

TRANSPARENCY IN PUBLIC PROCUREMENT IN SPAIN



Madrid, April 30, 2019

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I. Initiatives adopted in Spain to promote transparency in the award of public contracts.

A. Spanish Act 19/2013, 9 December, on transparency, access to the public information and good governance.

The purpose of this Act is to reinforce citizens' right to access information on public activities.

Among other measures:

- It compels Public Administrations to divulge *ex officio* relevant and updated information about their functions and applicable regulation, public contracts, subsidies, public aid granted, annual accounts, budgets, etc.;
- It grants citizens a right to request information from Public Administrations, having to identify themselves, but without an obligation to provide their reasons for their information request; and,
- It creates a Transparency Website, for the Central State Administration to publish the mandatory information that the Law compels it to provide.

B. Integrity Pacts.

The Integrity Pact, created by Transparency International, is an original governance initiative to improve transparency and participation, and to prevent corruption in public procurement. It is a **document that establishes the contracting authority' and bidders' commitments to comply with best practices and to maintain an ethical and transparent conduct in public procurement processes.**

The main characteristics of these type of pacts are:

- The Authority's commitment that its officials will not require nor accept any bribes, gifts, etc., and that it shall impose adequate disciplinary or criminal sanctions in case of violation;
- A statement from each bidder that it did not and will not pay bribes to obtain or retain the contract;
- The commitment of each bidder to inform of any payments made to any person (including agents or other intermediaries, as well as relatives, etc.) in connection with the relevant contract;

- An express undertaking from each bidder that its commitment not to pay or offer bribes and the obligation to provide information, as well as the corresponding sanctions, shall continue to be enforceable upon the awarded bidder for the full term of the contract;
- Bidders are recommended to adopt a company' Code of Conduct (where the use of bribes and other unethical behavior is clearly prohibited) and a compliance program for the implementation of the Code of Conduct throughout the company;
- The use of arbitration as a mechanism for the settlement of disputes and as the competent authority for the enforcement of sanctions; or pre-established sanctions covering any breach of a commitment by a bidder; and,
- An *independent observer* is involved, usually comprised of one or several experts, whose role is to supervise the tender, the award and the execution of the contract. This provides an additional guarantee to Public Administration's control and an improvement to public accountability.

In Spain, the first collaboration agreement was signed in 2017 between the Madrid City Council and Transparency International Spain for the analysis and definition of the **Pacts of Integrity for transparency in the field of public procurement**, and its implementation on the bidding process of the *“contract for the provision of management support services in connection with telephone and in-person assistance through citizen service channels of Línea Madrid”*.

This agreement sets out the objectives and characteristics of the future Integrity Pact and it establishes each party's responsibilities, that is, the contracting authority' and the companies' commitment to comply with high standards of integrity and transparency.

C. **Act 9/2017, 8 November, on Public Sector Contracts.**

The new Act on Public Sector Contracts incorporates new tools with a view to making progress on transparency levels and to facilitate access to information throughout all the milestones of contract execution.

The enforceability of this Act is extended to include political parties and trade unions; internal contracting instructions for contracting authorities other than “Public Administration” are removed.

The Act also reinforces contracting authorities' contracting profile tool, which will be published and accessible through the Public Sector Contracting Platform.

Use of the **electronic procurement** is mandatory since the entry into force of the Act, and it is expected to improve transparency as it will enable to monitor procurement process decisions. It shall allow all information to be included in the contracting profile, which will compile all relevant information of the contracting authorities.

Improvements, relating to information availability and transparency, are introduced in contracting procedures implemented by the public sector as a result of changes to contract types regulated in the Act. For example, the Act suppresses the negotiated procedure without publication that was previously applied varying on the contract amount, minor contracts' limits are lowered and their publicity is increased, and a new summary procedure is created with the purpose of becoming a transparent and agile procedure. Improvements are also made through the implementation of other measures, such as the obligation to refer more information to the Court of Auditors, resulting from the lowering of the threshold of contracts that must be referred within three months after their formalization.

II. Results of the measures implemented in Spain.

In January 2019, Transparency International warned the Spanish government of the very slight improvement achieved in the Corruption Perception Index, raising from place 42 to 41 out of 180 countries. This result shows reforms have not worked. Despite this slight improvement, Spain is the European country which has dropped most (seven points between 2012 and 2018), ranking 20 out of 28 member states.

A. Spanish Act 19/2013, 9 December, on transparency, access to public information and good governance.

According to the Transparency Act Compliance Assessment Report, published by the Transparency and Good Governance Committee, *“the institutions and agencies analyzed on the METSA 1 report, (...) have remarkable and outstanding levels on transparency matters”*.

However, it is striking that institutions such as the Economic and Social Council obtained a score of 5.42/10 on mandatory compliance pursuant to the Transparency Act, and a score of 3.75/10 on voluntary compliance. These results clearly differ from remarkable and outstanding scores.

Furthermore, among other issues:

- The right of access to information is not recognized as a fundamental right, but rather only as an ordinary one. In case of conflict, data protection prevails over right of access.
- In order to make the data understandable, reusable and interoperable, the Administration must previously have an efficient filing and storage system. Otherwise, it is excessively complex to provide the information required.

- This Act only applies at State level; the autonomous communities must approve their own transparency laws.
- Article 18 excludes from the right to access information all public communications and internal reports, without defining the term “internal”.
- The search engine on the transparency portal does not work properly: it does not index the documents’ internal data nor does it use basic functions that other internet search engines have been using for more than a decade.
- The transparency portal search engine requires the use of electronic IDs. According to the National Statistics Institute, in 2014, 47.9% of the population between the ages of 16 and 74 declared having an electronic ID, and only 8.5% of them had a card reader fixed with an electronic microchip, which must be bought separately.
- The transparency portal compiles information on contracts currently in force or that entered into force from 2014 onwards, but none regarding earlier contracts.

In a ranking prepared by two non-profit organizations, the Spanish Law of Transparency has been ranked 64 out of 99.

B. Integrity Pacts.

At an international level, the Integrity Pacts have been used for all types of contracts and procurements – public works, supplies, privatization, licenses – and in different legal and political contexts. For institutions, sharing monitoring tasks has allowed, for example:

- To prevent bad practices such as collusion, pre-design and bid rigging, fraudulent modifications, abuse of urgency proceedings, use of privileged information or conflict of interests.
- To generate trust and promote companies which operate with strict ethical standards.
- To reduce contracting costs, with better quality and more competitive bids, in addition to avoiding legal action.
- To apply real-time control, which improves the awarding process and solves implementation problems.
- To improve the reputation of those institutions that show a categorical commitment against corruption.
- To ensure citizen support for major public-work projects.

- To demonstrate leadership and vision, to modernize themselves and to innovate.

C. **Spanish Act 9/2017, 8 November, on Public Sector Contracts.**

Although the new Act on Public Sector Contracts promised many improvements regarding transparency in the public procurement field, Public Administrations are not fully complying with some provisions. By way of example:

- Public institutions must publish contracts in the Public Sector Contracting Platform, but this requirement is not being met;
- Regulations have not been simplified; but rather this Act regulates matters in too much detail and in a disconnected and incorrect way;
- The transition to an electronic administration is very slow;
- There is a lack of coherence between this Act and Act 19/2013, on transparency: the Transparency Act makes certain contents mandatory, but access to those is not simple and comprehensible if the information is only provided through the Public Sector Contracting Platform, which is designed for bidders.
- The fact that the applicability of the Act is not homogeneous for all public administrations nor to all regions. The importance of some city councils should not be circumvented.

III. **Proposal of measures to end the opacity in public work contracting in Spain.**

Once we have established that solely implementing punitive measures to improve transparency in the public sector (and, more particularly, in bidding procedures and contract awarding) has failed, there are some additional measures the legislator should consider to end opacity in public procurement:

- Avoid frequent amendments to the Act on Public Sector Contracts, to create greater homogeneity and regulatory stability.
- Apply the same procedural rules irrespective of whether the contracting authority is a public administration or not.
- Create an independent public procurement authority.
- **Promote the publication of contracts in the Public Sector Contracting Platform:** the Act on Public Sector Contracts should establish that contracts that are not duly published on the platform shall be void and null.

- **Transitioning towards an electronic administration** is a key tool for transparency and efficiency.
- **Draw up a strategic plan:** it is necessary to draw up a long-term, annualized, infrastructure strategic Plan, which incorporates the study of needs in each area, medium and long-term investments and the activity planned at each administration level, and which is prepared with the participation of key economic and social agents.
- **“Smart regulation”:** this new legislative strand proposes the rationalization in the elaboration process of laws. It defends a more intelligent, fair and less intrusive regulation; always maintaining an attractive and flexible economic environment for private sector activity. The four main advantages of “Smart regulation” are:
 - It simplifies the relationship between citizens and public administrations, reducing bureaucracy.
 - It provides a stable legal framework, with clear rules for all players.
 - It harmonizes the rights of users, consumers, public authorities and enterprises.
 - It provides real added value to the sector that it regulates.
- **Risk management:** risk management should be based on the elaboration of a risk map, which should offer the possibility of identifying both preventive and contingency measures, depending on each type of risk. Risk management should strive to target, locate, describe, categorize and prioritize, depending on their severity, the risks that the Public Administration must undertake and manage. In accordance with the current LCSP (Act on Public Sector Contracts), the risks can be identified according to the phases in which the bidding process is structured.

In addition, the Spanish legislator should look at the measures implemented in other countries such as USA, a reference in matters of transparency, and thus implement truly efficient measures that encourage transparency.

Examples of measures that have been implemented in the USA:

- In the USA, all federal agencies must publish their data in formats that are standard for all levels of federal administration. Thus, there is a disclosure of the federal agencies’ direct costs and a pooling and sharing of all information on contracts, loans, awarded aids and federal programs expenditure to allow taxpayers and politicians to more effectively track spending.
- For a company to be admitted to a public bid, it must previously issue a Compliance commitment.

- Since 2008, for contracts that exceed 5 million dollars, it is mandatory for companies that contract with the Public Administration to have an anti-corruption compliance program.
- The official agendas of people in charge must be made public.

Many measures have been adopted in other countries, but an essential aspect is achieving a change of attitude based on the fact that new technologies enable the transmission and management of information, provided that they are administered by independent entities.

Public Procurement is simply another part of the need to control the allocation and management of public resources.

But the need for control and the commitment to transparency cannot be extended unless we manage to radically alter the habits and behavior of citizens, as individuals and as executives in large corporations, in their relations with public administrations.

It cannot all be about penalties and punishments; changes to the Criminal Code alone are not enough: they help, but they are not enough.