

# Direct application of the European Single Procurement Document as of 18 April

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The deadline for transposition of the new European public procurement package of directives, which have not yet been transposed into Spanish law, is 18 April.

Apart from the possible liability of the Spanish state, the main consequence, pursuant to the principle of direct effect of European law, is that several provisions of such directives shall be directly applicable in Spain once the time limit for transposition has elapsed.

One of these provisions is article 59 of Directive 2014/24/EU, of 26 February, on public procurement (the "**Procurement Directive**"), which provides that at the time of submission of applications to tender or of tenders, contracting authorities shall accept the European Single Procurement Document ("**ESPD**"), consisting of an up-to-date self-declaration of suitability as preliminary evidence that the bidders fulfil the conditions for contracting, in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator meets such conditions.

Several paragraphs of article 59 of the Procurement Directive, among them the paragraph regulating the matter at hand, shall have direct effect as of 18 April, given that their provisions are clear and unconditional, as required by case law of the Court of Justice of the European Union ("**CJEU**") in order for provisions of directives to have direct effect (*Van Duyn* judgment of 4 December 1974).

This direct effect will mean that the power currently granted to contracting authorities by article 146 of the Recast Text of the Public Procurement Act (abbrev., "**TRLCSP**"), according to which they may

provide in the tender conditions the possibility for tenderers to substitute the initial submission of documentation evidencing their capacity and solvency with a statement of compliance with regards to the legally established conditions for contracting with government authorities, shall become the general rule for public contracts and contracts subject to harmonised regulations entered into by non-public contracting authorities, which will therefore be required to always accept the ESPD as evidence that bidders fulfil the conditions for contracting.

This has been recently confirmed by the Public Procurement Advisory Board in a recommendation published on 8 April 2016 in the Official Journal of Spain.

Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 established the standard form for the ESPD (the "**ESPD Regulation**"), thereby fulfilling the mandate contained in article 59(2) of the Procurement Directive. Pursuant to article 1 of the ESPD Regulation, from the moment the national measures implementing the Procurement Directive enter into force, and at the latest from 18 April 2016, the standard form set out in Annex 2 to the Regulation, which shall be binding in its entirety and directly applicable in all Member States, shall be used for the purposes of drawing up the ESPD.

The ESPD comprises a formal statement by economic operators to be used, pursuant to the Regulation itself, "as preliminary evidence in replacement of certificates issued by public authorities or third parties". By way of this statement, created in order to reduce administrative burdens, economic operators confirm that no grounds for exclusion apply to them,

that they meet the relevant selection criteria and, where applicable, fulfil the objective rules and criteria that have been set out in order to limit the number of candidates to be invited to participate. Use of the ESPD, as already indicated, shall be obligatory in all procurement procedures subject to the rules of both the Procurement Directive and Directive 2014/25/EU, which regulates procurement by entities in the excluded sectors, although it allows Member States to either determine via national regulation or allow contracting authorities and entities to decide whether the ESPD should also be used in other procurement procedures.

With respect to the rules on the use of the ESPD contained in the ESPD Regulation, the following should be noted:

- The contracting authority or procurer may ask any tenderer at any moment during the procedure to submit the required certificates and supporting documents.
- Economic operators may be excluded from the procurement procedure or be tried in cases of serious misrepresentation in filling in the ESPD. In this respect, misrepresentation in the ESPD could lead to a prohibition on contracting with the public sector, on the grounds set out in article 60(1)e TRLCSP, and could even lead to criminal penalties in the most serious cases.
- Economic operators may reuse the information that has been provided in an ESPD which has already been used in a previous procurement procedure as long as the information is correct and remains pertinent.
- As of 18 April 2018, the ESPD shall be provided exclusively in electronic form, for which electronic means of communication must exist. Until then, electronic and paper-based versions of the ESPD may co-exist.
- Where procurements are divided into lots and selection criteria vary from lot to lot, an ESPD should be filled in for each lot (or group of lots with the same selection criteria).
- Contracting authorities or procurers may choose, or may be required by Member States, to limit the information required concerning selection criteria to a single question, namely whether the economic operators meet or not all the required selection criteria.
- An economic operator participating on its own but relying on the capacities of one or more other undertakings must ensure that the contracting authority receives its own ESPD together with a separate ESPD setting out the relevant information for each of the undertakings it relies on. Where groups of economic operators participate together in the procurement procedure, a separate ESPD must be given for each of the participating economic operators.

The ESPD consists of the following parts and sections:

- Part I. Information concerning the procurement procedure and the contracting authority or procurer.
- Part II. Information concerning the economic operator.
- Part III. Exclusion criteria.
- Part IV. Selection criteria.
- Part V. Reduction of the number of qualified candidates.
- Part VI. Concluding statements.

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