

Contracting in water, energy, transport, and postal services industries: main new developments for companies

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On February 5, [Spanish Royal Decree Law 3/2020](#) of February 4, on urgent measures for transposing various EU Directives into Spanish law, was published in the Official Gazette of the Spanish State; it introduces important new developments for companies operating in the water, energy, transport, and postal services industries.

Spanish Royal Decree Law 3/2020, which will enter into force on February 25, 2020, affects contracting and procurement practices in what are referred to as the special industries. It repeals [Spanish Act 31/2007](#) and fully transposes directives [2014/25/EU](#) and [2014/23/EU](#) into Spanish law, which refer to contracting in the water, energy, transport, and postal services industries and to awarding of concession contracts, respectively.

This new royal decree law also amends [Spanish Act 9/2017, on Public Sector Contracts](#) (“Public Sector Contracts Act”) in relation to minor contracts.



Main new developments

- **Use of electronic media:** it establishes compulsory use of electronic media for information and communications, with some limited exceptions.
- **Strategic public contracting:** social and environmental considerations are transposed as both awarding criteria and conditions for contract performance.
- **Contracting prohibitions:** application of the contracting prohibitions under the Public Sector Contracts Act is made general to all contracting entities.
- **Preliminary market advice:** these practices are regulated for the first time.
- **Defense of competition:** in cases where signs of collusion exist, a summary procedure is established to be carried out before the Spanish Markets and Competition Commission (CNMC) or the competent regional authority.
- **Criteria for awarding:** the principle of most beneficial financial offer is replaced by the principle of offer with the best quality-price ratio.
- **Minor contracts from the Public Sector Contracts Act:** elimination of a contracting entity's obligation to confirm that a contractor has not signed other minor contracts that individually or jointly exceed the legal thresholds.



Scope of application of Royal Decree Law 3/2020

- Scope of entities to which it applies: The regulatory effects of Royal Decree Law 3/2020 will now apply to certain public and private entities (contracting authorities, state-owned companies, and private entities that have been granted special or exclusive rights) when entering into contracts for construction, supplies, services, and concessions in what are referred to as the special industries (water, energy, transport, and postal services), within the scope of the activities established in Royal Decree Law 3/2020 itself, and whenever the estimated contract value is equal to or above specific thresholds:
 - €1,000,000 or more for contracts involving certain social services and other specific services (listed in its Appendix I).
 - €428,000 or more in the case of supply contracts and all other service contracts, and also in cases of competitive tendering for projects.
 - €5,350,000 or more for construction contracts.

- This scope of application excludes government entities, which are still subject to the regulations under the Public Sector Contracts Act.

- Special or exclusive rights for purposes of Royal Decree Law 3/2020: A contracting entity is considered to have special or exclusive rights when these have been granted by a government entity under a legislative, regulatory or administrative provision that is compatible with the Treaty on the Functioning of the European Union (TFEU) and that has the effect of restricting exercise of an activity covered under TFEU to one or more entities, while materially affecting the ability of all other entities to exercise that activity. This excludes any rights that have been granted in an adequately publicized procedure that is based on objective criteria and is not contrary to EU law.

- Scope of contracts to which it applies: In line with Directive 2014/25/EU, the nature of the regulated contracts is determined by their material contents, which include those related to making available or operating fixed networks or grids for the supply of water, natural gas and heating, and electricity; and to transport services, ports and airports, and postal services; and to prospecting and extraction of oil, natural gas, coal, and other solid fuels. The types of contracts excluded from this scope are also regulated with greater detail, including mixed private-public contracts and those dedicated to performance of certain activities.



Modifications related to contract types

- Contract types: As established by the directives, and to properly establish the scope of application of Royal Decree Law 3/2020 with regard to the Public Sector Contracts Act and Spanish Act 24/2011 on public sector contracts in the areas of defense and security, there is expanded regulation of the contract types its scope does not cover. The regulations under Act 31/2007 on contracts with associated companies and joint ventures are revised, to ensure appropriate use of such arrangements in line with the principle of free competition.
- Minimum contents and durations for contracts: This subject is regulated for the first time. Contracts by contracting entities belonging to the public sector will be subject to the same restrictions as those established in the Public Sector Contracts Act.
- In-house procurement: For the first time, regulation is taking place on the subject of in-house procurement sourced to entities with their own legal personhood, as performed by contracting entities classified as contracting authorities, subject to the provisions from the Public Sector Contracts Act. Also, agreements established between entities belonging to the public sector are regulated for the first time.

Requirements on operator capacity and classification

- The scope of the contracting prohibitions established under the Public Sector Contracts Act is expanded to all contracting entities (in Act 31/2007 that scope was limited to public-law bodies and state-owned companies).
- The optional classification systems for contractors are maintained.

Quality-price ratio as criterion for awarding

- The awarding criterion of 'most beneficial economic offer,' used up until now, is replaced by the criterion of best quality-price ratio. This puts the emphasis not on the lowest price, but on the offer that best satisfies criteria based on quality, technical values, aesthetic and functional characteristics, accessibility, and universal design, as well as environmental characteristics (e.g., reduction of gas emissions and energy efficiency) and social characteristics (e.g., promoting access to employment, job stability, gender equality).



- There must be a link between those qualitative criteria and a contract's purpose. However, that link does not need to be 'direct,' but instead may be related to provisions required under the contract during any stage of its 'lifecycle.'
- For the service contracts from Appendix I (which include social services and services related to health, education, hotels and restaurants, prisons, public safety and rescue, investigation, security, and mail delivery), as well as for contracts involving provisions of an intellectual nature, the criteria related to quality must represent at least 51% of the point score that can be assigned during assessment of proposals and tenders.
- Labeling: More detailed regulation is introduced on the subject of social and environmental labeling, such as types related to organic agriculture and livestock, fair trade, and gender equality, as well as other aspects such as labeling used to verify that goods, products or services meet the required technical specifications, awarding criteria, or terms for contract performance.

Support for social and environmental clauses

- There are aspects establishing cross-cutting, mandatory inclusion of social, employment-related, and environmental elements as awarding criteria, as qualitative factors when evaluating the quality-price ratio, and as special terms for contract performance. There is a new obligation for tender specifications to require some of the special terms for contract performance in an environmental or social nature, or conditions related to innovation, such as the following: reduction of emissions, promotion of renewable energy use, stipulations on hiring a higher percentage of employees with disabilities, and measures that promote equality between women and men in the workplace.
- The possibility is also included for requiring companies awarded procurement contracts to have environmental management certificates or other environmental management measures.
- Disabilities: It includes application, by delegation of authority to government entities, of one of the causes for contracting prohibition under the Public Sector Contracts Act, regarding not meeting the requirement that at least 2% of the employees at any company with 50 or more employees must have a disability.
- Abnormally low offers: It imposes an obligation on contracting entities to reject abnormally low offers if it is detected that they do not meet the applicable environmental, social or employment-related obligations, with contracting entities even allowed to avoid awarding a contract to the best proposal or tender when those requirements are not met.



Contracting procedures

- The use of open, restricted and negotiated procedures is regulated, and contracting entities must justify the procedure they select.
- Competitive dialog is also introduced, as well as a new association procedure to promote innovation intended to encourage the development of innovative solutions without closing off the market, and which allows contracting entities to establish an association for long-term innovation to carry out that development.

New regulations on contract modification

- Another new development is the establishment of a restrictive regime for contract modification, including limitations on such practices and a requirement to publish notice of modification, and the corresponding statements and reports compiled.
- It will now be possible to terminate a contract already in effect when the legal requirements allowing modification are not met.
- For contracts by contracting entities that can be classified as contracting authorities, authorization will be required for modifications that are not included in the tender specifications and that exceed 20% of the initial contract price, excluding VAT. That authorization must come from the ministerial department with which that contracting entity is affiliated or that oversees it, after a mandatory decision has been issued by the Spanish Council of State.

Measures to defend free competition

- Also, the principles that must govern public procurement will now include the principle of free competition and the principle of guaranteed market unity.
- Measures to defend free competition are also transposed, including a summary procedure to be carried out before the CNMC or the competent regional authority, in circumstances where a contracting entity considers there is evidence for collusion, with that procedure taking place before the awarding and with suspension of the contracting process. This procedure will be subject to further definition by implementing regulations.



Measures on simplifying administrative burden and use of electronic media

- There an obligation to use electronic communication media, excluding limited exceptions. This includes electronic access to tender documents and technical specifications, using a contracting profile. Procedures involving notification and communications must take place exclusively by electronic means.
- New electronic procurement methods are also regulated, by establishing the possibility for contracting entities to use buying centers, dynamic systems, and electronic acquisition and auctions, and for the first time, occasional joint procurement by two or more contracting entities is also being regulated.
- The circumstances involving use of a formal declaration are expanded, and the regulations approved by the European Commission on the European Single Procurement Document (ESPD) are transposed (Commission Implementing Regulation (EU) 2016/7 of January 5, 2016).

Promotion of contracting with small-to-medium enterprises (SMEs)

- There are also measures introduced to benefit SMEs, such as allowing a business awarded a contract to demonstrate compliance with the deadlines established by law for paying suppliers as evidence of its solvency; and a new regulation on division of contracts into lots, with the requirement that non-division must be justified.
- Subcontracting: the restriction established under Act 31/2007 that no more than 60% of the amount of an awarded contract can be subcontracted, unless established otherwise in the specification sheet, is eliminated.

Invalidity, claims and dispute resolution

- Regulations are introduced on invalidity and claims in relation to contracting, which are very similar to those in the Public Sector Contracts Act. Special administrative appeals retain their current nature as optional and must be available free of charge for the appellants.



- Another new development is the possibility of out-of-court dispute resolution, with contracting entities able to make use of arbitration to resolve differences arising regarding the effects, performance, and termination of the contracts they enter into, regardless of their amount.

Entry into force and transitional regime

- Entry into force: The new regulations on contracting and procurement in the special industries will enter into force on February 25, 2020, i.e., 20 days after their publication in the Official Gazette of the Spanish State, excluding the summary procedure carried out before the CNMC in cases where there may be evidence for collusion in competition, which will enter into force later after the appropriate implementing regulations have been developed.
- Transitional regime: Contracting procedures started before entry into force of Royal Decree Law 3/2020 will be governed by the earlier legislation, with the understanding that a contracting procedure has been started if the corresponding call notice has been published for the contract's awarding process. In the case of negotiated procedures without publication, the approval date of the terms sheet will be used to establish the start date.

Modification to regulations under Public Sector Contracts Act on minor contracts

- Elimination of the limit for minor contracts: The Public Sector Contracts Act is amended in relation to minor contracts, eliminating the obligation on the contracting entity to check that the contractor has not signed other contracts that individually or jointly exceed the legal thresholds (€40,000 for construction contracts and €15,000 for service and supply contracts).
- Another requirement eliminated, for cases where the estimated value of a contract is €5,000 or less, is the one requiring a report from the contracting entity explaining why the minor contract is necessary and confirming that the contract's purpose is not being altered to avoid application of those thresholds, in relation to contracts where payment is verified using the system of advances from cash accounts or another similar system for making minor payments.



- This amendment to the Public Sector Contracts Act in relation to minor contracts entered into force on February 6, 2020.

For additional information, please contact Cuatrecasas.

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