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# Public Procurement & Government Contracts 2022

Spain: Law & Practice

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## Law and Practice

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## 1. GENERAL

### 1.1 Legislation Regulating the Procurement of Government Contracts

Currently, all legislation pertaining to public procurement in Spain is contained mainly within Law 9/2017, of 8 November, on Public Sector Contracts (*Ley de Contratos del Sector Público* – LCSP), which transposes Directives 2014/23/EU and 2014/24/EU of the European Parliament and the Council, of 26 February 2014, into the Spanish legal system.

This law establishes the following:

- the obligation for contracts to always have a specified price, in accordance with the services rendered;
- for this price to be adequate for the effective performance of the contract, based on the general market price;
- the possibility of reviewing these prices when they need to be adjusted, whether upwards or downwards, in order to account for economic changes to costs and, whenever possible, establishing classes for price changes based on specific targets whether in terms of periods or performance; and
- the payment method, in addition to all existing mechanisms for claiming the debt in cases of default by the administration.

Since Spain is a decentralised country, the Procurement Law is also complemented by the regional dispositions for each Autonomous Community (regional government).

### 1.2 Entities Subject to Procurement Regulation

Within the subjective scope of the LCSP, several entities and bodies are subject to procurement regulation in terms of the form and terms provided for them to be classified as contracting authorities. In particular, the law stipulates the

public administrations (the General Administration of the State, the Administrations of the Autonomous Communities and the Entities that make up the Local Administration), as well as public entities, commercial companies, foundations and associations that have been specifically created to satisfy the needs of the general interest or that simply fulfil the legal requirements. On this matter, the LCSP provides detailed regulation of the cumulative requirements that must be met in order to fall within the scope of its application, which has been significantly expanded.

### 1.3 Types of Contracts Subject to Procurement Regulation

The LCSP has reorganised the typical contracts to which it applies, in a bid to increase collaboration between the private and public sectors and thereby reactivate the Spanish economy. The legislator has expressly provided the following various types of contracts.

- A works contract is a contract between the administration and a businessperson with the purpose of:
  - (a) building goods of a real estate nature that are sufficient to fulfil an economic or technical function;
  - (b) the performance of works modifying the shape or substance of the land or subsoil; and
  - (c) the reform, repair, preservation or demolition of the aforementioned goods. The contract may also include the drawing up of the project. Furthermore, within the works contract, the law distinguishes between those contracts that relate to preliminary construction works, reform, restoration, refurbishment and extensive repairs, those that relate to simple repairs, those that relate to preservation and maintenance, and those that relate to demolition.

- A works concession contract is a contract in which the subject matter is the performance by the concessionaire of some of the works specified in the works contract, including the restoration and repair of existing buildings and the preservation and maintenance of the elements already built. Its consideration consists of either the right to operate the works, or of a combination of said right and a price. The main component of a works concession contract and a service concession contract is the transferral of the operational risks arising from the operation of the works, including demand or supply risks, or both. Operating risks arise when there is no guarantee that, under normal operating conditions, the concessionaire will recover the investment made, nor cover the costs incurred as a consequence of the operation of the works subject to the concession – ie, when there is a real exposure to the uncertainties of the market so that any potential estimated losses incurred by the concessionaire would not result in mere nominal losses.
  - A service concession contract is a contract by which one or several contracting authorities awards one or several legal persons or individuals, against payment, the management of a service that is owned by or comes within the responsibility of the contracting authority, and for which consideration consists of the right to operate the services subject to the contract or of said suitable class the right to receive a payment [price]. As in the works concession contracts, the service concession contract implies that the operational risks will be transferred to the concessionaire.
  - A supply contract is a contract drawn up with the aim of acquiring, leasing or renting movable products or goods, with or without the option to purchase, excluding those contracts that refer to computer programs, intangible property or tradable securities and, in any case, including the following contracts:
    - (a) those where the businessperson is obliged to deliver a series of goods consequently and for a price per unit, where the final amount is not entirely determined at the time the contract is drawn up, since the deliveries depend on the buyer's needs;
    - (b) those aimed at acquiring and renting telecommunications or data processing systems and equipment, their devices and programs, and the transfer of the right of use of the latter, in any of its accessibility possibilities, except for ad hoc computer programs, which shall be considered as service contracts;
    - (c) manufacturing contracts, where the product or products to be delivered by the businessperson must be manufactured according to a specific set of characteristics previously agreed by the contracting authority, even when said contracting authority must fully or partially provide the necessary raw materials; and
    - (d) those aimed at the acquisition of primary energy or transformed energy.
  - A service contract is aimed at providing services consisting of the performance of an activity or aimed at obtaining a result other than a (construction) work or supply, where the contractor is obliged to provide the service consecutively and for a price per unit.
- Regarding the minimum value thresholds, the LCSP only provides detailed regulation for contracts that are subject to harmonised regulation. For instance, for the services concession contract, among others, Article 20 establishes a minimum quantity of EUR5,382,000.
- Lastly, it is relevant to mention the innovations related to in-house procurement. This type of public agreement cannot technically be clas-

sified as a contract, but allows administrative bodies or public law entities to entrust the performance of material or technical activities to other administrative bodies or public law entities, provided certain legal requirements are met.

## 1.4 Openness of Regulated Contract Award Procedure

The free market principles dictate that every entity and body that fulfils the legal requirements will be allowed to conclude public contracts. However, it is essential to mention that procurement law establishes the following six different procurement procedures, with the possibility of opting for one or the other based on different criteria, such as the purpose of the contract, its value or the specific needs of the administration.

- In the open procedure, the administration calls for the tender of the contract through a procurement notice. Any interested organisation can then submit a proposal within the established terms without any margin for negotiation. Once the bids have been studied, the award will be decided based on a series of criteria, usually based on the balance between quality and price (best value for money).
- The restricted procedure is substantially similar to the open one, except the bidders are pre-selected by the contracting authority based on their technical, economic and financial capacity. A minimum of five bidders must be pre-selected. Otherwise, the award of the contract follows the instructions established for the open procedure without the possibility of negotiation. The law recommends using this procedure when the purpose of the contract makes reference to complex intellectual services, such as consulting, architecture or engineering services.
- In the procedure with negotiation, the award will go to the tenderer that is duly elected after negotiating the terms and conditions of

the contract with one or several candidates. In order to do so, the invitation to tender shall specify those aspects that are subject to negotiation and the procedure that is applicable to said negotiation. The law permits this procedure in those cases where prior design work is required, when innovative solutions are needed, when the technical specifications cannot be pre-established with the proper level of precision, or when the contract could not be awarded through the open or restricted procedures.

- The competitive dialogue procedure differs from the negotiation procedure in that any negotiation shall be conducted through a special dialogue panel with those pre-selected candidates, under their request, to develop one or several solutions that satisfy the needs of the purpose of the contract. This procedure is applicable for the same cases as the negotiation procedure, and it allows for the establishment of premiums and compensation for the participants. Once this dialogue is completed, those participants whose solutions have been accepted are invited to present their final bids, which shall be evaluated based on the best quality/price relationship, possibly negotiating the definitive terms and conditions.
- The association for innovation procedure aims to develop innovative products, services or works and acquire the resulting supplies, services or works when they comply with the agreed cost and performance levels. Any businessperson may request to participate in this procedure, and at least three of them will be selected and then be subject to negotiation with the contracting party. Once this dialogue is closed, all participants are invited to submit their final bids, reaching a resolution based on the established criteria.
- Lastly, the design contest shall be used in those cases that require the obtainment of

blueprints or projects, mainly relating to the fields of architecture, engineering, urban planning and data processing. To this aim, interested parties submit their requests for participation, from which no fewer than three shall be selected, applying objective, transparent and non-discriminatory criteria. Once selected, there is a first stage where a specific idea is requested for the tender and a second stage where this initial idea must then be developed. Contrary to all other procedures, in the design contest, the contract shall be awarded based on the criteria of a jury made up of individuals, at least two thirds of which have professional qualifications in the subject matter of the contract.

## 1.5 Key Obligations

The LCSP establishes several obligations that contractors must observe to conclude public agreements. The Spanish regulator, who is strongly influenced by European law, has reinforced the importance of social and environmental considerations in all public contracts, which, in turn, is directly related to certain constitutional principles such as -non-discrimination and environmental protection. In addition, contractors are obliged to fulfil demands regarding transparency and accounting, and to operate under effective and efficient mechanisms.

The Procurement Law does not require any specific standards on the accounting aspect, although there are specific cases where certain requirements may apply. For those cases where the contract is awarded at an interim price because the complexity of the contract does not allow for an accurate appraisal before the provision of services, the contracting authority shall establish a procedure for determining the final price, taking into account the effective costs and the method of calculation, the accounting standards the successful bidder shall apply to determine the cost of the provision of the ser-

vices, and the documentary controls and those controls the contracting authority may perform over the production process.

Likewise, for works concession and services concession contracts, it is mandatory to keep separate accounting records and to follow the accounting model established in the tender specifications.

In addition, tenderers must take part in a tender procedure, with specific requirements in terms of technical, economic and financial capacity. Therefore, the contracting authority may request any and all documents certifying said capacity. With regards to the economic and financial capacity, the Procurement Law allows for the following different methods of accreditation, and the tenderer can use one or several of them together.

- Total business turnover for the year may be used, or the turnover for the year for the specific industry in the context of the contract, always referring to the best business results from the last three fiscal years. It also establishes a limit, stating that the required turnover should not exceed one and a half times the estimated value of the contract, except for those duly justified cases. Furthermore, if the contract is split into different lots, this criterion shall be applied to each of those different lots, except when they can be awarded as a group, in which case a minimum turnover shall be established for the group.
- Where applicable, proof of civil liability insurance for an amount equal to or higher than the one required in the tender might be requested.
- Net equity or the ratio between assets and liabilities may be used as the closing of the last fiscal year. The obligation of approval of the annual accounts was enforceable for an amount equal to or above the required

amount. The ratio between assets and liabilities can only be considered if the methods and criteria used for their valuation are expressly stated, which must be transparent, objective and non-discriminatory.

- As an additional method, the contracting authority may require for the average term period of payments to suppliers not to exceed a pre-established threshold.

For the works concession and service concession contracts there is also the possibility of requesting alternative accreditation methods to ensure the contractor's capacity to contribute the necessary funds for correct performance. The accreditation methods for all of these alternatives may consist of:

- a bank certification;
- a policy or certificate of insurance against professional risks;
- the annual accounts; and
- a statement from the businessperson indicating the global turnover of the business.

The methods admitted for accreditation shall be included in the tender notice and each expressly indicated in their minimum amount, in euros. If these methods have not been stated, the regulation states that, in general, the main criterion shall be the annual turnover for the best of the last three full fiscal years, accredited through the annual accounts, which are approved and registered with the Trade Registry, which must represent at least one and a half times the estimated value of the contract when its duration is less than a year, and at least one and a half times the annual value when its duration is over a year. However, when there is no specific mention in the contract specifications for those contracts covering professional services, economic capacity may be proved through an insurance policy covering compensation against professional risks.

On the other hand, there are specific obligations for each type of contract, which can be consulted in the LCSP. For instance, in the contract for the concession of services, the contractor must provide the service with the agreed continuity and guarantee the private individuals the right to use it under the conditions that have been established by the payment, if any, of the economic consideration included in the approved tariffs.

## 2. CONTRACT AWARD PROCESS

### 2.1 Prior Advertisement of Regulated Contract Award Procedures

European law contemplates three types of advertisement, which the Spanish regulator has transposed into Spanish law:

- the prior information notice;
- the tender notice; and
- the award notice.

With regards to the prior advertisement of regulated contract award procedures (ie, the tender announcement), the law establishes an obligation for public authorities to lodge the contracting profiles of the contracting authorities of every entity of the public sector in the Public Sector Contracting Platform when making the call for tenders. Therefore, the procedures for the award of public administration contracts shall be announced and published on this platform.

However, in contracts of the Autonomous Communities, local entities or bodies or entities that are governed by public law dependent on them, advertising may be placed in the "Official Gazette of the State". When the contracts are subject to harmonised regulation, the invitation to tender must also be published in the Official Journal of the European Union. These announcements

shall also be published in the contracting profile of the contracting authority.

The LCSP establishes an extensive list of information that must be disclosed in the advertisement, including the name, address and email address of the contracting authority, the type of contracting authority and the main activity to be carried out.

## **2.2 Preliminary Market Consultations by the Awarding Authority**

The current LCSP introduces an important innovation regarding preliminary market consultations. The measure has received widespread market support as it properly defines the object of the contract and increases legal security.

The contracting authorities may carry out market studies and direct consultations of the active economic operators to prepare the tender correctly, and may inform the economic operators about their plans and the requirements they will need to meet in order to attend the process. On this matter, the contracting authorities are entitled to seek the advice of third parties, which may be independent experts or authorities, professional associations or even active economic operators in the market.

The reasons for the selection of the external advisers will be published in the contracting party's profile. Finally, it is essential to emphasise that consultations shall be conducted with respect to the principles of competition, non-discrimination, proportionality and transparency.

## **2.3 Tender Procedure for the Award of a Contract**

The LCSP establishes a tender procedure that guarantees adequate judicial protection's constitutional and fundamental right. This procedure is structured in the following five significant phases, which must adhere to the principles of

non-discrimination, proportionality and transparency:

- the prior information notice and the tender notice;
- presentation of applications for participation and proposals;
- the classification of offers, and the announcement and award of the contract;
- the resolution and notification of the award to all candidates and tenders; and
- the conclusion or formalisation of the contract.

In addition, there are three main procurement procedures "modalities": open, restricted, and the competitive procedure with negotiation. The law also contemplates the form of the competitive dialogue.

In the negotiated procedure, it is possible to negotiate prices in order to achieve the "best price-quality ratio". In any case, the contracting authority shall verify that no unfeasible bids are submitted in such terms that they result unusually low. To this effect, a specific procedure has been designed to identify those bids that are susceptible to being unusually low with respect to the criteria established in the tender, after which the bidders are requested to justify and breakdown in detail any low prices, costs or any other parameters rendering their bid unusual.

If the abnormality is not sufficiently explained after the information and documentation submitted by the bidder have been analysed, the bid shall be excluded from the classification. If the justification is accepted and the company is awarded the contract, mechanisms will be established to monitor the company in order to guarantee the correct performance of the contract.

## 2.4 Choice/Conditions of a Tender Procedure

Due to the nature of the open, restricted and competitive procedures, the contracting authority will have discretion in awarding contracts that are not subject to harmonised regulation. The negotiated procedure and the competitive dialogue can only be used in cases determined by law.

However, there are certain limits that the awarding authority must respect in any case. Above all, the decision taken by the contracting authority – which, once again, will have to be sufficiently justified – shall adhere to the principles of publicity, competition, transparency, confidentiality, equality and non-discrimination. Furthermore, the LCSP disposes that:

- the open and restricted procedures shall be used with preference over the other type of contracts;
- the restricted procedure is especially suitable when it comes to complex intellectual services, such as certain architecture or engineering services; and
- project competition rules shall be followed and respected, as these procedures are aimed at obtaining plans or projects, mainly in the fields of architecture, urban planning, engineering and data processing, through a selection that is entrusted to a jury, after the corresponding tender.

## 2.5 Timing for Publication of Documents

In open procedures for awarding contracts that are subject to harmonised regulation, the term for submitting proposals shall be no less than 35 days for works, supplies and services contracts, and no less than 30 days for works and services concessions. The term is counted from the date the contract notice is dispatched to the Publications Office of the European Union.

However, in works, supplies and services contracts, this general term may be reduced in certain cases. For instance, if the contracting authority had sent a notice of prior information, the general deadline for submitting proposals may be reduced to 15 days.

In public contracts that are not subject to harmonised regulation, the deadline for submitting proposals will be no less than 15 days, counted from the day after the publication of the contract tender notice in the contracting party profile. The law establishes that the period shall be at least 26 days for works and works concession contracts, as well as for service concession contracts.

## 2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

The LCSP does not set specific time limits for submitting requests for participation and proposals. The contracting authorities shall set the time limits for the receipt of tenders and requests for participation, taking into consideration the necessary time to prepare the tenders according to the complexity of the contracts while respecting the minimum time limits in the LCSP.

Two exceptions must be taken into account. When for any reason the services depending on the contracting body did not meet a request for information from an interested party, given with due notice, the contracting authorities must extend the initial term for submitting bids and requests to participate so that all those potentially interested in the tender can have access to all the information necessary to prepare them. On the other hand, it is possible to reduce the time limits in cases of urgent processing, but only in the manner provided by the law.

## 2.7 Eligibility for Participation in a Procurement Process

The LCSP establishes detailed and complex regulations on selecting and applying the criteria for awarding contracts. According to this law, the criterion for awarding contracts is mainly the “best price-quality ratio”, which is a crucial concept that has replaced the one based on the “most economically advantageous tender”. The best price-quality ratio will be assessed according to economic and qualitative criteria.

However, the contracting body may also include social or environmental aspects related to the object of the contract. The technical discretion of the contracting body should be highlighted, which is a very controversial matter in the Spanish jurisdiction. In any case, it is not possible to rely solely upon qualitative criteria, since they must always be accompanied by cost-related tests. However, it is possible to award contracts under the quantitative criteria of price alone (Article 146.1).

## 2.8 Restriction of Participation in a Procurement Process

According to the LCSP, a restriction in the procurement process is only possible on two measured occasions. Bans on hiring are regulated in detail by the law. However, the restriction of participation to only a small number of qualified suppliers is specifically referred to as the restricted procedure (see **1.3 Types of Contracts Subject to Procurement Regulation**). In this type of procedure, only those entrepreneurs selected by the contracting authority will be permitted to submit their proposals at their request and in consideration of their solvency. Furthermore, in this type of procedure, any negotiation of the terms of the contract with the applicants or candidates shall be prohibited.

The restricted procedure is especially suitable when it comes to complex intelligence services,

such as consultancy, architecture or engineering services. The contracting authority shall indicate the minimum number of qualified suppliers that may be invited to participate in this procedure, but it must always be at least five, to ensure effective competition.

## 2.9 Evaluation Criteria

The contracting body has technical discretion when it comes to the criteria evaluation (see **2.7 Eligibility for Participation in a Procurement Process**). In any case, contracting authorities will evaluate tenders based on criteria linked to the subject matter of the contract, such as the “best price-quality ratio”, the aesthetic or functional characteristics, the period of execution or delivery of the benefit, and the environmental characteristics or the satisfaction of social requirements that meet the needs defined in the specifications of the contract.

Nevertheless, the regulator establishes various limits to this effect. First, it is necessary to insist on the contracting body’s obligation to adhere to the principles of non-discrimination, proportionality and transparency when evaluating tenders, which is connected to their obligation to justify their decision in a good and proper manner. For this reason, the notification to all candidates, including the rejected tenders and the winner of the contract award, will have to justify in detail the motives behind the contracting bodies’ decisions.

The LCSP states that the contracting authorities will ensure that the award criteria are established in order to obtain high-quality works, supplies and services that respond as best as possible to their needs; this is particularly pertinent to contract procedures for services of an intellectual nature, such as engineering and architecture services.

The award criteria shall meet the following requirements:

- they will be linked to the object of the contract;
- they must be formulated objectively, with full respect for the principles mentioned above, and will not confer unlimited freedom of decision on the contracting authority;
- they must guarantee the possibility that the bids are evaluated under conditions of effective competition; and
- they shall be accompanied by specifications that allow for the effective verification of the information provided by the bidders in order to assess the extent to which the bids meet the award criteria.

## 3. GENERAL TRANSPARENCY OBLIGATIONS

### 3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

According to the LCSP, all candidates and tenderers shall be notified of the final results, and the award must always be sufficiently and correctly reasoned. The public authorities' resolution will be published in the contracting profile within 15 days. Therefore, there is a legal obligation of publicity and transparency, disclosing the evaluation criteria based on which bidders have been selected and tenders evaluated.

This publication, which ultimately responds to the public authorities' motivation duty, will contain the name of the successful tenderer and the characteristics and advantages of their proposition. The disclosure shall also include the legal and economic reasons why the successful tenderer was selected over the rest of the candidates, which must also be included in the administrative file.

### 3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

The regulator imposes an obligation to notify not only the selected bidders but also the rejected candidates, which, according to the Spanish Constitution, enables them to utilise their right of defence. Hence, the contracting bodies will notify the interested parties who have not been selected, including disclosing the ultimate motives that guided them to take such decisions. In this sense, the law states that the notification must contain the necessary information to enable the excluded tenderer or candidate to file a sufficiently well-founded appeal against the award decision.

### 3.3 Obligation to Notify Bidders of a Contract Award Decision

As mentioned in **3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology**, the LCSP specifies that all candidates and tenderers shall be notified of the final results, and that the award must always be sufficiently and correctly reasoned, disclosing the evaluation criteria based on which bidders have been selected and tenders evaluated.

### 3.4 Requirement for a “Standstill Period”

The law states that the award resolution must be notified to all bidders and tenderers and published within 15 days. However, it does not include any requirement for a standstill period on this matter; the term for the contract's conclusion will be specified in the notification itself. Additionally, the regulator establishes that, if the contract is subject to a special appeal (see **4.2 Remedies Available for Breach of Procurement Legislation**), formalisation may not occur before 15 working days have elapsed since the notification of the award to all tenderers and candidates. The Autonomous Communities may increase this period, but it may not exceed one month.

For next generation contracts, the European regulator has established certain particularities that directly affect the Spanish legislation. Thus, the contracting body may not formalise the contract until ten calendar days have elapsed from the day following the notification (ie, the resolution awarding the contract).

## 4. REVIEW PROCEDURES

### 4.1 Responsibility for Review of the Awarding Authority's Decisions

Interested parties can oppose the awarding authority's decisions through the special appeal established by Article 44 of the LCSP. In the field of the General Administration of the State, the body responsible for the knowledge and resolution of this appeal is the Central Administrative Court of Contractual Appeals, which is a specialised public entity that, in compliance with the conditions of qualification, independence and immobility, is attached to the Ministry of Economic Affairs and Digital Transformation. It is composed of a president and a minimum of two vowels. In Autonomous Communities, the competence to resolve the appeals is established by their respective rules. With regards to Local Corporations, the competence to resolve appeals will be established by the regulations of the Autonomous Communities.

Against the judgment given in this procedure, the interested parties will be able to interpose a judicial-administrative appeal to the competent body under the rules contained within the Regulation of the Administrative Jurisdiction.

### 4.2 Remedies Available for Breach of Procurement Legislation

There is currently no mechanism in Spanish legislation whereby citizens can report breaches of procurement legislation. Therefore, the only mechanism to remedy public procurement

irregularities is the special appeal referred to in **4.1 Responsibility for Review of the Awarding Authority's Decisions**, regardless of the later provenance of the judicial guarantee.

In effect, public procurement law includes what is known as a "special appeal on public procurement", through which an administrative procedure is regulated. It is optional and free of charge for those appealing before a set of specialised bodies that have full operational independence for the exercise of their attributions, known as "Administrative tribunals of contractual appeals".

The following contracts are susceptible to appeal through this special appeal:

- works contracts for an estimated value above EUR3 million, and supply and service contracts for an estimated value above EUR100,000;
- any framework agreements and dynamic procurement systems aimed at drawing up any of the aforementioned contracts;
- works concession or service concession contracts for an estimated value above EUR3 million;
- special administrative contracts for which, due to their nature, a tender price cannot be established or for a value above EUR100,000; and
- subsidised contracts and commissions using their own resources, when a value cannot be established, or when said value, including any extensions, amounts to EUR100,000 or higher.

However, only the following actions relating to these contracts can be appealed:

- tender notices, contract specifications and contractual documentation establishing the conditions governing the procurement;

- procedural measures adopted during the awarding procedure, when they have a direct or indirect effect on the award decision, when they determine the impossibility to proceed in the process, or when they result in defencelessness or in irreparable harm to legitimate rights or interests; in any case, these circumstances are considered to be present in the actions of the contracting panel or body deciding on the admission or rejection of candidates or tenderers or on the admission or exclusion of bids, including those bids excluded for being unusually low as a consequence of the application of Article 149;
- award agreements;
- modifications to the contracts, considering that the modification should have been subject to a new award process;
- the execution of commissions using their resources when they fail to comply with the legal requirements; and
- agreements for the recovery of concessions.

### 4.3 Interim Measures

The LCSP expressly mentions the possibility for the parties concerned to request interim or provisional measures in response to a precautionary mechanism as a manifestation of effective judicial protection, to preserve their interests against certain dangers during the process. Thus, before bringing the special appeal, the parties may request the competent body to implement these measures in order to correct procedural infringements or to prevent further damage to the interests concerned.

It is important to emphasise three aspects of this precautionary mechanism:

- the legislator establishes that no appeal shall be made against the decisions given in this procedure without prejudice to those decisions taken in the main proceedings;

- where the adoption of the provisional measures may result in prejudice of any nature, the decision may impose the provision of a guarantee sufficient to respond to them, without effect until such a course or guarantee is provided; and
- the suspension of the procedure, which may be agreed on a precautionary basis, shall in no case affect the time allowed for the submission of tenders or proposals by the parties concerned.

### 4.4 Challenging the Awarding Authority's Decisions

The regulator establishes that any natural or legal person whose legitimate rights or interests, individual or collective, have been or may be harmed, directly or indirectly, by the decisions subject to the appeal are allowed to challenge the awarding authority's decisions. Therefore, according to the law along with the Spanish jurisprudence, the key element to enable the procedural requirement of the legitimisation lies in the rights and interests concerned being affected.

The current LCSP has introduced an innovation on this matter, as trade union organisations will also be entitled to turn to this appeal when they fulfil the legal requirements.

### 4.5 Time Limits for Challenging Decisions

The period within which an awarding authority's decision can be appealed is established in 15 working days. However, the application of the counting rules depends on the act being appealed by the interested party. For instance, when the subject of the appeal is the tender announcement, the term will begin to count from the day after the publication thereof in the contractor profile. When the appeal is based on one of the causes of nullity determined by the law,

the filing deadline will be either 30 days from the conclusion of the contract or six months.

In the case of next generation contracts (ie, contracts to be financed with funds from the Recovery, Transformation and Resilience Plan), the period to launch a special appeal is established in ten calendar days.

#### **4.6 Length of Proceedings**

The typical length of proceedings relating to a procurement claim is between 40 and 60 working days. The LCSP has introduced an important reform, whereby the competent body must resolve the appeal within five days of the allegations and evidence procedures. However, reality shows that this deadline is rarely met, which is an issue that needs to be addressed to improve the functioning of the Spanish jurisdiction.

#### **4.7 Annual Number of Procurement Claims**

Since the current LCSP has expanded the cases in which a special appeal in contracting matters can be filed (by lowering the quantitative threshold, reducing the legal deadline to resolve, and adding cases of challenge), there has been a national increase in the number of such reviews. According to the last annual activity report of the Central Administrative Court of Contractual Appeals, there are an average of around 1,500 procurement claims per year.

#### **4.8 Costs Involved in Challenging Decisions**

According to the Procurement Law, challenging an awarding authority's decision is free for the appellants, without prejudice to the possible pecuniary sentences (in cases of temerity or bad faith, although it is not usual) imposed by the Administrative Court of the Public Procurement.

### **5. MISCELLANEOUS**

#### **5.1 Modification of Contracts Post-award**

Modifying contracts after their award is only permissible for justified reasons of public interest and, in any case, under a special procedure. There are two types of possible modifications:

- the contracting body will be able to exercise this faculty whenever the modification has been included in the specific administrative clauses under the terms and conditions established by the law, as long as it does not increase the initial price by 20% or more; and
- the contracting body will be allowed to modify the contract even if the law does not foresee the modifications in certain specific cases (additional allowances, unforeseeable circumstances and non-substantial modifications) and under certain appraised requirements.

In order to deal with the excessive rise in the cost of raw materials, new norms are being approved at a national level, following the lead of many European countries (including France and Germany) and some Autonomous Communities, such as Galicia or Extremadura. To this effect, Royal Decree-Law 3/2022 has recently been approved by the government and modifies the LCSP on this matter; see **5.4 Legislative Amendments under Consideration** for greater detail.

#### **5.2 Direct Contract Awards**

According to the procurement legislation, direct contract awards can only occur in the following cases:

- for minor contracts, which are determined in the LCSP according to their amount (less than EUR40,000 in the case of works, or less

- than EUR15,000 in the case of other contracts, such as supplies and services);
- for project contests aimed at obtaining plans or projects, mainly in the fields of architecture, urban planning, engineering and data processing, through a selection that, after the corresponding public tender, is entrusted to a jury whose members will be appointed following the provisions of the contest rules (Articles 183–187 of the LCSP);
  - for emergency processing, which corresponds to contracts enacted in response to an urgent need or whose award must be accelerated for reasons of public interest (Articles 119 and 120 of the LCSP); and
  - for the provision of healthcare in emergencies and for an amount less than EUR30,000 (Article 131.4 of the LCSP).

Given its practical relevance, it is also worth explaining the procedure for the awarding of minor contracts in greater detail. As stated above, a minor contract is any contract with a value of less than EUR40,000 for a works contract, or EUR15,000 for a supply or service contract. Under no circumstances may they exceed the term of one year, and they cannot be extended. For works contracts, the budget for the works to be performed should be included, regardless of also having its corresponding Project, where required by any applicable regulation.

When dealing with the minor contract, the processing of the file will require a report from the contracting authority justifying the need for the contract and the approval of the expenses and their inclusion in its corresponding invoice. The contract may then be awarded directly to any businessperson with the capacity and the professional qualifications required to perform the work.

However, the possibility of awarding several different minor contracts to a single contractor is

limited, since the sum of the estimated values of any minor contracts awarded to the same contractor cannot be more than EUR40,000 for works contracts or EUR50,000 for supply or service contracts.

## 5.3 Recent Important Court Decisions

In a Supreme Court Resolution (STS 2757/2021–ECLI:ES:TS:2021:2757) regarding the necessary requirements of solvency accumulation, the Court stated that, based on European law, the concept of “economic operator” shall be interpreted in a broad sense, which is directly related to the principle of proportionality.

In this sense, the Resolution recalls that the interpretation of this concept must be made from a functional and not a formal perspective, so the legal system facilitates companies’ access to public procurement. Therefore, denying the possibility of the accumulation of the technical capacities of companies that participate together in the tender would violate the principles of functionality, complementary capabilities and proportionality.

Even more, from the criteria established by the Supreme Court, it can be concluded that it is necessary to insist on the need to promote models of tender participation so restrictive inertia can be overcome in favour of an open and competitive market.

As a consequence of a cassation appeal, this Resolution sets the interpretative criterion on this matter, thereby contributing to increased legal certainty and reinforced uniformity in the judicial application of the law. From a practical perspective, this solvency integration criterion is significant as it favours true competition and the effective functioning of the Spanish economy.

## 5.4 Legislative Amendments under Consideration

An important legislative amendment regarding public procurement is currently being considered, as the government has already expressed its intention to carry out a deep reform of the LCSP, which will be conducted (predictably in a short period of time) according to the rules of every legislative and democratic process.

Due to its practical relevance, it is crucial to mention again the Royal Decree-Law that has recently been approved with regards to the modification of contract prices when the economic balance is distorted due to the excessive rise in the cost of raw materials. However, these exceptional measures may only apply for works contracts under certain legal requirements, as follows:

- works contracts in which price review systems were not contemplated;
- works contracts that incorporated revision clauses in their specifications, in relation to the periods in which the review would not be possible before 20% of the contract is executed or until two years have elapsed from its formalisation (these requirements are already provided by the Law of Contracts of the Public sector); and
- the amount of the exceptional review may not exceed 20% of the contract award price.

These measures will contribute to increased legal security and the consequent effective functioning of the market itself. In this sense, the Royal Decree-Law states that the economic impact of these measures will be clearly positive for the sector, since its application will lead to a decrease in the number of contract resolutions, as well as less litigation and a higher percentage of budget execution.

Since Spain is a decentralised country, it is necessary to clarify that these measures only affect the basic public procurement legislation (the LCSP). Nevertheless, they will also be applicable in those Autonomous Communities that agree on this matter.

López Rodó & Cruz Ferrer is noted for the specialisation, experience and independence of its public procurement team, which enable it to understand the complex relations between European and national contract regulations and the regulations of specific sectors such as energy, health services, and essential facilities construction and operation. The team of three partners and seven qualified attorneys has the skills needed to provide advice and handle ne-

gotiations and litigation before administrative and judicial tribunals or European institutions. Recent work highlights include advising on energy services efficiency installation and supply contracts with townships, handling litigation against the in-house provision of fire prevention services in forests, and advising on health services provision, design or litigation in energy contracts.

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