

Contracts with public authorities in Spain

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Contracts with Public Authorities are subject to the principles of competition and publicity, unless otherwise set forth by law, and in all circumstances, to the principles of equality and non-discrimination.

The relevant requirements for contracts with the Public Authorities to be validly entered into are the following:

- ⇒ Capacity of the contracting body
- ⇒ Capacity of the awardee contractor
- ⇒ Determining the contract's object
- ⇒ Setting the price
- ⇒ The fact that there is appropriate and adequate credit when there are payment obligations to made by the Public Authorities due to the contract
- ⇒ Procedures for the file
- ⇒ The control of the administrative resolutions with economic content related to the contracts
- ⇒ Approval of the costs
- ⇒ Signing the contract

1. CAPACITY OF THE CONTRACTING BODY

1.1 Contracting bodies

- a. General Public Authorities of the Government: Government Ministers and Secretaries are empowered to enter into contracts in their own name within the scope of their competence.
- b. Autonomous bodies and other government public entities: their legal representatives.
- c. Entities and common services of the National Insurance Services: General Managers.

1.2 Authorisations

The contracting body requires prior authorisation by the Council of Ministers in the following circumstances:

- a. The budget is equal to or higher than 2,000,000,000 pesetas.
- b. When the percentage or number of annual instalments legally set forth in Article 61 of the General Budget Act (hereinafter the LGP) are modified regarding contracts lasting various years.
- c. When the Council of Ministers deems it would be appropriate.

- d. When the contracting body voluntarily requests an authorisation by the Council of Ministers.

Moreover, the legal representatives and General Managers may hold limited contracting capacity regarding the amount freely determined by the head of the ministerial department to which they are assigned, thus requiring an authorisation.

2. CAPACITY OF THE CONTRACTORS

Individuals and legal entities, either Spanish or foreign, which hold full capacity to act and accredit their economic, financial and technical or professional solvency, may enter into contracts with the Public Authorities. Technical or professional solvency may be replaced by the relevant classification in the cases when pursuant to this Act it may be required.

Regarding legal entities which control a group of companies, these companies belonging to the group may be taken into account, for the purposes of accrediting their economic, financial and technical or professional solvency, or the relevant classification of the controlling legal entity, when appropriate, providing it accredits that it actually disposes of the resources of these companies, which are required in order to perform the contracts.

2.1 Capacity to act

The capacity to act of traders which are legal entities shall be accredited by means of the deed of incorporation or amendment recorded in the Companies Registry, when the trader is not Spanish but from a Member State of the European Union, accrediting that it has been recorded in a professional or commercial registry is sufficient, when this requirement is demanded by the regulations in the State involved. The remaining foreign traders must accredit their capacity to act by means of a certificate issued by the Spanish Embassy in the relevant Country.

2.2 Economic solvency

Economic and financial solvency of the employer may be accredited through one or several of the following procedures:

- a. A report by the financing institutions or, when appropriate, any document justifying that there is an indemnity insurance covering professional risks.
- b. Concerning companies, submission of balance sheets or extracts thereof, in the event that their publication is compulsory in the States where the former are incorporated.
- c. A statement related to the total turnover and any works, supplies, services or duties performed by the company during the last three financial years.
- d. Any other documents deemed as being sufficient by the Public Authorities.

2.3 Technical solvency

The procedures for accrediting technical or professional solvency by the contractor vary depending on if the tender to be awarded is for a contract of works, supplies or services. The different resources may be classified as follows: qualifications, experience, a list of any works carried out in recent years and statement of the material and human resources which the bidder in the tender disposes of.

2.4 Prohibition to contract

Under no circumstances, may those involved in any of the following situations enter into contracts with the Public Authorities:

- a. Those that have been sentenced by an enforceable judgement or those prosecuted or accused of fraudulent or possessory offences or of bribery offences, embezzlement of public funds, influence peddling, negotiations prohibited for civil servants, disclosure of secrets or use of privileged information or offences committed against the Inland Revenue Services.
- b. Those declared in bankruptcy, receivership proceedings, having begun an arrangement of creditors or administrative order or when having submitted an application of bankruptcy or receivership, meanwhile when appropriate, have not been discharged.
- c. An absolute judgement having been passed of any contract entered into with the Public Authorities for a matter they had been declared guilty.
- d. Those sentenced by an absolute judgement due to offences against safety and hygiene in the workplace or due to offences against freedom and safety in the workplace, or those sentenced or sanctioned of an absolute nature due to a serious offence or infringement regarding market discipline within the professional field or related to the disabled being included on the work force or due to a very serious offence regarding labour issues, according to that set forth in Act 8 dated 7th April 1988, concerning infringements and sanctions of a labour nature.
- e. The individual or the legal entity's directors incur in any of the legal cases of incompatibility. Likewise, when this prohibition affects their spouses, anybody who may be linked to them due to a similar cohabitation relationship and their descendants, providing, as regards the latter, said persons hold their legal representation.
- f. Those not being up to date in fulfilment of their tax obligations or those regarding the National Insurance Services imposed by the rules in force, under the terms stipulated by the regulations.
- g. Those having committed serious fraud when submitting the relevant returns to the Public Authorities in fulfilment of the provisions in this Act or otherwise in its development rules.
- h. Those having breached the obligations imposed on the employer due to any agreements of cancellation of the classifications granted, or due to the statement of disqualification to undertake contracts with any Public Authorities.
- i. In the event of foreign traders belonging to Member States of the European Union, not being recorded, when appropriate, in a Professional or Commercial Registry, under the conditions set forth by the legislation of the State where they are established.
- j. Those sanctioned as a result of the relevant administrative file under the terms stipulated in the General Budget Act and the General Inland Revenue Services Act.
- k. Those not duly classified, when appropriate, according to that set forth in this Act, or they do not accredit sufficient economic, financial and technical or professional solvency.

Credentials by traders proving that they do not incur in any prohibition to enter into contract with the Public Authorities stated in the prior article, related to the situations listed in the different sections, may be carried out by means of a legal testimony or an administrative certificate, when appropriate, and when this document may not be issued by the competent authority, it may be substituted by a reliable statement granted by an administrative authority, notary public or any qualified professional body. In the event of companies belonging to Member States of the European Union and this possibility is set forth in the regulations of the relevant State, it may also be replaced by a reliable statement, granted before a legal authority.

Awarding of contracts in favour of persons lacking the capacity to act or solvency, as well as persons which are found under any of the cases included in Article 20 are null and void with full rights. Notwithstanding the aforementioned, the contracting body may decide that the trader continues performing the contract with the same clauses, for the essential period of time in order to avoid damaging the relevant public interest.

Individuals or legal entities from Countries which do not belong to the European Union, apart from accrediting their full capacity to enter into contracts and be bound according to the regulations in their Country and their economic, financial and technical or professional solvency, must also justify, that the Country of origin of the foreign company also accepts that in a substantially similar manner Spanish companies take part in contracts with the Public Authorities, by means of a report by the relevant Spanish diplomatic representation, attached to the documents submitted. Furthermore, regarding works contracts these companies must have a branch in Spain, appointing attorneys or representatives for their operations, and they must be recorded in the Companies Registry.

In the contracts for works, supplies, consulting and assistance, services and unusual specific and particular assignments which do not exceed a certain amount, the collaboration report to which the prior section refers is not be required when related to companies from Countries signing the Public Contracting Agreement of the World Trade Organisation.

2.5 Temporal Associations of Companies

The Public Authorities may enter into contracts with traders associations, which are temporarily incorporated for such purpose, without signing any public deed being required until the award in their favour has taken place. Said traders are jointly bound before the Public Authorities, and they must appoint one sole representative or attorney of the association with sufficient powers to exercise the rights and perform the duties stemming from the contract until termination thereof, notwithstanding that there are joint powers which may be granted by the companies in order to collect and pay substantial amounts.

For the cases in which classification is required and the temporal association of traders includes national traders, foreign traders not belonging to the European Union or foreign traders belonging to the European Union, the two former ones must accredit their classification and the latter, should this be lacking, must accredit their economic, financial and technical or professional solvency.

3. OBJECT OF THE CONTRACTS

The object must be established, and the fact of it being required to fulfil the purposes of public service must be duly justified in the contracting file.

4. PRICE

The contracts must have a definite price, in national currency. The price must be paid to the contractor according to the services actually rendered and pursuant to all the conditions of payment set forth in the contract.

If payment must be carried out in a foreign currency, this must be stated, as well as the maximum amount and the total price in the national currency.

A Review of prices may only take place under the following circumstances i) when 20% of the contract amount has been performed, ii) when six months have elapsed as of the award iii) when the applicable formulae or reviewing system is described in the conditions of special administrative clauses.

A price review may never be appropriate as regards out of the ordinary specific and special assignment contracts.

The reviewing formulae must be approved by the Council of Ministers, published in the Official Gazette and must be reviewed at least every two years.

The reviewing formulae chosen by the contracting body must not vary for the term that the contract is in force.

5. GUARANTEES REQUIRED IN ORDER TO ENTER INTO CONTRACTS WITH THE PUBLIC AUTHORITIES

5.1 Provisional guarantees

In order to use the open or limited procedure tendered by the Public Authorities, accrediting that a provisional guarantee equalling 2% of the contract's bid has been provided previously is required, submitting it to the relevant contracting body. In the absence of a budget, the contracting body must provide an estimate.

Said guarantee must be provided:

- a. In cash, Government bonds or private securities guaranteed by the Government, by an Autonomic Community, by the contracting Public Authorities or by any of the corporations included in section (b.) below, subject to, when appropriate, the conditions which may be statutorily stipulated. The cash, securities or relevant certificates must be deposited in the General Deposits Savings Bank or in its branches or Savings banks or equivalent public entities of the Autonomic Communities or contracting local corporations, with the exceptions which may be statutorily stipulated.
- b. By means of a warrantee provided by a Bank, Saving Bank, Credit Co-operative and Reciprocal Guarantee Companies authorised to operate in Spain.
- c. By insurance deposit contract entered into in the manner and under the conditions that may be statutorily set forth, with an insurance entity authorised to operate in the branch of deposits.

In the conditions of the special administrative clauses, companies accrediting the required classification in order to take part in the bidding for the contracts when the amount does not exceed

certain sums as stipulated by law the contracting body may choose not to demand the obligation to provide a provisional guarantee.

The provisional guarantee is reimbursed to those involved immediately after awarding the bid for the contract in the cases where the awarding procedure is an auction or award, when the former is by tender. The guarantee provided by the trader of the awardee is retained when it is included in the awarded bid.

In the cases of suspected recklessness in the bids, the guarantee provided by the trader which is included therein is retained, as well as the guarantee provided by the best bidder which are not involved in reckless circumstances, until the awarding agreement has been pronounced and after the recklessness of the bids has been decided.

5.2 Final guarantees

The awardees of the contracts are bound to create a final guarantee of the amount of 4% of its bid, to be left at the disposal of the contracting body, whatever the procedure and manner of awarding the contract may have been, and must be provided in any of the manners and under the conditions stated for the provisional guarantee.

Alternatively to that set forth in the prior section, the contractor may provide a total guarantee referring to all the contracts entered into with Public Authorities or with a contracting body, without any special specification for each contract. The total guarantee ensures, in a general and permanent manner, fulfilment by the awardee of the duties stemming from all the contracts in force entered into with the Public Authorities or contracting body, when appropriate, up to 4 per cent of the relevant contract budget, or the amount of the award, when no prior budget has been determined.

At all times, the total guarantee must be adjusted to the consequences of the possible liabilities exercised thereon, in order to permanently maintain the same level for which it was provided.

5.3 Special and supplementary guarantees

Moreover, the contracting body may stipulate an additional guarantee of up to 6% of said bid in the conditions of the administrative clauses. For all purposes, said supplement is deemed as a final guarantee.

In the case of an award to a trader whose bid had initially incurred in a case of recklessness, the contracting body requires the contractor to provide a final guarantee for the total amount of the awarded contract, which may replace the 4 per cent provided as a provisional guarantee.

5.4 Exceptions to providing guarantees

Providing a guarantee, either provisional or final, is required in the following supply contracts:

- a. Those entered into with agency companies of public services related to the kind of supplies, as stated in Article 173.1.a)
- b. Those in which, in a system of negotiated procedure; the contractor immediately delivers consumable or easily impaired goods before the price is paid, unless there is a guarantee term.

- c. When the supplying company is foreigner and guarantees fulfilment of the contract, according to international trading customs.

In consulting and assistance, services and special out of the ordinary assignments, the contracting body may also dispense with the obligation of providing a guarantee. In management of public services contracts, the Council of Ministers is responsible for dispensing with such obligation.

Similarly, due to the contracting body, exemption may arise for the relevant entities to provide a guarantee when such exemption for these entities is acknowledged by the governmental laws or relevant autonomic provisions.

5.5 Providing and readjusting guarantees

Providing a provisional guarantee is accredited by the applicant at the time of submitting the bid for the tender to the contracting body.

Providing a final guarantee must be carried out by the awardee within a term of fifteen working days, counted as of the award of the contract being notified.

In consulting and assistance and services contracts for specific and definite out of the ordinary assignments the guarantee may be provided in the manner of withholding it from the price.

Failure to provide the guarantee in time is a cause for cancelling the awarded contract.

When the contract undergoes a variation in its value, it must be readjusted within the stipulated term of 15 working days, counted as of the date the contract is amended, so that the due proportion with the budget is maintained.

5.6 Extension of the guarantees

The final guarantees is related to the following items:

- a. Due to penalties imposed on the contractor due to the late performance of the contract.
- b. Due to the undertakings derived from the contract, from the expenses arising to the Government due to a delay by the contractor to fulfil its undertakings and the damages caused thereto due to performance of the contract or in the case of breach thereof, without termination.
- c. Due to forfeiture which could be ordered in the event of termination of the contract.
- d. Moreover, in the supply contracts the final guarantee covers the lack of flaws or defects in the goods supplied during the term of the guarantee set forth in the contract.

5.7 Cancellation of guarantees

The guarantee may not be returned or cancelled until the due date of the guarantee term and the contract being dealt with has been satisfactorily fulfilled or has been terminated without the contractor being to at fault.

In the event of partial delivery, the contractor may only request the return or cancellation for the proportional part of the guarantee when this is expressly authorised in the conditions of the special administrative clauses.

In the event of assignment of contracts, the return or cancellation of the guarantee provided by the assignor will not take place until the one by the assignee has been formally provided.

When one year has elapsed as of the date of termination of the contract, without formal delivery and settlement taking place for reasons not caused by the contractor, the return or cancellation of the guarantees take place without further delay, providing the liabilities for which the guarantee was provided have not arisen.

5.8 Enforcement of guarantees

To enforce the final guarantee, the contracting authorities have preference over any other creditor for enforcement of the guarantee, whatever may be the nature thereof and whatever the grounds may be based on.

When the guarantee is not sufficient to pay for the liabilities affecting it, the authorities proceed in collecting the difference by means of administrative proceedings of court order, pursuant to that set forth in the respective collection regulations.

5.9 Guarantees provided by third parties

The guarantees provided in favour of the contractor by individuals or entities other than the contractor must be of a joint and several nature.

In the insurance deposit contract, the contractor holds the position of insurance holder, and the contracting authorities that of the insured party. Failure to pay the premium, whether one sole one, the first or subsequent, the insurance company is not be entitled to cancel the contract, nor may it be terminated, nor the insurance company coverage be suspended, nor may it be freed of its duty, in the event the insurance company must enforce the guarantee. The insurance company may not oppose the exemptions that the insured party could hold against the insurance holder.

6. PROCEDURES OF THE CONTRACTING FILES

The contracting files may be ordinary, urgent or emergency.

The procedures of the urgent files follow the same steps as the ordinary ones, with the special circumstances that are pointed out in the following section. To carry out the procedures for the files of emergency exceptional steps are taken.

6.1 Urgent Procedure

The contract files may be subject to an urgent procedure when their being required can not be postponed or their award is required for reasons in the public interest. The file must contain an urgent statement by the contracting body and with the due reasons.

The procedure of files classified as urgent are characterised by being dealt with in a preferential manner by the different administrative, tax and advisory bodies taking part in their prior procedures. In ordinary files, the length of terms set forth for bidding and awarding are reduced by half.

Beginning performance of the contract may be granted, even when the formalities have not taken place, providing the relevant final guarantee has been provided; under no circumstances may performance of the contract be delayed for more than two months from the date of the award, otherwise the contract is terminated.

6.2 Emergency processing

Emergency processing is only set forth in the case of disasters, situations implying serious danger or requirements affecting national defence, in which the Public Authorities must act in an immediate manner.

The competent contracting body, not being bound to process the administrative file, may request performance of the relevant actions in order to solve the event occurring, to arrange the requirement arising or else, totally or partially, freely contract its object, without being subject to the formal requirements set forth in the Act.

Once the actions object of this exceptional treatment have been performed, the relevant procedures are fulfilled, which do not now have an emergency nature pursuant to that set forth in the Act.

7. GENERAL PROCEEDINGS

7.1 Assessing the length of terms and the amount

All terms set forth in this Act are deemed as referring to calendar days, unless it is expressly stated that they are working days.

Whenever the text in this Act refers to the amount or sum of the contracts, they are deemed as including Value Added Tax, unless expressly stated otherwise.

7.2 Announcements

All the procedures for awarding the contracts must be announced in the «Official Gazette», except for the negotiated proceedings. The latter need only be announced in the «Official Gazette» when they must be announced in the «Official Gazette of the European Communities» due to their amount.

However, the Autonomic Communities, local corporations and their autonomous bodies and public corporations, as regards those contracts which, due to their amount, need not be published in the «Official Gazette of the European Communities» the announcement in the relevant Official Journals or Gazettes may replace the one in the «Official Gazette».

In open proceedings, publication must be carried out with at least twenty-six days prior notice before the last date stipulated for receiving bids.

In limited procedures and those negotiated with an announcement, publication must be carried out with at least fourteen days prior notice before the last date stipulated for receiving bids.

7.3 Bids by interested parties

The bids must be secret and subject to the system set forth in the conditions of the special administrative clauses.

Their submission implies the unconditional acceptance of the total contents of said clauses, with no exception whatsoever.

They must include the following documents in a separate envelope:

- a. Those accrediting the employer's legal capacity and, when appropriate, its representation.
- b. Those accrediting the company's classification, when appropriate, or justifying the requirements for its economic, financial and technical or professional solvency, as well as a reliable statement of not being involved in having incurred in prohibition.
- c. The receipt accrediting the fact that the provisional guarantee has been provided.
- d. Regarding foreign companies, a statement of being subject to the jurisdiction of Spanish courts and Tribunals of any level, for all circumstances which might arise from the contract in a direct or indirect manner, waiving, when appropriate, the relevant foreign jurisdiction of the bidder.
- e. Those accrediting that the company is up to date in fulfilment of the Inland Revenue and National Insurance Service obligations imposed by the provisions in force.

When there is a requirement to submit any other documents is required, this must be mentioned in the conditions of the special administrative clauses and in the relevant announcement of tender.

7.4 Simultaneous bids

In the bidding, each bidder may not submit more than one bid, notwithstanding the cases in which the conditions of special administrative clauses of the tender accepts submitting different or alternative solutions to that defined in the project which is the object of the bidding.

Neither may any bid be put forward when temporarily associated with other ones, when this is carried out in an individual manner, nor may it belong to more than one temporary association.

A breach of these rules implies non-acceptance of all the bids put forward by the bidder.

8. AWARDING PROCEDURES

The Public Authorities Contracts Act regulates three different procedures for awarding the contracts:

- a. Open procedure, allowing any interested trader to take part,
- b. Limited procedure, allowing only those traders previously appointed by the Public Authorities to take part. The Public Authorities must draw up and justify in the conditions of special administrative clauses the objective criteria according to which the contracting body must process those invited to take part in the procedure. The number of companies that are planned to invite to take part must be a minimum of five and a maximum of twenty.
- c. Negotiated procedure, by which the contract is awarded to the trader freely assigned by the Public Authorities, with prior consultation and negotiation of the contract with one or several traders. A bid by three companies with capacity to perform the contract's object is required,

providing this is possible, determining the price with the chosen company and recording all the aforementioned in the file.

Both in the open and limited procedures, awarding may be carried out by means of an auction or tender, in both cases encouraging participation.

In the negotiated procedure, with or without an announcement, the Public Authorities require a high level of confidentiality in the stage of awarding the contract, and the Public Authorities are authorised to breach the competition principle, being able to award the contract to a trader chosen in a free manner, only requiring that a minimum of three traders with a capacity to perform the contract's object have been consulted.

Such confidentiality empowering the Public Authorities in the negotiated procedure implies only the awarding stage, since, regarding the other stages of a contracting file which require processing, the negotiated procedure also requires fulfilment of the processes also included in the open and limited procedures. Thus the preparation stage of the file (drawing up the tenders, approving the bids, approving the files), and the stage for signing the contract (requirements and the objective and subjective items of the contract) are similar in all the aforementioned procedures.

Under certain circumstances, expressly listed in the Public Authorities Contracts Act, the contracting body may agree to use the negotiated procedure for awarding contracts, being able to differentiate the cases in which an open or limited procedure has taken place previously and those directly using the negotiated procedure.

Therefore, the negotiated procedure may be agreed upon after an open or limited procedure has been held, when the economic bids have been irregular or not acceptable, or otherwise no bids have been submitted. Similarly, under certain circumstances implementation of the negotiated procedure may also be agreed upon without having held an open or limited procedure, such as in the following cases:

1. The aim of the contract is experimentation, research or development.
2. Due to an imperative emergency stemming from unforeseeable circumstances for the contracting body, when prompt performance is required, which may not be attained by means of the ordinary urgent procedure.
3. When dealing with supplementary works or deliveries required, or in repeating works similar to others previously awarded, or when they imply a replacement supplies and awarding the supplementary work or delivery to the previous contractor or supplier is advisable.
4. Due to a technical or artistic specification or due to reasons related to safeguarding exclusive rights, the object of the contract may not be entrusted to more than one sole supplier.
5. In the event of awards derived from a framework agreement or contract (set forth in the Directive 93/38 only for contracts related to the water, electricity transport and telecommunications sectors).
6. In the event of supplies from a centralised acquisition system.
7. When the object of the contract has been declared confidential or of a reserved nature and performance of the contract requires special security measures.

8. When the budget for the works is less than 5,000,000 pesetas or the goods to be supplied are for less than 2,000,000 pesetas, a limit that is raised to 3,000,000 pesetas for manufacturing contracts.
9. When the goods object of the contract are part of Spanish Historic Patrimony.

9. MINOR CONTRACTS

As well as such procedures for awarding the contract, the Public Authorities Contracts Act regulates the so-called "minor contract", which means those of an amount which do not exceed a certain quantity:

- a. Works contracts of an amount no higher than 5,000,000 pesetas
- b. Supply contracts of an amount no higher than 2,000,000 pesetas
- c. Consulting and assistance contracts for an amount no higher than 2,000,000 pesetas

The procedures of the file to award a minor contract only requires approval of the costs by the contracting body and the relevant invoice thereof being included, complying with the stipulated regulatory requirements and in minor works contract, furthermore, the works estimate is included, notwithstanding that there must be a plan when specific rules require so.

The literal text of Article 57 of the Public Authorities Contract Act has been subject to discussion, when in regulating minor contracts the text states verbatim: "the procedure of the file only requires approval of the expense and inclusion of the relevant invoice thereof".

In the procedures of the files for awarding the so-called "minor contracts", the discretion of the Authorities reaches its highest level, as none of the requirements which must be complied with in open, restricted and negotiated proceedings are required for it to be awarded. Thus, tenders, approvals, contracting boards or contracts nor even the three necessary consultations required for the negotiated procedure are applicable.

Obviously, a lack of competition in the bids and the agility of such procedures to award the "minor contracts", may produce the fractioning of the contract in order to reduce the amount thus make such award system be worthwhile.

10. FRACTIONING OF THE CONTRACT

The fractioning of the contract in order to lower the amount thereof and hence avoid the publishing requirements, the procedure and the relevant kind of awarding is not admitted by the Public Authorities Contracts Act.

Said rule reiterates that set forth in the Directive 93/96¹, forbidding fractioning of supplies to avoid applying the Directive, which is only stipulated as procedures for open, restricted and negotiated awards.

¹ Directive 93/96 of the EEC, dated 14th June, concerning co-ordination of the awarding of public supply contracts procedures.

Notwithstanding, said general principle, it is possible to fraction the object of the contract in various lots, duly accredited in the file, providing the object allows this and each of said parties are able to separately use and benefit from this or when the nature of the object requires so. In such case, when the contents of the lots is practically the same, one sole contract may be entered into for the award of the lots.

This exception to the general prohibition of fractioning is not so, as its objective does not imply an aim to avoid a certain procedure, but to allow forming identical lots by means of one sole contract to be awarded to different contractors, the only case when fractioning of the contract actually makes sense.¹

11. SYSTEMS OF AWARDING

Both in the open procedure and the limited one, the award may be carried out by auction or by tender. The auction is based on a rate expressed in money, and the bidder, which without exceeding it, bids a lower price. In the tender, the award is granted to the bidder who, generally, puts forward the most advantageous bid, bearing in mind the criteria set forth in the tender conditions, without exclusively maintaining the price therein and notwithstanding the Authorities being entitled to declare it without bidders.

11.1 Auction

In the auctions the Contracting Board previously classifies the documents submitted, in the stipulated time and manner, and proceeds, by a public procedure in the opening of the bids admitted and the proposal by the contracting body for awarding the contract to the bidder who has put forward the lowest price.

The proposal for the award does not imply any right in favour of the proposed trader from the Authorities, while the contracting body has not awarded the contract.

In auctions, the awards must be granted within a maximum term of twenty days, counted from the day after the opening of the bids received in a public procedure. When no agreement on the award is reached within the term, the trader is entitled to withdraw his/her bid and the guarantee provided is returned or cancelled.

When the contract is cancelled due to the fact the awardee does not fulfil the required conditions for its formalities or a contract is cancelled when the performance of which has already been started, the Authorities may award the contract to the bidder or bidders coming after the former, in order of the bids, providing this is possible, prior to proceeding in a new summons, counting on the agreement of the new awardee.

11.2 Reckless withdrawals

¹ Luis Cayuela Sebastián. Public Authorities Contracts. Ed. CEF 1996

A reckless withdrawal is deemed as a bid that may not be fulfilled due to it being disproportionate or reckless.

When the contracting body suspects that there are grounds that the bid is a reckless withdrawal, it must request a report by the Consulting Board of Administrative Contracting when due to the circumstances this is advisable.

The disproportionate or reckless withdrawals are assessed according to the objective criteria statutorily set forth and when they are declared they must require a prior request for information from all the bidders which are allegedly included therein, as well as technical advice on the relevant service. The contracting body, in view of the mentioned reports, must agree upon an award in favour of the bid at the lowest price which may be fulfilled to the satisfaction of the Authorities and, failing this, the best bid which has not incurred in recklessness.

When the award is made in favour of a trader whose bid had previously incurred in suspected recklessness, a final guarantee is required for the total amount of the awarded contract.

11.3 Tender

The contracts in which the award to the trader is not carried out by exclusively taking into account the bid at the lowest price is awarded by means of a tender and, particularly, in the following cases:

- a. When the Authorities have not previously stipulated the projects or budgets.
- b. When the definition of the service approved by the Authorities may be improved by other technical solutions or by reducing its term of performance, to be proposed by the bidders.
- c. When the Authorities provide materials or supplementary means for performance thereof, the good use of which requires special guarantees by the contractors.
- d. When use of a specially advanced technology is required, or when the performance is particularly complex.

In the conditions of special administrative clauses for any tender the objective criteria must be set forth, which is the basis for the award, such as the price, performance or delivery term, costs of use, quality, profitability, technical value, esthetical or functional features, availability of spare parts, maintenance, technical assistance, post-sales service or such like, according to which the contracting body must agree upon it.

The criteria to which the prior section refers must be stated in a descending order of importance and in the level of deliberation attributed thereto.

Variants or alternatives to the bids put forward by the bidders may be accepted, unless expressly stated otherwise, when they fulfil the submitting requirements and types included in the conditions of particular administrative clauses.

In order to award the contracts the Contracting Board must previously categorise the documents submitted and then proceed, by means of a public action, in opening the bids submitted by the bidders and issue a bidding award, including in all cases the deliberation of the objective criteria for

the award. Alternatively, the Authorities may award the contract to the most advantageous bid, by means of implementing the objective criteria for the award without needing take into account its economic value, or state that the tender is without bids.

The award of the contract must take place within a maximum term of three months, counted as of opening the bids, unless otherwise stipulated. Should the awarding agreement not be pronounced within the stipulated term, the traders accepted for the tender are entitled to withdraw their bids and the guarantee provided must be returned or cancelled.

The provisions related to holding an auction must also govern the tender, except concerning that exclusively applicable to a certain award system.

12. NOTIFICATION OF THE AWARD

The award of the contract, whatever the procedure and awarding manner that may be used, is notified to those taking part in the bidding and once the formalities have been carried out, it must be notified to the Public Registry of Contracts.

Depending on the total amount of the contract, the award is only be published in the «Official Gazette» or in the relevant Official Journals or Gazettes of the Autonomic Communities and local corporations, or also in the «Official Gazette of the European Communities.

The contracting body notifies any rejected candidate or bidder who requires so, within a term of fifteen days as of receiving the application, the reasons for refusal of their candidature or bid and the features of the awardee determining that the award is granted in his/her favour, pursuant to what is set forth in the prior section as far as notification is concerned.

13. DRAWING UP AND FORMALITIES OF THE CONTRACTS

The contracts are drawn up by means of the award by the competent contracting body, whatever the awarding procedure or manner used may be.

The formalities of the contracts of the Authorities drawn up in an administrative document within a term of thirty days as of the date following notification of the award, said document being a sufficient title in order to be entered into any public registry, being able however to raise a public deed when the contractor so requests, the costs stemming from the granting thereof being at his/her expense.

When, due to any circumstances the contractor may be liable for, the formalities of the contract may not be carried out within the mentioned term, the Authorities may agree upon termination thereof, with a prior hearing of the interested party. When opposition is put forward by the contractor, a report by the Council of State or the relevant advisory body of the Autonomic Community is required. When appropriate, termination will bring about forfeiture of the provisional guarantee to pay for the damages caused.

When the Authorities are responsible for the causes of not carrying out the formalities, the contractor must be compensated for damages stemming from the delay, regardless of the fact that the contractor may request termination of the contract.

Performance of the contract may not begin without the prior formalities having being carried out, except in the cases of urgent or emergency procedures.

The Authorities may not verbally contract, unless the contract is of an emergency nature.

14. PERFORMING THE CONTRACTS

The contractor is bound to fulfil the contract within the total time set for its performance, as well as the partial terms stated for its successive performance.

The contractor being in delay may not require prior notification by the Authorities, which may choose either to terminate the contract or to impose economic sanctions.

When the sanctions for delay amount to 20 per cent of the amount of the contract, the contracting body is authorised to proceed in termination thereof or agree upon continuing performance resulting in imposing new sanctions. This authorisation is also granted to the Authorities concerning a breach in the partial terms by the contractor, when this is set forth in the conditions of special administrative clauses or when a delay in fulfilment of the former makes it likely to reasonably presume that it would be impossible to fulfil the entire term.

Should the Authorities choose termination, this must be agreed by the contracting body without any procedure being required other than holding a hearing of the contractor and, the opinion of the Council of the State or equivalent advisory body in the relevant Autonomic Community when opposition is put forward by the contractor. When the delay is due to any reasons for which the contractor is not responsible and the latter offers to fulfil the undertakings by obtaining an extension of the assigned period of time, the Authorities grant a term which, at least, would be equal to the time lost, unless the contractor asks for a shorter term.

The contractor is bound to compensate for any damages caused to third parties as a consequence of the operations required to perform the contract.

The Authorities are also liable for damages caused to third parties as a consequence of the flaws in the project drawn up by the former in the contract for works or in manufacturing supplies.

Third parties may previously require, within the year following that in which the damages were caused, that the contracting body, once the contractor has been heard, gives its opinion on which of the contracting parties is liable for damages.

The contractor is entitled to receive payment for the services performed under the terms set forth both in this Act and the contract and according to the stipulated price. Payment is made totally or partially by means of payment on account.

The Authorities are bound to pay the amount within the two months following the date of issuing the certificates for works or the relevant documents accrediting total or partial contract and should this be delayed, they must pay the contractor, as of fulfilment of said two-month term, the legal interest on the money being increased by 1.5 points, on the appropriate amounts. Should delay in payment exceed four months, the contractor may proceed, when appropriate, in suspending fulfilment of the contract, notifying the Authorities of this fact with one month's notice for the purposes of acknowledging the rights which may stem from said suspension, under the terms set forth in this Act. Similarly, if the delay by the Authorities exceeds eight months, the contractor may be entitled to terminate the contract and be compensated for the damages caused as a consequence thereof.

The contractors which, according to the prior article, are entitled to receive money from the Authorities may assign their right to be paid by the Authorities.

In order for an assignment of the right to be paid to be fully effective before the Authorities, certified notification thereof concerning the assignment agreement is essential.

15. ASSIGNMENT OF THE CONTRACTS

The rights and duties stemming from the contract may be assigned to a third party providing the assignor's technical or personal skills have not been a determining factor in order to award the contract.

In order for the awardees to be able to assign their rights and duties to a third party, the following requirements must be fulfilled:

- a. The contracting body has expressly authorised the assignment in a prior manner.
- b. The assignor must have performed at least 20 per cent of the contract's amount, or he/she must have been in operation at least within a term equal to one fifth of the term of the contract, should the latter concern management of public services.
- c. The assignee is able to enter into contract with the Authorities and must be duly classified, when this has been required of the assignor.
- d. The formalities of the assignment must be carried out between the awardee and the assignee, by means of a public deed.

The assignee is subrogated in all rights and duties, which would correspond to the assignor.

16. SUB-CONTRACTING

Unless otherwise provided in the contract, or unless, due to its nature and conditions it may be presumed that it must be directly performed by the awardee, the latter may agree with third parties upon a partial performance thereof.

Sub-contracting is subject to fulfilment of the following requirements:

- a. In all circumstances, the Authorities must be notified of this sub-contract in writing, stating the parts of the contract that must be carried out by the sub-contractor.
- b. The contracts of a secret or reserved nature, or when performance thereof require special safety measures, or else when so required in order to safeguard the essential interest of the security of the State, sub-contracting always requires an express authorisation by the contracting body.
- c. The partial services sub-contracted by the awardee with third parties may not exceed the percentage of the bid of the contract set forth in the conditions of special administrative clauses. In the event that such item is not included in the conditions, the contractor may sub-contract up to a percentage not exceeding 50 per cent of the contract's budget.

- d. The contractor is bound to pay the sub-contractors and suppliers the agreed price under the terms and conditions, which must not be less favourable than those set forth for relationships between the Authorities and the contractor.

The sub-contractors are only bound to the main contractor, which is therefore totally responsible for performance of the contract before the Authorities. Under no circumstances may the contractor agree upon partial performance of the contract with persons who have incurred in suspension of classifications or disqualification to contract.

17. OPTIONS OF THE AUTHORITIES

The contracting body holds the option to interpret the administrative contracts, solve any doubts arising from fulfilment thereof, modify them due to reasons of a public interest, agree upon their termination and determine their effects. The relevant agreements put an end to the administrative channels and become immediately enforcement proceedings. In the relevant file a hearing is held for the contractor.

The report by the Council of the State or an equivalent advisory body in the relevant Autonomic Community is required in the following cases:

- a. Interpretation, annulment and termination, when opposition is put forward by the contractor.
- b. Modifications, when the amount, either in a separate or joint manner, is higher than 20 per cent of the original price of the contract and the latter is equal to or is higher than 1,000,000,000 pesetas.

18. PRICE REVIEW

Reviewing the prices in the contracts may only take place when the contract is performed in 20 per cent of its amount and six months have elapsed as of it being awarded. The conditions of special administrative clauses list the applicable formula or reviewing system and, in a termination with reasons, when unfairness thereof may be established, this must also be included in said conditions.

Review of the prices must be carried out by means of the indices or formulae of an official nature as set forth by the contracting body. The formulae reflect the part related to the workforce and basic items in the contract's price. These formulae must be published in the «Official Gazette» and may be reviewed at least every two years. Among the standard formulae, the contracting body must, in the conditions of the special administrative clauses, determine those which are deemed as being the most appropriate ones as regards the relevant contract, notwithstanding that, when none of these coincide with the features of the contract, special formulae may be proposed, which must also be approved by the Council of Ministers. The formulae implemented in the contract may not be modified for the term it is in force.

The amounts of the appropriate reviews are made effective by means of the relevant payment or discount in the certificates or partial payments or, in an exceptional manner, in the settlement of the contract, when the latter may not have been included in said certificates or partial payments.

19. CANCELLATION OF THE CONTRACT

19.1 Causes for cancellation

The following are causes for cancellation of the contract:

- a. When the death or inability arises of the individual contractor or termination of the status of a company of the contracting company.
- b. Declaration of bankruptcy, an administrative order, receivership or proven insolvency in any procedure or creditors arrangement.
- c. The mutual agreement between the Authorities and the contractor.
- d. Failure by the contractor to provide the final guarantee or the special or supplementary ones in the cases set forth by Law.
- e. Failure to fulfil the formalities in time.
- f. Delay in compliance with the terms by the contractor.
- g. Failure in the payment by the Authorities within a period of eight months.
- h. Failure to fulfil of the remaining essential contractual undertakings.
- i. Those expressly set forth in the contract.
- j. The specific ones for each category of the contract.

The contracting or acting body must agree upon cancellation of the contract on request of the contractor.

Failure to provide the guarantee, delay in fulfilment of the beginning date in the urgent procedures files, as well as being declared in bankruptcy, receivership or proved insolvency in any proceedings always results cancellation of the contract.

In the remaining cases of cancellation of the contract, the right to perform it will be discretionary for the party not being responsible for this taking place. When the cause for cancellation is death or disability of the individual contractor, the Authorities may agree to the continuance of the contract with the heirs or successors.

Cancellation by mutual agreement may only take place when another reason for cancellation does not arise that the contractor is responsible for and providing that reasons of public interest make it unnecessary or inconvenient that the contract continues in force.

In the event of a company merger or contribution of a company, the contract may continue in force with the company taking over or incorporated due to the merger, being subrogated in all the governing rights and undertakings thereof.

In the cases of a spin-off or contribution of a company, the contract continues in force with the resulting or beneficiary company, which is subrogated in all the governing rights and undertakings thereof, providing the resulting or beneficiary company has the solvency required to accept the award agreed upon.

In a creditors arrangement and administrative order, the Authorities discretionally continue the contract when the contractor provides sufficient guarantees in their opinion for performance thereof.

When the cause of cancellation is the failure to provide the supplementary guarantees, the cancellation affects the whole of the contract.

In the event of delay in performance, should the penalties caused by the delay exceed 20 per cent of the amount of the contract, the Authorities may be entitled to cancel the contract or impose further sanctions.

Fulfilment of the undertakings derived from the contract by the Authorities results in cancellation thereof only in the cases set forth in this Act.

19.2 Effects of cancellation

- a. In the event of not carrying out the formalities of the contract in time for causes the contractor is responsible for, forfeiture of the provisional guarantee takes place and damages caused are claimed.
- b. When cancellation takes place due to mutual agreement, the rights of the parties is adjusted to that validly stipulated between the Authorities and the contractor.
- c. Breach by the Authorities of the undertakings of the contract generally result in payment for damages the contractor may be due for such reason.
- d. When the contract is cancelled due to breach by the contractor the guarantee is forfeited, furthermore the Authorities are compensated for the damages caused which exceed the amount of the forfeited guarantee.

20. INVALIDITY OF THE CONTRACTS

The contracts regulated by this Act are invalid when any of its preparatory or awarding procedures are invalid and when any of the following reasons for annulment or cancellation in Administrative or Civil law arise:

20.1 Causes for Annulment in Administrative Law

The following are causes for annulment in administrative law, referring to the time of awarding the contract:

- a. Those set forth in Article 62.1 of the Legal system of the Public Authorities and Common Administrative Procedures.
- b. The duly accredited lack of capacity to act or economic, financial, technical or professional insolvency or when the awardee is involved in any of the prohibitions or incompatibilities stated in section 2.4.
- c. The lack or insufficiency of credit, in accordance to that set forth in Article 60 of the General Budget Act and other legal rules of the same nature as the rest of the Public Authorities subject to this Act, except in the cases of urgent procedures.

20.2 Causes of annulment in administrative law

Other infringements of a legal nature and specially the rules contained in the Authorities Contracts Act are reasons for annulment.

20.3 Reasons for invalidity in Civil Law

Invalidity of contracts for reasons acknowledged in Civil Law, when administrative contracting is applicable, are subject to the requirements and terms of performance of the actions set forth in the civil ordinance, however, the procedure to put them into force are subject to that set forth in the prior articles for administrative procedures and contracts which are able to be annulled.

20.4 Effects of declared annulment

- a. The declaration of annulment of the preparatory procedures of the contract or awarding when this is absolute, will imply in all cases, annulment of the contract itself, the parties having to reimburse each other reciprocally for everything they had received by virtue thereof and when this is not possible its value is returned, The party responsible must compensate the other party for the damages caused.
- b. Annulment of the procedures, which are not preparatory, will only affect these and their consequences.
- c. Should the administrative declaration of annulment of a contract cause serious consequences in the public service, continuance of its effects may be set forth under the same clauses and in the same agreement, until the urgent measures have been adopted to avoid the damage.

21. APPEALS AND ARBITRATION

Against all agreements that bring the administrative channels to an end proceed in a legal review appeal, pursuant to that set forth in the regulating law of such jurisdiction.

Submitting to arbitration is subject to the requirements set forth in the general Budget Act or in the relevant rules of other Public Authorities.

22. CONTRACTS ENTERED INTO ABROAD

Contracts which are entered into and performed abroad, notwithstanding taking the principals of Spanish law into account to resolve doubts and loopholes which may arise in their application, the following rules are applicable:

- a. Regarding the General Government Authorities, The Ministry of Foreign Affairs is responsible for the formalities of these contracts, which enforces them by means of its diplomatic representative's or consulates and may delegate this in favour of other bodies, civil servants or individuals.

Regarding the Autonomic Bodies, Managing Entities and common services of the National Insurance Service, its legal representatives or the one delegated thereby are responsible for the formalities of these contracts.

Regarding other bodies and entities subject to this Act, the lawful representatives are responsible for the formalities.

- b. Notwithstanding the capacity requirements which the Government laws may demand where the contract is entered into, determining the capacity and solvency conditions of Spanish companies and those belonging to the remaining members of the European Community, are pursuant to that set forth in the prior chapter 2.
- c. The conditions of special administrative clauses may be replaced by the clauses of the contract itself.
- d. The contracts may be awarded by a negotiated procedure, having to obtain, whenever possible, three bids at least from companies able to fulfil them.

- e. The formalities are carried out by means of a certified document, forwarding the details of these contracts to the Administrative Contracting Consulting Board, notwithstanding being bound to forward them to the Court of Auditors.
- f. Regarding minor contracts, they are in accordance to that set forth in relation thereto in Spanish law.
- g. The awardee may demand a similar guarantee as that set forth in Spanish law to ensure performance of the contract, when this is possible and suitable to the continues in the State where the contracting is made and in the absence of this, that which is usual and authorised in such State.
- h. Payment of the price depends on delivery by the contractor of the service agreed, except when this is opposed by the law or the customs in such State, in which case a guarantee must be demanded to cover the advance payment.
- i. In these contracts, it is endeavoured to include clauses that try to conserve the interests of the Authorities in the case of possible breaches by the contractor and to authorise amendments in the contract, which may be convenient for them.

In contracts with Spanish companies, clauses of submission to Spanish Courts are included and in contracts with foreign companies it is endeavoured, whenever circumstances permit so, to include clauses which try to resolve conflicts which may arise by means of systems of simple arbitration proceedings.

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