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# Public Procurement & Government Contracts

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## SPAIN LAW AND PRACTICE

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López Rodó & Cruz Ferrer Abogados was established in 1945 and has become a renowned firm in the fields of administrative law, regulation and competition, civil law and business law, with key practice areas of energy, the National Health System, pharmaceutical, public works, local ser-

vices, public procurement litigation and arbitration. The firm has a six-strong public procurement team, including two partners: Juan de la Cruz Ferrer and Alfonso Llorente Caballero.

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Juan de la Cruz Ferrer is the managing partner, with a wealth of experience in energy, the National Health System, pharmaceutical, public works, local services, public procurement and arbitration. A member of the Spanish Administrative Law Professors Association, he is a Jean Monnet Professor of European Law and Administrative Law (Complutense University of Madrid) and a visiting professor at the Universities of Paris-Sceaux; Aix-Marseille; Católica Portuguesa; Interamericana de Puerto Rico; Tucumán and the Argentine Chamber of Commerce; Instituto de Estudios Superiores de Administración, Venezuela; and Católica and Los Andes, Chile.

## 1. General

### 1.1 Basic Statutes Governing Public Procurement

Legislation pertaining to public procurement in Spain is mainly dictated by Law 9/2017, of November 8, on Public Procurement (the "Public Procurement Law"), which establishes, for instance:

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

Spain is a decentralised country, so the Public Procurement Law is complemented by the regional dispositions for each autonomous community (regional government).

### 1.2 Regulations Governing Cost Reimbursement and Pricing Issues

The Public Procurement Law establishes the legal arrangements between the service provider and users for service contracts and service concession contracts (see 1.4 Common Types of Procurement and Contract Mechanisms).

Thus, it establishes that legal arrangements must have been set prior to the procurement, stating that the corresponding administration shall take ownership of this activity, establishing the scope of the services to be rendered to the public and regulating any legal, economic and administrative aspects relevant to the provision of the service.

### 1.3 Public Sector Procurement Procedures

In addition to the six main procedures, which will be explained later, it is worth mentioning, given its practical relevance, the procedure for the awarding of minor contracts. In this respect, 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. Also, 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 having also 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, as well as the approval of the expenses and their inclusion into its corresponding invoice, and then it may be awarded directly to any businessperson with the capacity and professional qualifications required to perform the works.

However, the possibility of awarding several different minor contracts to a single contractor is limited, since it establishes that the sum of the estimated values of any and all minor

tion or traffic specific to the contracting administration or since they satisfy directly or immediately a public interest in an area of its specific competence. Private contracts are those entered into by the public administration when the subject matter does not satisfy directly and immediately a need or public service, those entered into by contracting authorities other than the public administration and those entered into by those public entities that do not satisfy the condition of being a contracting authority.

Thirdly, the Public Procurement Law makes a distinction between harmonised and non-harmonised contracts. Thus, while there are certain exceptions, a harmonised contract is any of the following: a works contract; works concession and service concession contracts for an estimated value of EEUR5,548,000 or higher; supply and service contracts for an estimated value of EUR144,000 or higher when they are awarded by the general government administration, its independent bodies or social security's management and common services entities; supply and service contracts entered into by other entities for an estimated value of EUR221,000 or higher; and service contracts for social services and other specific services for an estimated value of EUR750,000 or higher. All contracts below the specified threshold shall be considered as non-harmonised contracts.

The Public Procurement Law also regulates subsidised contracts, which are those that are directly funded, at more than 50% of their total amount, by entities considered to be contracting authorities, whenever a subject matter is specified and when they are above a specific amount.

Then, taking these three aspects into account, the Public Procurement Law establishes that the following matters belong to administrative justice:

- those related to the drawing up, awarding, purpose, modification and termination of administrative contracts;
- those arising in relation to the drawing up and awarding of private contracts of the public administrations;

- those linked to the drawing up, awarding and modification of contracts, when it is considered that these modifications should have been subject to a new award, entered into by the contracting authorities when they are not considered to be part of the public administration;
- those related to the drawing up and awarding of contracts from entities that are not of a contracting authority nature;
- any appeals brought against the resolutions issued by the administrative bodies resolving this special procurement appeal, as well as appeals against the actions performed in the drawing up and awarding of the contracts by public sector entities that are not considered to be contracting authorities; and
- those matters related to the drawing up, awarding and modification of subsidised contracts.

And the following, to civil justice:

- any disputes arising between the parties related to the purpose and termination of the private contracts of entities considered as contracting authorities, whether or not they are public administrations, except for the contractual modifications mentioned in the second and third items in the previous list;
- any matters related to the purpose and termination of contracts entered into by public sector entities that are not of a contracting authority nature; and
- the notification of any contentious matters related to the private funding of a public works concession or service concession contract, except for those matters relative to the actions arising from the execution of the administrative obligations and powers that, in accordance with the provisions of the Public Procurement Law, are granted to the awarding administration, which shall belong to the administrative justice.

#### 4.2 Agencies, Courts and/or Organisations Permitted to Resolve Disputes

In terms of the legal body that should be notified of the appeal, this matter will depend on the entity the contract is being entered into with and of the justice branch with jurisdiction. With regards to these, if the body with jurisdiction to hear the appeal belongs to the administrative justice, the provisions of Law 29/1998, of April 13th, regulating administrative justice, shall apply and if the legal body belongs to civil justice then Law 1/2000, of January 7th, on civil procedure, shall apply.

Likewise, there are a series of specific cases that make reference to the performance of the contract, making it possible to bring a "special appeal on public procurement".

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