

PROCUREMENT DRAFT BILL REPORTS SUMMARY

On 16 July, 2015, the CNMC Board approved two reports¹ regarding the Draft Bill on public sector contracts and contracts in special sectors. These reports analyse the implications of this new public procurement regulation in terms of effective competition in the markets and efficient economic regulation. The goal of both Draft Bills is to form the backbone of public procurement in Spain in the coming years through the transposition of the fourth generation of EU standards on the matter into Spanish law.

For the CNMC it is absolutely essential to have a public procurement regulation that favours effective competition. This is not just because of its economic importance (approximately 18.5% of Spain's GDP), but also because when competition fails there is invariably a loss of economic efficiency due to needless wasting of public resources. The lack of competition may also lead to a heightened risk of collusion as the result of the reduced competitive tension between the bidders which, in the most extreme cases, may contribute to the appearance of collateral problems in the form of corruption.

The constitutional recognition of freedom of enterprise is an obligation of all political powers. Consequently, the enactment of any possible anti-competitive limitation or restriction must be preceded by the corresponding balancing of the interests being pursued by the regulation versus the benefits that would arise from the competitive functioning of the markets. This analysis must be sufficiently justified, as required by the current legal order.

Currently, public procurement has **clear regulatory deficiencies**: high entry barriers (especially in concessions), multiplicity of procurement bodies, diversity of procedures and complicated learning curves, asymmetric information, few operators in certain sectors, insufficient *ex-post* evaluation and monitoring, lack of motivation in public sector employees, problems of governance and dispersion of rules among a number of different regulatory frameworks.

While there are some **positive features** in the Draft Bills analysed, such as the suppression of the negotiated procedure on grounds of value, commitment to electronic procurement, encouragement of transparency and accountability, or the assumption of the concept of contract's life-cycle, **the CNMC considers the following basic lines of reform, proposed in the two aforementioned reports.**

First, it is necessary to **adopt a more ambitious approach** than the mere transposition of EU directives in order to create a more comprehensive reform.

¹ [IPN/CNMC/010/15](#) REPORT ON THE DRAFT BILL ON PUBLIC SECTOR CONTRACTS.
[IPN/CNMC/011/15](#) REPORT ON THE DRAFT BILL ON PROCUREMENT PROCEDURES IN THE WATER, ENERGY, TRANSPORT AND POSTAL SERVICES SECTORS

Second, while the legal guarantees must be fully preserved, it is necessary to avoid an **excessively bureaucratised regulation and to focus, in essence, on the economic rationale of procurement**. This economic perspective could introduce incentives to maximise the participation of operators and the achievement of more efficient results. In this regard more attention should be paid to procurement best practices and benchmarks in the private sector.

Third, it is **necessary to give more importance to the principle of efficiency in the management of public funds made by procurement powers and their staff**. Efficiency in public procurement must be extrapolated to concrete results. For instance, CNMC propose to create certain incentives for procurement powers and public employees, such as linking future budget availability to the achievement of good efficiency results.

Fourth, priority must be given to **the need for evaluation (ex-ante and ex-post) of procurement processes**. This evaluation should not only be focused on the compliance with the legal formalities but also on the economic results of the public procurement. This evaluation, thus, should take into consideration indicators of the competition and efficiency in the market where the public procurement take place. In this sense, CNMC could play a collaborating role in this process on the basis of its consultative function. Additionally, practical and direct consequences must be implemented in the case of the breach of these principles.

Fifth, **there must be a reconsideration of the introduction of secondary objectives** (as social and environmental objectives, among others) that, while well-meaning, may threaten the primary objectives of public procurement (efficient use of public funds, safeguarding of free competition and selection of the most economically advantageous offer), raising the cost to taxpayers. Furthermore, such secondary objectives may be achieved by other means than public procurement.

Sixth, **regulation on public procurement should take into account the implications of the standard on State aid**. This matter exceeds by far current treatment in law –limited to treatment of abnormally low bids due to illegal State aid received by the bidder- and should be properly addressed. With the aim to better take into consideration existing relations between State aid and public procurement, the contracting unit should be entitled to request those bidders with abnormally low bids information on all subsidies received, no matter whether they are State aid. Existence of State aid and its compatibility (where appropriate) with arts. 106 and 107 TFUE must be properly assessed, most particularly in cases in which there are prima facie indications of their presence (for instance when public funds are given to concessionaires).

Lastly, it must be remembered that **collusion** in public procurement (*bid rigging*) is one of the main concerns of competition authorities, yet the **existing detection mechanisms are notably deficient**. It is precisely for this reason

that effective measures must be enacted to make more likely the collaboration of the public procurement offices and agents. These measures can be training courses, screening tools, or regulations that boost administrative cooperation. On one hand, the aversion of companies to bid rigging must be intensified increasing their consciousness of the consequences of noncompliance. On the other hand, a more proactive (not merely passive) behaviour of procurement bodies must be incentivised.

In short, from the CNMC's perspective, only if all of these approaches are brought to bear will it be possible to achieve substantial change in public procurement. To put it another way, only if all of the stakeholders (and obviously the bodies proposing the standard and the procurement bodies in particular) realise the usefulness of these changes will a permanent change come about in the culture of the management of public funds, which, we mustn't forget, must always be used for the common good.