Public Procurement World - Spain

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# 1. The Laws

## a. What is the applicable legislation?

The legislative framework for public contracts and public procurement consists of two main laws: Royal Legislative Decree 3/2011 of November 14 which provides the revised text of the Public Sector contracts related norms; and Law 31/2007, of October 30, on contracting procedures in the special sectors (water, energy, transports and postal services). Royal Legislative Decree 3/2011 refers to the contracts and procurement processes to be used by public administration related bodies, and Law 31/2007 refers to those to be used by companies and entities owned by public administrations and private companies holding special or exclusive rights granted by a public administration body. These are the laws implementing Directives 2004/17/CE and 2004/18/CE, respectively.

Directives mentioned above have been repealed by Directives 2014/23/CE, 2014/24/CE and 2014/25/CE, that should have been implemented by Member States no later than April 18, 2016. However, none of them has been transposed yet in Spain. Therefore, and in accordance with the judgments of the European Union Court of Justice, it should be understood that some provisions of the Directives produce direct effect and are compulsory for contracting bodies (e.g. Articles 27 to 29 and 32 of the EU Directive 2014/24).

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

The European Union principles and rules have been an obligatory reference for the Spanish legislator. The most important and influential European rules are: the Treaty of the European Union with its principles of transparency and free movement of persons, goods, services and capital; Directive 2014/24/CE, of February 26, on the coordination of procedures for the award of public contracts; Directive 2013/25/CE, of February 26, [on procurement by entities operating in the water, energy, transport and postal services sectors](http://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:32014L0025); Directive 2014/23/CE, of February 26, on the Award of Concession Contracts; and Services Directive 2006/123/EC, of December 12.

## c. What are the basic underlying principles of the legal framework?

The main principles underlying the rules on public procurement are free access to tenders, publicity and transparency of the procedures, equal treatment and non-discrimination of candidates participating in the procurement procedure, and efficient use of public funds in case the procedure is launched by a public administration or related body or company. The latter is ensured through prior definition of the needs of the public service to be provided and through guaranteeing free competition, as well as the selection of the best economic offer. Procurement procedures cannot introduce unjustified restrictions to these principles either in the execution of the procedures or in the performance of the contract, once this has been awarded. Finally, these procedures must also prevent unlawful collusion between bidders.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

Yes, the aerospace and defense procurement has its own regime, and it is regulated by Law 24/2011, of August 1, on public sector defense and security contracts, entered into force in November 2011. This piece of legislation implements Directive 2009/81/CE, of July 13, on coordination of the awarding procedures of certain works, supplies and services contracts related to defence and security, and provides a specific set of rules for their related procurement processes. In addition to Law 24/2011, it is important to note Instruction 5/2010 issued by the Ministry of Defence, which approves the Plan for the Organization of the Ministry of Defence's Contracting Related Procedures as well as Royal Decree 1011/2013, of December 20, which also relates to the internal organization and distribution of functions within the Ministry of Defense in connection with contracting, technical agreements and the like.

Following Directive 2009/81/CE, of July 13, Law 24/2011, of August 1, establishes a different treatment for defense contracts. Law 24/2011 reinforces the security aspects of the information which is transferred to tenderers, the guarantee of continual supply, and the need to establish certain norms which allow for a more flexible contracting procedure. Royal Legislative Decree 3/2011 is supplementary to Law 24/2011. Essentially, the different regime establishes a procedure for the selection of tenderers with the purpose of limiting their number, so that the negotiating procedure may be held with a limited number of qualified tenderers which meet all the technical and solvency requirements necessary for the proper execution of the contract.

Law 24/2011 also seeks to strengthen small and medium-size companies' participation in public contracts and requires transparency in the selection of subcontractors by establishing minimum publicity requirements for the subcontracting process, so that subcontracts follow objective criteria.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

The following bodies, agencies and entities of the public sector are subject to public procurement rules or principles:

the Public Administration at the national, autonomous community and local levels (e.g. Ministry of Industry; Catalan Government, etc);

the entities for the management and provision of common services of the Social Security (e.g. *Instituto Nacional de la Seguridad Social*);

the autonomous bodies, public corporate entities, public universities, national agencies and any public sector entities with legal status or those organized under them, including those that function independently or with special autonomy recognized by law, have regulatory functions or exert external control over a particular sector or activity;

companies where a stake higher than 50% is publicly owned;

consortia with legal status in which a public administration holds a stake;

foundations with a direct or indirect majority contribution from one or more public sector entities or permanent foundations with an endowment of more than 50% in goods or rights contributed or transferred by the public entities;

the Social Security mutual insurance company covering accidents and occupational diseases;

any entities or agencies with legal status which have been created specifically to meet needs of general interest, with no industrial or commercial interest, provided that one or more entities in the public sector are largely financing their activities, controlling their management or appointing more than half the members of the board of directors, management or supervision;

associations formed by the agencies, organizations and entities mentioned above;

entities from the public sector and public companies in the so-called special sectors: water, gas and heating, electricity, postal services, transport services, prospecting and drilling for oil, gas, coal and other solid fuels, and provision of transport terminals.

Each of the above entities may be subject to a different level of restraint in its procurement rules and principles, according to a case-by-case analysis under the rules provided by law.

## b. Which private entities are covered by the laws?

The following private entities are subject to public procurement rules or principles:

entities that, according to Section 2(a) above, are deemed to belong to the public sector but may have a private nature;

private entities entering into subsidized contracts above the price threshold applicable at any time; or

private entities granted exclusive or special rights in the so-called special sectors: water, gas and heating, electricity, postal services, transport services, prospecting and drilling for oil, gas, coal and other solid fuels, and provision of transport terminals.

Private entities would be subject to procurement principles rather than to the stricter rules of public procurement.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Co-operations between contracting authorities are exempted from public procurement law if certain legally defined conditions are met. That is the case if the contract is awarded to an entity that is predominantly controlled by the contracting authority awarding the contract (or controls the contracting authority), the contractor carries out the essential part of its activities for the controlling contracting authority and no private equity investment in the contractor's entity exists.

## d. Which types of contracts are covered?

Those entered into by an entity belonging to the public sector: works and construction contracts; public works concession contracts; contracts for the management of public services; supply contracts; service contracts; and contracts for collaboration between the public and the private sectors (public-private partnerships), over the price thresholds applicable at any time. Other types of contractual relationships entered into by entities in the public sector may be governed by legislation other than procurement laws but would still be restrained by the principles of transparency, competition and publicity, as a general rule.

Those entered into by an entity in the so-called special sectors: works and construction contracts, supply contracts and services contracts, over the price thresholds applicable at any time.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

The treatment of the changes varies depending on whether it is an extension, an amendment or a transfer to a new contractor:

On one side, public contracts can be extended once or twice, as long as its conditions remain unchanged and the awarding has been done taking into account the maximum duration of the contract, including the extensions. The eventual extension must be established by the tender documents.

On the other side, it is possible to amendment a contract provided that (i) the tender documents established this possibility in a clear manner and specify the procedure to be followed; or (ii) in case the tender documents do not foresee this possibility, some exceptional conditions apply (e.g. in cases of force majeure; or the contracted service turns out to be inadequate to satisfy the necessity covered by the contract as a consequence of errors or omissions in the project). In the latter case, the accorded amendment may not alter the essential conditions of the tender and awarding, as well as it should be limited to introduce those indispensable changes.

It will be considered as an "alteration of the essential terms of the tender" and, therefore, the modification would not be allowed, in the following cases:

the proposed amendment significantly alters the function and characteristics of the contracted service, or the proportion between the service and the price;

in case it is required a professional qualification or different solvency conditions not contemplated in the original contract;

in case the amendment entail a price modification equalling or exceeding a 10% of the awarding's price;

any other changes where we can assume that known in advance (during the tender procedure), either other companies/persons would have concurred, or the concurrent bidders would have presented offers substantially different form the ones already presented.

In those cases, the contract will be terminated and new procurement procedure would have to be initiated.

Furthermore, the amendment can not include new complementary services to the one originally contracted, an extension of the purpose of the contract in order to include new finalities not foreseen in the tender documents, or add a service susceptible to be exploited independently. In these cases a new procurement procedure will also be necessary.

Regarding the assignment of public contracts, the Spanish law distinguishes between succession and assignment of contracts:

**Succession**: the change of the contractor party is due to a fusion, as a consequence of other corporate restructuring operations like split-ups, or contribution or transfer of business or branch of business. In these cases, the contract will keep in force as long as either the "new" company has the required solvency for the awarding. The situation must be notified to the contracting body.

**Assignment**: a public contract/s is/are assigned to a third party. The assignment is subject to the fulfillment of the following requirements:

the technical and personal qualities of the contractor can not have been determinants to award the contract, and the assignment of contract can not cause an effective restriction of competition in the market;

the assignment must be previously authorized by the contracting body;

the 20% of the contract has to have been executed;

the assignee must have capacity to contract with the administration; and

the assignment must be formalized in a public document.

Nevertheless, please note that in Spain Directive 2014/24/CE has not been transposed yet, and it introduce some modifications in this regard.

## f. What is the applicable regime for framework agreements?

Framework agreements are contracts designed to set out the general conditions for future procurements during a given period of time and especially the cost of those procurements. The contracting authority has to conduct a competitive award procedure to award a framework agreement. The contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified. The length of a framework agreement is limited to four years.

Framework agreements with multiple suppliers are admissible, but they shall be a minimum of 3.

Contracts based on a framework agreement can only be awarded under the conditions laid down in the framework agreement. The contracting authority may conduct a competitive procedure for the award of single orders under the framework agreement with multiple suppliers if this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement. The award decision should be based on objective reasons that have been set out in the procurement documents for the framework agreement.

## g. What is the applicable regime for public-private partnerships (PPPs)?

Public-private partnerships can only be used for complex projects, therefore they require a prior assessment in order to determine the complexity of the project, as well as the need of executing it through this kind of contract. Then, the contracting authority will issue a descriptive document to establish the basis for the competitive dialogue with the bidders, and this document will be included in the descriptive document of the contract.

As indicated, PPs must be awarded via competitive dialogue. This procedure is characterized by the establishment of a dialogue between the contracting body and each bidder to find out the best solution for the project as a previous step to the awarding.

This procedure is initiated with the publication of the invitation to tender and the mentioned descriptive document (which replaces the usual tender documents). Those interested in the tender have to apply, but eventually, it will be the contracting body that chooses, at least, three eventual bidders. After that, the invited bidders will submit their proposals and the competitive dialogue will start. Once the contracting authority finds the solution to its necessities, the dialogue ends and the participants are allowed to submit their bids. The last step is the awarding to the most economically advantageous offer.

## h. How are concessions dealt with?

Currently, the Spanish legal system establishes two types of concessions: public works concession and concession for the management of public services. Both are subjected to general procurement provisions, without prejudice to certain particularities.

However, with the transposition of the Directive 2014/23/EU this regulation would be changed, because it creates specialized procurement law provisions on the award of concessions. Nonetheless, this Directive is a directive of minimums, which means that States can establish a stricter regulation when transposing it.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

As provided in the laws, the principles of transparency, competition and publicity apply. Where procurement rules do not strictly apply, procurement principles may still be enforceable. The laws contain criteria to define their specific scope of application for each scenario. Actions circumventing or breaching the application of procurement rules and principles may have their contracts nullified. In addition, there may be actions punishable as violations of competition law. If a case involves public officers, they could be punished for an offence under certain circumstances.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

Ordinarily, open procedures (tenders or auctions fully open to competition) and restricted procedures (tenders or auctions open only to a certain number of pre-qualified operators) are followed. In certain cases, it is also possible to conduct a negotiated procedure (in which certain clauses of the contract may be discussed and negotiated, as an exception to the obligation of open and restricted procedures) or a competitive dialogue (for the joint definition by the operators and the contractor of the technical and/or legal or financial hedging of a contract of high complexity). Direct award is possible for so- called minor contracts (below the economic thresholds determined by law).

Finally, Directive 2014/24/CE aggregates a new procedure called "innovation partnerships", that despite not being transposed yet, it is widely considered to have direct application. This new procedure is similar to the negotiated procedure but with some specialties.

## b. What status do electronic means/procedures have?

Currently, Spanish laws contemplate the establishment of an electronic procurement in two phases. Notice publications, availability of tender documents and communications between public authorities and economic operators during the procurement process must be done by electronic means. However, contracting bodies are not obliged to allow the submission of the offer electronically until October 2018. Nonetheless, if a contracting body has already implemented this electronic register, operators are obliged to submit the offer by it.

## c. Where are contract notices, i.e. calls for bid, published?

In relation to the above, contract notices are electronically published in the corresponding Official Journal (e.g. BOE/EU) and on the buyer profiles of the contracting authorities (e.g. Institut Català de la Salut)

Some examples:

BOE: [https://www.boe.es/boe/dias/2017/03/31/index.php?d=77&s=5](https://www.boe.es/boe/dias/2017/03/31/index.php?d=77&amp;s=5)

Ajencia Tribitaria: <http://www.agenciatributaria.es/AEAT.internet/Inicio/La_Agencia_Tributaria/Perfil_del_contratante/Perfil_del_contratante.shtml>

Institut Català de la Salut: [https://contractaciopublica.gencat.cat/ecofin\_pscp/AppJava/notice.pscp?reqCode=searchCn&idCap=204588](https://contractaciopublica.gencat.cat/ecofin_pscp/AppJava/notice.pscp?reqCode=searchCn&amp;idCap=204588))

Correos: <http://www.correos.es/ss/Satellite/site/pagina-perfil_contratante/sidioma=es_ES>

Adif: <http://www.adif.es/es_ES/empresas_servicios/licitaciones/licitaciones_en_curso.shtml>

## c. Can certain prospective bidders be excluded from the competition?

Yes, it is possible where no responsive or compliant offers have been submitted and due to abnormally low values (applicable to price and to other parameters), when so specifically provided in advance in the set of tender specifications.

Furthermore, bidders are only allowed to submit one bid for each procurement procedure. Neither may they endorse any proposal from a bidder consortium if they have already submitted one, either individually or with another bidder consortia. The infringement of this rule implies the rejection of all proposals submitted.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Contracts are awarded to economic operators that are suitable with regard to the subject-matter of the contract. A bidder or an applicant respectively is suitable if he possesses technical knowledge, efficiency and reliability. Economic operators possess the required technical knowledge if they have the knowledge and experience to accomplish the task subject of the contract. Specific experience in similar tasks will be considered.

An economic operator qualifies as reliable if he guarantees contract performance in due form and, in particular, in line with applicable provisions of law (tax, social, criminal, etc.). Additionally, he has to provide the ability to carry out the contract within the time limits set by the contracting authorities and follow the instructions given by them.

Finally, some entrepreneurs can be required to classification of their activity (works/services).

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Prequalification is specifically contemplated for restricted procedures, where tenders or auctions are open exclusively to a certain number of operators pre-selected by the contracting authority in accordance to their solvency.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

There are some prohibitions on contracting that can exclude operators from participating in tenders (e.g. to have been convicted of an offence that leads to a mandatory exclusion from the procurement procedure; to be declared insolvent or solicit the contest voluntary creditors, etc). However, these prohibitions will not last forever: some of them will last as long as the circumstance exists, and others will have a determined duration subjected either to the length of the penal sentence, or to periods of 3 or 5 years, depending on the case.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

In order to prevent conflicts of interest, a company that was involved in the set-up of an open procurement procedure (i.e. drafting of or advising on the specifications) can be excluded from said procedure. However, new Directive 2014/24/CE contemplates the possibility that contracting bodies request the assessment of market participants, as long as this advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency. In that case, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Yes, operators may submit joint bids, and when such joint bids are submitted, they are required to commit to the creation of a temporary joint venture specific for the contract to be awarded and become bound by joint and several liabilities.

With regards to limitations, please see answer 4.C.

## g. Can members of a bidder consortium be changed during a procurement procedure?

There is a lack of a proper regulation for bidder consortiums in public sector contracting Laws, therefore doctrine and case-law must be applied case by case.

With regards to the possibility to change member of a bidder consortium, it has been commonly accepted that if before the awarding, a member of the consortium expressively waives or is declared insolvent (which constitutes a prohibition for contracting), the contract can be awarded to the remaining members of the consortium as long as they fulfill all solvency and classification requirements.

On the other side, there are not pronouncements about the possibility of incorporating additional members to the consortium that has already submitted an offer. However, it could be understood that this practice is illegal since it would imply a subjective novation contrary to the principle of equal treatment.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Related bidders are those which belong to the same group or holding or are otherwise related by corporate means. It is generally assumed that the participation of related bidders in the same procurement procedure with competitive bids is an anti-trust law violation because it is assumed that information relevant for drafting the bids is exchanged between entities of the same group or holding. However, it is a very controversial issue.

The law expressly prohibits the participation of related bidders in public works concession contracts.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

Yes. EU companies' participation is subjected to fulfilment of the requirements established in their own legislation. On the other side, non Community companies may be authorized to participate as long as they submit a report (from the respective Spanish Permanent Diplomatic Mission) concluding that under their national procurement law, Spanish companies are also allowed to participate in their procurement procedures. However, in harmonized contracts, non Community companies that come from a State signatory of the Government Procurement Agreement of the World Trade Organization will be exempted from proving this report.

Finally, in works contracts, non Community companies are required to establish a branch in Spain with legal representation and registered in the Mercantile Registry.

# 5. Specifications

## a. Are there any rules on the specifications?

Yes, the laws contain rules for the preparation of contract specifications by the contracting entity before the selection procedure formally starts, rules applicable to the determination of the technical specifications that will be established in the contract specifications and consequently required during the selection process and for contract performance, and a series of provisions relating to the execution, amendment and termination of contracts that are more or less mandatory depending on the type of contract and the nature of the contracting entity.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

In general terms, bidders are not allowed to change the specifications. However, the tender documents can establish the possibility to include variations on the offer.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

Yes, community legislation aims at promote the participation of Small and Medium Enterprises in procurement procedures. To this end, Spanish legislation contemplates the obligation to divide the contract into lots when possible, so that an award chance for SMEs is guaranteed. Unfortunately, it is not used as frequently as it should.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

Yes, awarding criteria and their weightings must be decided and indicated in advance in the call for tender or the specifications. As awarding criteria, in order to determine the most economically advantageous offer, aspects such as quality, price, execution period, environmental characteristics and other economic and technical issues of the bid, are accepted. If the tender only contemplates one award criteria, it must be the lowest price.

## b. Are there any limitations regarding the offered bid price?

The contracting authority has to request clarification from a bidder if his bid appears to be abnormally low. If this clarification does not lead to a satisfactory result, i.e. an economic explanation for the offered low price, the contracting authority can exclude the bidder. The consideration of what is an abnormally low price should be determined in the tender documents.

## c. Are there any rules on alternative bids?

If the contracting authority does not expressly declare the submission of alternative bids as required or permitted, their submission is not admissible. If they are admitted, an alternative bid has to be linked to the subject-matter of the procurement contract. In any case, submitted alternative bids have to be assessed in the same way as main bids. In this perspective, award criteria have to be established in a manner that they are applicable to both main bids and alternative bids. Additionally, the contracting authority has to set out minimum requirements for alternative bids in the procurement documents and establish in what manner they have to be submitted.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

The so-called "minor contracts", which are works contracts amounting to a maximum of €50,000 and other contracts for a maximum of €18,000 (all of them with a maximum term of one year).

"Emergency contracts", where because of a catastrophe, situations of grave danger or national defence needs, the Administration may contract the necessary works, supplies and services without the formalities of other contracts.

## b. What are the consequences for violation of the competitive bidding requirement?

Public contracts which are awarded without any kind of bid procedure, i.e. directly awarded to one entity without meeting the conditions for such a direct award set forth in the procurement regulations, are deemed void. A frustrated bidder or a company interested in the contract has to initiate such a review procedure within certain time limits (see 8 d below). If those time limits expire and no review procedure has been initiated, the directly awarded contract cannot be challenged as void anymore. Besides that, there is also the possibility of an ex-officio review. But in any case, the voidance of the contract can be declared both by a Contracting Authority and by a judge in a judicial review procedure.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

Royal Legislative Decree 3/2011, on public sector contracts, envisages different remedy procedures for the claim of the Contracting Public Body in the phases of preparation and awarding of the public tender:

For harmonized contracts (those exceeding a fixed amount that are subjected to European legislation) Special Administrative Appeal on the award of public contracts and Special Administrative Procedures to nullify the whole process , may be followed.

For non harmonized contracts, Ordinary Appeals may be pursued.

The remedies exposed above constitute what is called "administrative remedies", however, in procurement procedures it is also possible to appeal before Courts (unattended claims before public bodies and those concerning compliance with contract obligations may be brought before the courts). To this effect, Administrative Litigation Courts are those competent to resolve disputes concerning: (i) the preparation, award, effects, compliance and termination of administrative contracts; (ii) the preparation and award of private contracts entered into by public administrations; and (iii) the preparation and award of certain contracts of entities which are not considered public administration bodies but are considered "Awarding Authorities". Administrative Litigation Courts are also competent to resolve appeals filed against resolutions by public bodies.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Those contracts concluded with entities which are not considered public administration bodies but are considered "awarding authorities" (contracting authorities) are considered "private contracts" whose award procedure is subject to public procurement rules. Therefore, disputes that arise between the parties over the effects, compliance and termination of these contracts may be followed before Civil Courts. Apart from that, they can also be submitted to arbitration (The bid call should envisage this possibility).

Finally, it is not possible to enforce any civil law damage claim against the Administration, since the exercise of legal actions for Administration's Patrimonial Liability, are followed before Administrative Litigation Courts.

## c. Is there a specific forum before which procurement disputes are heard?

Special Administrative Appeals must be treated by Independent Administrative Bodies, created specifically for this purpose (*e.g. Tribunal Administrativo Central de Recursos Contractuales*). Ordinary Administrative Appeals shall be treated by the contracting entity.

Appeals before the courts involving the resolutions of administrative bodies must be treated by General (not specific) Administrative Litigation Courts.

## d. Are there any timing requirements for the review?

Yes, but the limit for lodging each appeal is different:

For Special Administrative Appeal on the award of public contracts, parties have 15 working days.

For Special Administrative Procedures to nullify the whole process, the law foresees 30 working days.

For Ordinary Appeals, it has been set a deadline of 1 month.

For Judicial Claims, the law establishes a 2 months term.

## e. What are the main preconditions for review?

To lodge a Special Administrative Appeal it is required to notify to the contracting authority the intention to appeal. Additionally, in some regions a tax must be paid. This communication is not necessary in Special Administrative Procedures to nullify the whole process and Ordinary Appeals.

On the other hand, it is worth to mention that judicial review may be sought only after opportunities for administrative review have been exhausted.

## f. What are admissible grounds for starting a review proceeding?

There are many grounds that parties can invoke in a review procedure, however, they can be summarized in two groups: (i) appeals based on a breach of public procurement rules, and (ii) appeals based on the inclusion of some technical aspects that infringe the legal principle of equal treatment and equal opportunity (which in fact it is a breach of the public procurement rules). Inadmissible direct awards are the most drastic violations of procedural rules and are therefore an admissible ground for initiating review proceedings.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

As a general rule, the submission of a review proceeding does not automatically entail the suspension of the contract award procedure, therefore parties have to request it as a precautionary measure (the deadline to submit offers cannot be suspended). However, the Special Appeal against the awarding resolution automatically suspends the procedure.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

If the suspension of the procurement procedure has been agreed, there are no consequences of a successful review beyond the nullity of the appealed act, and the obligation to repeat it.

The resolution of a review proceeding may declare null and void the appealed act, and, if so, declare the obligation to take the actions back to the last valid act. It may also include a compensation for damages.

Finally, as judicial review tend to last years, it is possible that at the time of ruling the judgment the bidding has finished and the contract had been awarded and performed, so taking the proceedings back is almost impossible. In those cases, judicial decisions usually establish a compensation for damages.

## i. How long does a judicial proceeding for review take?

First instance judicial proceedings for review easily take 2 years, and in case of getting to the Second instance, it could take up to 5 years.

## j. Must unsuccessful bidders be notified before the award? If so, when?

The excluded bidders would have to be notified as soon as the decision is taken. And the awarding resolution must be notified to the bidders (or published in the online platform), but once it has been issued, not before. The contract can not be formalized before 15 days elapse from said notification to allow frustrated bidders to submit the eventual Special Appeal.

## k. Are review proceedings common?

Yes, but Special Administrative Appeals are the most used.

## l. Are damage claims in relation with procurement procedures common?

No, they are not very common. That is because damage claims usually are exercised in judicial reviews and it is not common to appeal before the Courts in these cases (keep in mind that judicial review may be initiated only after opportunities for administrative review have been exhausted, and that they take, at least, 2 years).

## m. What are the leading court decisions involving procurement disputes?

Although in practice there are many disputes in Spain that never reach the trial phase, there are indeed a number of very important rulings by the Spanish Supreme Court involving procurement disputes, which are followed by lower courts across the country. The following may be mentioned in this regard: the ruling of 5 January 2009, in *Telefónica Móviles España, S.A. vs. Spanish State General Administration*, on the termination of a public contract for the management of the public service for the establishment of a telecommunications network, based on the contractor's infringement; and the ruling of 9 April 2008, *ESAVE, S.A. vs. Spanish State General Administration*, on the termination of a public contract for the management of the public service of building security services, based on the contractor's infringement.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Apart from the abovementioned framework, there are some other relevant related bodies of law: Royal Decree 817/2009, of May 8, which partially implemented the ancient Law 30/2007; and Laws 39/2015 and 40/2015, of October 2, on the Common Administrative Procedure and the Legal Regime of Public Administrations.

For procurement by local governments, the following are also relevant acts: Law 7/1985, of April 2, on the basis of local government; and Law 39/1988, of March 5, on local finance.

## b. Does a specific contract law apply for public contracts?

No, without prejudice of special regulation for some specific sectors, the whole procurement procedure is regulated by Royal Legislative Decree 3/2011, of November 14, on Public Sector contracts.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

There are no specific laws that apply when procuring technology. This kind of procurement is subject to the general framework.

## b. Are there any specific laws or practices that apply in the defense sector?

Yes, procurement procedures in defense sector are subjected to Law 24/2011, of August 1, on public sector defence and security contracts, which implements Directive 2009/81/CE, of July 13, on coordination of the awarding procedures of certain works, supplies and services contracts related to defence and security.

For more information, please read question 1.d)

## c. Are there any specific laws or practices that apply in the health care sector?

There is not a specific law applying in health care sector. However, an Additional Disposition in Royal Legislative Decree 3/2011 applies and contemplates the possibility of buying medicines and sanitary products by means of a centralized procurement. To this effect, a specific body has been created: Public Health Service (Instituto Nacional de Gestion Sanitaria - INGESA)

## d. Are there any specific laws or practices that apply to any other particular industry sector?

Yes, water, energy, transports and postal services sectors are regulated by Law 31/2007, of October 30, on contracting procedures in these special sectors. However, keep in mind that there is a draft bill implementing the new European Directive 2013/25/CE, of February 26, [on procurement by entities operating in the water, energy, transport and postal services sectors](http://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:32014L0025) that has to be approved in the following months.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

First of all, please note the singular situation that Spain is currently facing: three European Directives on public procurement should have been transposed before April 2016, but due to the difficulties to form government (for almost one year) they are still pending of approval. To this effect, there are some draft bills that should be passed throughout this year: a new Public Procurement Law; and a new Law on procurement by entities operating in the water, energy, transport and postal services sectors

Both of them implementing the latest European Directives: Directive 2014/24/CE, of February 26, on the coordination of procedures for the award of public contracts; Directive 2013/25/CE, of February 26, on procurement by entities operating in the water, energy, transport and postal services sectors and Directive 2014/23/CE, of February 26, on the Award of Concession Contracts.

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