

## PRACTICAL COMPETITION LAW RECOMMENDATIONS FOR COMPANIES PARTICIPATING IN PUBLIC TENDERS IN SPAIN

### The CNMC stresses the importance of pro-competitive public procurement

In the past five years, the Spanish Antitrust Authority (*Comisión Nacional de los Mercados y la Competencia*, "**CNMC**") has imposed penalties in excess of 530 million euros for competition infringements involving public procurement,<sup>1</sup> with both the CNMC<sup>2</sup> and regional antitrust authorities<sup>3</sup> having bid-rigging investigations as one of their priority areas.

On 23 May 2025, the CNMC announced the publication of its updated Guide on the preparation and design of public tenders (the "**Guide**"). This Guide, dated 22 April 2025, is the third phase of the update of the CNMC's 2011 Guide on public procurement. The previous editions covered public procurement planning, self-procurement and agreements. This edition will be followed by further updates covering the awarding, execution and the *ex-post* evaluation stages.

This update of the Guide also reflects the antitrust authorities' growing interest in public procurement. In this regard, in November 2023 the Catalan Competition Authority ("**ACCO**") published its [Guide](#) for the Detection of Collusion in Public Procurement, while the European Commission published a [Communication](#) to combat collusion in public procurement in 2021.

In this Client Briefing, we explore some practical issues regarding competition law that arise in the day-to-day activities of companies that frequently participate in public tenders.

#### Key recommendations

- Companies should avoid contact with competitors during preliminary market consultations.
- Companies should only participate in bidding consortia or resort to subcontracting if objectively justified following a case-by-case assessment.
- Bid specifications may be appealed if they are configured in a way that hinders competition.
- In technological tenders, risks of technological *lock-in* should be reported.
- Prohibitions to bid in public tenders due to competition law infringements only apply if the resolution itself determines the scope and duration of the prohibition, or once they are entered in the Registry.
- It is important to document the justification behind financial bids.
- Technical bids should be independent and should avoid using templates that have been shared with other companies.
- The submission of bids by companies in the same group can be investigated pursuant to art. 3 LDC.

<sup>1</sup> CNMC Resolutions in cases S/0016/21, *Suministro de Alimentos*; S/0021/20, *Obra Civil 2*; S/0021/21, *Subastas de Ecoembes*; S/0008/21, *Licitaciones Material Militar*; S/DC/0614/17, *Seguridad y Comunicaciones Ferroviarias*; S/0025/19, *Gestión de Archivos*; S/0013/19, *Conservación de Carreteras*; S/0011/19, *Transporte Cántabro de Viajeros*; S/DC/0627/18, *Consultoras*; S/0644/18, *Radiofármacos*; S/DC/0626/18, *Radars Meteorológicos*; S/DC/0598/16, *Electrificación y Electromecánicas Ferroviarias*.

<sup>2</sup> For example, on 2 April 2025, the CNMC [announced](#) that it was investigating an alleged bid rigging for civil works, building works and other construction services in Cantabria. On 16 June 2025, the CNMC [announced](#) that it was carrying out inspections to investigate potential bid rigging agreements in tenders called by AENA for the lease of facilities to be used as fixed bases of operations in airports.

<sup>3</sup> For example, Catalan Competition Authority (ACCO) Resolutions in case 108/2020, *Servicios de Organización de Eventos*; Resolutions of the Competition Council of Andalusia in case S/07/2023, *Conservación Carreteras 2*; and of the Galician Competition Commission in case 1/2025, *Licitación Acciones Formativas de Empleo*.

### How can competition infringements in public procurement be detected?

In addition to the usual channels for bringing complaints (either public complaints, or through an anonymous mailbox whistleblowing channel) as well as the leniency programme, there is also a specific reporting channel for public procurement infringements. Since the entry into force of Spanish Act 9/2017, of 8 November, on Public Sector Procurement (the "**LCSP**"), public administrations must inform the antitrust authorities when they detect indicia of anticompetitive practices in relation to the tenders they call (articles 132 and 150).

### Why is it important to comply with competition regulations?

Penalties for infringing competition regulations can amount to 10% of the infringing company's total global turnover, in addition to fines for managers of up to 60,000 euros. For companies that often take part in public tenders, the imposition of a prohibition to bid is particularly serious, as it can last up to three years. There is also a risk of potential claims for damages which, in this case, could be brought by both the public administration and potential competitors. In addition to the above, there is the risk of the public administration rescinding the contract, and even the possibility of anticompetitive practices being investigated before the criminal courts.

### Why is the Guide relevant?

According to a [report](#) by the Independent Office for Procurement Regulation and Supervision of all public tenders called in Spain in 2023, more than 40% of the lots had a single bidder. That is why the CNMC's Competition Promotion Directorate has prepared this Guide to help public administrations design and prepare tenders that favour competition.

While the Guide is not intended as advice for bidding companies, important recommendations can be drawn from it as to the limits companies should abide by when participating in public tenders.

Knowing the Guide's content will allow companies to identify when the design of a tender may be detrimental to them and thus be able to take appropriate legal action to safeguard their interests –for example, by appealing the bid specifications before the Central Administrative Court for Public Procurement Claims (the "**TACRC**"), or before the administrative courts or specialised bodies in the Autonomous Communities that have them–. We include below a list of reasons why a tender can be annulled:

- For including disproportionate solvency and classification requirements.<sup>4</sup>
- For having a design or division (or lack thereof) into lots that prevents competition.<sup>5</sup>
- For including disproportionate or discriminatory technical specification requirements.<sup>6</sup>
- For setting a bid submission deadline that is too short.<sup>7</sup>
- For requiring a specific technology instead of establishing specific needs.<sup>8</sup>

Similarly, in the event of an investigation by an antitrust authority, the Guide can be useful in identifying when competition problems are caused by the configuration of the tender.

Lastly, the Guide can also be useful for detecting breaches (caused by and in relation to a tender) of the principles of necessity, proportionality and non-discrimination, as well as infringements of Spanish Act 20/2013, of 9 December (the "**Market Unity Act**"), which can lead to the CNMC's intervention against the public administrations calling the tender.

<sup>4</sup> For example, the 6 June 2023 judgment of the Spanish National Court, Chamber for Judicial Review, appeal 7/2018, annulling a clause of the Special Administrative Clauses due to the disproportionate experience requirements.

<sup>5</sup> For example, Resolutions 435/2023, of 13 April, and 602/2023, of 18 May, of the TACRC; and Resolution 089/2024, of 17 May, of the Procurement Appeals Body of the Autonomous Community of the Basque Country.

<sup>6</sup> For example, Resolution 1137/2021, of 9 September, of the TACRC.

<sup>7</sup> Report INF/CNMC/124/24 by the Competition Chamber of the CNMC's Board, on the Special Clauses governing the procurement of telecommunications services from the Spanish General Administration and other public entities.

<sup>8</sup> Report INF/CNMC/133/18 by the Competition Chamber of the CNMC's Board, on the Special Clauses governing the signing of the Framework Agreement for the provision of servers, storage systems and infrastructure software.

## Practical recommendations

- **Prior to the call for tenders:** the Guide recommends that public administrations conduct preliminary market consultations prior to the call for tenders, to ensure that the tender is as open as possible and that it is in line with the functioning of the market. Companies taking part in these consultations are advised to avoid contact with competitors, ensuring that any documentation is exchanged only with the public administration.<sup>9</sup> Likewise, the hiring of consulting firms that were involved in the preliminary consultation creates two potential competition risks: (i) the risk that such consulting firms may, as a result of their involvement in the preliminary market enquiries, access strategic information capable of conferring on any bidder an anti-competitive advantage, and (ii) the risk that one same consulting firm may be advising more than one bidder in the same tender, potentially leading to indirect information exchanges. Therefore, caution should be exercised when hiring consulting firms to prepare a tender.
- **Participation through bidding consortia:** the Guide states that public administrations should monitor the participation of bidding consortia in tenders when this is not objectively justified (i.e. where bidding in consortium is *essential*).<sup>10</sup> Antitrust authorities are particularly concerned about tenders having only one bidder, where such bidder is a consortium. Equally of concern are scenarios in which the same bidding consortium submits successive bids over time, or when a company participates both individually and as part of a bidding consortium in similar tenders. When analysing the objective reasons for participating through a bidding consortium, the antitrust authority (and the courts, as the case may be) must carry out a case-by-case assessment, considering the requirements of each tender and the bidding companies' technical and financial capacities to participate individually.<sup>11</sup> Companies are advised to assess in detail all factors that could justify bidding as a consortium before submitting the bid, and to refrain from bidding in consortium if it is objectively possible to bid individually.
- **Subcontracting:** subcontracting is analysed in a similar way to bidding consortia. Antitrust authorities are particularly concerned about 'cross-subcontracting' situations, or situations where a company does not participate in the tender but ultimately ends up providing the service through a subcontract.<sup>12</sup> Subcontracting is also analysed by antitrust authorities (and by the courts, as the case may be) on a case-by-case basis, so companies should assess all factors that could justify their participation in tenders through subcontracting, and should avoid this, to the extent not necessary.
- **Technical bids:** bids must be prepared independently. Antitrust authorities pay close attention to any similarities between separate bids, and may interpret them as signs of collusion.<sup>13</sup> Such similarities can include, among others: identical errors, the formatting and font used, the technical specifications and terminology used, and even document properties and metadata, as well as the timing of submitting the competing bids.<sup>14</sup> Companies are advised to pay particular attention when working with consulting firms (that may be using templates or be providing services to several companies competing in the same tender), or when using templates from previous tenders.
- **Prohibition to bid in public tenders:** the Guide advises public administrations to ensure that companies are not banned from bidding in public tenders (because, if so, they could be excluded from bidding). Prohibitions to bid deriving from competition infringements are fully effective only if the resolution itself determines the scope and duration of the prohibition to bid, or else once they are entered in the Official Registry of Bidders and Classified Companies of the Public Sector. Therefore, public administrations should not exclude companies in cases where the scope and duration of the prohibition to bid has not yet been determined, and where the prohibition has been

<sup>9</sup> For example, the Guide refers to a decision of the Mexican Competition Authority (COFEC), which in 2018 fined several companies that manipulated price information provided during the market research stage prior to a tender process.

<sup>10</sup> CNMC Resolutions in cases S/0008/21, *Licitaciones Material Militar*; and S/DC/0598/2016, *Electrificación y Electromecánicas Ferroviarias*.

<sup>11</sup> CNMC Resolution in case S/0545/15, *Asturias Concrete*. See also the CNMC Resolution in case S/0519/14, *Railway Infrastructure*; as well as National Court judgments 584/2021, 349/2022, 703/2022, 357/2022, 399/2022, 352/2022 and 488/2022, which annul the aforementioned resolution due to lack of proof regarding the alleged anticompetitive nature of bidding consortia.

<sup>12</sup> CNMC Resolution in case S/0316/10, *Sobres de Papel*.

<sup>13</sup> See the Andalusia High Court of Justice judgment of 9 May 2018, no. 432/2018, confirming the Resolution of the Competition Council of Andalusia in case S/08/2015, *Facto y Salcoa*.

<sup>14</sup> For example, the Resolution of the Galician Competition Commission in case 6/2023, *Licitación Urbanización de Consorcio Zona Franca de Vigo*.

appealed and an interim suspension granted. Companies excluded for this reason should consider the possibility of appealing the decision of the procurement authority.

- **Financial bids:** antitrust authorities look for price patterns, comparing them with previous tenders and even in related sectors, with the help of artificial intelligence tools.<sup>15</sup>
  - **Abnormally low bids:** the Guide recommends that abnormally low bids be assessed by a specialised technical service to ensure that the threshold is not set in a way that impedes competition. Antitrust authorities have found in the past that abnormally low bids can serve anti-competitive purposes (e.g. by bidding too high in an attempt to lower the abnormality threshold and knock out companies bidding at lower prices).<sup>16</sup> In any case, abnormally low bids do not automatically knock bidders out, since bidders always have the possibility of justifying their low bid. To avoid this situation, companies are advised to do detailed financial analyses that justify, with verifiable figures, the bids they submit to the public administrations, especially if these are particularly high or particularly low.<sup>17</sup>
  - **Coverage offers:** another main concern for antitrust authorities are coverage offers. The authorities usually consider it a sign of coverage offers when the prices submitted are either too high or too low (very close to, or too far from the bid price), when financial bids are submitted together with unacceptable technical bids, or when technical or financial bids are identical or very similar to one another.<sup>18</sup> In line with the preceding point, companies must be able to justify the price levels offered for each tender.
- **Lot design:** the Guide recommends avoiding creating advantages for operators through the design of the tender itself; for example, creating an advantage for bidders based on their geographic location. In this regard, the Guide recommends that public administrations include objective requirements that do not *ex ante* preclude participation in public tenders, rather than geographic criteria.<sup>19</sup> Companies finding that such criteria apply are advised to appeal the tender documents.
- **Technology procurement:** the Guide identifies the risk of lock-in with regard to a certain brand or supplier in public tenders for the procurement of technology. To prevent this, the Guide suggests that public administrations emphasise their desired result, rather than foreseeing the solution (for example, refraining from defining a very specific aim or from requiring specific technical functionalities that can only be met by an operator having access to certain technology); that they prioritise technical standards and benchmarks; that they set requirements for algorithmic transparency, traceability, explainability and interoperability; and that they require bidders to adopt personal data processing and AI compliance measures. Companies are advised to review the tenders' requirements and to follow the suggestions above to help prevent technological lock-in; and upon finding that the public administrations are applying unnecessary or disproportionate criteria, to consider appealing the tender documents.
- **Bidding by companies in the same group:** according to the 'single bid principle', bidding companies can only submit one bid. However, companies belonging to the same corporate group (provided they each have separate legal status) can participate in the same tender, as long as their bids are independent. Companies submitting bids in a coordinated manner may be excluded from bidding for breaching the aforementioned 'single bid principle'. Their conduct could furthermore lead to an infringement of competition law, not under article 1 of the Spanish Defence of Competition Act (*Ley de Defensa de la Competencia*, "**LDC**") (in the case of companies in the same group, by application of the "*group privilege*"), but rather under article 3 LDC (infringement of competition law due

<sup>15</sup> The CNMC has an artificial intelligence model for detecting collusion in public tenders ("**BRAVA**", *Bid Rigging Algorithm for Vigilance in Antitrust*).

<sup>16</sup> For example, CNMC Resolution in case S/0013/19, *Conservación Carreteras*.

<sup>17</sup> Note that the submission of bids by companies in the same group impacts the valuation of abnormally low bids, pursuant to article 149.3 LCSP.

<sup>18</sup> For example, Resolution S/DC/0627/18, *Consultoras*; and ACCO Resolution in case 100/2018, *Aerobús*.

<sup>19</sup> IPN/CNMC/024/24, on the Food and Nutrition Draft Bill, the report and Royal Decree 315/2025, of 15 April, establishing the implementing regulations for Spanish Act 17/2011, of 5 July, on food safety and nutrition to promote healthy and sustainable eating at schools.

to unfair acts).<sup>20</sup> Therefore, companies forming part of the same group wishing to participate in the same tender are advised to prepare and submit their bids entirely independently and separately.

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<sup>20</sup> See the Galician Competition Commission Resolution in case 1/2025, *Licitación Acciones Formativas de Empleo*, and Galicia High Court of Justice judgment 2001/2025, of 7 March 2025.

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