

Public and Regulatory Update

The Central Administrative Court admits the indirect challenge of the Sheets in cases of nullity of full right

22nd November 2019

Concerning TACRC Resolutions 25 July 2019, rec. no. 70/2019 and 28 October 2019, rec. no. 904/2019

The Central Administrative Court of Contractual Appeals accepts the indirect appeal against the Specifications of Particular Administrative Clauses in two recent resolutions issued when appeals filed against the respective awarding acts (Resolution of 25 July 2019, rec. no. 70/2019 and Resolution of 28 October 2019, rec. no. 904/2019) were made.

In the last of the resolutions, the Court examined the act of awarding the "Individual and collective health transport service for the patients of the FRATERNIDAD-MUPRESA healthcare centre located in the province of Toledo". The appellants defended the nullity of the PCAP award criterion regarding the additional resources, by not limiting them, and considering that the lack of limitation infringes the principle of free competition and competition, favouring large companies, without this criterion being linked to the needs of the contract and being impossible to fulfil. The successful bidder argued that the appellants were alleging the nullity of the evaluation criterion and that the period for appealing the Invitations to Tenders has already precluded them. TACRC upheld the appeal:

- i. Firstly, it should be remembered that the general rule is that the submission of a bid implies acceptance of the contents of the Invitations to Tender. If a bidding entity does not challenge the conditions and bases within the term established in the LCSP, "it will lack the legitimacy to challenge it later, contravening its own acts, when it is not favoured by the awards it obviously intended".
- ii. However, there is one exception to this general rule: in cases of nullity of full right, indirect recourse against the Invitations to Tenders is permitted even if they have not been the object of a prior and express challenge. To this end, the Tenders must lack one of the nullity defects of Law 39/2015.
- iii. The Court is particularly rigorous in the case of article 47.a) of Law 39/2015 for infringement of equality before the Law and non-discrimination, which occurs in cases of restriction of free competition as in this case.

These pronouncements of the TACRC consolidate its doctrine in this regard. This doctrine had already been applied by the Court of Justice of the European Union ("ECJ") in its judgment of 12 March 2015 (C-538/13), recognising the possibility of challenging the tender after the deadline for doing so had expired when the contractor could not understand the terms of the tender until a later time when the contracting authority made clarifications. Previously, the Supreme Court in its Judgment of 19 March 2001 (rec. no. 565/1994), had left open the possibility of declaring the nullity of those clauses that were vitiated by law; a possibility that the TACRC specifies in these resolutions, dictated in the indirect challenge of specifications.



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