The impact of competitive tendering on the execution of public contracts and concession contracts

Spain

0. Preliminary remarks: the law applicable to (disputes regarding) the execution of public contracts under the scope of application of EU Directives 2014/24/EU and 2014/23/EU

The public procurement system is not uniform in all member States, rather there are marked differences which affect the contractual typology itself. While some European legal systems classify contracts concluded by public sector entities within the setting of private Law, others classify some contracts concluded by public sector entities within the setting of public Law and other contracts concluded by them within the setting of private Law, as is the case of Spain.

In Spain, the current Law in force that must be considered is the Law 9/2017, 8th November, on Public Sector Contracts, that transposes the European Parliament and the Council Directives 2014/23/EU and 2014/24/EU, of 26 February 2014, into the Spanish legal system, (herein after LCSP). But only one part of this Law corresponds to said transposition, because the Law is also made up of other rules applicable to public sector procurement and that are in line with the Spanish tradition on the matter.

Article 2 of the LCSP defines its "objective scope of application" stating that are included under the same: 'public sector contracts', that are defined as contracts for pecuniary interest -whatever their legal nature- concluded in writing between one or more economic operators and one or more of the public sector entities included in the subjective scope of application of the LCSP for the execution of works, the supply of products or the provision of services. The LCSP also clarifies that a contract has pecuniary interest when the economic operators involved in the same obtain some type of economic benefit, either directly or indirectly.

In order to understand the Spanish system on this topic, it is important to know that in Spain since many decades ago there has been a specific Public Law to regulate the purchases made, originally, by Public Administrations, or, nowadays, according to the updated terminology, by entities -with public nature or not- linked to the public sector. This terminological updating is not only a matter of names. Many years ago, public purchasers were mainly Public Administrations. Nowadays and for different reasons, many of the purchases we are interested in for the purpose of this project are made by entities linked to the public sector, but not necessarily Public Administrations.

In the Spanish legal tradition on this topic, the contracts concluded by public sector entities -mainly Public Administrations- have their own regulation separated from the Civil Law. There is a Law on Public Sector Contracts (currently, the aforementioned LCSP). Although this is not to say that Civil Law is never applicable, because depending on different factors a contract concluded by a public sector entity could even be mainly regulated by Civil Law.

The Spanish tradition on the topic is based on the French tradition, and it is built on the basis of the so-called "administrative contracts" as a category. A category that, in

principle, has nothing to do with the European Law, that is, that it is not foreseen in the UE Directives on the topic.

In the current Spanish Law on Public Sector Contracts, only Public Administrations can conclude "administrative contracts". Originally an administrative contract was a contract concluded by a Public Administration to meet needs in the general interest. Nowadays, an "administrative contract" can be a works contract, a supply contract, a service contract, a services concession contract or a works concession contract concluded by a Public Administration. But all these types of contracts can be also concluded by entities that are not considered Public Administrations, but contracting authorities. In this later case, all of them are considered private contracts, but, in part, are under the scope of application of the Law on Public Sector Contracts.

Private contracts: mainly, those signed by entities of the public sector, which are not Public Administrations. But also, in some cases, contracts concluded by Public Administrations.

In order to understand the regulation of the Spanish LCSP it must be highlighted that the intensity in the application of the same depends on the combination of three different factors:

i. The nature of the contracting entities
ii. The nature of the contract (administrative or private), and
iii. The amount of the contract (European thresholds)

The combination of these three aspects leads to many possibilities.

Regarding **contracting entities under its subjective scope of application,** the LCSP quotes three different groups (Article 3):

a) Public Administrations: a group of territorial and non territorial-based entities endowed with public nature. It is worth noting that there are entities with a public nature that this Law does not consider "Public Administrations". That is, according to this Law the public nature of an entity does not mean that the entity is a "Public Administration". But according to this Law all Public Administrations are considered "contracting authorities" *per se*.

b) Contracting authorities: in the sense of the concept determined by the EU Directives on Public Procurement. "State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law". 'bodies governed by public law' means bodies that have all of the following characteristics:

a. they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.
b. they have legal personality
c. they are financed, for the most part, by the State, regional or local authorities, or by other CA; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other CA.

According to Spanish LCSP all Public Administrations are contracting authorities, but not *vice versa*. Most of the entities with a public nature that this Law does not consider "Public Administrations" are contracting authorities because they observe the requirements envisaged by EU Directives.

c) Other entities of the Public Sector: residual category where are included entities not belonging to the two above categories (e.g.: many public enterprises).

The distinction between administrative contracts and private contracts of public sector entities is nowadays regulated in Articles 24 and following of the LCSP. The figure of the administrative contract is used to refer to those contracts Public Administrations enter into most frequently (works, works concession, service concession, supplies and services). These contracts are governed entirely by the regulations of administrative Law and disputes arising in connection therewith will be under contentious-administrative jurisdiction. On the other hand, private contracts are those which (i) are entered into by a Public Administration, whenever they relate to provisions other than those referred to above (works, works concession, service concession, supplies and services); or (ii) are entered into by public sector entities which do not meet the condition of Public Administration. In this case, as a general rule, the preparation and awarding of the contract are subject to administrative Law, while the execution phase is governed by private Law. Consequently, incidents arising in relation to the effects and termination of private contracts will be settled before the civil jurisdiction.

In sum, only Public Administrations conclude administrative contracts, and only administrative contracts are completely under the scope of application of the LCSP, they have a maximum application of the LCSP: preparation-award-conclusion-execution/performance-termination. In this case, the Private Law only applies in a subsidiary way.

On the other hand, the Law applicable to contracts concluded by contracting authorities that are not public administrations is as follows: a) LCSP applies to the preparation, awarding and conclusion phases of these contracts; b) private Law applies to the execution/performance-termination of these contracts, except for some aspects. Indeed, the LCSP also applies to the execution phase of these contracts regarding those aspects related to the execution phase that are affected by the EU Directives, that is: modification, special conditions of execution, subcontracting, resolution, and obligations in environmental, social or labor matters; assignment; technical rationalization of contracting; as well as the payment terms.

Finally, the minimum application of the LCSP is for contracts concluded by Public Sector Entities that do not have the status of contracting authorities. These contracts shall be governed in their preparation and award by particular public rules but with regard to their effects, modification and termination is totally applicable the Civil Law.

The current Law on Public Sector Contracts approved in 2017, includes a general regulation, common to all 5 contract types it regulates: works contracts, supply contracts, service contracts, service concession contracts, and works concession contracts. These contract types are those recognized in EU Directives.

As explained, the intensity in the application of the Spanish Law depends on different factors. The approach of this project is to focus the attention in those contracts and

concessions concluded by CA and that are under the application of the EU Directives 2014/24/EU and 2014/23/EU, and is the approach of the solution given under the Spanish regime to the case studies.

Case study 4: parties hold differing meanings as to the interpretation of an ambiguous term in the contract

4.1. Description of the case study

Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that A and B hold differing meanings as to the interpretation of an ambiguous term in the contract.

A dispute arises between A and B on the question whether the contract is to be performed by the parties in accordance with A's interpretation. If so, the result would be that B will suffer financial loss. In the event that the contract is to be performed according to B's interpretation, this would be detrimental to A.

4.2 . General contract law: overview of the law on interpretation of contracts

The explained distinction between administrative contracts and private contracts of public sector entities is relevant for the purposes of resolving this case, given that the procedure for determining how a contractual clause must be interpreted varies depending on the nature of the contract.

1. In the case of ***administrative contracts***, the Public Administration enjoys a series of prerogatives or inordinate powers which place it in a position of superiority with regard to the contractor, which are listed in Article 190 of the Law 9/2017. Among these prerogatives is the power of unilaterally interpreting the contract and resolving any doubts offered by compliance therewith. Thus, when a clause in the contract is worded in a confusing way, or gives rise to doubts with regard to the manner in which it must be interpreted, it will be the Administration that has drafted the contract specifications itself which determines the sense which is best suited to satisfying the general interest. The justification of this prerogative is to avoid damage to the public interest arising as a consequence of the delay which could be brought about by suspending the execution of the provision to resolve any problems of interpretation.

The lack of specific provisions in the administrative regulations means that the Public Administration has to conduct this interpretive task pursuant to the criteria established in the Civil Code which regulate contracts between private individuals (see, in particular, Articles 1281 et seq.), whilst taking into account the public interests.

The first criterion is that, where the literalness of the terms of the contract seems to be contrary to the evident intention of the parties, the latter shall prevail over the former. In order to determine the intention of the contracting parties, the court will observe their acts at the time of entering into the contract and after it.

On the other hand, if a contract term admits various meanings, it must be understood in the most appropriate way for it to be effective. As the term is part of a contract, it must be interpreted in accordance with the contract as a whole. If a word can be interpreted in different ways, then it will be understood in the sense which is most appropriate to the nature and purpose of the contract.

Where previous rules are not enough to clarify the ambiguity of the term, it shall be interpreted in favour of the greater reciprocity of interests, as long as it relates to accidental circumstances of the contract.

In order to conduct this task, the Administration must proceed with an adversarial procedure in which the contractor is offered the possibility of outlining its position regarding the correct reading of said clause (see Article 191 Law 9/2017). Additionally, this decision must be preceded by a report from the contracting authority's Legal Department and, should the contractor oppose the interpretation, a report will also need to be requested from the Council of State or equivalent body in the Autonomous Community. Once the administrative procedure has concluded, the agreement on interpretation will be immediately enforceable; i.e., the contractor is immediately obliged to comply with the administrative will, irrespective of whether or not this complies with the Law. The foregoing is without prejudice to the possibility of challenging this decision before the contentious-administrative jurisdiction, which will conduct a full review of the act of interpretation.

2. If the contract is of a ***private nature***, the scenario is substantially different, since the Administration cannot exercise the aforementioned prerogative. It occurs when the Public Administration enters into a contract other than works, work concessions, service concessions, supplies, and services; or when it is celebrated by public sector entities which do not meet the condition of Public Administration, regardless of the type of contract.

In this case, the possible disputes which may arise with regard to the interpretation of the contract will need to be resolved by the civil courts. The court will rule on which interpretation is more consistent with the whole contractual clauses and documentation, as well as with the subject matter of the contract. Generally, the court will rely on the criteria set out in Articles 1281 et seq. of the Civil Code, as explained above.

4.3 Application of general contract law to the case study

Whether we are dealing with an administrative contract or a private contract, it is important to make it clear that the scope of the power to interpretate the terms of the contract is constrained by the original wording. Thus, it is not possible to introduce any modification or to renegotiate the contract.

Given that public contracts are similar in nature to adhesion contracts, in the sense that one part sets the conditions and the other has to accept them, it is essential to take into account the provision contained in Article 1288 of the Civil Code. This provision states that the interpretation of an ambiguous clause in a contract shall not favour the party who has caused that ambiguity. Indeed, the contracting authority is responsible for preparing the contract specifications clearly and precisely, so that all reasonably informed and normally diligent tenderers may understand the exact scope thereof and interpret them in the same manner (CJEU of 29 April 2004, *CAS Succhi di Frutta SpA*, case C-496/99 P, section. 111).

In the same vein, the Spanish jurisprudence has understood that when the terms are unclear and there is not one single logical interpretation thereof, even when taking into account their literal sense, such murkiness may not favour the party that has given rise to

it (STS of 2 November 1999, rec. no. 7261/1995; of 3 February 2003, rec. no. 2927/2001; and of 5 April 2006, rec. no. 6955/2003). This means that the consequences arising from the ambiguity with which the contractual documentation is drafted cannot fall to the contractor.

This power, however, is limited by the general principles which regulate public procurement, particularly the principles of equal treatment and non-discrimination. Hence, one cannot speak of an "authentic" interpretation of the terms of the contract, rather one that is in line with the existing regulatory framework and the founding principles.