

Informative Note

Further adjustments to the simplified open procedure of the Public Contracts Act

29th April 2020

Regarding 28th April Royal Decree Law 16/2020 on procedural and organisational measures to deal with COVID-19 in the scope of the administration of justice

28th April Royal Decree-Law 16/2020 on procedural and organisational measures to deal with COVID-19 in the field of the Administration of Justice, has added new regulatory measures in the field of public law and regulation that complement those approved to date as a result of the health crisis caused by COVID-19.

1. More "technical adjustments" for the simplified open procedure of the Public Contracts Act

The third final provision has been amended for the second time within a week, the previous one being Royal Decree Law 15/2020 published on 22nd April, article 159.4 of Law 9/2017 on Public Sector Contracts. If at that time the modification was justified by the need to allow the continuation of tenders that had not been interrupted by this procedure, the explanatory statement now refers to technical correction, which could hardly be considered a reason of extreme and urgent need.

Two new features are introduced. On the one hand, where before there was talk of envelopes, now there is talk of electronic envelopes and files, an expression which, although better suited to electronic procurement, did not pose any insoluble problem. It was enough to consider that when the law referred to an envelope, that is, the sealed envelope containing the offer, it was also referring to the encrypted digital file containing the offer in an electronic procedure.

The second development is more important because it corrects the amendment operated by the previous Royal Decree law. In its original wording, the law on public sector contracts required the opening of the envelope or file in a public act in which the aspects that could be valued by the application of objective formulas were included. Royal Decree-Law 15/2020 explained that in times of pandemics the opening of the envelope or file at a public event could prevent the procedure from continuing, so it was possible to exclude it when the procedure was processed electronically, as provided for in the specifications. Now, at last, any reference to the opening at a public ceremony has been removed. Thus, unless provided for in the specific administrative specifications, it is not necessary for the procedure to be conducted at a public event, whether the tender is conducted electronically or not.



2. An open door to the financial imbalance of public entities

In the midst of the process of containing the deficit and slimming the public sector, Law 40/2015, on the Legal System for Public Administrations, established that public bodies or instrumental entities of the state public sector could not be in a situation of financial imbalance for more than two consecutive budgetary years without taking measures. If these bodies were, for the purposes of European accounting -SEC- to be considered as public administrations, they had to comply with the rules applicable to administrations in terms of financial balance. If they were other types of entities (subject to market rules) the imbalance was determined by negative gross operating results. The imbalance maintained over two financial years was not an automatic cause of dissolution but did require a financial equilibrium plan to be proposed and implemented over two financial years. If balance was not achieved, the body was automatically dissolved. The second additional provision exempts public bodies that do not maintain financial equilibrium in the years 2020, 2021 and 2022 from this cause for dissolution.

3. Improvements in the use of information technology in communications for the administration of justice

The first final provision modifies **Article 4.2 f and 6.2 d of 5th July Law 18/2011** regulating the use of information and communication technologies in the administration of justice. The aim is to allow citizens and lawyers to identify themselves and sign in any electronic procedure that they carry out with the Administration of Justice by the same means and systems that they use to identify themselves and sign when they address the Administration electronically: that is, those referred to in articles 9 and 10 of 1st October Law 39/2015, on Common Administrative Procedure for Public Administrations. In the case of lawyers, the systems used with the administration must allow for their unequivocal identification as a professional. To this end, the Council is expected to provide judicial offices with a mechanism for interconnection with the registers of members of the Bar Associations accessible through the one-stop shop.

The need to allow teleworking revealed by the pandemic has led to a requirement for the competent administrations to make available to offices and judicial bodies computer systems that allow secure access by judicial personnel from outside judicial premises. This obligation to make this type of means available to allow external access by users, including the public prosecutor's office, is reiterated on two occasions (article eight and fifth additional provision of Law 18/2011) and in one of them it is recalled that these devices must allow digital disconnection, a right that is already included in the legislation for public employees.

We hope the information is useful and of your interest. At Andersen Tax & Legal we have created a multidisciplinary team to attend to all the questions that may arise on this aspect or in relation to the COVID-19.



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