

THE MOST SIGNIFICANT CHANGES TO PUBLIC PROCUREMENT FOR SPAIN'S LOCAL COUNCILS*

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Abstract

Spain's Law 9/2017, of 8 November, on public sector procurement (LCSP), which came into force on 9 March this year, has entailed a change in model with regard to the use of public procurement as a tool for achieving a range of public policy objectives, such as sustainability, innovation, social responsibility and procurement from SMEs and third (voluntary) sector undertakings. It also aims to ensure that this model is more efficient, seeking better value for money in the selection of contractors and in the products and services procured, introducing the principle of integrity as one of the cornerstones of public procurement and advocating its simplification. The entirety of this raft of innovations has an impact upon local councils, sometimes a very important one: new award criteria, limits on small contracts, and more. Additionally, the LCSP contains specific provisions aimed at local councils, such as restrictions on the participation of elected officials in technical procurement boards (*mesas de contratación*) and a ban on temporary staff forming part thereof, and the duties assigned to local councils' internal auditors and secretaries.

Key words: Public sector procurement; local council procurement; local procurement; strategic public procurement.

PRINCIPALS NOVETATS EN LA CONTRACTACIÓ PÚBLICA DELS ENS LOCALS

Resum

La Llei 9/2017, de 8 de novembre, de contractes del sector públic (LCSP), que va entrar en vigor el 9 de març d'enguany, ha comportat un canvi de model en la mesura que impulsa l'ús instrumental de la contractació pública per a la consecució de diversos objectius d'interès públic com la sostenibilitat, la innovació, la responsabilitat social i el foment de la contractació a petites i mitjanes empreses i amb entitats del Tercer Sector Social. Al mateix temps es persegueix un model més eficient, de manera que es busca una millor relació qualitat-preu en la selecció dels contractistes i en les prestacions, s'introdueix el principi d'integritat en la contractació pública com un dels seus pilars bàsics i s'advoca per la simplificació. Tot aquest conjunt de novetats afecten els ens locals i, en alguns casos, de forma molt significativa: nous criteris d'adjudicació, límits a la contractació menor, etc. Igualment la LCSP conté normes específiques adreçades als ens locals, com les limitacions a la participació d'electes en les meses de contractació o la prohibició que en formi part el personal eventual, i les funcions que s'atribueixen als interventors i als secretaris d'ajuntament.

Paraules clau: Contractes del sector públic; contractació dels ens locals; contractació local; contractació pública estratègica.

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1 Introduction: the challenge of strategic public procurement

The entry into force of Spain's Law 9/2017, of 8 November, on public sector procurement (LCSP) on 9 March 2018 represented a challenge for every area of public administration to which it is applicable, given the key nature of most of its provisions and, more particularly, for local councils¹. The LCSP's goal is to implement a new responsible, efficient, electronic and quality model for public procurement. To achieve this, it is based around three key concepts: strategic public procurement, integrity and simplification.

This new model has been promoted by the European Union by means of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU of the European Parliament and of the Council, on public procurement, within the framework of the Europe 2020 strategy for smart, sustainable and inclusive growth. However, it should be borne in mind that the transposition of these directives into the Spanish legal system has occurred almost two years late with regard to the established deadline (18 April 2016) and four years after their adoption in 2014. This therefore represents a disadvantage in terms of timing compared with most Member States with advanced economies, which already implemented them some time ago. Catalonia, with its Decree Law 3/2016, of 31 May, on urgent public procurement measures, saw the earlier implementation of the application of the Directives' articles that, according to community case law, had a direct effect, meaning that Catalan public administrations were able to begin to implement this new model from the second half of 2016.²

So, the LCSP represents a new paradigm of using public procurement to achieve secondary public policy objectives, as noted by its Article 1.3, which establishes the requirement for all public procurement procedures to incorporate, compulsorily and on a cross-cutting basis, social and environmental criteria, provided that they have some relationship with the procurement contract's object, whilst also encouraging procurement from SMEs and third (voluntary) sector undertakings. This shift has a significant impact upon the definition of award criteria, replacing the concept of the most economically advantageous bid with that of the best price-quality ratio (Article 145) and attaches greater importance to special performance conditions, which are mostly of an employment-related nature, in that it makes it compulsory to include at least one of the conditions contemplated in Article 202 in all public procurement contracts. Therefore, the LCSP provides a boost for the social and environmental facets of public procurement in comparison with the previous legislation on the matter.³ Furthermore, until now, neither contentious-administrative case law nor procurement courts have, generally, been in favour of social clauses, especially with regard to the subrogation of workers or the imposition of a particular collective bargaining agreement.⁴ Indeed, this has been an important field of public procurement-related doctrinal debate, making the changes brought about by the LCSP particularly significant.⁵

Additionally, the LCSP introduces a series of measures to promote procurement from SMEs and third sector undertakings, including Article 99's general rule of dividing contracts into batches (already introduced in Catalonia in Decree Law 3/2016), the requirement to review payments to subcontractors (Article 127) and the possibility of making payments directly to subcontractors if so contemplated in the procurement documentation and pursuant to future regulations (AP 51a).

The second cornerstone of the LCSP is the principle of integrity, which first appears in Article 1, together with the other principles applicable to public procurement: publicity, competition, transparency and non-

1 The special provisions affecting local councils are contained in Additional Provisions Two and Three. Case law is, in general, contrary to this placement for provisions on public procurement for local bodies, more particularly with regard to the lack of adaptation of basic legislation into line with their needs. Cf. Gómez Melero, Gerardo, "La contratación de los entes locales", in Gamero *et al.*, 2018.

2 With regard to the impact of the LCSP on Decree Law 3/2016, cf. Corretja Torrens (2018b).

3 The LCSP contains a degree of hierarchisation of the clauses, giving priority to social and environmental ones, leaving innovation more on the back burner. Cf. Gallego Córcoles, Isabel in "El Derecho de la contratación pública" in Gamero Casado *et al.* (2018).

4 Some recent examples include Tribunal Central de Recursos Contractuales (Central Contractual Appeals Court) Decision 379/2018, of 20.04.2018, and the Decisions of the Tribunal Superior de Justicia de Madrid (Madrid High Court) of 7.06.2017, Rec. 318/2016; of 29.09.2016, Rec. 633/2013; and of 31.03.2017, Rec. 630/2015, amongst others.

5 Cf. Juan Gómez (2018), Moreno Molina (2018) and Gimeno Feliú (2018a), amongst others.

discrimination and equality of treatment. This principle provides the basis⁶ for a great many of the changes implemented in the LCSP: the promotion of open procedures over directly awarded ones (the elimination of the negotiated procedure unpublicised by reason of amount, which had already been abolished in Catalonia by Decree Law 3/2016, and greater control over small-scale procurement); an increase in the obligations for publicity and the centralisation of information in a single platform, in the case of Catalonia, the *Plataforma de Serveis de Contractació Pública* (Public Procurement Services Platform, PSCP);⁷ increased requirements with regard to transparency and the justification for procurement contracts by means of the reports contemplated in Articles 28 and 116, and, most particularly, the bolstering special procurement-related appeal;⁸ and the regulation, for the first time, of conflicts of interests in Article 64, in very broad terms, embracing both real and apparent conflicts. This is due to the fact that public procurement is a high-risk field from the standpoint of fraud and corruption, as so often highlighted by the media and emphasised by case law on a number of occasions.⁹

The LCSP's third cornerstone is simplification and e-procurement. One of the chief problems with public procurement is the excessive time taken up by its procedures. The LCSP provides for two new simplified procedures in Article 159, with the goal of them becoming the standard procedures, and promotes e-procurement in all procedural stages. Additional Provisions Sixteen and Seventeen establish the requirements for e-communications and also the required electronic tools and devices. The LCSP makes e-communications compulsory from its entry into force, without exception.¹⁰

2 Changes with a particular local impact

Moving on to examine the Law in detail, there are many changes introduced by the LCSP, some of which have proved highly controversial. By way of example, in addition to those noted above, we could mention:

- that greater coverage of its subjective scope (which now embraces political parties, trades union organisations, employers' organisation, professional associations and foundations and associations related to any of the above, but only when they meet the requirements for being a contracting authority and only with regard to procurement contracts subject to harmonised regulations, which are subject to internal procurement instructions based on the principles of publicity, competition, transparency, equality and non-discrimination);
- differentiation between the estimated value of procurement (EVP), the base tender budget and the contract price and the difficulties in calculating them, taking account of concepts such as "market prices", "general expenses", etc.;

6 As defined by Gallego Córcoles, Isabel, in "El Derecho de la contratación pública: evolución normativa y configuración actual" in Gamero Casado *et al.* (2018).

7 By application of Article 347.3 of the LCSP and Additional Provision Eight of Law 19/2014, of 29 December, on transparency, access to public information and good government, which establishes the contractors' profiles for the contracting authorities for all public administrations in Catalonia and for their respective public sectors, which must compulsorily be hosted on the PSCP.

8 The free-of-charge nature of the special appeal from the entry into force of the LCSP; the possibility of appealing against records of procedures, management tasks for in-house resources and changes to contracts, and the reduction in thresholds for contracts open to appeal. Additionally, a new governance model is provided for with the creation of the Oficina Independiente de Regulación y Control (Independent Regulation and Oversight Office) and different coordination bodies. In Catalonia, some of the functions assigned by the LCSP to this new office are currently carried out by the Oficina Antifrau de Catalunya (Catalan Anti-Fraud Office) and, within the scope of the powers of the Government of Catalonia, the Directorate-General for Public Procurement, created by Decree 45/2016.

9 This is made clear in the December 2016 public opinion survey published by the Oficina Antifrau de Catalunya: when asked which field they believed corruption was most prevalent in, 71.5% of respondents answered that it was in public procurement (in 2014, the figure stood at 78.5%). The importance of integrity is made clear in Gallego Córcoles, Isabel, "El Derecho de la contratación pública: evolución normativa y configuración actual" in Gamero *et al.* (2018: 109ff.) and in Gimeno Feliú, José María, "Corrupción y contratación pública: las soluciones de la LCSP" (Gamero *et al.*, 2018).

10 Cf. Corretja Torrens, Mercè (2018a).

- the changes in contract typologies, with the elimination of the public services management contract and of the public-private partnership contract, introduced in 2007, and the introduction of the “services concession” (contemplated in Directive 2014/23);¹¹
- the promotion of innovation with the regulation of the new innovation partnership procedure, and the new step of preliminary market consultations;
- greater strictness in the use of small-scale procurement contracts and the regulation of new simplified procedures, noted above;
- the modification of contract terms, contemplated in Article 29 LCSP, which, whilst reducing the initial term of service agreements (5 years) in comparison with preceding legislation, permits extensions to this term under certain conditions without a resolution from the governing body of the autonomous community in question;
- the new system for contractual invalidity, adapted into line with Law 39/2015, and the introduction of new express causes for nullity and voidness, and the new system for modifications to contracts.

Given the limitations in terms of space, in this article we shall focus on three of these changes that, whilst affecting all levels and areas of government, we believe may have a greater impact upon local councils: the standardisation of levels of application, the new system for contracts in-house providing and the limitations on small-scale procurement.

2.1 The standardisation of levels of application of the Law

Associated with the principle of integrity, the LCSP has standardised its applicability to the different typologies of contracting authorities.

According to its Article 3, the following form part of the local public sector:

- As a public administration, all those bodies forming part of the local authorities, including autonomous bodies and consortia and other public law undertakings that have been expressly created to meet public policy requirements and that are not industrial or trading in nature, provided that one or more of the subjects that must be regarded as a contracting authority control its management or appoint at least half of the members of the governing bodies and do not receive the majority of their financing from market income.
- As a non-public administration contracting authority (*poder adjudicador no administración pública*, PANAP), those consortia, public law undertakings and trading companies at least 50% owned by one of the undertakings forming part of the public sector, or in those cases in which, whilst not exceeding this percentage, they are affected by the case contained in Article 5 or the Recast Text of the Law on the Stock Exchange which, meeting the above criteria, receive the majority of their financing from market income, and local public foundations.

Under the terms of previous legislation, only contracting authorities regarded as public administrations were entirely subject to the Law. Other contracting authorities not defined as a public administration only applied the law to contracts under harmonised regulations (and with some exceptions), whilst, with regard to contracts of a lower amount, they had to approve internal procurement regulations that only needed to respect the principles of transparency, publicity, confidentiality, non-discrimination and equality of treatment.

The LCSP has standardised applicability to encompass both types of contracting authority. Public administrations remain entirely subject to the complete law, whilst the other (non-public administration) contracting authorities are subject to the law with regard to harmonised procurement contracts (without the exceptions previously in force) and, for contracts of a smaller amount, the internal instructions are abolished¹², with a new system being established in Article 318. According to this Article, works with an

¹¹ This legal figure is the subject of an article by José Luis Martínez Alonso in this very issue, to which I would refer readers.

¹² As announced in the preamble to the LCSP. Nevertheless, there have been numerous doctrinal discrepancies with regard to the

estimated value (EVP) of less than 40,000 euros can be directly awarded, as can supplies and services with an EVP of less than 15,000 euros, whilst procurement contracts for works, services and supplies with an EVP above these amounts and up to the thresholds for harmonised ones must use any legal procedure, except for the negotiated procedure without publicity, use of which is limited to the cases contemplated in Article 168. With regard to enforceability and termination, these contracts are governed by private law, but also applicable are certain provisions of environmental and social clauses and those on the modification of clauses, amongst others.

Article 318 has given rise to a great many doubts as to its interpretation, in that it does not classify as small contracts those of the latter undertakings and allows them to choose between “any of the [legal] procedures” (except for that without publicity). Both Spain’s Abogacía General del Estado (State Legal Service) and the Government of Catalonia’s Directorate-General for Public Procurements have issued statements equating procurement contracts of these undertakings with an EVP of less than 40,000 euros for works and 15,000 euros for services and supplies with small contract, thus stating that they are also subject to the new requirements for small-scale procurement (commented on below) and also that all the elements of the chosen procedure are completely subject to them, without the possibility of making changes thereto. The main argument in support of this interpretation is the unificatory intent of the LCSP with regard to the application of procurement procedures.¹³

For remaining public sector undertakings not classified as a contracting authority, a system similar to that previously in force is retained. Thus, Article 321 LCSP establishes that internal instructions must be approved that respect the principles of publicity, competition, transparency, confidentiality, equality and non-discrimination, and that contracts must be awarded to whomever submits the best bid, pursuant to Article 145. Alternatively, these undertakings may also award contracts pursuant to rules directly established by the Law.

2.2 The objective scope: cooperation agreements, management assignments and in-house procurement

With regard to its objective scope of application, the LCSP is applicable to all for-value public sector procurement contracts and to those subsidised by contracting authorities, entered into with natural or legal persons.

Article 6 LCSP excludes from its scope agreements, provided that they meet certain conditions,¹⁴ and management assignments regulated by Law 40/2015, of 1 October, and the legal system for the public sector, which it distinguishes from the so-called tasks for “in-house resources”, which is given somewhat controversial new regulations.

Tasks for in-house resources are regarded as forming part of the internal organisation of the public administrations and are defined in Article 32.1 LCSP, and the Law therefore clearly establishes that these do not entail procurement, but subjects them to publicity requirements. They may also be appealed against by using the special procurement-related appeal. In order to exclude them from the LCSP, they are made subject to compliance with a number of requirements (Article 32.2). This precept is basic in nature¹⁵ and is applicable to all public administrations. The requirements to be met are as follows:

abolishment of these instructions (Vázquez Matilla, 2018 and Valdivia Poch, 2018). The purpose of this abolishment is to avoid the fragmentation of the applicable system as highlighted by Díez Sastre, Sílvia, in “El ámbito subjetivo de la Ley de Contratos del Sector Público. La contratación de los poderes adjudicadores no Administración Pública” in Gamero *et al.* (2018).

13 Cf. Directive 2/2018 of the Government of Catalonia’s Directorate-General for Public Procurement (which abolishes the internal instructions for the PANAP reporting to it) and Instruction 2/2018, of 17 January, of the Abogacía General del Estado.

14 Basically, that the undertakings involved are not of a market-oriented nature, that the agreement implements a partnership between the participating undertakings for the purpose of guaranteeing the provision of public services, and that the carrying on of the partnership is guided solely by public interest considerations.

15 An aspect criticised by Amoedo Souto, Carlos Alberto, in “Los encargos a medios propios, ¿Hacia un nuevo comienzo?” in Gimeno Feliú, 2018a.

- a) that the contracting authority giving it assignments exercises over the body a control, direct or indirect, which is similar to that which it would have over its own services or units, such that it may exercise a decisive influence over its strategic objectives and significant decisions;
- b) that more than 80% of the activities of the body receiving the assignment are carried out in the performance of the tasks entrusted to it by the contracting authority giving it the assignments and that controls it or by other legal persons controlled in the same way by the undertaking giving it the assignment;
- c) if it is a private law body, that the entirety of its equity or capital be publicly owned or contributed; and
- d) that the in-house nature of the recipient undertaking is formally acknowledged in its Memorandum and Articles of Association, with prior compliance with the following requirements:
 - i. Express acceptance or authorisation by the contracting authority that the body is an in-house undertaking;
 - ii. Verification by the contracting authority that the body that will be an in-house undertaking possesses the appropriate human and material resources for the assignments, pursuant to its legal object.

With regard to the date of compliance with the above requirements, the deadline for the first three is 9 March, the date the Law enters into force, whilst for the fourth it is 10 months after publication of the Law, in other words, 9 September 2018, pursuant to Final Provision 16.

Additionally, Article 32.7 LCSP establishes that the legal transactions that the bodies receiving the assignments organise in the performance of said assignment are subject to the LCSP and may not be the object to partial subcontracting of more than 50% of the amount of the assignment, except in the case of works or services concession undertakings, public law undertakings and private companies with entirely public capital carrying out public service management. This section may be regarded as giving concrete form to the concept of Section 2's "appropriate human and material resources for the assignments".

This Section 7 of Article 32 has been modified by Law 6/2018, of 3 July, on the general State budgets for 2018, which has excluded contracts signed by in-house resources for the provision of public administration computer and technology services from the enforcement of the 50% percentage.¹⁶

Compliance with these requirements entails some added complications for local councils as, in some cases, the control exercised over the in-house resource (which may be a public law undertaking of another public administration or a consortium) is exercised indirectly by means of the most representative associations, placing in doubt the requirement for decisive influence. In any case, it is the contracting authorities that must check compliance with these requirements with regard to their in-house resources and, if necessary, promote the regulatory modifications required on the basis of the legal object of the undertaking, its objectives and its capital and equity.¹⁷ Possible alternatives to bear in mind include partnership agreements or other legal figures such as programme contracts, which can be used to define the legal and financial system covering relations between local public administrations and the undertakings that were until now classified as in-house resources.

In the case of consortia, which in many cases have private stakes in their capital or equity held by private foundations or other undertakings, it should be noted that Article 12 of Directive 2014/24 limits stakes held by private capital in both public and private undertakings, provided that they are direct capital participations and, additionally, makes exceptions to this prohibition in cases in which these capital participations are either non-controlling or non-blocking and, furthermore, that these capital participations are required by national legislative provisions and are in conformity with the Treaties. Although the LCSP does not expressly include these exceptions in its provisions, we believe that such an interpretation can be given to it.¹⁸

¹⁶ Cf. Gimeno Feliú (2018b).

¹⁷ Cf. Amoedo Souto (2018).

¹⁸ On this issue, cf. Noguera de la Muela, Belén, in "Cooperación vertical: los encargos a medios propios o servicios técnicos" (Gamero *et al.*, 2018: 683-707).

2.3 Procurement procedures. The new system for small-scale procurement contracts

Important changes have also been made in the field of procurement procedures. Firstly, as noted above, the negotiated procedure, unpublicised by reason of amount, has been abolished, two new simplified open procedures have been designed and regulations are provided for a new innovation association procedure. So, award procedures firstly include the open procedures (with the open procedure type for harmonised procurement contracts requiring publication in the OJEU); the two new simplified open and simplified Internet-based procedures of Article 159; the restricted procedure; the negotiated procedures (with and without publicity); the competitive dialogue; the new innovation partnership procedure; design contests; and, finally, small-scale procurement contracts.

The main difference between open procedures and negotiated procedures is that negotiation is completely excluded in the case of open procedures (Article 156), whilst it is compulsory in negotiated ones. In any case, the choice of procedure must be duly justified in the dossier (Article 116.4). Additionally, to permit a better understanding of the market, prior to the open procedure, the LCSP contemplates the possibility of carrying out preliminary market consultations under the terms contemplated in Article 115.

For its part, the purpose of the new innovation partnership procedure is to promote innovation as one of the strategic objectives of public procurement by means of the development of new innovative products, services or works and their subsequent acquisition and exploitation, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants (Article 177). This is a stimulus for demand.

The procedure comprises three successive phases. The first consists in publishing a public call for the selection of candidates, in which the contracting authority defines the need to be covered and the minimum requirements and costs to be met by each bidder. The second involves inviting candidates and the development of the innovation. In the third, the contracting authority decides upon the acquisition of the result of the innovation and its exploitation. The innovation partnership procedure provides great flexibility with regard to both defining the object of the procurement contract – in that it consists in the definition of a public need, rather than an exact good or service – and in each phase it allows for a decision to be made on whether or not to proceed, and on whether the innovation and development is to be procured jointly or separately.

With regard to the simplified open procedures, the LCSP covers two in its Article 159. The first, for works of up to two million euros and services and supplies of up to 100,000 euros, may be employed provided that there are no award criteria involving value judgements (or that the latter do not exceed 25% of the applicable weighting, unless the object of the procurement is an intellectual service, when they can be up to 45%). It should be noted that the requirement that award criteria be objective does not mean that they may not be social or environmental in nature, provided that they can be measured objectively.

The procedure is very quick and streamlined. Bids must be submitted within 15 days (if for services or supplies) or 20 days (for works). Bidders must be registered with the Registro Oficial de Licitadores y Empresas Clasificadas (Spanish Official Register of Bidders and Classified Companies, ROLECE) or in the Government of Catalonia's Registre Electrònic d'Empreses Licitadores (Electronic Register of Bidders, RELI), thus reducing the amount of documentation to be submitted, as well as there being no need to lodge a guarantee in advance and fewer procurement board members.

The second simplified procedure is to be found in Section 6 of Article 159. It is not given a particular name and is entirely performed via the Internet, for procurement of works of up to 80,000 euros and services and supplies of up to 35,000 euros. In this case, the award criteria must be objective and the bid submission deadline is at least 10 days.

Lastly, reference should be made to the use of small-scale procurement (Article 118). This procedure is particularly important on a local level, given that it is the one most commonly employed there, together with the negotiated procedure without publicity by reason of amount, which has now been abolished. As a result, direct award procedures are severely restricted under the new legislation.

With regard to the dossier, note that small-scale procurement is also subject to the justification requirements, like other procedures, such that the dossier must always include the approval of the expense and the associated invoice, and also a “report from the contracting authority justifying the need for the procurement”. Said report must be signed by the contracting authority, whoever this may be (in the case of local bodies, the mayor, president or chair of the corporation’s plenum), unless this power has been delegated.¹⁹

It should also be borne in mind that the LCSP lowers the quantitative thresholds for both works procurement contracts (with an EVP of up to 40,000 euros)²⁰ and for services and supplies contracts (with an EVP of up to 15,000 euros). In both cases, these values are for the estimated value of procurement, as with the entire LCSP.

Furthermore, pursuant to Section 3 of Article 118 LCSP, which has caused the greatest controversy, the dossier must include the following justification:

- a) that the procurement contract’s object has not been altered to avoid application of the general procurement rules, and
- b) that the contractor has not signed other small-scale procurement contracts that, taken individually or together, exceed the figure set forth in Section 1 to this Article.

Verification of compliance with these requirements is the duty of the contracting authority, and an exception is made for the case of Article 168.a).2n, in other words, the possibility of making a direct award by means of the unpublicised negotiated procedure. This verification must also be reflected in a contracting authority report.

The rigidity of these limitations has been the object of wide-ranging criticism and has forced procurement advisory boards to issue statements on the matter. For its part, the Junta Consultiva de Contractació Administrativa de la Generalitat de Catalunya (Administrative Contracting Advisory Board of the Government of Catalonia) issued Report 1/2018 which, based on the underlying purpose of the precept (increasing competition between companies, avoiding the subdivision of the procurement contract object and preventing the use of small-scale procurement contracts for recurring procurement requirements), concluded that the restriction on signing a certain amount of small-scale contracts with the same contractor company only applies to contracts with a matching object, in the sense of those comprising substantially coinciding services, and must be counted by budgetary year. Accordingly, procurement contracts may be signed with the same company and said limits exceeded, provided that the objects of the contracts are different.

In addition to that of Catalonia, the Spanish State Board and those of Aragon, Madrid, Galicia and the Basque Country have also issued statements, although their interpretations do not always coincide.²¹

This greater inflexibility introduced by the LCSP with regard to small-scale procurement will force public administrations (and particularly local ones) to use alternative procurement procedures, such as the new

¹⁹ This was confirmed by Report 1/2018, of the Government of Catalonia’s Junta Consultiva de Contractació Administrativa, published on its website.

²⁰ These limits were increased to up to 50,000 euros by AP 54a. of Law 6/2018, of 3 July, on the general State budgets, with regard to contracts undersigned by public officials of the Spanish Science, Technology and Innovation System (*Sistema Español de Ciencia, Tecnología e Innovación*) (González, 2018).

²¹ Reports of the Junta Consultiva de Contratación Pública del Estado (Public Procurement Advisory Board of Spain) 41/2017, 42/2017 and 5/2018; Report of the Junta Consultiva de Contratación Administrativa de Aragón (Administrative Contracting Advisory Board of Aragon) 3/2018; Report of the Junta Consultiva de Contratación Administrativa de Madrid (Administrative Contracting Advisory Board of Madrid) 1/2018; Report of the Xunta Consultiva de Contratación Administrativa de Galicia (Advisory Board of Galicia) 1/2018 and Recommendation 1/2018 of the Report of the Junta Asesora de Contratación Pública de la Comunidad Autónoma de Euskadi (Public Procurement Advisory Board of the Basque Country). In essence, the Boards of Aragon and Madrid opt for stating that, when considering the incompatibility for signing small-scale procurement contracts with the same contractor, the calculation must be made with regard to the contracting authority and not the contractor undertaking (a number of undertakings may have a shared contracting authority), and that the singleness of the object must be assessed with regard to contract types (i.e. small-scale works, services or supplies contracts); the Advisory Board of the Basque Country also applies the criteria of contract types. On the other hand, the Advisory Board of Galicia holds that the incompatibility is with regard to the authority or separate functional unit and for contracts with the same contractual object. The Advisory Board of Spain holds that account should be taken of the contractual object, irrespective of its type. With regard to the time period in question, only the Advisory Board of Spain opts for counting the year from the date of approval of the expense, whilst all the others hold that it must be with regard to the budgetary year and for expenses approved after the entry into force of the LCSP.

shortened open procurement procedures or make use of already existing aggregate purchase mechanisms, or even the new dynamic purchasing system. Small-scale procurement shall, in fact, be consigned to covering very occasional and sporadic requirements, with a temporal scope of less than one year.²²

Article 63.4 includes an innovation with regard to publishing information, as it provides that information, at least on the object, term, award amount, including any value added tax, and the identity of the awarded company for small-scale procurement contracts must be published on an aggregate basis, at least quarterly, with the contracts ordered by the identity of the awarded company, except for contracts with an estimated value of less than 5,000 euros, if the payment system employed is that of repeated cash advances (*anticipos de caja fija*) or another similar system for smaller payments. In addition to this obligation, in Catalonia, Article 13 of Law 19/2014, of 29 December, on transparency, access to public information and good government, establishes that the obligations of active publication are also applicable to all small-scale public procurement, irrespective of its amount.

3 Special provisions for local councils

3.1 The powers of contracting authorities on a local level

As noted above, special stipulations for local councils are provided for in Additional Provisions Three and Four LCSP.

The first issue relates to the powers of contracting authorities on a local level. A distinction is drawn between general powers in public procurement and powers with regard to private contracts and those subject to legislation on public assets. The function of contracting authority for the procurement of works, supplies, services, works concessions, services concessions and special administrative assignments belongs to the mayor and local council chairs when their EVP does not exceed 10% of ordinary budgetary resources²³ or, under any circumstances, the sum of 6 million euros, including those of a multi-year nature that do not have a term of more than four years, provided that the cumulative value of all the annual sums does not exceed the indicated percentage with regard to the budget for the first financial period or the indicated amount. In all other cases, the power belongs to the plenum of the council (residual competence), as does responsibility for approving the general procurement documents. In municipalities with large populations, the powers of the contracting authority are exercised by the *junta de gobierno local* (municipal cabinet), or can be delegated to a councillor,²⁴ irrespective of the procurement contract amount or its term, and the power to approve the general procurement documentation also belongs to the plenum.

Indeed, the LCSP shifts contracting authority powers from mayors and chairs of local councils to the plenum since, whilst the previous legalisation made reference to the amount of the procurement contract, the benchmark for the LCSP is the estimated value of procurement (EVP).

With regard to procurement boards (*juntas de contratación*) their creation is optional, pursuant to Section 5 of Additional Provision Two, as established in the previous Law. These boards must be created by resolution of the plenum and must necessarily include the council's internal auditor and secretary (or head of the body assigned with the powers of providing legal advice to the corporation). If the procurement board is operational, there is no need for the involvement of the technical procurement board (*mesa de contratación*). Procurement boards act as the contracting authority for certain works contracts (whose objects encompass simple repair, upkeep and maintenance work), contracts for supplies (with regard to consumables or assets easily impaired thorough wear and tear) and services (when the value does not exceed 10% of the council's ordinary resources or the actions are contemplated in the associated budgetary period and are carried out pursuant to the terms and conditions for the execution of the budget).

22 So, for example, José Manuel Martínez Fernández (2018) states that not even works management contracts can be the object of small-scale procurement, given the duration of their term.

23 As some authors highlight, the concept of "ordinary budgetary resources" is not clearly defined, thus making this assignment of powers more complicated. Cf Gómez Melero, Gerardo, in "La contratación de los entes locales" (Gamero *et al.*, 2018: 2711).

24 As noted by Concepción Campos (2018b), delegation does *not* permit exceptions to the restrictions imposed upon small-scale procurement.

3.2 Special provisions on technical procurement boards and other advisory bodies

With regard to advisory and expert bodies in procurement procedures, i.e. the technical procurement board and committee of experts, the LCSP introduces a number of changes.

Firstly, there is the need to publish the makeup of the technical procurement boards on the contractor's profile of the relevant contracting authority. Standing technical procurement boards may be constituted.

The technical procurement board comprises the chair, who must be a member of the corporation or a civil servant, and at least three members. These members must include the secretary or head of the body assigned the legal advisory function, the internal auditor or head of the body assigned the functions of financial and budgetary control and those others appointed by the contracting authority from amongst the corporation's career civil servants or permanent workforce or elected members thereof. The secretary must be a corporation civil servant.

Changes include the fact that the head of the body assigned the functions of financial and budgetary control may be a member of the technical procurement board, that the possibility of fixed-contract civil servants forming part of it is restricted (they may only do so when there are no sufficiently qualified career civil servants and that this is so demonstrated in the dossier, with the added problem of demonstrating this lack of qualification)²⁵ and, above all, that temporary staff are disqualified from forming part thereof. There is also a restriction on the number of elected officials that may form part of it: their number may not exceed one third of the total number of members.

In municipal local councils, municipal associations and local consortia, staff of provincial councils or sole-province autonomous communities may form part of the technical procurement board.

With regard to the other advisory body that acts in procurement procedures, the committee of experts contemplated in Article 146.2a) LCSP, Point 8 of Additional Provision Two establishes that, in local bodies, these committees may be made up of any career civil servants or permanent employees with the appropriate qualification who have not taken part in the formulation of the project's technical documentation. This staff must necessarily include a legal specialist in public procurement.

In the case of both the technical procurement boards and the committees of experts (which, with the LCSP, are also applied to contracts awarded by PANAP), the restrictions on their makeup, whilst accentuating their technical nature and, in the case of the committee, guaranteeing independence of criteria, could cause problems in some municipalities due to the lack of staff able to form part thereof.

3.3 Special provisions on local authorities: municipalities with less than 5,000 and 20,000 inhabitants

The LCSP establishes a set of specific rules for municipalities with less than 5,000 inhabitants and for those with less than 20,000 inhabitants, as well as rules on centralised procurement in both cases.

For those with less than 5,000 inhabitants, special provisions are introduced with regard to works procurement. Section 3 of Additional Provision Two assigns the plenum the power to authorise the formulation and tendering of independent projects associated with each part of the works when the execution period exceeds an annual budget, provided that these parts are able to be used separately in the sense of general use or service, or may be substantially defined. Meanwhile, Section 7 of Additional Provision Three adds that, in works procurement contracts whose financing exceeds the annual budget (and not the execution, as provided for in previous legislation), independent projects may be formulated for each part of the work, provided that these parts are able to be used separately in the sense of general use or service, or may be substantially defined. Performance of each of the projects may be the object of a separate procurement contract, without prejudice to application of Articles 99 and 101 (which govern the object of the contract and the estimated

25 Cf. Colós Tenas, Jesús, in "Las especialidades de la contratación pública en la administración local" (Gimeno Feliú, 2018a).

value). The new Law also eliminates the authorisation of the corporation's plenum by absolute majority and the impossibility of delegation.

With regard to approval of the expense, the LCSP states that, in procurement contracts for municipalities with less than 5,000 inhabitants, it may be replaced by certification of the existence of credit, issued by the internal auditor secretary or, as the case may be, the corporation's internal auditor (Additional Provision Three, Section 4).

Municipalities with a population of less than 20,000 inhabitants may arrange tenders for procurement contracts that are not subject to harmonised regulation for service concessions relating to the management of two or more different public services, provided that the average annual value of the contract does not exceed 200,000 euros, and the contracting authority justifies this decision in the dossier on the basis of the objective need to proceed with the unified management of these services. In all cases, the individual procurement documents shall specify the functional and territorial scope of the service concession contract.

One final change worth highlighting is the regulation of centralised procurement. In municipalities with a population of less than 5,000 inhabitants, procurement powers may be exercised by bodies that, acting as centralised contracting authorities, are constituted pursuant to Article 228 LCSP, by means of agreements. Agreements can also be reached by virtue of which management of procurement procedures is entrusted to provincial councils or single-province autonomous communities. The reference to provincial councils in the LCSP is expanded to include supra-municipal local bodies contemplated in the relevant statutes of autonomy with powers to assist and cooperate with municipalities and to provide local public services (districts, metropolitan areas, etc.). Local councils, irrespective of the possibility of joining the Spanish centralised procurement system and the centralised procurement bodies of autonomous communities and other local undertakings, as contemplated in Section 3 of Article 228, may also form part of the central procurement bodies created by associations of local councils referred to in Additional Provision Five of Law 7/1985, of 2 April, modified by Law 27/2013, of 27 December, on the rationalisation and sustainability of local authorities (LRSAL), as well as those created by the Spanish Government's Administración General del Estado (Additional Provision Three, Section 10).

It should be noted that, in this case, no limitation is established with regard to population, and it is therefore applicable to all local councils, irrespective of their number of inhabitants.

Also remember that the LRSAL already assigned the power over centralised procurement in municipalities with a population of less than 20,000 inhabitants to provincial councils or equivalent undertakings pursuant to Spanish State or autonomous community legislation (Article 36.1.g of Law 7/1985, of 2 April, governing the bases for local government (LBRL)).

3.4 New functions for council secretaries and internal auditors

Section 3 of Additional Provision Three governs internal audit functions. The local council's internal audit body carries out its financial review functions. Reviews must also be carried out on the evaluation of the economic impact of the procurement contract (unless it is a small-scale contract) with regard to compliance with the principals of budgetary stability and financial sustainability required by Article 7.3 of Organic Law 2/2012, of 27 April, on budgetary stability and financial sustainability. The only difference with the previous law is that the LCSP makes reference to the internal audit body of the local council and includes requirements arising from the regulations on budgetary stability. It obliges the internal audit body to attend the physical receipt of all procurements, except those of small-scale procurement contracts, in the performance of its duty to carry out a physical review of all investments.²⁶ It may be assisted in the receipt by a technical staff member specialising in the object of the procurement contract, who must be someone other than the project manager or the person responsible for the procurement. With regard to the physical review of the investment, in addition to the terms of this Additional Provision, account must be taken of Article 20 of Royal Decree 424/2017, of 28 April, governing the legal system for internal control in local public sector

²⁶ Required by Article 214.2d) of the Recast Text of the Law governing local tax offices, approved by Royal Legislative Decree 2/2004, of 5 March.

councils. Provincial councils, and the other supra-municipal local bodies with powers to assist and cooperate with municipalities, shall assist small municipalities to this and other ends contemplated in the LCSP.

With regard to council secretaries, Section 8 of Additional Provision Three establishes that the reports the LCSP assigns to legal services must be issued by the secretary or the head of the legal advisory service in the case of certain municipalities. Thus, in municipalities with a large population, it is the duty of the head of the legal advisory service to issue the reports that said Section 8 assigns to the secretary, and the coordination of the aforementioned obligations of publicity and information is the duty of the head of the support body (*órgano de soporte*) of the council cabinet (*junta de gobierno*).

One change is that the LCSP lists the cases in which the legal report by the secretary shall be compulsory: the approval of procurement dossiers, the modification of procurement contracts, the revision of prices, contract extensions, maintenance of the economic balance, and contract interpretation and termination. The LCSP states that it is also the duty of the secretary to coordinate the obligations of publicity and information established in transparency regulations.²⁷

Lastly, mention should be made of the new legal system for civil servants with the nationwide administrative authorisation established in Royal Decree 128/2018, of 16 March. Amongst the functions assigned to secretaries is that of acting as a notary public with regard to procurement and the issuing of preliminary reports required by laws and regulations.

4 Conclusions

As noted, the LCSP promotes a change in model with regard to public procurement, in the aim of encouraging social, environmental, and innovation clauses and procurement from SMEs and third (voluntary) sector undertakings. This commitment to strategic public procurement adds greater complexity to procedures, in that it forces a revision of award criteria and the formulas used to date in the search for the best price/quality relationship. It is not easy for public sector management to design criteria other than those based on price whilst also avoiding discretionality or to find new award formula: there is therefore a need to evaluate quality in objective terms.

Furthermore, the use of public procurement as a strategic tool entails planning, creating inter-administration and public-private cooperation frameworks and establishing long-term objectives that will have to be coordinated with other public policies aimed at local governments.

Additionally, the new requirements for justification, transparency and integrity, although initially causing new administrative workloads for managers, as is also the case with the restrictions on small-scale procurement and the encouragement of the use of open and publicised procedures, form part of the cultural shift towards transparency in public administrations and may contribute to the revision of administrative practices and to an improvement in citizens' perception of public procurement. In this regard, there is a need to encourage open procurement, continuous oversight and citizens' participation in public procurement.

It is true that, on a local level, some of the changes entailed by the LCSP are particularly problematic, as local councils have fewer resources and means to implement them. This is the case, for example, with small-scale procurement, as councils normally have more difficulties in diversifying successful tenderers, or with tasks for in-house resources, demonstrating control and decisive influence over these resources. The implementation of e-procurement is, given its cost, a further challenge for local authorities, and the restrictions on local elected officials and bans on temporary staff forming part of procurement boards may also prove problematic in some small town councils.

To sum up, however, the new model leads us to regard public procurement as yet another public policy that cannot be made up on the hoof: it requires planning and forethought. There may be a need to promote aggregate procurement to tackle many of the challenges raised, and, above all, there is a need to train

²⁷ Cf. more information in the Report by the Directorate-General for Public Procurement with regard to the changes made by Law 9/2017, of 8 November, on public sector procurement specifically affecting the local level.

managers and provide them with the tools and resources required to allow public procurement to attain the goals of efficiency, transparency and quality demanded by the public.

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