



## The supply price and its payment cannot depend on the use of products and equipment by the Administration calling the tender

*Judgment of the Supreme Court of 28 November 2017*

### Background

This case stems from an appeal filed by a Spanish Federation for Healthcare Technologies' Companies (FENIN) against the specifications of a tender called by the healthcare authority of the Basque Country for the award of a supply contract for products and equipment to perform blood gas tests. The Public Tender Court of the Basque Country upheld the arguments of FENIN and declared several clauses of the tender specifications as invalid. Some of these clauses set the supply price of the products and equipment on the basis of the number of tests actually performed and conditioned its payment to those tests which were effectively used.

Since the price and its payment depended on the use of the products and equipment made by the healthcare authority of the Basque Country, the Court considered that the compliance with the contract was left to the discretion of one of the parties, which is contrary to the Spanish Civil Code and the regulations on public contracts. After filing an appeal before the Superior Court of Justice of the Basque Country, which was dismissed, the healthcare authority of the Basque Country appealed before the Supreme Court.

The main argument of the appeal was that the tender specifications did not violate any rules. The healthcare authority of the Basque Country argued that the rules should be interpreted according to the context and social reality of the moment, and that in current times of serious economic crisis, the public system should be allowed to adopt measures to guarantee its sustainability.

For this purpose, the healthcare authority of the Basque Country approved a set of measures to contain healthcare expenditure, among them, developing a system to set the price of the contract as described in the tender specifications.

### Position of the Supreme Court

The Supreme Court dismissed the appeal of the healthcare authority of the Basque Country and confirmed the judgement of the Superior Court of Justice, ratifying FENIN's arguments.

The Supreme Court understood that the fulfillment of the contract could not be left to the discretion of one of the parties, that the contract must have a concrete price to be paid in consideration for the delivery of goods, and the payment obligation cannot depend on whether the Administration uses the products and equipment delivered. The Supreme Court added that the clauses of the tender specifications were properly invalidated since they resulted in a situation of uncertainty not only regarding the price but also as to its enforceability, which is contrary to the Law.

Finally, the Supreme Court declared that the measures taken by the healthcare authority of the Basque Country to rationalize expenditure and improve efficiency in the management of resources could not result in the infringement of regulations applicable to tender supply contracts. Accepting the social reality in which the rules must be applied cannot lead to ignoring such regulations or to changing essential characteristics of tender supply contracts.