URÍA
MENÉNDEZ

The main innovations of Law 9/2017 of 8 November on public sector contracts

December 2017

Contents

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Law 9/2017 of 8 November on public sector contracts (the "**LCSP**", for its initials in Spanish), which transposes into the Spanish legal system the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014, was published on 9 November 2017 in the Spain's State Gazette (*Boletín Oficial del Estado*) no. 272.

The LCSP will come into force on 9 March 2018 and will repeal the Restated Text of the Law on Public Sector Contracts approved by Royal Legislative Decree 3/2011 of 14 November (the "**TRLCSP**", for its initials in Spanish), as well as any other rules of equal or lesser standing that are incompatible with the provisions of the LCSP.

The LCSP will be applied to procurement proceedings that are commenced after it has come into effect, commencement being understood as the publication of the call for competition (or the approval of procurement documents in procedures without publication). Contracts awarded before the entry into force of the LCSP will be governed by the previous regulation with regard to their effects, compliance and termination, duration and regime for extensions.

General rules

SCOPE OF APPLICATION

The LCSP has slightly extended the scope of application of the rules. Included within its subjective scope are political parties, trade union and business organisations, and foundations and associations related to any of these entities where they fulfil the requirements to be considered a contracting authority. The new law implements a more precise regulation of public foundations, which are classified as contracting authorities.

As regards the objective scope of application, excluded contracts and legal transactions have been structured in a more organised and defined manner. In addition to expressly excluding circumstances such as contracts for political campaign services, the new article 6 of the LCSP provides detailed regulation of the cumulative requirements for agreements and entrustments to fall outside the scope of application of the law.

CATEGORISATION OF TYPES OF CONTRACT

The main innovation in this area is the reorganisation of the typical contracts that have channelled collaborations between business and the public sector in the provision of public works and services. The public works concession is maintained, but the contract for the management of public services (in its four sub-categories of concession, special agreement, mixed-ownership company and profit-sharing management) is replaced by the services concession. The public-private partnership agreement is also removed as a type of contract.

In the regulation of mixed contracts, the LCSP provides detailed development of the applicable rules for establishing which standards are to govern their award.

IN-HOUSE PROCUREMENT

The LCSP establishes innovations with regard to what it describes as “in-house procurement”.

The LCSP differentiates this in-house procurement from the entrustment established in article 11 of Law 40/2015 of 1 October, on the legal regulation of the public sector (“**LRJSP**”, for its initials in Spanish), pursuant to which administrative bodies or public-law entities may entrust the performance of material or technical activities to other administrative bodies or public-law entities.

The regulation of in-house procurement that is set out in the LCSP distinguishes between procurement by contracting authorities and procurement by other entities forming part of the public sector that are not classified as contracting authorities.

As a general rule, entities must satisfy tougher requirements in order for contracts with them to fall outside the scope of application of the LCSP. The aim of this is to prevent inappropriate use of in-house procurement to evade competitive tendering, which would subvert the principle of free competition.

An entity must satisfy the following requirements to be classified as an in-house provider:

(i) Having sufficient staff and material resources to perform the contract. There is a percentage limit on what can be subcontracted by these entities.

(ii) Obtaining authorisation from the contracting authority to which it reports.

(iii) Not having private capital participation.

(iv) Not performing more than 20% of its activities on the open market.

The entity may only partially subcontract with third parties; the proportion must not exceed 50% of the sum of the contract, though this limitation will not be applicable in some circumstances.

These internal arrangements will also be subject to challenge via special procurement appeal.

According to the first transitional provision of the LCSP, this regulation will be applicable to in-house procurement that takes place after the LCSP has come into force.

SPECIAL PROCUREMENT APPEAL

The main innovations with relation to the special procurement appeal are as follows:

First, the LCSP eliminates the application for annulment. More precisely, there is a reorganisation of the means of challenge established in the law, since the grounds upon which it was possible to file an application for annulment may be relied upon via the special procurement appeal.

Second, the LCSP reinforces the special procurement appeal, broadening its scope of application in a dual sense:

- The sums permitting access to the appeal are reduced. After the entry into force of the regulation, appeals may be brought concerning the acts set out in the LCSP relating to: *(i)* works contracts with an estimated value in excess of EUR 3,000,000; *(ii)* supply and service contracts with an estimated

value in excess of EUR 100,000; and *(iii)* works or services concessions with an estimated value in excess of EUR 3,000,000.

- Additionally, the actions subject to appeal are extended. Of note in this respect is the opportunity to appeal acts related to special administrative contracts when, due to their characteristics, it is not possible to establish their tender price or, otherwise, when their estimated value exceeds that which is established for services contracts, as well as in-house procurement when the amount cannot be established or is equal to or greater than EUR 100,000, taking into account the total duration of the services contract plus extensions. It is also important to highlight the possibility of appealing amendments to particular administrative clauses that are or are not provided for in the procurement documents when it can be deemed that they should have been the object of a new award. As mentioned, a special appeal may also be brought against the execution of in-house procurement in cases where the legal requirements are not satisfied. This is further extended to concession rescue agreements, and to framework agreements and dynamic purchasing systems that have the object of bringing about works, supply or services contracts, as well as to contracts based on either of them.

Third, trade union organisations are given standing to file these appeals when decisions subject to appeal offer grounds to deduce that they entail that there will be a breach of social or labour obligations with respect to the workers participating in the performance during the process of executing the contract. There is also express recognition of standing for sectoral business organisations representing the collective interests affected by the challenged act.

And fourth, the power to create a specialist body with competence to rule on special procurement appeals is delegated to the councils of highly populated municipalities, in accordance with article 121 of Law 7/1985 regulating local government, as well as to provincial governments.

TEMPORARY ASSOCIATIONS OF UNDERTAKINGS ("TAU")

The LCSP applies a large proportion of existing case law and doctrine in this area.

The new text establishes what happens if, during the tender phase or once the contract has been formalised: (i) the composition of the TAU is modified (with an increase or decrease in the number of companies comprising it or the replacement of one or more companies); (ii) there is an alteration in the relative participation of the companies making up the TAU; (iii) one of the members is in a situation involving a prohibition on contracting; (iv) one of the members enters into a process of corporate succession (merger, division, etc.); or (v) any member has been declared insolvent, even if the

liquidation phase has already commenced. Article 69 of the LCSP (sub-articles 8 and 9) sets out the consequences of the abovementioned situations.

PROHIBITIONS ON CONTRACTING

Though the LCSP substantially upholds the reform on prohibitions introduced by the LRJSP, it does contain the following innovations:

- Some of the pre-existing prohibitions are qualified:
  - Before the reform introduced to the TRLCSP by the LRJSP, having been penalised in a final judgment for the commission of a serious offence in terms of "market discipline" was considered a prohibition on contracting. After the reform, the foregoing term was replaced with a reference to "distortion of competition". The new regulation now includes both categories.
  - As regards the prohibition for having been penalised in a final judgment for the commission of very serious environmental offences, the closed list of environmental regulations which infringement could give rise to the prohibition is replaced by the following open-ended reference: "due to very serious environmental offences according to the provisions of applicable law".
  - The prohibition on contracting for being declared insolvent will be applicable unless an effective agreement has been reached "or an out-of-court payment settlement procedure has been commenced".
- Failure in the case of companies with more than 250 employees to comply with the obligation to establish an equality plan in accordance with article 45 of Basic Law 3/2007 of 22 March, for the equality of men and women is added as a ground for prohibition on contracting.
- The self-cleaning measures established in the Directives are incorporated. These provide for the possibility of not declaring prohibitions on contracting (or the possibility of revising existing declarations) – except in certain circumstances – when the persons subject to the prohibition prove: (i) payment of or commitment to pay the fines and compensation established by administrative judgment or resolution that created the grounds for prohibiting contracting, provided that the aforementioned persons were declared liable to pay those fines or compensation in the aforementioned judgment or resolution; and (ii) the adoption of technical, organisational and staff measures to prevent the commission of future administrative offences, which shall include adhering to a leniency programme with regard to distortion of competition. It is important to take into account

that the procedure for establishing prohibitions on contracting varies depending on the particular ground for prohibition. Certain prohibitions can be established by the contracting body itself.

Preparation and award of public authority contracts

PRELIMINARY MARKET CONSULTATIONS

Article 115 of the LCSP partly incorporates a demand that has received widespread market support in order to properly define the object of the contract. With the aim of securing the most suitable solution for purchasing works, goods and services and informing operators of procurement plans and projected requirements, the LCSP introduces the possibility for contracting bodies to conduct market studies or consult the economic operators that are active in the sector prior to the procurement procedure. The outcomes of consultations must take the form of generic characteristics, general requirements or abstract formulae. Participation in consultations does not prevent subsequent participation in the procurement procedure. Consultations must be conducted in a manner that is at all times respectful of competition and the principles of non-discrimination and transparency.

THE "BEST PRICE-QUALITY RATIO" AS A CRITERION FOR AWARDING CONTRACTS

The new law establishes detailed and complex regulation on selecting and applying the criteria for awarding contracts.

According to the LCSP, the criterion for awarding contracts is the "best price-quality ratio". This concept nominally replaces that of the "most economically advantageous tender". The best price-quality ratio will be assessed on the basis of economic and qualitative criteria. The contracting body may include social or environmental aspects related to the object of the contract among the qualitative criteria.

When only a single award criterion is used, it must be related to the costs of the performance offered, such as price or return or life-cycle costing. It is not possible to rely solely upon qualitative criteria; they must always be accompanied by cost-related criteria, which may, at the discretion of the contracting body, take the form of the price or a return-based approach.

AWARD PROCEDURES

With regard to award procedures, the LCSP introduces the simplified open procedure, the innovation partnership procedure and the competitive procedure with negotiation.

- The simplified open procedure is applicable to works, supply and services contracts that do not exceed specified thresholds, provided they do not include any award criterion that entails value judgments or, if they do, its weighting does not exceed specified percentages. Procedural steps are simplified, time frames are shortened and some particularities are introduced: documentation is presented in a single envelope (unless there are award criteria entailing value judgments), no provisional guarantee is required and the tenderers – with the exception of EU or EEA Member States – must be registered in the corresponding Register of Tenderers.
- The new innovation partnership procedure is established for cases in which it is necessary to conduct research and development activities with respect to innovative works, services and products that will subsequently be purchased by the public authorities. After the call for competition and the submission of requests to participate, the contracting body selects the candidates that can present tenders. The contracting body then creates a partnership with one or more partners, which conduct separate research and development activities. This innovation partnership will be structured, in turn, in successive phases that may culminate in the purchase of the resulting supplies, services or works.
- The competitive procedure with negotiation will be applicable in cases where: (i) the tenderers need to conduct preliminary work to design or adapt performance to the specific case; (ii) performance includes innovative projects or solutions; (iii) there are specific circumstances relating to the nature, the complexity or the legal or financial make-up of the performance or to the risks attached to it that require the existence of a negotiation; (iv) the technical specifications cannot be established with sufficient advance precision; (v) only irregular or unacceptable tenders have been submitted in previously held open or restricted procedures; or (vi) the performance concerns highly personal social services. Invited tenderers will have access to the procedure on the basis of similar rules to those governing restricted procedures, and the procedure will give rise to a negotiation of the terms of the contract with the invited tenderers. These terms may be developed through successive selection stages.

The LCSP retains the competitive dialogue procedure and extends the circumstances in which it is applicable, which will be the same as those for the competitive procedure with negotiation. It includes broader regulation of the prizes or payments that are established for participants in the dialogue.

Finally, with relation to award procedures, it should be noted that the LCSP eliminates the negotiated procedure without publication on grounds of value, replacing it with the simplified open procedure.

MINOR CONTRACTS

The LCSP reduces the applicable thresholds for classifying contracts as minor. Specifically, minor contracts will be deemed to be those with a value of less than EUR 15,000 (for supplies and services) and less than EUR 40,000 (for works).

The LCSP also establishes that a report justifying the need for the contract will be required from the contracting body in the course of the procurement of a minor contract (in addition to requiring approval of the spending and the inclusion of the corresponding invoice in the procurement record, which was already required in the TRLCSP).

Finally, the LCSP introduces the obligation to expressly show in the procurement record that: (i) the object of the contract is not being altered in order for the minor contract procurement regime to be applicable; and (ii) the contractor has not entered into further minor contracts that, individually or jointly, exceed the maximum thresholds for minor contracts.

Effects, performance and termination of public authority contracts

CONTRACTUAL AMENDMENTS

The LCSP maintains the distinction between amendments provided for in the procurement documents and amendments for which there is no provision.

The LCSP increases the requirements for the former so that in addition to complying with the other provisions of article 204, amendments may not exceed 20% of the initial price, introduce new and previously undefined unit prices or alter the overall nature of the contract.

Amendments not provided for in the procurement documents and those that are provided for but exceed the stated limits must comply with new rules that increase the flexibility of those introduced in 2011 by the Sustainable Economy Law (*Ley de Economía Sostenible*). These amendments must be limited to introducing essential variations in order to respond to the objective grounds that make them necessary. There must be evidence that one of the following circumstances has arisen:

- The need to add items of performance, provided that (a) it is not possible to change contractor for economic or technical reasons, and (b) the amendment does not exceed 50% of the initial price (excluding VAT).
- The existence of supervening circumstances that were unforeseeable at the time of the award, provided that the amendments (a) could not have been foreseen by a diligent public authority; (b) do not exceed, in isolation or together with other unforeseen amendments, 50% of the initial price (excluding VAT), and (c) do not alter the overall nature of the contract.
- The amendment is not substantial. An amendment will be deemed substantial when it results in a contract that is materially distinct in nature from that which was initially entered into, or provided that it: (a) introduces conditions that would have permitted the selection of another tenderer or would have attracted more tenderers had they been known of; (b) alters the economic balance in favour of the contractor in a manner that was not provided for in the contract; or (c) significantly extends the scope of the contract, which will be deemed to have occurred when the price is modified by more than 15% for works contracts or more than 10% for other contracts.

In general, amendments to contracts subject to harmonised regulation will be published in the Official Journal of the European Union. All amendments will be published in the contracting party's profile within

five days of their approval. The publication must include the contractor's grounds and all reports relating to the amendment.

CORPORATE SUCCESSION AND ASSIGNMENT OF THE CONTRACT

In situations involving corporate succession, it is expressly established that the resulting business must notify the contracting body of the circumstances that have occurred and what the succession has entailed. It is also established that the guarantee provided by the first successful tenderer remains in force until replaced.

The LCSP requires the possibility of assignment to be expressly established as an option in the procurement documents. The contract cannot be assigned if the procurement documents do not provide for it.

The rules on assignment otherwise essentially coincide with those currently in force. However, the new regulation emphasises the regulated nature of authorisations of assignments and establishes tacit approval if the contracting body does not rule on the assignment request within a term of two months.

The LCSP also clarifies the insolvency situations in which the percentage limits that it establishes (20% of the price or 1/5 of the duration for concessions) can be exempted from application. For concession contracts, the LCSP introduces the step-in right for pledgees or mortgagees. If the right is established in the procurement documents, the creditor may at any time request that the concession be assigned to a third party if its (present or future) infeasibility is proven and provided that the third party in question complies with the other requirements.

SUBCONTRACTING

The LCSP eliminates the percentage limit on subcontracting. It also removes the possibility of requiring that up to 50% of the contract budget be subcontracted. The general rule is that subcontracting is possible within the limits that are set out in the procurement documents. In no case may these limits entail an effective restriction on competition.

The LCSP essentially maintains the system of prior notification of the intention to subcontract. However, prior to the execution of the subcontract proof is required that the subcontractor is not subject to a prohibition on contracting.

The LCSP maintains the position that breach of the subcontracting rules can result in a penalty of up to 50% of the subcontracted amount, but only if this is provided for in the procurement documents.

Termination can only occur on this ground if there is a breach of the fundamental obligations identified as such in the procurement documents.

The LCSP establishes greater control for the contracting body over compliance with subcontractor payment periods in works or services contracts with an estimated value in excess of EUR 5 million in which more than 30% of the value is subcontracted. In these contracts, breach of subcontractor payment periods will always be subject to penalisation.

Finally, provided certain conditions are met, procurement documents will be able to incorporate the possibility of making direct payments to subcontractors. These payments will have the same nature as payments on account as in the case of works certifications.

SOCIAL AND ENVIRONMENTAL CLAUSES

The LCSP reinforces the importance of social and environmental considerations in public contracts. Contracting bodies may establish these considerations as qualitative award criteria for evaluating the best price-quality ratio or (as they have done previously) as special performance conditions, provided that these are linked to the object of the contract, are not discriminatory, are compatible with EU law and are established in the procurement documents or in the contract notice. The change in the context of special performance conditions is that the LCSP obliges the contracting body to establish in the procurement document at least one special environmental, social or labour condition from those set out in article 202.

Breach of the special performance conditions can give rise to penalties. The LCSP also establishes non-payment of salaries to workers assigned to the performance of the contract or breach of the conditions established in a collective bargaining agreement as new grounds for the termination of contracts.

Works and services concessions

As stated, the LCSP also transposes Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (the "**Concessions Directive**"). The LCSP has been drafted to reorganise the group of contracts that have to date governed collaborations between the public sector and business for the provision of public infrastructure and services, though this was not mandatory under the Directive. It has eliminated the public-private partnership agreement and replaced the public services management contract (with its various sub-categories) with the services concession.

The Concessions Directive regulates two kinds of concessions: works and services. The latter partly coincides with the form of concession under the former public services management contract. The defining element in both cases is the transfer of operating risk to the concessionaire, substantially equivalent to the traditional risk and responsibility in the exploitation of the traditional concession under the Spanish legal system. The regulation of the works concession is of supplementary application to the services concession in all matters not expressly regulated for the latter, provided that such regulation is compatible with the nature of the concession. For this reason, we shall set out the aspects common to both kinds of concession in the section regarding works concessions.

WORKS CONCESSION CONTRACT

- Transfer of operating risk

  There are no differences with the previous regulation in terms of the scope of performance under works concession contracts. In line with the Directive, the definition of the contract revolves around the contractor's assumption of what the new law classifies as "operating risk" in the exploitation phase of the works, which is not substantially different from the contractor's previously existing obligation to exploit the works at its own risk and responsibility.

  This operating risk may encompass demand risk, supply risk or both. The definition of supply risk refers to the "provision of the works and services which are the object of the contract, in particular the risk that the provision of the services will not match demand". This supply risk is simply what has traditionally been labelled "availability" risk for infrastructures.

The LCSP establishes that the transfer of operating risk to the concessionaire must mean that there is no guarantee that this party will, under "normal operating conditions", recover investments made or cover costs incurred as a result of exploitation of the works. Any potential estimated loss that the concessionaire may incur in this regard shall not be "merely nominal or negligible".

- Innovations in preparatory actions and contractual design

  (A) Feasibility study

  In terms of innovations relating to the feasibility study justifying the suitability of a works concession, this study must include:

  - A justification of the quantitative and qualitative advantages counselling the use of this as opposed to other types of contract.
  - Net current value of all concessionaire investments, costs and revenues for purposes of assessing operating risk, as well as the criteria for valuing the discount rate.
  - Impact of the concession as regards budgetary stability.

    This aspect will be of great practical importance to contracting authorities, since the statistical treatment of concessions in the European System of Accounts ("**ESA**"), applicable for calculating the deficit and debt of public authorities, has been one of the main factors in the increased use of concessions. Given the practical coincidence between the definition of operating risk and that of economic risk to be assumed by concessionaires established in the ESA, a significant reduction may be expected in the discrepancies that arose in practice between the contractual classification and the classification in national accounts.
  - If there are contributions to the construction or exploitation of the concession, the study must examine their compatibility with the Treaty on the Functioning of the European Union.

  (B) Private initiative in the submission of feasibility studies

  When a feasibility study submitted by a private party culminates in the grant of a concession, the new LCSP provides that the author of the study has the right to five additional points beyond those obtained through the application of the tender award criteria. If not awarded the concession, the author will in any case have the right to indemnification for costs, increased by 5% as compensation.

(C) Duration

Concessions must have a limited duration, which is calculated in the procurement documents on the basis of the relevant works (or services in the case of services concessions). If the term of the contract exceeds five years, the maximum duration may not exceed the time calculated as reasonable for the concessionaire to recover the investments made for the exploitation of the works or services together with a return on the capital invested, taking into account the investments necessary to achieve the specific contractual objectives. In any case, the maximum duration of works concession contracts cannot exceed 40 years.

- Financial-economic regime of works concessions

(A) Remuneration of the concessionaire

The LCSP ends the doctrine and case-law debate over the possible tax status of the tariffs received by concessionaires. Whether they are paid by users or by the public authority, the law entirely excludes the possibility of considering them as taxes, as technically these charges are not a tax. Nonetheless, they could be interpreted as purely private prices depending on the specific circumstances of the case.

The possibility is also expressly established for the public authority to remunerate the concessionaire by way of availability payments. These payments must be calculated on the basis of automatic rates of correction for levels of availability, regardless of the potential penalties applicable to the concessionaire.

(B) Circumstances involving rebalancing of the public works concession contract

The legal circumstances involving re-establishing the economic balance of the works concession are defined as the following:

- Amendment of the contract.
- Actions by the contracting public authority that, due to their binding nature on the concessionaire, cause the fundamental rupture of the economic rationale for the contract.
- Events of *force majeure* that directly cause the fundamental rupture of the economic rationale for the contract.

The LCSP expressly excludes the right to rebalancing in the case of non-fulfilment of the projected demand set out in the studies carried out by the public authority or the concessionaire.

(C) The concessionaire's right to withdraw from the concession contract

The concessionaire is recognised as having a right to withdraw from the concession contract in certain situations in which compliance becomes excessively onerous. This right materialises in the following cases:

- The approval by public authorities other than the contracting authority of general rules after the concession contract has been formalised.
- A legal or contractual obligation upon the concessionaire to incorporate technical advances that are available on the market after the formalisation of the concession contract.

In both cases, the measures in question must entail an annual net increase in costs of at least 5% of the net amount of the turnover of the concession for the period remaining until its conclusion. Withdrawal from the contract will not provide a right to indemnification for any of the parties.

- Effects of early termination

The LRJSP had already modified the effects of early termination of works and public services management contract concessions. That modification ended the traditional regime of the inappropriately named "liability of the public authority", which permitted the recovery of the value of the investments in works and land, according to the valuation established in the contract, minus their accounting depreciation. We may briefly recall the configuration of the effects of termination as approved by the LRJSP and now upheld by the new LCSP:

- When early termination occurs for reasons attributable to the contracting authority, the concessionaire will receive the value of the investments minus their accounting depreciation, as well as indemnification for loss and harm.
- When early termination occurs for reasons not attributable to the contracting authority (including the insolvency of the concessionaire), the compensation to be received by the concessionaire is identified with the "market valuation of the concession", as determined in a new award procedure via ascending-price auction, in which the sole award criterion is the price.

The tendering will take place in the following manner:

The sum earmarked for the contract is established based on future cash flows that the concessionaire company is projected to obtain in the period from the termination of the contract until its expiration, as established in article 282 LCSP.

If the first tendering is unsuccessful, a new one will be called with a tender rate of 50% of the first.

If the second tender is also unsuccessful, the value of the concession will be the rate thereof, without prejudice to the possibility that the original concessionaire or creditors holding at least 5% of the liabilities of the concessionaire may present a new purchaser who pays at least the tender rate.

The new concessionaire is subrogated to the position of the original one, with the conditions of the concession contract (including the duration) remaining the same as those established in the terminated contract.

- Rescue of concessions

The LCSP provides more detailed regulation of the requirements for a contracting entity to be able to rescue the concession. For such rescue to take place, it will be necessary to show: (i) the existence of public-interest reasons for the rescue; (ii) that the works are to be directly exploited; and (iii) that direct management is more effective and efficient than concessionary management.

This same regulation is also applicable to the rescue of services concessions, with the difference that the TRLCSP already tied rescues to direct management by the public authority.

It should also be taken into account that in accordance with sub-article 3 of the first transitional provision, this new system is applicable to rescue agreements occurring after the LCSP enters into force. The system is hence also applicable to concessions awarded prior to the LCSP's coming into effect.

SERVICES CONCESSION CONTRACT

- Definition and scope of the services concession contract

One of the most significant innovations of the LCSP is the disappearance of the public services management contract and its replacement – though with a broader object – by the services concession contract. The latter is also subject to harmonised regulation when the estimated value of the contract is in excess of EUR 5,225,000.

In any case, the option to award works and services concessions to mixed-ownership companies remains, as do certain special agreements for healthcare provision, which are allocated the nature of services concessions.

Services concession contracts will be those in which a contracting authority entrusts to a concessionaire the management of a service subject to economic exploitation which the former owns or is responsible for. This no longer necessarily has to be a public service, as was the case for the public services management contract. The consideration received by the services concessionaire will be the right to exploit the services that are the object of the contract, or such right accompanied by the right to receive a price. This exploitation right must entail the transfer of operating risk. If the transfer of operating risk does not take place, the contract will be deemed a services contract and certain special conditions will be applicable to it. The essential element of the services concession contract is therefore the transfer of operating risk, so concession contracts may exist for services provided directly to the public authority or to users, provided that the concessionaire assumes that risk, which as stated is substantially identical to the traditional risk and responsibility in the exploitation of the service.

The services concession may entail the execution of works, in which case the maximum duration of the contract is reduced from 50 to 40 years. Otherwise, the duration of the services concession may be up to a maximum of 25 years, or a maximum of 10 years in services concessions that entail the provision of healthcare services. Beyond this, provisions for establishing duration are the same as for works concessions.

For purposes of legal certainty, the thirty-fourth additional provision establishes that the references to public services management contracts in applicable law must be deemed references to the services concession contract insofar as they are compatible with the provisions of the LCSP for such contracts.

- Legal regime applicable to services concessions depending on their public service nature

  Services concessions do not necessarily have to relate to a public service. This circumstance has forced the legislator to establish certain special conditions that are only applicable when the concession concerns a public service. These are essentially the following:

  - During the preparation stage, the public service regime must be established prior to the procurement procedure.
  - During the execution stage, the public authority will retain the necessary monitoring powers to ensure the proper implementation of the service.
  - The public authority may resolve to take over or intervene in the service on the terms provided in relation to works concessions.

- Economic-financial regime of the services concession contract

  The concessionaire has the right to fixed remuneration based on the use of the service, which will be directly received from users or from the public authority itself. The following issues arise with relation to remuneration:

  - There is uncertainty as to whether services concessions allow for "availability payments" as consideration for the concessionaire, since there is no express mention of this.
  - As in the case of works concession contracts, the tariffs that the concessionaire will receive are technically not a tax. But this classification is qualified by the forty-third additional provision, which appears to limit the public nature of the consideration received for the provision of public services. It therefore appears that in the case of services concessions that do not relate to a public service, the tariffs paid by users will be private prices, in line with the previous observations regarding tariffs received by the concessionaire of public works.

  The LCSP also refers to the possibility that the concessionaire may pay a "fee", without providing for how this will be determined.

  Finally, the concessionaire's right to maintenance of the economic balance of the services concession is substantially the same as that which is established for the works concession.

- Mixed-ownership companies as concessionaires

  As stated, though the LCSP eliminates the various forms of indirect management from the public services management contract (mixed-ownership company, special agreement and fee-based management), its twentieth additional provision retains the possibility of awarding works and services concession contracts to mixed-ownership companies. In accordance with the literal wording of the LCSP, this would involve the direct award of the concession, which would be possible if the choice of private partner has been made in conformity with the standards established in the law for the award of concessions.

Contracts from other public sector entities

PREPARATION AND AWARD OF CONTRACTS BY PUBLIC SECTOR ENTITIES THAT ARE NOT CLASSIFIED AS PUBLIC AUTHORITIES

Contracts subject to harmonised regulation that are entered into by contracting authorities that are not public authorities will be prepared and awarded in accordance with the rules applicable to contracts awarded by public authorities.

The observations set out below must be taken into account with relation to the award of contracts not subject to harmonised regulation that are entered into by contracting authorities that are not public authorities.

The preparatory studies for and preamble to the LCSP note the disappearance of procurement instructions in order to standardise the preparation and award of contracts entered into by contracting authorities that are not public authorities in line with those awarded by public authorities.

The LCSP thus removes the express reference to the requirement for contracting authorities that are not public authorities to have internal guidelines, and the rules to be applied when awarding contracts not subject to harmonised regulation are established as follows:

- direct awards are possible when the estimated value of the contract is lower than EUR 40,000 in the case of works contracts and works or services concessions, or lower than EUR 15,000 in the case of services and supply contracts; and
- when the foregoing thresholds are exceeded, awards may be made via any of the procedures established for public authorities with the exception of the negotiated procedure without publication, which can only be used in the cases established in article 168.

However, the fifth transitional provision of the LCSP requires contracting authorities that are not public authorities (the mention of title three must be understood as a reference to book three) to adapt their guidelines within four months from the entry into force of the law. This transitional rule permits the interpretation that, though not legally binding, it is possible for contracting authorities that are not public authorities to maintain their procurement guidelines provided that they strictly observe the award regime established by the LCSP and set out above.

For other public sector entities that do not have the status of a contracting authority, the obligation remains to make use of procurement guidelines to regulate the procurement procedures for the award of their contracts.

THE APPLICABLE LEGAL REGIME FOR PURPOSES OF CONTRACTS ENTERED INTO BY PUBLIC SECTOR ENTITIES THAT DO NOT HAVE THE STATUS OF A PUBLIC AUTHORITY

Contracts entered into by public sector entities that do not have the status of a public authority will continue to be classed as "private contracts".

However, the LCSP extends the areas of its regulation that must be applied to contracts entered into by contracting authorities that are not a public authority: they will be subject not only to the provisions on legal limits to contractual amendments, but also to the provisions on social clauses; special conditions for performance, assignment and subcontracting; technical procurement rationale; and issues relating to form of payment and certifications. It is also provided that the impossibility of performance and non-payment of salaries will serve as grounds for termination of these contracts.

The performance of contracts entered into by public sector entities that do not have the status of contracting authorities will also be generally subject to private law.

ADMINISTRATIVE ORGANISATION FOR THE MANAGEMENT OF PROCUREMENT

A new administrative unit is created within the State Advisory Board for Public Procurement (*Junta Consultiva de Contratación Pública del Estado)*, known as the Committee for Cooperation on Public Procurement (*Comité de Cooperación en Materia de Contratación Pública*). Among other issues, this body will be responsible for coordinating the interpretative criteria used by the various public authorities with respect to public procurement rules and the promotion of electronic procurement in the public sector context.

Also created is the Independent Procurement Supervision Office (*Oficina Independiente de Supervisión de la Contratación*), which must ensure the proper application of public procurement regulation and coordinates the monitoring of procurement by contracting authorities throughout the public sector. This Office will notify the competent bodies if it becomes aware of any circumstances constituting an offence or infringement at local, regional or State level.

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