures are the joint, horizontal cooperation between awarding entities, by which they cooperate to reach a common goal in the public interest but without establishing a bilateral relationship with reciprocal obligations that would be equivalent to a public contract.

If a public–public joint venture created a separate entity for the provision of works, services or goods, the requests to that separate entity would not be subject to the public procurement regulations if that separate entity was a joint ‘controlled legal person’ under the terms of the EU directives. In this case, the controlled legal person would have to meet the following requirements: (1) to be jointly controlled by the awarding entities that hold a joint power of control over it; (2) it cannot have any private shareholder; (3) it cannot perform more than 20 per cent of its activity in the market; and (4) it must have been invested with the adequate personal and material means to fulfil the assignment (the percentage that can be subcontracted is limited, although there are some exceptions). If those requirements are not met, the allegedly controlled legal person could not receive direct requests from the awarding entities, which will be obliged to call for a public procurement procedure.

Public–private partnerships (PPP) are completely bound by public procurement rules. The selection of the private partner of a PPP needs to comply with the tender rules of the public procurement regulations. In addition, if the awarding entity decided to award a contract to the PPP, if that contract was not included in the tender to select the private partner, a new tender will have to be called.

On the other hand, a PPP whose major shareholder is an awarding entity will be included in the Spanish public sector, and, therefore, it will have to comply with the public procurement regulations when requesting the provision of works, supplies or services. The requirements that will need to be complied with by the PPP will depend on the category of public sector entity, as stated in Section III.i. PPPs operating in the utilities sector (water, energy, transport and postal services) will have to request the provision of works, supplies and services in accordance with Law 31/2007, which regulates public procurement in these sectors.

## V THE BIDDING PROCESS

### i Notice

The notices of every tender process have to be published in the internet profile of the awarding entity. This profile needs to be accessible from the website of the awarding entity.

In addition, it will be mandatory to publish the notice of the tender process in the Official Journal of the European Union for contracts subject to harmonised regulation (described in Section III.ii).

Finally, the public authorities and the entities related to them will have to publish the notice in the applicable official journal: (1) central government and related entities in the Spanish Official Journal; (2) the 17 autonomous regions and related entities in the regional official journal; and (3) local authorities in the official journal of their province.

### ii Procedures

The awarding entities will need to follow one of the following public procurement procedures in order to award a public contract. As a general rule, public procurement procedures shall be handled through electronic means.

On the other hand, contracts for small amounts (below €15,000 for supplies and services, and below €40,000 for works) can be directly awarded without the need for a public procurement procedure. The awarding entity will have to justify the need to execute this contract, the approval of the expense and the incorporation of the invoice in the file. It will also have to be ascertained that the contractor has not signed more contracts than, individually or jointly, exceed the maximum thresholds of the smaller contracts.

#### *Open procedure*

This is the ordinary proceeding. Any company interested to tender can take part in it by submitting an offer, and by proving that it has the capacity and solvency required by the awarding entity. There is no margin for negotiation between the bidders and the awarding entity. The procedure consists of:

- a* publication of the notice by the public authority;
- b* submission of the offers by the bidders;
- c* evaluation of the offers by the awarding entity; and
- d* the award of the contract to the best offer followed by the signing of the contract.

#### *Restricted procedure*

Restricted procedure can also be used as an ordinary proceeding. There is a preliminary phase in which potential bidders express their interest to take part in the tender. Among those interested candidates, the awarding entity will select the bidders who will be invited to submit and offer. The tender process will only take part with the invited candidates. In this procedure there is no margin for negotiation.

#### *Negotiated procedure*

This is an exceptional procedure that can only be used in the following cases:

- a* it is necessary that the bidders design or adapt the object of the contract to the specific case and circumstances;
- b* the object of the contract includes a project or innovative solutions;

- c there is a need for negotiation linked to the object of the contract or to the risks that its implementation may entail;
- d the technical prescriptions of the service cannot be previously established with sufficient precision;
- e in open or restricted procedures followed previously, only irregular or unacceptable offers have been submitted; and
- f they are services that can only be carried out by a specific person. The procedure is very similar to the restricted procedure and it will lead to a negotiation of the terms of the contract with the invited bidders, which may be developed through successive selective phases.

### ***Competitive dialogue***

Competitive dialogue is also an exceptional procedure. It will only be applicable in the same cases as the negotiated procedure. The awarding entity has a need, but it does not know how exactly this need can be satisfied. The awarding entity will invite selected bidders to take part in the procedure, and will establish a dialogue with them in order to develop one or several solutions that are capable of satisfying the needs of the awarding entity. These solutions will be the basis on which the bidders will make their offers and the awarding entity will award the contract to the best offer or offers.

### ***Partnership for innovation***

Partnership for innovation is also an exceptional procedure. It can only be used when it is necessary to carry out research and development activities regarding works, services and innovative products, for subsequent acquisition by public sector entities.

### **iii Amending bids**

Offers submitted by the bidders cannot be amended. As stated above, the negotiated procedure and the competitive dialogue allow stages of negotiation between the awarding entity and the bidders. Once the final offer has been submitted, however, there is no possibility of any further modifications.

## **VI ELIGIBILITY**

### **i Qualification to bid**

Law 9/2017 establishes situations in which a company will be subject to a 'prohibition to tender' with the public sector and, therefore, they will not be able to take part in public procurement procedures. These situations are: (1) to have been convicted for serious crimes (such as terrorism, unlawful association, illegal financing of political parties, corruption in business transactions, influence peddling, bribery, fraud and tax fraud, crimes against the Public Treasury and the Social Security, crimes against the rights of workers, and crimes related to environmental protection); (2) to have been sanctioned for serious infringements (in matters such as unlawful competition, labour integration, equal opportunities and non-discrimination against disabled persons, social legislation or environmental legislation); (3) insolvency; (4) to have failed to fulfil the tax and social security obligations; (5) to have

issued false statements in the documentation of the offer regarding the capacity and solvency of the bidder. In such circumstances, prohibitions to tender have a limited period of time depending on the specific cause and circumstances.

Furthermore, bidders will need to prove that they have the capacity and solvency required in the tender documents, in order to be admitted in the tender. The solvency required has to be proportionate and adequate to the object of the contract. Excessive solvency requirements, which would not allow suitable bidders to take part in the tender, would constitute a breach of the public procurement principles. Public procurement regulations require, in general terms, proving the bidder's financial solvency and technical capacity. Bidders can make up their financial solvency with the resources of other companies (of the same group of companies or of third parties) if they can prove that such means are at their disposal.

## **ii Conflicts of interest**

Conflicts of interest imply a prohibition to tender in the following cases: (1) bidders who have a public official or public representative as a director or as a significant shareholder who is affected by the Spanish legislation regulating their incompatibility (this conflict of interest affects spouses and very close relatives); (2) bidders who have employed former public officials or former public representatives who have taken decisions that affected that company or who hold responsibilities related to it within the last two years.

## **iii Foreign suppliers**

Companies from EU or European Economic Area countries can take part in public procurement procedures with the same rules and rights as Spanish companies.

Companies from third countries (i.e., from outside the EU or the EEA) will have to prove that their country allows Spanish companies to take part in public procurement procedures. This will be proven by a report of the Spanish Economic and Commercial Office in that country. This report will not be necessary in the event that the country of origin was a member of the WTO GATT and a contract was tendered subject to a harmonised regulation. In addition, the documents of the specific tender can require that bidders from these third countries create a subsidiary in Spain.

# **VII AWARD**

## **i Evaluating tenders**

The evaluation criteria of the offers must have been set forth and published in the tender documents (i.e., the notice and specifications) with the maximum detail and transparency. Likewise, the weight attributed to each of the criteria must have been published. These criteria must be directly linked to the object of the contract and its performance.

If there is only one single evaluating criterion, it must relate to the costs, which may be the price or a criterion based on profitability. If there is more than one evaluation criteria, preference should be given to those that refer to characteristics of the object of the contract that can be assessed by figures or percentages obtained through the mere application of the formulas established in the specifications. However, it may be necessary to introduce subjective criteria that cannot be evaluated through the application of a mathematical formula, such as the evaluation of innovations or technological aspects offered by bidders. In this case, the evaluation criteria should be defined in the most specific way, in order to reduce the discretion of the awarding entity in its evaluation.

Bidders will submit two sealed envelopes. The first envelope will contain the information relating to the subjective criteria and the second one to the objective criteria. The award entity will first evaluate the subjective criteria, and once the evaluation is concluded, the envelope with the objective criteria will be opened. Therefore, the awarding entity does not know the nature of the objective criteria when evaluating the subjective criteria.

## **ii National interest and public policy considerations**

Domestic bidders cannot be favoured. The principle of equality between bidders and non-discrimination apply. Therefore, solvency requirements and evaluation criteria must be related to the object of the contract and be proportionate.

The public procurement regulations incentivise the use of social and environmental considerations in public procurement. However, they cannot create discrimination between domestic bidders and foreign bidders. Social and environmental considerations can be used as evaluation criteria only when they are related with the object of the contract (for instance, the control of pollution in the provision of a public transport service). They can also be used as a condition that the contractor will have to comply with, but they are not an element on which bidders can compete and obtain a better evaluation (for instance, the obligation to hire a specific number of unemployed people for the performance of the contract). The position of bidders has to be equal.

## **VIII INFORMATION FLOW**

The awarding entity is obliged to publish all the relevant information regarding the tender in its internet profile (such as the tender specifications, technical requirements, qualification and evaluation criteria, etc.). All bidders have access to the same information.

Unsuccessful bidders will have access to all the relevant documents (such as the evaluation reports for the offers) and decisions of the awarding entity. They will be expressly notified with the awarding resolution before the signing of the contract, and with any other relevant decisions affecting their offer in order to guarantee their right to challenge these decisions.

Unsuccessful bidders, at their request, can have access to the offer of the successful bidder in order to prepare their appeal. However, confidential information provided by bidders will not be disclosed. This information has to be expressly declared as confidential by the bidders at the moment of submitting their offer, and it has to be justified in order to protect, for instance, technical or commercial secrets or to avoid situations of unlawful competition.

## **IX CHALLENGING AWARDS**

Historically, unsuccessful bidders would rarely challenge the award of public contracts Spain. A judicial ruling in favour of the claimant might arrive too late to be effective because the contract would have already been executed and performed.

This situation has radically changed since the transposition of the Remedies Directive into Spanish law in 2010, by introducing *recurso especial en materia de contratacion*, a new special and urgent appeal on public procurement. This special appeal on public procurement is decided by an administrative court that is completely independent from the awarding entity; it is free of charge, and its filing paralyzes the signing of the contract until the appeal

is decided. This special appeal is not mandatory and bidders can file a direct appeal before the contentious-administrative courts. In any case, the special appeal on public procurement has been a successful and frequently used mechanism.

### **i Procedures**

The special appeal on public procurement can be submitted to challenge decisions of the awarding entity (tender documents, award decision, etc.) regarding only the following contracts: (1) works contracts, services and works concession contracts with a value of more than €3 million; (2) supplies and services contracts with a value of more than €100,000; and (3) framework agreements and dynamic purchase system of works, supplies and services contracts with the value mentioned above.

The award decision can only be challenged by unsuccessful bidders and other entities who may hold a right or interest against it (such as, for instance, companies that have challenged the tender documents and specifications for not allowing them to take part in the tender).

The special appeal on public procurement has to be filed within 15 days of the date of the notification of the award decision (if the notification was sent electronically and it was published in the internet profile of the awarding entity, the 15 day period will start on the date on which it was sent).

The administrative court on public procurement will request the awarding entity to respond to the appeal within two days. Afterwards, the administrative court will request any other interested party (i.e., the preferred bidder) to file statements within five days. The parties can propose the production of evidence about the relevant facts.

The administrative court on public procurement will then issue its ruling, which will be directly executive in its nature. This ruling can only be challenged before the contentious-administrative courts.

### **ii Grounds for challenge**

It will only be possible to admit grounds to challenge a decision that would modify the decision to award the contract to the preferred bidder. It can be claimed that the preferred bidder should have been excluded from the procedure because it did not have the capacity of solvency as required by the tender documents, or because its offer had breached requirements or obligations established in the tender documents. On the other hand, it can also be argued that the awarding entity evaluated the offers in a disproportionate and discriminatory way, because it unduly underrated the offer of the losing bidder in comparison with the content of the preferred bidder.

### **iii Remedies**

The decision to award a public contract will automatically be suspended if a special appeal on public procurement is filed. The administrative court can exceptionally revoke that suspension on justified grounds of public interest. In a special appeal against other decisions of the awarding entity, injunctions can be granted.

The ruling of the administrative court can declare that the award decision is void, that the offer of the preferred bidder has to be excluded or that the bidder that filed the appeal should have been the preferred bidder. In that ruling, the administrative court can grant

damages for the claimant. In the event that the special appeal was rejected, if that appeal is considered to be grounded upon recklessness and bad faith, fines could be imposed upon the claimant (of between €1,000 and €30,000).

## **X OUTLOOK**

The Spanish Parliament has been processing the draft bill of the law to transpose the 2014 Utilities Contracts Directive (for the water, energy, transport and postal services sectors). This law has not yet been approved. A Spanish General election was called for 28 April 2019, which may further delay the approval of this law.

The Spanish Government has approved Royal Decree-law 5/2019 of 1 March in order to approve the contingency plan in the event of a no-deal Brexit, with some measures relating to public procurement.

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