



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

Public Procurement of Infrastructure Projects and Energy Projects

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National Report of Spain

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1. What is the legal framework on public procurement in your country governing public purchases of energy projects and large-scale infrastructure projects?

The legal framework on public procurement in Spain governing public purchases of energy projects and large-scale infrastructure projects is shaped by:

- Royal Legislative Decree 3/2011, dated November 14th, approving the consolidated text of Act 30/2007, dated October 30th, on Public Sector Procurement (hereinafter, TRLCSP). The TRLCSP has become the most important reference within procurement legislation and its basic legal framework.

The current text is a compilation of the different amendments made to Act 30/2007 (hereinafter LCSP) since it was passed, after several infringement proceedings were initiated against the Kingdom of Spain by the European Commission.

After its approval in 2011, TRLCSP has been amended several times to update the thresholds approved by the European Commission and to improve free access to tenders.

- Act 31/2007, dated October 30th, on procurement procedures in the water, energy, transport and postal services sectors (hereinafter, Act 31/2007), which regulates these contracts when the contracting authority is not a public administration.
- Act 24/2011, dated Augustus 1st, on public procurement for the defense and security sector (hereinafter, Act 24/2011), which regulates the contracts awarded by the relevant authorities in the defense and security sector.
- Additionally, there are Regulations which partially implement the TRLCSP such as, Royal Decree 817/2009, dated 8th May and Royal Decree 1098/2001, dated 8th October, this last one is in force until new legislation is adopted.

The above-mentioned bodies of law constitute legislation passed by the State. Since Spain is divided into seventeen regions with legislative autonomy in some areas (called Comunidades Autonomas, hereinafter the Regions), there are also provisions passed by the Regions on public procurement with limited territorial application (such as Act 3/2011, dated February 24th, on measures governing public contracts in Aragón approved by the Parliament of the Region of Aragon, Act 6/2006 on public contracts approved by the Parliament of the Region of Navarra and Act 3/2007, dated July 4th on public works of Catalonia). Regional

regulation cannot contradict those State regulation provisions that function as basic legislation.

1.1 Are the relevant rules to be found in a broad public procurement package or are they found in separate legislation?

The relevant rules are found in the separate bodies of legislation referred to above.

1.2 Are there relevant thresholds obliging to apply public procurement rules to such projects?

Monetary threshold values exist. They refer to the estimation of the total amount to be spent by the contracting authority excluding VAT, and determine whether a contract falls under the scope of the directives and therefore the rules and specific procedures that must be followed for each individual contract. Threshold values are periodically updated in Spanish legislation according to the thresholds approved by the European Commission.¹

In addition there are other monetary thresholds established by Spanish legislation which regulate:

- The possibility of using the negotiated procedure according to the estimated value of the contract and when a contract notice is necessary.²
- The use of direct award for small estimated value contracts³.

1.3 Are there any exemptions from the application of the public procurement rules provided for in the legislation for such projects?

No. Neither TRLCSP nor Act 31/2007 or Act 24/2011 include any exemptions from the procurement rules stipulated for these projects.

2. Is this legal framework based on international agreements and commitments, like the EU Directives?

Since Spain's accession to the European Union on 1 January 1986, the Legislative regulations on public procurement have been to a great extent the result of transposing of Community directives on this matter. European Union law has

1 The current thresholds which determine whether contracts fall under the scope of the directives are the following: works concessions and works contracts: €5,186,000; supply and service contracts: €134,000 (for State public administration) and €207,000 (for regional and local administration, and for other bodies and entities). For utilities contracts and for contracts of the defense and security sector: threshold values are the following: works contracts: €5,186,000 and supply and service contracts: €414,000€. Public-private partnerships contracts always fall under the scope of the Directive no matter the estimated value.

2 According to TRLCSP a negotiated procedure can be followed to award public works contracts with an estimated value inferior to €1,000,000, and to award service, supply and other contracts with an estimated value inferior to €100,000. When the estimated value of a public works contract is higher than €200,000 the publication of a contract notice is necessary to start the procedure. For other contracts the publication of a contract notice is necessary when the estimated value is higher than €60,000.

3 According to TRLCSP a direct award can be used to award public work contracts with an estimated value lower than €50,000 and to award supply and services contracts with an estimated value lower than €18,000.

decisively influenced the development and recent evolution of Spanish legislation on public procurement.

Spanish Public Procurement Law is currently based on the following Directives:

- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.
- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC.

On March 28th 2014, the following Directives were published in the Official Journal of the European Union:

- Directive 2014/23/UE of the European Parliament and of the Council of 26 of February 2014 on the award of concession contracts.
- Directive 2014/24/UE of the European Parliament and of the Council of 26 of February 2014 on public procurement and repealing Directive 2004/18/EC.
- Directive 2014/25/UE of the European Parliament and of the Council of 26 of February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with these Directives by 18 April 2016, with the exception of some articles.

The Spanish legal framework is also based on the Plurilateral Agreement on Public Procurement (GPA) and Agreement on the European Economic Area (EEA Agreement).

3. If based on international agreements and commitments, have your country added any specific procedures and tools to the national legislation directed to the procurement of energy projects and large-scale infrastructure projects?

Spain has added two specific contracts aimed at procurement or energy projects and large-scale infrastructures to the national legislation, namely: (i) the public

works concession contract⁴, introduced by Act 13/2003, on public works concession; and (ii) the public-private partnership contract⁵, introduced by the LCSP.

The LCSP also introduced the competitive dialogue procedure⁶ to be used for the procurement of (i) public-private partnership contracts and (ii) for projects in which the contracting authorities are not able to specify the technical resources needed to satisfy their needs or objectives and /or are not objectively able to specify the legal and/or financial make-up of the project.

4. Which, if any, is the procurement procedure envisaged in the legal framework for the procurement of energy projects and large-scale infrastructure projects?

Taking into account the characteristics of these types of contracts, the competitive dialogue procedure is the procedure envisaged to procure them in the cases mentioned in response to question 3.

4.1 What is the most commonly used procurement procedure within the legal framework for the procurement of energy projects and large-scale infrastructure projects?

The most commonly used procurement procedure for the procurement of energy projects and large-scale infrastructure projects is the open procedure⁷.

In case of a (i) public-private partnership contract or (ii) contract for which the contracting authorities are not able to specify the technical resources needed to satisfy their needs or objectives and /or are not objectively able to specify the legal and/or financial make-up of the project, the competitive dialogue procedure has to be used.

In the security and defense sector the most commonly used procurement procedure is the negotiated procedure with publication of contract notice⁸.

4 Public works concession contracts are public contracts having as their object the execution, or both the design and execution, of works related to one of the activities within the meaning of annex I of the Directive 2004/18/EC or a work or the carrying out, by whatever means, of a work corresponding to the requirements specified by the contacting authority. The consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

5 Public-private partnership contracts can be defined as public contracts between a public sector authority and a private party, in which the skills and assets of each sector are combined to create an asset or facility and delivering a service for the benefit of the general public. The private party assumes substantial financial, technical and operational risk in the project.

6 The competitive dialogue is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender. (Article 1.11.a) Directive 2004/18/EC)

7 In an open procedure any interested economic operator may submit a tender (article 1.11.a) Directive 2004/18/EC).

8 Negotiated procedures means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.(article 1.11.d) Directive 2004/18/EC) Contracting Authorities shall negotiate with tenderers the tenders submitted by them

4.2 Are conditions for use of various procurement methods clearly established

Conditions for use of various procurement methods are clearly established as explained in responses to questions 4 and 4.1.

5. What are the award criteria (in public procurement procedures) most commonly used for energy and large-scale infrastructure projects? Are the Lowest price or the most economically advantageous tender most common? Are circumstances related to quality, time and output evaluated?

The concept of “most economically advantageous tender” in Spanish legislation is broader than the concept used in Directive 2004/18/EC, as it covers the use of multiple parameters in the community norm and the criterion of “lowest price”, which is formally distinguished from the former. The exposition of grounds of the LCSP, which introduced this concept, specifies in this respect that the law has considered both Community concepts under the same denomination so as not to force the usual linguistic value of the expressions used (it expressly mentions that it would not be understood that the cheapest tender, when the price is the only criterion to be assessed, was not qualified as the “most economically advantageous” tender) and so as to facilitate its use as a guideline that underscores the necessity to consider effectiveness criteria on procurement.

Considering that, the most commonly award criteria used for those procurement procedures is the most economically advantageous tender with the use of multiple parameters linked to the subject-matter of the public contract in question, such as quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, delivery date and delivery period. Article 150 of TRLCSP establishes the obligation to use this award criterion for contracts with a complex performance and for those with a significant environmental impact.

6. Do the public procurement rules regulate relations between the investor, the contractors and subcontractors?

The public procurement rules regulate the relationship between the contracting authorities and the contractors, and the relationship between the contractors and subcontractors. As a general rule, the contractor is allowed to subcontract the execution of a part of the contract, unless the tender documents ban this possibility. According to TRLCSP, when allowed, the contracting authority can limit subcontracting to a certain percentage of the price of the contract. If no limit is established subcontracting cannot exceed the 60% of the price of the contract.

in order to adapt them to the requirements which they have set out in the contract notice, the tender documents and the additional documents, if any, and to seek out the best tender.

Subcontractors maintain their relationship solely with the contractor, and the contractor is the only party liable for the execution of the contract before the contracting authority.

TRLCSP regulates other matters such as:

- The contractor's obligation to inform the contracting authority about subcontracting: identity or characteristics of the subcontractors, technical or professional and knowledge and ability, and the part of the contract to be subcontracted (article 227.2 TRLCSP)
- Penalties to be applied in the event that the contractor infringes the obligations regarding subcontracting (article 227.3 TRLCSP).
- The possibility of the contracting authority requiring that some parts of the contract be subcontracted: (i) a minimum of a 30% of the value of the works in the case of a public works concession contract (article 273 TRLCSP); and (ii) a maximum of 50% of the price of the contract for all other contracts.
- Payment conditions for subcontractors and suppliers (articles 228 and 228 bis TRLCSP).

Act 24/2011 also stipulates a procedure to be followed by contractors to select subcontractors.

The relationship between the investor and contractor and eventually between the investor and the subcontractor is basically governed by private law. In some cases the tender documents require the tenderers⁹ to commit to a financial investment.

TRLCSP stipulates the possibility of the concessionaire of a public works concession contract issuing:

- Securities that represent an interest in one or several of the credit rights in favour of the concessionaire consisting of the right to collect the tariffs and income that they may obtain for the exploitation of the commercial elements of the concessions, as well as those corresponding to the contributions that, as the case maybe, the administration must bear.
- Bonds or other debt securities.

7. Are there works concession procedures used for the procurement of energy projects and large-scale infrastructure projects? And if so, are there one or several specific procurement procedures envisaged for this in your national legislation?

⁹ According to article 1.8 of Directive 2004/18/EC, tenderers are those economic operators who have submitted a tender.

There is no specific procedure expressly stipulated for the procurement of public works concession contracts. Any of the ordinary procedures envisaged in TRLCSP can be used to procure these projects. The most commonly used ones are the open procedure, the restricted procedure¹⁰ and the competitive dialogue when the circumstances as described under question 3 above are met.

8. According to your experience, how often do foreign bidders participate in award procedures related to energy projects and large-scale infrastructure projects in your country?

In my experience foreign bidders' participation is very low in award procedures related to large-scale infrastructure contracts.

In general it is difficult to measure how often foreign bidders participate in such projects since their participation in award procedures related to energy projects and large-scale infrastructure is normally done through their Spanish subsidiary or through an Spanish SPV (Special Purpose Vehicle) created for that purpose. Also, the Public Register of public contracts does not keep a record of such data.

9. Are the model contracts for the construction works commonly used (at national as well as international level, like the FIDIC Books)? If so, which are the most commonly used model contracts for the procurement of energy projects and large-scale infrastructure projects? Are the model contracts specifically designed for public procurement?

Spanish contracting authorities don't use model contracts like the FIDIC books. Normally each contracting authority prepares its own contract models according to its own specifications.

10. Please briefly describe how do the model contracts regulate the contractual liability of the contractor. Are models of liability similar to those applied in case of Turn-Key Contracts, design-build contracts or build contracts (where the design is provided by the procuring entity) commonly used?

Contracts normally regulate the contractor's contractual liability of the contractor by referring to what is established in the law.

As a general rule, the contractor is liable for:

- Defects which appear during the execution of the works and during the year after delivery and acceptance of the works (guarantee period). A bank guarantee or insurance is required to cover this liability.
- If works are destroyed during the 15 years after the guarantee period has passed due to hidden defects attributable to the contractor, the contractor is liable for all damages.

¹⁰ Restricted procedures means those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender. (article 1.11.b) Directive 2004/18/EC)

- When the contract includes the design and drafting of the project, the contractor is also liable for
 - All defects, mistakes, technical deficiencies, defaults and infringements of any legal provision. In these cases, the contractor has to rectify these irregularities. Infringement of this obligation can lead to penalties, indemnifications and the termination of the contract; and
 - When mistakes and defaults attributable to the contractor cause the execution cost of the works to deviate by more than a 20% in more or less, indemnifications equal to a reduction of the price of the contract by an amount equivalent to the percentage deviation can be imposed, up to a limit of the 50% of the price of the contract.
- The contractor is also liable for all damages suffered by the Administration and third parties during the performance of the works due to defects, mistakes, technical deficiencies, defaults or and infringements of any legal provision attributable to the contractor. The indemnification stipulated by the law is equal to 50% of the amount of the damages and cannot exceed five times the price of the project. The contracting authority is entitled to claim this indemnification during the 10 years after which the works were accepted.

11. To what extent are external lawyers engaged to draft, or otherwise involved, contract notices and/or contract documents in the case of procurement of energy projects and large-scale infrastructure projects?

External Lawyers provide legal advice for those projects:

- When the project is complex.
- When the Contracting Authority does not have enough internal lawyers.

External lawyers normally propose the procedure that best suits the needs of the contract, prepare the tender documents and provide legal advice during the awarding procedure, as well as during the performance of the contract if needed. External lawyers also participate in the defense of the contracting authority decisions when it faces appeals from the tenderers.

12. Is it, in your country, common to appeal against award decisions related to procurement of energy projects and large-scale infrastructure projects? What is the authority relevant to recognize the appeal (common court, arbitration court, other)?

In recent years, appeals against public procurement decisions have become more common due to, (i) the current economic landscape in Spain (ii) the establishment of an independent body to resolve the appeals.

The Law determines two jurisdictions (civil and contentious-administrative) that may rule on review remedies depending on the nature of the contracts.

The competent authority to recognize the administrative remedies depends on the kind of contract and its value:

- Special appeals for procurement and annulment appeals are resolved by the Central Administrative Court of Procurement Appeals (Tribunal Administrativo Central de Recursos Contractuales), or its equivalent in the Regions. This is an independent body whose members have a judiciary status and are organized as a court. The regions have the option to create their own Administrative Court of Procurement Appeals or to refer their claims to the central one. Some of the regions have already created their own Administrative Court of Procurement appeals.
- The remaining remedies must be sought before the competent administrative body (the contracting authority or another body with greater authority)

The decisions of these Administrative Courts and authorities can be reviewed in a later stage by the Judicial Courts of Contentious-administrative jurisdiction.

The Judicial Courts of the civil jurisdiction are competent to recognize appeals against award decisions when the contracting authority is a body or entity different than the Administration.

Arbitration is only possible for those claims related to the performance of the contract and when the contracting authority is a body or entity different than the Administration.

13. From your experience – what would you indicate as the most problematic issue while awarding public procurement for such projects and on the other hand what would you call the biggest achievement/improvement made of the legislation implemented during last years for such projects.

The most problematic issue we've faced when awarding public procurement for such projects in the present economic scenario is access to financial resources.

The biggest improvements made to the legislation implemented in recent years are:

- The establishment of the competitive dialogue procedure intended to achieve the best results when the contracting authority is facing complex problems that cannot be resolved by using the open or restricted procedure.
- The establishment of the independent body to review the decisions of the contracting authorities referred to in question 12.
- Appeal procedure for public procurement, which allows for a more effectively and rapidly review of contracting authorities decisions. Some of the characteristics of this procedure are:
 1. Shortened timescales. An appeal must be resolved within 20 days.

2. Suspension of the procurement process until the appeal is resolved, in the event that the appeal is brought against the awarding decision.
 3. When the appeal is brought against other decisions related to the procurement procedure, it is possible to request preventive measures or injunctions, which tend to protect the objective of the appeal.
 4. An annulment appeal can be filed against specified stages and documents.
- The simplification of formal requirements that determine the suitability of the tenderers to participate in the award procedures.
 - The introduction of electronic and telematic tools in procurement procedures.

14. What are the most commonly used/provided by the public procurement laws instruments for securing of the performance of the contracts?

Public procurement legislation provides the contracting authorities with the necessary instruments to oblige the contractor to comply with the contract.

Among them:

- Guarantees to secure the performance of the contract. They are normally granted by banks or insurance companies. According to Act 14/2013, the withholding of an amount equal to the price of the contract can be used as a guarantee in works, services, supply and public service management concession.
- The establishment of penalties.
- The establishment of certain causes that lead to the termination of the contract.

15. Is it possible to sign the contract for the procurement of energy projects and large-scale infrastructure projects in other than national language?

Public contracts -according to TRLCSP those awarded by state, regional or local authorities- have to be signed in any of the languages recognized as official in the region where the contract is formalized and has to be executed.

According to Act 1/1998 of linguistic policy of Catalonia¹¹, private contracts according to TRLCSP those awarded by bodies and entities different than the administration-, can be signed in a language other than Spanish or Catalan, and in those cases an official translation is required. However, in actual practice this is not possible since contracting authorities always require that the contract is signed in one of the languages recognized as official in the region where the contract is formalized and has to be executed.

¹¹ Since the Regional Authorities have competence to regulate the use of their own language in their territory, there might be other provisions on this subject.

16. Is there a legal or regulatory requirement for public disclosure of the information related to the award procedure?

Besides publication of public notices when required by the law, as a general rule contracting authorities have to disclose publically the following information related to the award procedure:

- The reasons why tenderers or candidates¹² have been excluded from the procedure as well as why abnormal or disproportionate tenders¹³ are not considered in the final phase of the award procedure. These reasons have to be included in the notifications addressed to the tenderers.
- The awarding and the signature of the contract.
- Moreover, the contracting authorities have the obligation to periodically send the basic information of the awarded contracts to the Public procurement Contracts registry.

12 According to article 1.8 of Directive 2004/18/EC, a candidate is an economic operator that has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue procedure.

13 Abnormal or disproportionate tenders are those tenders that appear to be abnormally low in relation to the goods, works or services being procured.