

# Amendment of the RPA regime in concessions

The Draft Bill on Public Sector Procurement (*Anteproyecto de Ley de Contratos del Sector Público*) proposes an amendment to the regime governing what is known as the financial liability of public administrations (*responsabilidad patrimonial de la administración*) ("**RPA**") in the event of the termination of concession agreements, limiting in certain cases their amount to the market value of the concession.

## Draft Bill on Public Sector Procurement

**On Friday, 17 April 2015, Spain's Council of Ministers has received a report from the Ministry of Finance and Public Administrations the Draft Bill on Public Sector Procurement. This Draft Bill implements European Community regulations on public procurement, into Spanish law.**

One of the most noteworthy changes included in this legislative reform of the Public Sector Procurement Act is the amendment of the RPA regime in the event of the termination of concession agreements: in case of termination attributable to the concessionaire, the maximum amount of the RPA is limited, so the recovery of the investment is not guaranteed.

### RPA in the Draft Bill on Public Sector Procurement

**According to the Draft Bill, in the event of the termination of the concession:**

- The Administration's general duty is maintained, to pay the concessionaire for having invested in:
  - The expropriation of land;
  - The execution of the works and installations which are to become the property of the Administration.
- The need is maintained to take into account the state of the assets and the time remaining until their reversion.

## Key amendments

- The RPA is limited in the event of the termination of the concession for reasons attributable to the concessionaire:
    - The value of the RPA cannot exceed that of the concession
    - The value of the concession will depend on whether the agreement continues with another concessionaire (in which case the awarded value will apply) or not (in which case the value of the operating results for the past three years will apply)
  - Only in the event of termination attributable to the Administration is the additional indemnification of damages maintained
  - This amendment will only be applicable to concessions whose procurement records were opened following the entry into force of the Act
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- The 6-month term for setting the resulting amount is maintained.
  - The termination of the concession when the concessionaire applies for insolvency or is declared insolvent is always considered attributable to the concessionaire.
  - The amount of the RPA differs depending on the causes of termination:

(a) If the termination is attributed to the concessionaire, the maximum amount to be paid by the Administration is limited:

- The value of the works and installations cannot exceed the value of the concession. The value of the concession depends on the fate of the concession, which is decided by the Administration.
- If the concession will continue with a new concessionaire, the value of the concession will be the value for which the new agreement is awarded
- If the concession will not continue with another concessionaire, the value will be determined according to the operating results for the past three years.

(b) If the termination is attributed to the Administration:

- The duty of the Administration to pay for the investment made by the concessionaire is maintained, taking into consideration the state of the asset and the time remaining until reversion.
- The duty of the Administration to pay the indemnification is maintained, but the loss of profits is calculated according to the operating results for the past three years, instead of for the past five years.

### Applicability of the new RPA: only to future agreements

- This amendment of the RPA regime will apply to all concessions whose procurement records were opened following the entry into force of the Act.
- Those concessions which were awarded prior to the

entry into force of the Act, or whose procurement records were opened before that date, will be governed by the previous legislation, i.e. they will not be affected by this amendment of the RPA regime.

### Status of the legislative process

- At this time, the Draft Bill has only been submitted with certain reports by the Ministry of Finance and Public Administrations to the Spanish Council of Ministers.
- Therefore, the Draft Bill must still undergo several steps in the process and be the subject of mandatory reports before the Council of Ministers brings it before the Spanish Legislative Chamber (Cortes Generales) to complete the legislative process.

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