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The International Comparative Legal Guide to:

Public Procurement 2015

7th Edition

A practical cross-border insight into public procurement

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EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Public Procurement*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of public procurement.

It is divided into two main sections:

One general chapter. This chapter outlines EU public procurement rules.

Country question and answer chapters. These provide a broad overview of common issues in public procurement laws and regulations in 29 jurisdictions.

All chapters are written by leading public procurement lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Donald Slater and Edward McNeill of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Since Spain joined the European Union in the year 1986, our legislation regarding public procurement has been obliged to refer to EU regulations, and has had to adapt to the requirements of successive EU Directives on this subject.

Currently state regulation on public procurement is set out in Royal Decree Legislation 3/2011, dated 14 November, in which the Revised Text of the Law on Public Sector Contracts (hereinafter, TRLCSP) is approved, which sets out in one legal text, the previous Law 30/2007 dated 30 October for public sector contracts and the subsequent amendments introduced through Law 2/2011 dated 4 March, for Sustainable Economy.

Furthermore, in line with the methodology indicated by EU Directives, the Law 31/2007 dated 30 October also includes the whole body of standards regarding public procurement in Spain, concerning tendering procedures for the water, energy transport and postal services sectors.

These two regulations have the fundamental objective of incorporating the provisions of Directive 2004/18/EC of the European Parliament and of the Council, dated 31 March 2004 into our legal system, on the coordination of the procedures concerning the awarding of public contracts for public works, supplies and services – a provision which introduced numerous transcendental changes to EU regulations for public procurement and which resulted in a qualitative step forward in European contract regulation – as well as Directive 2004/17/EC on the coordination of the procedures in awarding public contracts in the water, energy, transport and postal services sectors (the so-called excluded sectors).

The TRLCSP has been partially developed through the approval of Royal Decree 871/2009 dated 8 May, for which the Law 30/2007 dated 30 October for Public Sector Contracts was partially developed. However, the majority of public procurement standards of a regulatory nature are still set out in Royal Decree 1098/2001 dated 12 October, for which the general Regulation of the Law for Public Administration Contracts was approved. This regulation came before the 2007 Law for Public Sector Contracts and even before the 2004 EU Directives, so it should be considered as applicable only when there is no contradiction to the legal regulation which is of higher rank, nor that which is stated in the Directives.

In the last two years, the TRLCSP has been subject to numerous amendments from state legislation from a series of laws that incorporate measures to improve the functioning of the public sector, and benefit economic activity. Among these, it is worth highlighting the amendments made by Royal Decree-Law 4/2013 dated 22 February, for support measures for business entrepreneurs, growth stimulation, and employment creation; Royal Decree-Law 8/2013 dated 28 June for urgent measures against Public Administration late payment, and support to local entities with financial problems; Law 11/2013 dated 26 July for support measures to business entrepreneurs, growth stimulation, and employment creation; and Law 14/2013 dated 27 September, for support to business entrepreneurs and their internationalisation.

Finally, it must be taken into account that in 2014 the European Union provided a new set of legislation for public procurement, set out in Directive 2014/23/EU by the Parliament and the Council, dated 26 February 2014, relating to the awarding of concession contracts, a Directive that represents the first complete regulation of this type of contract on a European level; Directive 2014/24/EU by the Parliament and the Council dated 26 February 2014, concerning public procurement, for which the Directive 2004/18/EU is revoked; and finally, Directive 2014/25/EU by the European Parliament and the Council, dated 26 February 2014, relating to contracting by entities from the water, energy, transport and postal service sectors, for which Directive 2004/17/EC is revoked. The three Directives described establish that the maximum period during which their provisions should be incorporated into respective state legislation is until 18 April 2016, so it is to be expected that the aforementioned Spanish regulations on public procurement will be amended before this date.

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

At the end of 2013 Law 19/2013 dated 9 December was published, for transparency, and access to public information and good governance, the objective of which, according to its own Explanatory Memorandum, is to establish obligations concerning setting up active public exposure which should connect a wide range of subjects, among which all of the Public Administrations, Judicial and Legislative bodies (for activities concerning Administrative Law), as well as other constitutional and statutory bodies, are included. Additionally, the Law is applied to certain entities which, due to their particular public relevance, or if they receive public funds, will be obliged to reinforce the transparency of their activity.

Concerning public procurement, the Law obliges Public Administrations and other applicable authorities included in it, to make all of their contracts public, indicating the object, length, amount of the tender, and awarding, the procedure applied for their opening up, the ways in which, if necessary, they have been published, the number of participating bidders, and the identity of the winning bidder, as well as amendments made to the contract. Any decisions concerning withdrawal or renunciation of contracts must also be made public.

Furthermore, it requires the publication of statistics concerning the percentage in budget volume of contracts awarded through each of the procedures set out in public sector contract legislation.

Finally, the Law obliges the General State Administration to implement a Transparency Portal, which depends on the Ministry of the Presidency, to allow for public access to all the information that the Law obliges is made public.

However, it should be taken into account that the Law delays the application of measures related to transparency until a year after its publication, for anything concerning general State Administration, and two years for any related to autonomous regions and local authorities. On 10 December 2014, the new transparency portal set out by this Law should already be operative.

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

As already mentioned, given that Spain is a European Union Member State, the regulations on public procurement must be adapted to the principles derived from the Treaties of the European Union as well as the EU Directives set out on this subject. The primacy of EU Law means that its regulations take preference over those for national Law, so in the event of any conflict or clash between them, the EU Law will always take precedence, regardless of the rank of internal regulations, and independently of whether they have been approved afterwards, in other words, aside from their status or length.

Furthermore, this principle of primacy also obliges the Spanish judiciary and courts to apply EU regulations and give preference to these over national legislation. The national court is obliged to guarantee full effectiveness of EU regulations, by, if necessary, disregarding out of its own initiative, any provisions from national legislation that go against these, even if they are subsequent, and is not obliged to request or wait for prior derogation of these through legislation or any other constitutional procedure.

In any case, it must be taken into account that the European Directives on public procurement, just like the other European Directives, are not regulations that on their own have a direct effect on citizens, but they first require regulatory transposition by Member States. However, the European Court of Justice recognised in some cases that the Directives caused a direct effect when Member States had not transposed the Directive within the established time limit, or when state regulation is considered contradictory to these Directives (cases of non-transposition in the time limit or defective transposition).

1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

As a consequence of all of this aforementioned information, the general principles of public procurement applicable in Spain are those that derive from EU Treaties and EU Directives on this subject. More specifically, the principles of freedom of access, transparency, public exposure, equal treatment without discrimination, are the underlying principles of the whole regulatory standards concerning public procurement, and are characterised by their mainstreaming, given that they appear in all of the stages of contracting, from the preparatory state of contracts, through to their execution.

These principles are embodied in article 1 of the TRLCSP, setting out to this effect, that "The object of current Law is to regulate public sector contracts, in order to guarantee that they abide by principles of freedom of access regarding tenders, public exposure and transparency of the procedures, non-discrimination and equal treatment among candidates, ensuring that, with regards to budget stability and control over expense, an efficient use of funds designated to building works, acquisition of goods and contracting of services is made, by first setting out the needs that are to be covered, guaranteeing free competition and the selection of the most economically advantageous offer".

1.5 Are there special rules in relation to procurement in specific sectors or areas?

The EU Directives concerning public procurement only apply to contracts for public works, supplies and general services, and therefore do not apply to many other types of contracts that Public Administrations open up, and which are subject to special regulations set out in internal Spanish Law.

Article 4.1 of the TRLCSP sets out that the following negotiations and legal relations are excluded from the application of Law and are to be governed by their own specific regulations:

a) The service relationship of civil servants and the contracts governed by labour legislation.

b) The legal relationships involving the provision of a public service, the use of which requires the payment by the users of a fee, rate or public price of general application.

c) The collaboration agreements entered into by the State Administration with the management entities and common services of the Social Security, the Public Universities, the Autonomous Communities, the Local Entities, the Autonomous Agencies and Remaining Rublic Entities; or those agreements entered into by these bodies and entities with each other, unless that, by their nature, are considered to be contracts subject to this Law.

d) The agreements that, in accordance with the specific rules governing them, are celebrated by the Administration with natural or legal persons subject to private Law, provided that their object is not included in the contracts regulated under this Law or in special administrative rules.

e) The agreements included in the scope of article 346 of the Treaty on the Functioning of the European Union that are concluded in the defence sector.

f) The agreements entered into by the State with other States or international public Law entities.

g) Supply contracts relating to direct activities of public bodies, dependent on the Public Administrations, whose activity is commercial, industrial, financial or similar, if the goods on which they deal have been acquired for the purpose of returning them, with or after processing, to the market, according to their peculiar purposes, provided that such bodies are acting by virtue of the specific powers assigned to them by the Law.

h) Contracts and agreements resulting from international agreements concluded in accordance with the Treaty on the Functioning of the European Union with one or more third

countries not members of the Community, relating to works or supplies intended for the joint implementation or exploitation of a work, or contracts relating to services for the joint implementation or exploitation of a project.

i) Contracts and agreements made pursuant to an international agreement relating to the stationing of troops.

j) Contracts and agreements awarded by virtue of a specific procedure of an international organisation.

k) Contracts relating to arbitration and conciliation services.

l) Contracts for financial services in connection with the issuance, purchase, sale and transfer of securities or other financial instruments, in particular, transactions relating to state financial management and operations aimed at obtaining money or capital by the bodies, organisations and public sector entities, as well as the services provided by the Bank of Spain and treasury operations.

m) The contracts whereby a body, organisation or public sector entity is obliged to deliver goods or rights or provide a service, notwithstanding the fact that the purchaser of goods or recipient of services, if it is a public sector entity subject to this Law, must conform to its requirements for entering into the contract.

n) Legal businesses whereby it is commissioned to an entity that, as stated in article 24.6, has the condition of resource and technical service of the Commissioning Administration, the performance of a certain service. However, the contracts to be awarded by the said entities for the provision of the commissioned services shall be subject to this Law, on such terms as may be appropriate according to the nature of the contracting entity, the type and amount of the contract; and in any event, when dealing with contracts for works, services or supplies whose amounts exceed the thresholds established in Section 2 of Chapter II of this Preliminary Title, the private Law entities must follow in their preparation and award the rules laid down in Articles 137.1 and 190.

o) The authorisations and concessions on public property, and the contracts for the operation of patrimonial assets other than those defined in article 7, that will be governed by their specific legislation, except where expressly declared applicable the provisions of this Law.

p) The contracts of sale, donation, swap, lease and other similar legal transactions on immovable property, securities and intangible assets, unless they affect computer programs and should be classified as supply or services contracts, which will always have the character of private contracts and governed by the Law of property. These contracts shall not include services that are specific to typical contracts regulated in Section 1 of Chapter II of the Preliminary Title, if the estimated value of the same exceeds 50 per 100 of the total amount of the business, or if they are not linked to the principal object of the patrimonial contract in the terms provided in article 25; in these two cases, the said services must be subject to independent contracting in accordance with the provisions of this Law.

q) The supply and service contracts concluded by the State Public Research Bodies and similar bodies of the Autonomous Communities, aimed at services or products needed for the implementation of research projects, technological innovation and development, or technical services, when the presentation and outcome derived therefrom is linked to scientific, technological and industrial returns, which are suitable for being traded, and their performance has been entrusted to the body's research teams pursuant to a competitive procedure.

r) The research and development contracts remunerated in full by the contracting authority, provided that it shares with the successful tenderers the risks and benefits of scientific research and technical expertise necessary to develop innovative solutions that outperform those available on the market. In awarding these contracts, the contracting authority must ensure the respect for the principles of publicity, competition, transparency, confidentiality, equality and non-discrimination and selection of the most economically advantageous tender.

Furthermore, it should be taken into account that, as stated in the EU regulation, contracts from water, energy, transport and postal services are governed under specific regulations.

2 Application Of The Law To Entities And Contracts

2.1 Which public entities are covered by the law (as purchasers)?

In accordance with article 3.1 of the TRLCSP, this regulation is applied to all bodies and entities that make up the so-called public sector, conforming to the regulations of the European Directives that include:

a) The General State Administration, the Administrations of the Regional Autonomous Communities and the Authorities that make up Local Administration.

b) Managing Authorities and services relating to Social Security.

c) Autonomous bodies, state-owned corporate entities, Public Universities, State Agencies and any public entity with its own legal status connected to a subject that belongs to the public sector, or depending on it, including those which have regulatory functions assigned to them or any external control on a certain sector or activity and either have functional independence or some degree of legally recognised autonomy.

d) Trading companies with share capital that is over 50% owned either directly or indirectly by entities described in points a) to f).

e) Consortiums with their own legal status referred to in article 6.5 of Law 30/1992 dated 26 November on Legal Framework for Public Administrations and Common Administrative Procedure, and local legislations.

f) Foundations made up either directly or indirectly of majority capital of one or several bodies integrated in the public sector, or whose foundational assets, permanently make up more than 50% in goods or rights contributed to or lent by these institutions.

g) Social Security Health Services for Work Accidents and Occupational Illness.

h) Any organisation, body or entity with its own legal status, that has been specifically created to meet general needs, that does not have an industrial or trade purpose, as long as one or several subjects belonging to the public sector are majority financers of its activity, control its management or appoint more than half of the members of its administrative body, management or supervisory board.

i) Associations made up of organisations, bodies and entities described above.

Additionally, section 3 of the aforementioned Law sets out that public sector entities have the status of contracting authorities according to the Law, under the following terms:

According to the Law, contracting authorities are considered to be, the following organisations, bodies and entities:

a) Public Administrations.

b) All other organisations, bodies or entities with their own legal status, other than those described in section a), that

have been specifically created to meet general needs, that do not have an industrial or trade purpose, as long as one or several subjects (which must be considered contracted authorities according to the criteria stated in this section 3), are majority financers of its activity, control its management or appoint more than half of the members of its administrative body, management or supervisory board.

c) Associations made up of the organisations, bodies and entities described above.

2.2 Which private entities are covered by the law (as purchasers)?

As mentioned previously, article 3 of the TRLCSP defines its scope of application for certain private entities according to the Law. In order to give an accurate response to this point, we should distinguish entities which are subject to private Law for their organisation and functioning (regardless of the composition of their share capital), from entities which are private both from a legal point of view and due to their composition.

In this first case, legislation concerning public procurement is most definitely applicable for trade companies with share capital that is over 50% owned either directly or indirectly, by Public Administrations or other bodies comprising the current public sector. These companies are considered contracting authorities according to the Law, and as a result, are subject to its provisions.

In the same way, other private legal entities are also subject to this regulation, such as foundations made up of an either direct or indirect majority capital of one or several public sector bodies, or whose foundational assets are permanently made up of more than 50 per cent in goods or rights that are contributed or lent by these bodies; Social Security Health Services for Work Accidents and Occupational Illness, and in fact, any organisation, body or entity with its own legal status, that has been specifically created to meet general needs, that does not have an industrial or trade purpose, as long as one or several subjects belonging to the public sector are majority financers of its activity, control its management or appoint more than half of the members of its administrative body, management or supervisory board.

Finally, it should be pointed out that the Law also states that certain supposed entities belonging to the private sector are also subject to these regulations. This happens in the event that private entities set up any of the subsidised contracts defined in article 17 of the Law or when these entities enter into public works contracts with third parties, as set out in the terms of article 247 of the TRLCSP.

2.3 Which types of contracts are covered?

Within the scope of application of the TRLCSP, administrative contracts such as those set up by a body considered a Public Administration should be distinguished from private contracts. Both are subject to the Law, but differ in their degree of connection.

Article 19 of the TRLCSP considers administrative contracts those set up by a Public Administration wishing to carry out building work, a concession for public work, public service management, supply and services, as well as collaboration contracts between the public sector and the private sector. Excluded from consideration as administrative contracts are financial service contracts and those entered into for creative and artistic and literary interpretation, and entertainment shows.

However, atypical or special administrative contracts are considered to be those set up by a Public Administration that do not have any of the aforementioned characteristics (that are considered typical administrative contracts), are specifically connected to the contracting party Administration, in that their objective is to satisfy either directly or indirectly a public purpose that is specifically within their field of activity. In this case, they are considered special administrative contracts, as long as by Law they are not expressly considered to be private contracts.

Finally, any contracts set up by public sector bodies, organisations and entities that do not meet the condition to constitute them as Public Administration, are considered to be private contracts. Private contracts are also those set up by Public Administrations and which are not intended for any of the purposes that the Law defines as administrative contracts. In this regard, contracts of a patrimonial nature for example, set up by Public Administrations are private contracts.

Private contracts, whether they have been awarded by a Public Administration or by a public sector body, and which do not have this condition, are governed by their specific regulations, and in absence of these, by the provisions set out in the TRLCSP in as far as their preparation and allocation is concerned. Regarding their effects and expiry, these contracts are governed under private Law regulations.

2.4 Are there financial thresholds for determining individual contract coverage?.

EU Directives establish certain economic thresholds in order to determine in which way contracts are subject to its provisions. Accordingly, state regulations (in this case, the TRLCSP) distinguishes between contracts subject to harmonised regulations, such as contracts that are directly subject to the application of European Directives (also called SARA contracts), and contracts for a lower amount which are only connected to the regulations fixed by national legislation. The main difference between contracts subject to harmonised regulations and those which are not, is in the obligation in the contracting entity to announce the tenders and winners of harmonised contracts in the Official Journal of the European Union. Additionally, the maximum period for presenting bids is longer. Another notable characteristic of harmonised contracts is the possibility to interpose the so-called special procurement remedy, that in accordance with the regulation set out in Directives 89/665/EEC, 92/13/EEC and 2007/66/EC of the European Parliament and Council, all of which relate to remedy procedures concerning the awarding of public contracts.

The thresholds established to determine the difference between contracts subject to harmonised regulation (SARA contracts) and contracts only subject to national legislation depend on the European legislation and may be subject to periodic alterations. Currently, the thresholds which determine whether contracts are subject to harmonised regulation are the following (articles 14 to 17 of the TRLCSP):

Public works contracts and concessions: Public works contracts and concession contracts for public works are subject to harmonised regulation if their estimated value is equal to or in excess of 5,186,000 euros.

Public supply contracts: Public supply contracts are subject to harmonised regulation if their estimated value is equal to or more than the following amounts:

a) 134,000 euros, for contracts awarded by General State Administration, its autonomous bodies, or Managing Entities and Common Services of the Social Security. However, when contracts are awarded by contracting authorities that belong to the defence sector, this threshold is only applicable when it concerns supply contracts relating to the products listed in appendix III).

b) 207,000 euros, when it concerns different supply contracts based on the contracting subject or its purpose, of those described in the previous point.

Service contracts: Public service contracts described in categories 1 to 16 of Appendix II are subject to harmonised regulation if their estimated value is equal to or more than the following amounts:

a) 134,000 euros, for contracts awarded by General State Administration, its autonomous bodies, or Managing Entities and Common Services of the Social Security.

b) 207,000 euros, for contracts awarded by public sector organisations, bodies or entities other than General State Administration, its autonomous bodies, or Managing Entities and Common Services of the Social Security, or when even if they are awarded by these, they are category 5 contracts consisting of television and radio broadcasting services, telecommunication connection and integrated services, or category 8 contracts, as defined in Appendix II.

In accordance with the regulations set out in article 17 of the TRLCSP, contracts for public works and service contracts are in any case subject to harmonised regulations if more than 50 per cent of their amount is directly subsidised by entities that are considered to be contracting authorities, as long as they belong to one of the following categories:

a) Public works contracts for civil engineering activities described in section F, division 45, group 45.2 of the Standard General Classification of Economic Activities within the European Communities (NACE), or the building of hospitals, sports centres, leisure or recreational areas, school or university buildings and buildings for administrative use, as long as the estimated value is equal to or in excess of 5,186,000 euros.

b) Service contracts linked to any of the public work contracts described in point a), with an estimated value equal to or in excess of 207,000 euros.

As already indicated, the regulations for subsidised contracts will also be applied to those contracts set up by private sector entities or by public sector entities which are not considered contracting authorities.

Finally, it should be indicated that in contracts which are not subject to harmonised regulation (contracts that are below these thresholds) national legislation has also set out its own thresholds according to the amount of the contract in order to determine the different allocation procedures. This means, for example, that administrative public work contracts for amounts under 50,000 euros, or 18,000 euros for service contracts, can be awarded directly, without the need for a tender procedure nor public exposure (article 138 of the TRLCSP).

2.5 Are there aggregation and/or anti-avoidance rules?

One of the main changes introduced by Law 30/2007, currently TRLCSP, was to increase and define more precisely the types of public sector entities and bodies that have to subject their contracts to public sector regulations, with different levels of adherence depending on the nature of the entity in question. Therefore the extent of the application is one of the measures adopted to ensure the adherence of these entities to the regulations for public procurement.

Another of the measures set out in the TRLCSP is the establishment of very precise regulations in order to determine the estimated value of the contract, as well as the possibility of dividing its tender up into different parts. By establishing economic thresholds to define adherence to certain contracts subject to harmonised regulation, or even to determine the tender procedure and public exposure required in each case, it forces the Law to be especially attentive concerning the possibility of using fraudulent methods to avoid these regulations, by artificially reducing the price of the contracts.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

Spanish legislation sets out special regulations for concession contracts, distinguishing between public works concession contracts and public services concession. The concession of public works is defined by a contract whereby the contractor is assigned to carry out building work in exchange for either only the right to exploit it or the same right as well as the right to receive payment. Directive 18/2004/EC considered the public works concession contract as a type of public works contract and included it in the scope of its application. As a consequence, the public work concession contract is currently a contract subject to harmonised regulation, which is regulated in articles 240 to 274 of the TRLCSP.

This regulation also regulates the concession of services as part of the public service management contract, in articles 275 to 288 of the TRLCSP. The public service management contract consists of the indirect management of services which the Public Administration is responsible for, and in accordance with article 277 of the TRLCSP, one of the types of public service managements of the Administration is the concession. The recently approved Directive 2014/23/EU of the European Parliament and the Council, dated 26 February 2014, regulates the awarding of concession contracts for the first time on a European level, so therefore these contracts are subject to harmonised regulations. The deadline set for Member States, including Spain, to adapt their internal regulation to this Directive regarding service concessions, is 18 April 2016.

2.7 Are there special rules for the conclusion of framework agreements?

Yes. The framework agreements are regulated in articles 196 to 198 of the TRLCSP. They consist of establishing the conditions with one or several business representatives, that the contracts they wish to award during a certain period will have to comply to. These framework agreements are subject to the same public exposure as the rest of contracts, depending on the amounts and the conditions of the contracts to be awarded, and whether they are subject to harmonised regulation or not.

2.8 Are there special rules on the division of contracts into lots?

Yes. The main rule for dividing contracts up into separate lots is that this must not affect the estimated value of the contract, which is the decisive element in order to be able to set up the awarding procedure, as well as the public exposure which the awarding must be subjected to. As a result, article 88.7 of the TRLCSP sets out that if the contracting of public works or of a service or standard supply give rise to simultaneous awarding of contracts in separate lots, consideration shall be given to the estimated overall total of all the lots together.

Therefore, it must be taken into account that the thresholds that determine whether contracts are subject to harmonised regulation also take into account possible divisions of these into lots and set out specific rules with regards to this. Articles 14, 15 and 16 of the TRLCSP set out that when the accumulated value of the lots of the divided contract is equal to or more than the threshold determined for contracts to be subject to harmonised regulation, these

regulations will be applied to the awarding of each separate lot. However, contracting bodies are allowed to make exception to these rules for lots with an estimated value below certain amounts (1,000,000 euros for public works contracts, 80,000 euros for supply and service contracts) as long as the accumulated value of the lots does not exceed 20 per cent of the accumulated value of the total.

Current legislation requires that the contracting authority submits a justification for the division of contracts into lots, given that this is only permitted when lots can be used or benefitted from separately as a functional unit, or if the division of lots was due to their nature and objective of the contract. However, it should be pointed out that the new Directive 2014/24/EU introduces a total change in this point, with the objective of giving SMEs greater access to these contracts, which is expressly indicated in considerations 78 and 79. Therefore, article 46 of the Directive sets out that dividing contracts into lots will be the general rule (always abiding by the rule regarding calculation of the estimated value) and that if necessary the legislator must justify why they have chosen not to divide the contract up. Furthermore, the possibility of limiting the number of lots awarded to the same tender is also taken into account.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

In accordance with the provisions in Directive 2004/18/EC, the TRLCSP considers the following tender procedures for the awarding of contracts: an open procedure; a restricted procedure; a negotiated procedure, with competitive dialogue; and the tender of projects.

Procedures regarded as ordinary are: open procedures and restricted procedures, both should be applied on a general basis. However, applying a negotiated procedure, with or without public exposure, and a competitive procedure, are only applied in those cases specifically indicated by Law. Small contracts are those which are awarded without tender and are only allowed when they are below certain amounts.

The most favourable procedure for tenders, given that it is the procedure that most respects the principle of equality for each candidate, is the open procedure, in which any company with sufficient capacity and financial solvency (stated by the contracting authority in the tender specifications) can present a tender.

The restricted procedure is also considered an ordinary procedure, and the contracting authority is free to choose this option. In this procedure, only companies which have been selected after having made a request can present a tender, and will depend on the financial solvency in accordance with the criteria set out and justified in the tender specifications. In accordance with the terms set out in article 163 TRLCSP, the contracting body will indicate the minimum number of companies who will be invited to participate in the procedure, and cannot be less than five. If deemed necessary, a maximum number of candidates invited to present an offer may also be established.

The negotiated procedure is an extraordinary procedure, which may only be used when certain circumstances occur, which are set out in articles 170 to 175 of the TRLCSP. In the negotiated procedure, the contract falls with the tenderer chosen by the contracting entity, following consultation and negotiation of the contract terms with one or several candidates. The negotiated procedure may require public exposure, depending on its composition. Except in those cases where it is required to make the offer for tender public, the general rule is that the Administration area will directly contact the candidates that they consider meet the requirements for capacity and financial solvency, and negotiate with them matters regarding the contract's technical and economic specifications.

Competitive dialogue is another of the extraordinary procedures, and its use is subject to the Law, depending on certain circumstances. This procedure is particularly used for complex contracts in which it is considered that use of the open or restricted procedures do not allow for suitable allocation of the contract. In this procedure the technical and administrative specifications are substituted for a descriptive document. The contracting entity directs an exchange of opinions with the selected candidates, having requested this to them, in order to come up with solutions that meet their needs.

Project tenders are focused on obtaining plans or projects, mainly in the fields of architecture, engineering and data processing, and selection is made, following the corresponding tender, by a jury.

And finally, small contracts are those which a contracting authority can award a contract directly to any economic operator who has the capacity to act and has the required professional qualifications necessary to carry out the requirements of the contracts, without public exposure nor tender procedure. This type of allocation is only permitted for contracts of a low amount (50,000 euros for public works and 18,000 euros for contracting supplies and services).

As a general rule, the stages in which awarding procedures are divided up are the following:

- Preparation of the contract. In the preparation phase, the contracting authority establishes which tender process is to be followed, the administrative and technical tender specifications (including the conditions that define the rights and obligations of each party, as well as the technical specifications required according to the contract, and in general all of the points set out in articles 114 to 118 of the TRLCSP).
- Tender. In this phase offers are received from tenderers and during the first stage it is determined whether they have sufficient capacity and financial solvency to participate in the tender. In the second phase, the offers which have been presented are evaluated to determine the most economically advantageous offer. As a general rule, the contract is awarded to the most economically advantageous offer.
- Implementation. Once the contract has been awarded and formalised, the implementation phase of the contract begins, and ends once the contract has been correctly implemented.

3.2 What are the minimum timescales?

The general deadlines are as follows:

When contracts are subject to harmonised regulation, minimum time limits are established by the EU Directive, and the national legislator may extend these limits if it is considered appropriate. During the procedures for awarding of contracts subject to harmonised regulation, the time limit for presenting offers is not less than 52 days, counting from the date of sending the announcement of the contract to the European Commission. This limit may be reduced by five days when access to tender specifications and complementary documentation is available online.

For contracts not subject to harmonised regulation, the minimum time limit for receiving offers for the contracts is 26 days from publication of the tender announcement in the corresponding

gazette for public works offers and concession of public works. For remaining contracts, the minimum time limit is at least 15 days, although these limits may be extended in any case at the discretion of the contracting body.

In the case of restricted procedures, the time limit for receiving applications to participate is 37 days from the date in which the tender announcement is sent to the Official Journal of the European Union. From this moment, the tenderers who have presented an application to participate and have been accepted, will have a limit of 40 days to present their offers.

In the case of restricted procedures in contracts which are not subject to harmonised regulation, the minimum time to start receiving applications to participate is at least 10 days from publication of the announcement of the contract in the corresponding gazette, and the time limit allowed for presenting offers is 15 days.

For other procedures, time limits will depend on the complexity of the contract.

3.3 What are the rules on excluding/short-listing tenderers?

The TRLCSP regulates conditions for prohibiting entering into these contracts in detail, so the tenderers that are in these situations will not be able to enter into contracts with public sector bodies. Among these conditions, for example, is that the tenderer has been declared financially insolvent during any of the procedures, or is not up-to-date in tax or social security obligations, etc.

Besides this, as a general rule, any individual or legal entity, national or foreign, is obliged to have total capacity to act, and meet the requirements for capacity and financial solvency set out in the tender specifications. Regarding financial solvency and the means to accredit this, it should be highlighted that for certain contracts with Public Administration it is necessary that the economic operators are duly classified.

3.4 What are the rules on evaluation of tenders?

The basic criteria for awarding the contract are determined by the contracting body and will be expressed in detail in the announcement, in the specific Administration clause specifications or in the description document. These documents must state the assessment criteria that will be applied, as well as the assessment and/or relative weighting. The regulation for criteria for awarding the contract is related to the principles of equality and non-discrimination, as well as the principles of free competition and the prohibition of arbitrary action. Article 150 of the TRLCSP regulates the assessment criteria of the offers, by setting out that in order to determine criteria for awarding contracts, preponderance will be given to those who make reference to the characteristics of the object of the contract, which can be evaluated in figures or percentages obtained through the application of the formulas described in the tender specifications. In the event that for a tender following an open or restricted procedure, the criteria to be assessed is attributed a lower weighting (applied automatically through formulas) than that which would correspond to criteria with a quantified value judgment, then either a committee should be set up with a minimum of three members who are experts but do not form part of the contracting body, and have appropriate qualification, and who will carry out the assessment of offers according to these criteria, or the assessment should be entrusted to a specialised technical body which is duly identified in the specifications.

This criteria could narrow it to one, in which case it must be the one with the lowest price.

3.5 What are the rules on awarding the contract?

Article 151 of the TRLCSP states that the contract should be awarded to the tenderer who has presented the most economically advantageous offer. However, this does not mean that the contract must be awarded to the tenderer who has offered the lowest price for those cases in which the specifications set out several assessment criteria for the offers. In this event, the contract will be awarded to the tenderer whose proposal as a whole, by applying the assessment criteria set out in the specification, obtains the best assessment.

As previously mentioned, article 150 of the TRLCSP establishes a preponderance for objective criteria or which can be assessed through the application of mathematical formulas.

3.6 What are the rules on debriefing unsuccessful bidders?

The selection of the most economically advantageous offer, and as a result the one awarded to the contract, must have been made on the basis of the assessment criteria of the offers made and previously published by the contracting entity. The result of the assessment of offers must be accessible to the rest of the tenderers, who may contest this assessment if they do not agree with it.

3.7 What methods are available for joint procurements?

The TRLCSP anticipates some joint tender procedures, the objective of which is to rationalise administrative proceedings and make the public procurement process more efficient. In this regard, an example of this would be the framework agreements referred to in question 2.7, the dynamic purchasing systems, and central purchasing bodies.

Dynamic purchasing systems are procurement procedures set up exclusively by electronic and computer means or telematics, for contracting public works, services and general supplies and which have a maximum duration of four years. They are set up by publishing a tender announcement, which will expressly indicate that a dynamic procurement system of is to be opened. Throughout the duration of the system, the companies which have presented an indicative offer, may improve their offer, and any interested companies may also present an indicative offer in order to be included.

Every contract awarded under the dynamic system must follow a tender process and all businesses accepted in the system will be invited to present an offer for a specific contract.

Concerning Public Administration centralised purchases, articles 206 and 207 of the TRLCSP regulate the centralised purchase by general state administrations of supplies and services.

3.8 What are the rules on alternative/variant bids?

Article 147 of the TRLCSP sets out the rules for accepting variations or improvements in the offers presented by tenderers. Presentation of these is allowed as long as in awarding these, different criteria other than price is taken into account, and the specifications for specific administrative clauses have expressly set out this possibility. Additionally, it is obligatory that this is expressly stated in the tender announcement.

3.9 What are the rules on conflicts of interest?

Conflicts of interest in the public sector are currently regulated under Law 5/2006 dated 10 April, for the Regulation of Conflicts of Interest of Members of the Government and Senior Officials of General State Administration, as well as on a general basis, in Law 53/1984 dated 26 December, for Incompatible activities related to Public Administration Staff, and Organic Law 5/1985 dated 19 June, for the General Electoral System, relating to conflicts of interest and incompatible activities related to elected representatives. Additionally, the regulation at a local government level should be added to this, which was approved to regulate incompatible activities relating to staff serving the different local administrations.

In this context, article 60 of the TRLCSP sets out the general prohibition of entering into contracts with the public sector with contractors in which either an individual, or the administrators of an entity of legal capacity, are involved in any of the incompatibilities indicated in these regulations.

For legal entities, this prohibition does not only affect those who are administrators, but also the very composition of the share capital, affecting the prohibition to enter into contracts for all legal entities in whose capital they have a share of, under the terms and amounts set out in the aforementioned legislation, senior officials of any Public Administration, as well as the elected representatives serving these.

The prohibition is also extended in both cases to spouses of those affected, or any individual with a similar relation of cohabitation, and descendants of those affected for reasons of incompatibility.

4 Exclusions And Exemptions (Including In-house Arrangements)

4.1 What are the principal exclusions/exemptions?

Article 4 of the TRLCSP sets out the businesses and legal relations which are excluded from the application of Law and are to be governed by their own specific regulations. They are the following:

a) The service relationship of civil servants and the contracts governed by labour legislation.

b) The legal relationships involving the provision of a public service, the use of which requires the payment by the users of a fee, rate or public price of general application.

c) The collaboration agreements entered into by the State Administration with the management entities and common services of the Social Security, the Public Universities, the Autonomous Communities, the Local Entities, the Autonomous Agencies and remaining Public Entities; or those agreements entered into by these bodies and entities with each other, unless, by their nature, are considered to be contracts subject to this Law.

d) The agreements that, in accordance with the specific rules governing them, are celebrated by the Administration with natural or legal persons subject to private Law, provided that their object is not included in the contracts regulated under this Law or in special administrative rules.

e) The agreements included in the scope of article 346 of the Treaty on the Functioning of the European Union that are concluded in the defence sector.

f) The agreements entered into by the State with other States or international public Law entities.

g) Supply contracts relating to direct activities of public bodies, dependent on the Public Administrations, whose activity is commercial, industrial, financial or similar, if the goods on which they deal have been acquired for the purpose of returning them, with or after processing, to the market, according to their peculiar purposes, provided that such bodies are acting by virtue of the specific powers assigned to them by the Law.

h) Contracts and agreements resulting from international agreements concluded in accordance with the Treaty on the Functioning of the European Union with one or more third countries not members of the Community, relating to works or supplies intended for the joint implementation or exploitation of a work, or contracts relating to services for the joint implementation or exploitation of a project.

i) Contracts and agreements made pursuant to an international agreement relating to the stationing of troops.

j) Contracts and agreements awarded by virtue of a specific procedure of an international organisation.

k) Contracts relating to arbitration and conciliation services.

l) Contracts for financial services in connection with the issuance, purchase, sale and transfer of securities or other financial instruments, in particular, transactions relating to state financial management and operations aimed at obtaining money or capital by the bodies, organisations and public sector entities, as well as the services provided by the Bank of Spain and treasury operations.

m) The contracts whereby a body, organisation or public sector entity is obliged to deliver goods or rights or provide a service, notwithstanding the fact that the purchaser of goods or recipient of services, if it is a public sector entity subject to this Law, must conform to its requirements for entering into the contract.

n) Legal businesses whereby it is commissioned to an entity that, as stated in article 24.6, has the condition of resource and technical service of the Commissioning Administration, the performance of a certain service. However, the contracts to be awarded by the said entities for the provision of the commissioned services shall be subject to this Law, on such terms as may be appropriate according to the nature of the contracting entity, the type and amount of the contract; and in any event, when dealing with contracts for works, services or supplies whose amounts exceed the thresholds established in Section 2 of Chapter II of this Preliminary Title, the private Law entities must follow in their preparation and award the rules laid down in Articles 137.1 and 190.

o) The authorisations and concessions on public property, and the contracts for the operation of patrimonial assets other than those defined in article 7, that will be governed by their specific legislation, except where expressly declared applicable the provisions of this Law.

p) The contracts of sale, donation, swap, lease and other similar legal transactions on immovable property, securities and intangible assets, unless they affect computer programs and should be classified as supply or services contracts, which will always have the character of private contracts and governed by the Law of property. These contracts shall not include services that are specific to typical contracts regulated in Section 1 of Chapter II of the Preliminary Title, if the estimated value of the same exceeds 50 per 100 of the total amount of the business, or if they are not linked to the principal object of the patrimonial contract in the terms provided in article 25; in these two cases, the said services must be subject to independent contracting in accordance with the provisions of this Law.

q) The supply and service contracts concluded by the State Public Research Bodies and similar bodies of the Autonomous Communities, aimed at services or products needed for the implementation of research projects, technological innovation and development, or technical

services, when the presentation and outcome derived therefrom is linked to scientific, technological and industrial returns, which are suitable for being traded, and their performance has been entrusted to the Body's research teams pursuant to a competitive procedure.

r) The research and development contracts remunerated in full by the contracting authority, provided that it shares with the successful tenderers the risks and benefits of scientific research and technical expertise necessary to develop innovative solutions that outperform those available on the market. In awarding these contracts, the contracting authority must ensure the respect for the principles of publicity, competition, transparency, confidentiality, equality and non-discrimination and selection of the most economically advantageous tender.

All in cases, the second section of this article clearly states that for the resolution of any doubt or uncertainty that may arise in this type of business, the principles and regulations set out in the law will be applied. Particularly, the general principles derived from the European Union treaties will be applied, fundamentally, the respect for principles of freedom of access, public exposure, transparency and non-discrimination in treatment of candidates.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

As a result of the previous section, article 4.1.n) of the TRLCSP expressly excludes from the application of the Law, the legal businesses by virtue of which the contracting authority entrusts an entity which has the condition of its own means as well as their technical service to provide a certain service.

The definition of own means, and as a result, the so-called "in house" contracts contained in the TRLCSP is directly attributed to the jurisprudence of the European Union Court of Justice which has been responsible for defining this concept and has been streamlining it since the first sentence on 18 November 1999 (C-107/98, Rec. I-8121, Teckal).

In this regard, article 24.6 of the TRLCSP defines in-house contracts under the following terms:

"With regard to the purposes provided in this article and in article 4.1.n), the organisations, bodies and entities of the public sector can be considered to have their own means and technical services from the contracting authorities for which they carry out the majority of their activity when they hold a similar control over these to that which they hold over their own services. If they are companies, the total of their capital must also be publicly owned."

In any case, it is understood that the contracting authorities hold a similar control over an organisation, body or entity to that which they hold over their own services if they can confer them management duties which are obligatory for them according to the instructions fixed unilaterally by the purchaser, the payment of which is fixed by reference to rates approved by the public entity they depend on.

The condition of own resources and technical service of the entities who meet the criteria indicated in this section, must be expressly recognised by their own regulation or statutes which the entities must determine with respect to which have this condition and define the rules of duties which can be conferred to them, or conditions under which they can be awarded contracts, and for these will determine the impossibility of participating in public tenders opened by the contracting authorities of which they have their own resources notwithstanding that when no tenderers concur, the provision of them may be in charge of ordering them.

5 Remedies

5.1 Does the legislation provide for remedies and if so what is the general outline of this?

In accordance with the regulations set out in European Directives, and particularly, in Directive 2007/66/EC, dated 11 December, regulating the review of the procurement process, articles 37 to 50 of the TRLCSP regulate the so-called question of nullity of contracts in a special review of the procurement procedure.

In the special review for procurement procedure, Public Administration contracts and contracting authorities may intervene in contracts that are subject to harmonised regulation, and if they are not, in the following cases:

- Service contracts included in categories 17 to 27 of Appendix II with estimated values equal to or above 207,000 euros.
- Public service management contracts in which the budget for initial costs, excluding the amount for Value Added Tax, is above 500,000 euros and the duration over five years.

Within the framework for contracts indicated in the special reviews for procurement procedures, it may be possible to intervene against.

- Tender announcements, tender specifications and contract documents which establish the conditions under which the contract is enforced.
- Procedural methods adopted in the awarding process, as long as these influence directly or indirectly on allocation, determine the impossibility to continue the procedure, or produce irreparable defencelessness or prejudice to legitimate rights or interests.
- Awarding procedure agreements adopted by contracting authorities.

The special review process for procurement has an administrative nature, not jurisdictional, and it is always optional for the interested parties, who in certain circumstances, can opt to intervene directly with a judicial appeal. If the special review intervenes against the decision for awarding the contract, it has an automatic suspension effect and prevents the contract being formalised, either until the competent body decides to lift the suspension, or until resolution of the appeal begins.

Given that it is an administrative appeal, the decision adopted by the competent body may always be subject to review by the ordinary courts of justice.

Tendering procedures which, according to this regulation, cannot be subject to special review, can be appealed through the ordinary administrative appeals, as long as their admission is authorised.

Concerning articles 37, 38 and 39 of the TRLCPS, these regulate special cases of contractual nullity and the so-called question of nullity for contracts subject to harmonised regulation as well as service contracts included in categories 17 to 27 of Appendix II with estimated values equal to which exceed 207,000 euros.

The question of nullity may intervene in especially serious infringements of the procedure, and which possible tenderers or those affected may not necessarily be aware of (such as infringements regarding the rules on public exposure of the tender, or those regarding suspensory effects of the special review, etc.), and be subject to longer time limits. This does not cause automatic suspension of the contract.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

As already mentioned, both the special review procedure for procurement and the question of nullity are optional and it may not be necessary to effectuate these in order to access the ordinary courts of justice. Therefore in certain circumstances, assuming that there are grounds for admission, the interested party may react against proceedings that they consider damaging to their interests, by filing the corresponding appeal to the ordinary courts of justice.

When the special review does not apply to the contract, ordinary administrative appeals which apply may be filed.

Finally, the dispute resolution that may arise with regards to the effects, performance and termination of the contracts, may be subjected to arbitration only when the contracting authority is not a Public Administration. Arbitration is conducted in accordance with Law 60/2003, dated December 23, for Arbitration.

5.3 Before which body or bodies can remedies be sought?

The EU Directive 2007/66/EU sets out that the resolution for special review for procurement procedures is conferred to an independent body, not necessarily a judicial one. Conforming to this, Spanish legislation has created a new specialised body, the Central Administrative Tribunal for Procurement Remedies, for the resolution of special reviews for procurement procedures that are filed against contracts or procurement records within the scope of general State Administration.

The TRLCSP states that autonomous regions may create a similar independent body of an administrative nature, for the resolution of appeals that are filed against contracts, within the scope of the respective autonomous region's authority. To date, the majority of autonomous regions have created these specialised administrative tribunals.

Within the scope of Local Administration, resolution of these appeals is established by the regulation set out by each autonomous region and in the in the absence of express attribution, it corresponds to the autonomous body created to this effect.

5.4 What are the limitation periods for applying for remedies?

The filing of a special review for procurement must be announced in advance before the contracting authority. This announcement, and the subsequent appeal must occur within 15 working days counting from the following day after notification of the action that is being appealed against.

The question of nullity must be presented in a period of 30 working days from publication of the contract's allocation, or from notification to the tenderers affected by the reasons for rejection of their application or proposal. For other cases, the question of nullity may be presented in any case before six months after the contract has been formalised.

Ordinary administrative appeals must be presented within a month from notification of the action appealed against.

Reviews filed with the administrative dispute courts must be presented within two months from notification of the actions appealed against.

5.5 What measures can be taken to shorten limitation periods?

There are no procedures which can reduce the time for filing appeals, although these are already quite short. Likewise, there is no urgent procedure regulated to shorten the time established for resolving appeals. However, it should be noted that, in accordance with the Central Procurement Review Court Report for 2013, the average time required for the resolution of appeals filed during that year was 17 days.

5.6 What remedies are available after contract signature?

Once the contract has been formalised and for a maximum period of six months the interested parties may present the question of nullity regulated in articles 37, 38, and 39 of the TRLCSP, as long as one of the conditions specifically set out for this has been met.

Furthermore, in the case of administrative contracts, following its formalisation, an *ex officio* review can be made, in accordance with the regulation set out in article 34 of the TRLCSP. For private contracts, an application for nullity can be made, due to invalidity reasons which are regulated by civil Law.

5.7 What is the likely timescale if an application for remedies is made?

The period during which the special review for procurement procedures will be resolved cannot be established in advance, and the duration of the processing of this will depend on the complexity of the matter, on those affected, as well as on whether it is necessary to open a probationary period or not. However, the Law sets out very short processing periods (five days to resolve continuation of the suspension, five days to present allegations, 10 days for probation), and, as already stated, in accordance with the Central Procurement Review Court Report for 2013, the average time required for the resolution of appeals filed during that year was 17 days.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

In accordance with the Central Procurement Review Court Report for 2013, a total of 1067 special reviews for procurement processes were presented regarding general State Administration, out of which 1009 had been resolved by 1 February 2014. Out of these, 172 were totally upheld and 168 were partially upheld. 314 reviews were dismissed and 340 were declared inadmissible, mainly due to lack of legitimacy of the appellant. Therefore, over 50% of appeals admitted were either totally or partially upheld.

5.9 What mitigation measures, if any, are available to contracting authorities?

In the event that the administrative court perceives temerity or bad faith in the filing of an appeal or in the application for interim measures, the responsible party may be fined for this. The amount of this would be between 1,000 and 15,000 euros, to be determined depending on the degree of bad faith perceived and the damage occurred to the contracting authority and the rest of the tenderers.

6 Changes During A Procedure And After A Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Once the tender announcement has been published, no possibility has been set out for the contracting authority to change the tender specifications and conditions for awarding the contract. If the Administration intends to make changes, it should leave the already started tender procedure unaffected, and approve new conditions and specifications, opening up a new tender.

Notwithstanding this, modification of contracts during their execution and also during the tender procedure and once the contract has been awarded, is strictly regulated.

6.2 To what extent are changes permitted to final tenders (pre- and post-contract award)?

Once presented, offers made by tenderers may not be changed, neither before nor after awarding the contract.

6.3 To what extent are changes permitted post-contract signature?

Regulation of contract modification during execution of them, and therefore, after they have been formalised, is currently set out in articles 105 to 108 of the TRLCSP.

In accordance with this regulation, modification of contracts during their execution will only be possible, as a general rule, when this is expressly set out in the Tender Specifications or in the tender announcement, and the conditions under which this can be made has been expressed precisely and in clear detail, as well as scope and limits of any modification that may be agreed by expressly indicating the maximum percentage of the contract price that these may affect, and the procedure that must be followed to do so.

1. Any modifications not set out in the specifications or in the tender announcement may only be made if sufficient justification relating to any of the following circumstances is made:
   a) Inadequacy of services requested to meet the needs intended to be covered in the contract, due to errors or omissions occurring during the drafting of the project or of the technical specifications.
   b) Inadequacy of the project or of the specifications regarding the service to be carried out, due to objective reasons determining its inadequacy consisting of geological, water, archaeological, environmental, or similar circumstances, stated after the awarding of the contract, and which were previously unforeseeable, having applied total diligence denoting good professional practice during the project planning or in the drafting of the technical specifications.
   c) *Force majeure* or unforeseeable circumstances which made carrying out the service in the initially set terms impossible.
   d) The necessity to include technical developments to substantially improve it, as long as availability of these on the market occurred after awarding the contract, due to the status of technical conditions.
   e) The need to adjust the service to technical, environmental, urban, safety, or accessibility specifications, which were approved following the awarding of the contract.
2. Agreement of modifications made to the contract in accordance with the conditions set out in this article cannot alter the essential conditions of the tender or awarding of the contract, and must be limited to including the strictly essential variations necessary to address the underlying cause that make them necessary.
3. According to the conditions stated in the last section, it is understood that the essential conditions for tender and awarding of the contract will be altered in the following cases:
   a) When modification substantially alters the function and essential characteristics of the service initially contracted.
   b) When modification alters the relation between the service contracted and the price of it, as defined in the conditions for the awarding of it.
   c) When different professional expertise is required to that stated in the initial contract, or financial solvency conditions are substantially different, for the changes made to the contract to be carried out.
   d) When modifications made to the contract are equal to or exceed, more or less 10 per cent of the price when awarding the contract; in the event that subsequent modifications are made, the total of these must not exceed this limit.
   e) In any other case in which it can be presumed that, if the modification had been known in advance, different interested parties may have opted to tender, or if the tenderers taking part would have presented substantially different offers to those made.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

In the event that this transfer is carried out due to company mergers or spin-offs, the TRLCSP states that the contract should remain with the entity awarded, as long as it has the financial solvency required upon agreement of awarding it, or the different beneficiary companies of the aforementioned transactions, and if existing, the company from which assets derive, companies or branches, are fully and jointly responsible for the execution of the contract.

Notwithstanding this, article 226 of the TRLCSP also regulates the conditions under which it is possible to assign a contract to a third party, once it has been formalised. To this regard, the Law allows for assignment as long as it has been previously authorised by the contracting authority, the assignor has executed at least 20 per cent of the amount of the contract, or if it is for management of a public service, that this had been carried out for at least a fifth of the duration of the contract, the assignee has sufficient capacity to enter into a contract with the Administration and the required financial solvency, which must be duly classified if this requirement has been asked of the assignor, and must not for any reason by forbidden to contract, and ultimately, that the assignor's technical or personal qualities have not been a deciding factor for awarding the contract, and the assignment of it would not imply a restriction on competition in the market. Assignment to third parties is not authorised if this implies a substantial alteration of the characteristics of the contractor in the event that these are essential to the contract.

Assignment must be formalised publicly in writing and the assignee will be subrogated in all the rights and obligations that would correspond to the assignor.

7 Privatisations And PPPS

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Regulations relating to liberalisation of certain sectors in the economy that had traditionally been state monopolies, do not form part of the legislative body of Spanish legislation for contracts, nor are they included in EU Directives on public procurement.

However, contract legislation does regulate the provision of public services by private entities. This concerns forms of indirect management of public services and not in any cases privatisations or liberalisations of these services, given that the contracting Public Administration always keeps an authoritative control and strategic management of the service.

Article 275 of the TRLCSP states that the Administration may indirectly manage services within its competence, through a contract, as long as they are susceptible to being exploited by private companies. Services by indirect management may not be lent that imply exercising of authority inherent to public powers, under any circumstances. Modalities of indirect management of public services set out in state legislations are:

- Concession, where the business manages the service at its own risk.
- Interested management in which both the administration and business benefit from the service, in the proportions established in the contract.
- Concession with an individual or legal entity that carries out similar services to those of the public service in question.
- Partially public-owned companies, in which the administration participates itself or through a public entity, together with individuals or legal entities.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

One of the provisions of the TLCSP includes the collaboration contract between the public and private sectors. Article 11 of this Law defines this type of contact as one in which a Public Administration or a public business entity or similar body belonging to the Autonomous Regions requests a private legal entity to intervene in a global and integrated action for a certain period, depending on the duration of recovering the cost of investment or expected financial formulas. This action, in addition to financing immaterial investments of building work or supplies required in order to meet certain objectives of public service or related to interventions of general interest, should also include one of the following:

a) The construction, installation or transformation of works, equipment, systems, and products or complex assets, as well as their maintenance, up-dating or renovation, their exploitation or management.

b) The comprehensive management of complex installations.

c) The manufacture of goods and the provision of services that include specifically developed technology with the aim of providing more advanced and economically advantageous solutions than those already in existence.

d) Providing other services related to development for public service Administration or of general interest they have been put in charge of.

Furthermore, it should be pointed out that only collaboration contracts between the public and private sector can be put into effect, if it has been made clear that other alternative types of contract do not sufficiently meet the public sector needs.

However, aside from this new type of contract, it should be taken into account that Spanish legislation concerning contracts has traditionally accounted for the existence of institutionalised public and private collaboration as types of indirect management of public services. In this regard, regulation related to the constitution of partially public-owned companies should be highlighted, in which the administration participates alone or through a public entity, together with individuals or legal entities from the private sector.

Partially publicly-owned companies are considered in article 177 of the TRLCSP as a type of public service management company, and therefore their creation is subject to issues, procedures and conditions of this type of contract. However, the additional 29th Provision of the TRLCSP regulates the contractual regime of this type of company in detail, as institutional forms of collaboration between public and private sectors, pointing out that public contracts and concessions could be directly awarded to a partially-publicly owned company in which public and private capital concurs, as long as the choice of private associate has been carried out in accordance with the regulations set out in this Law for awarding of contracts whose execution makes up their object, and where applicable those relating to the collaboration contract between the public and private sector, always on the understanding that no modifications in objects or conditions of the contract will be made that were taken into account during the selection of the private associate.

On the other hand, the second section of this additional Provision also regulates the financial regime of these companies, stating to this effect that: "Notwithstanding the possibility of using financial means such as issue of bonds, loans, or participating loans, partially publicly-owned companies set up for executing a public contract and which are set out in this additional provision, can (a) obtain capital increases, as long as the new capital structure does not alter the essential conditions of the awarding of the contract unless it had been already foreseen and set out in the contract, and (b) securitise the right to payment that they hold in relation to the entity awarding the contract the execution of which it is responsible for, by obtaining authorisation from the contracting body, having met the requirements set out in the regulations regarding market values".

8 Enforcement

8.1 Is there a culture of enforcement either by public or private bodies?

Public procurement represents approximately 18.5% of GDP in Spain. Despite this, one of the traditional characteristics of public procurement has been the absence of many legal conflicts regulating the awarding of contracts. This situation has been largely due to the slim possibilities of obtaining a really efficient control over this.

However, the amendment made for reviews in Directive 2007/66/EU as well as the new regulation for public procurement introduced in Spain via Law 30/2007 for public sector contracts, and administrations adopting good codes of conduct regarding governance and transparency, have given rise to a greater level of commitment in this area, both from Public Administrations and also in general, from potential tenderers, which are more and more attentive and demanding with strict compliance of the Law. This has caused an increase in lawsuits.

The more efficient legal control is carried out both by Administrative Courts for contract review and as a last resort by the Courts of Justice, whether in administrative dispute jurisdiction or under criminal jurisdiction for actions that may be considered criminal.

The action of the Court of Auditors should also be taken into account, an institution in charge of supervising activity regarding State Administration contracts, and where applicable, requiring accounting responsibility from those who handle public funds (there are similar public bodies created by the autonomous regions for control over their respective administrations).

And finally, also from the National Commission for Markets and Competition, Public Administration proceedings in procurement are controlled in order to avoid distortions in free competition and unfair practices.

8.2 What national cases in the last 12 months have confirmed/classified an important point of public procurement law?

In the last year, several proceedings relating to public procurement have taken place. Especially notable for its high media coverage was the conflict that arose from the awarding of a contract by the Catalan Government (Generalitat de Catalunya), through a public service management contract managed by Aigües Ter Llobregat water company, as well as the water supply infrastructure that this entity has. One of the tenderers filed a special appeal against the awarding of this contract, to the administrative Courts for contractual review, which partially upheld the special review for procurement proceedings, in the sense of excluding the awarded company from the procedure. This resolution was appealed for to the Courts of Justice and is currently pending sentence.

9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

As already stated, this year new EU Directives for public procurement have been approved.

- Directive 2014/23/EU, dated 26 February 2014, concerning concession contracts.
- Directive 2014/24/EU, dated 26 February 2014, concerning public procurement which replaces Directive 2004/18/EC.
- Directive 2014/25/EU, dated 26 February 2014, concerning contracting by entities operating in the water, energy, transport and postal services sectors.
- Directive 2014/55/EU, from the European Parliament and the Council, dated 16 April 2014, concerning electronic invoicing in public procurement.

The maximum period for transposition of the first three is 18 April 2016, so presumably before this date, amendments to legislation will be made to adapt current Spanish legislation to that contained in the Directives. Concerning the Directive on electronic invoicing, this must be transposed to the national legislation of each Member State before 27 November 2018.

The main change in this new wave of EU Directives is the regulation to this level for the first time of concession contracts in Directive 2014/23/EU and their consideration from now on as contracts subject to harmonised regulation. This could have a large impact on the legislation of some European Member States. However, in Spain the TRLCSP already regulates these contracts as a whole, and subjects them to a similar regime (except those related to European publicity) as the remaining contracts subject to harmonised regulation. Apart from this, the main changes in Directives 2014/24/EU and 2014/25/EU are:

- Priority is given over price, to aspects such as quality, environmental considerations, social aspects or innovation.
- A new tender procedure is introduced, that of association for innovation.
- Bureaucracy and costs to companies will be eliminated, as only the awarded entity will be required to present original documents accrediting compliance with the legal conditions set out for contracting, and for the rest this is substituted for declarations by the participants during the procurement process.
- Provisions are established to guarantee that subcontractors meet the applicable obligations in the areas of environmental, social and employment Law, while in the event of non-payment by the contractor, the possibility will be made that the contracting entity would pay the subcontractors directly.

9.2 Are any measures being taken to increase access to public procurement markets for small and medium-sized enterprises and other underrepresented categories of bidders?

As already indicated, one of the main objectives of the new EU Directives is to enable SME access to public contracts. To this effect, measures are introduced to reduce bureaucracy to contract and enable electronic contracting in order to access tenders all over Europe without the need to have a large business structure. One European procurement document will be created, exclusively in electronic format, consisting of a business declaration in the sense of not being excluded, of meeting all the requirements necessary to be a bidder, and to be able to accredit all of the corresponding documentation.

Furthermore, one of the measures explicitly adopted by the Directive to make SME access to tenders easier, is the new regulation to divide contracts into lots, and the need for the contracting authority to expressly justify non-division of these, under the terms already stated in question 2.8.

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