



PRO/CNMC/001/15: ANALYSIS OF PUBLIC PROCUREMENT IN SPAIN: OPPORTUNITIES FOR IMPROVEMENT FROM THE PERSPECTIVE OF COMPETITION

05 February 2015

Table of Contents

I. COMPETITION AND ECONOMIC EFFICIENCY AS CENTRAL VALUES OF PUBLIC PROCUREMENT IN SPAIN.	3
II. ANALYSIS OF THE MAIN DEFICIENCIES IN PUBLIC PROCUREMENT IN SPAIN:	8
II.1. Need for greater access, transparency and openness:.....	8
II.2. Need for evaluation of economic efficiency and effective competition.	12
II.2.1 Need for economic evaluation by the contracting authority itself.	13
II.2.2 Need for evaluation of economic efficiency and the level of competition by a specialist outside body	15
II.3 Need to make greater use of new information technologies:	16
II.4. Need for greater cooperation among public administrations.	17
II.5. Need to simplify public procurement procedures.	18
II.5.1. Simplification of the procedures	18
II.5.2. Reduction in legislative dispersion in respect of public procurement:	21
III. ACTIONS ENVISAGED BY THE CNMC:	21
III.1. Participation in the transposition of the new procurement Directives .	22
III.2. Coordination between the CNMC and the various contracting authorities	22
III.3. Actions relating to the JCCAE and the State Contracting Platform	22
III.4 Training of supervisory bodies on procurement:	23
III.5 Review of the rules on public procurement	24
III.6 Update of the Guide to public procurement and competition	24

The Board of the *Comisión Nacional de los Mercados y la Competencia* (Spain's National Authority for Markets and Competition, hereinafter CNMC), in its meeting of 5 February 2015, has approved this report on the ***Analysis of public procurement in Spain: opportunities for improvement from the perspective of competition.***

This report is approved on the CNMC's own initiative, in exercise of its competences as per Article 5.1 of Act 3/2013 of 4 June creating the CNMC.

I. COMPETITION AND ECONOMIC EFFICIENCY AS CENTRAL VALUES OF PUBLIC PROCUREMENT IN SPAIN

It is difficult to overstate the importance of public procurement and other methods of public acquisition of goods and services for citizens' welfare, trust in government, business competitiveness and the health of the country's economy.

In quantitative terms, public procurement in the developed countries exceeds 15%¹ of Gross Domestic Product (GDP), accounting for approximately 18.5%² of GDP in the case of Spain. In other words, about €194 billion a year, or more than €4,100 a year *per capita*³. Qualitatively, health, education, justice, public safety, transport and practically any other aspect of day-to-day economic reality is profoundly affected by how, how much, when and from whom the public sector, in all its regional dimensions and legal forms, procures its goods and services.

The huge volume of public funds used, and their necessarily limited nature, has obvious implications for competition and market regulation.

¹ According to the OECD, the weight of public procurement is between 13% and 20% of world GDP. See [Public Procurement for Sustainable and Inclusive Growth. Enabling reform through evidence and peer reviews](#). In the European Union (EU-27), estimated expenditure on public procurement of goods and services in 2011 was supposedly around €2,450 billion, including utilities (19% of the EU-27's GDP). In 2012, excluding utilities, it reached €1,774 billion (1.07% more than the comparable figure for 2011, representing 13.7% of EU 27 GDP). (Sources: [Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation](#), European Commission, 2011; [Public procurement indicators 2011](#), European Commission 2012 and [Public Procurement Indicators 2012](#), European Commission, 2014.

² According to Spain's [Public Procurement Observatory](#), this 18.5% is actually understated because it does not include public procurement other than by contracting, such as in-house providing and agreements. According to other European Union public procurement indicators, the figure for Spain was 15.5% of GDP for 2011 including utilities and 11.83% excluding them, (10.18% for 2012).

³ Based on nominal GDP for 2013 of [€1,049,181 million](#) and a population of [46.46 million](#), according to data of the INE (*Instituto Nacional de Estadística*, Spain's National Statistics Institute).

There is an urgent, priority need to regulate public procurement in a way that genuinely favours competition⁴. **The public sector in Spain must impose on itself an increasingly transparent, pro-competitive and economically efficient public procurement system, for the benefit of citizens, businesses and the public administrations.**

The fact that Spanish and EU legislators are gradually improving the rules for public procurement with a view to facilitating the efficient use of available public funds is welcomed. **The main economic instrument for optimising the use of public money in procurement procedures is, and must continue to be, the introduction and safeguarding of free competition.** To this end, various fundamental principles have been incorporated into the legal system, including freedom of access to bidding procedures, openness and transparency of procedures and non-discrimination and equal treatment of bidders.

For many years now the promotion, supervision and defence of these conditions favouring access to procurement, as well as the quest for greater efficiency and effective competition in these procedures has been one of the main areas of interest and activity of the most advanced competition and regulatory authorities, and particularly those of Spain.

The CNMC considers that the work done in this field, both by the authorities that preceded it and by itself, has been useful and pertinent. The recommendations made to public administrations to eliminate unjustified restrictions in fulfilment of the competition advocacy function⁵, the sanctioning of anti-competitive practices in the field of public procurement⁶ (*bid rigging*) and the use of the Authority's legal standing⁷ to *challenge* before the competent courts such acts of public

⁴ International bodies such as the OECD and the World Bank have pointed out that integrity in public procurement is essential for maintaining citizens' trust in the public sector. See For example *Integrity in Public procurement*, OECD. Similarly, in the European sphere, the Commission's Communication of 3 March 2010 "[Europe 2020, a European strategy for smart, sustainable and inclusive growth](#)" (Europe 2020 Strategy) determines, among other matters, the need to improve the general conditions of public bidding processes so as to favour innovation in those markets where the public sector is a major buyer.

⁵ In this respect, reference can be made to the "[Guide to public procurement and competition](#)" (2011), the "[Application of the Guide to Public Procurement and Competition to bidding processes for the provision of public healthcare in Spain](#)" (2013), the "[Report on in-house providing in Spain: Implications of its use from the perspective of the promotion of competition](#)" (2013) or the numerous reports on contract specifications of various State bodies available on www.cnmc.es.

⁶ See, *inter alia*, the following case files [S/0383/11 Cuenca ambulance service](#), [SACAN/0012/11 Las Palmas Municipality Transport](#), [S/0226/10 Highway bidding procedures](#), [S/0316/10 Paper envelopes](#), [S/0429/12 WASTE](#).

⁷ On the basis of [Article 5.4](#) of Law 3/2013 of 4 June creating the CNMC (old [Article 12.3](#), no longer in force, of Law [15/2007 of 3 July on the Defence of Competition](#)) and of [Article 27](#) of Law 20/2013 of 9 December guaranteeing the single market.

administrations subject to administrative law which create obstacles to the maintenance of effective competition in the markets, are to highlight in this respect.

This work in the area allows the CNMC to confirm the **persistence of structural problems in public procurement and specifically in public contracts**. In many cases **these structural problems make it impossible to ensure that effective competition is maintained** in the markets.

When competition breaks down there is invariably a **loss of economic efficiency and an unnecessary waste of scarce and costly public resources**. At the same time, reduced competitive tension increases the risk of **collusion**.

Furthermore, public procurement is inherently **prone to the existence of irregular practices from the competition perspective** due to circumstances such as the following:

- i) **high barriers to entry**, such as the requirement for investments in public concessions or the economic, information and legal costs involved in taking part in the bidding process,
- ii) the **multiplicity of contracting authorities⁸ each with its own different procedures⁹ and complex learning curves** both for bidders and the public administration responsible itself, or
- iii) the **intrinsic problems of asymmetric information and complex agency relationships**, which, if not properly corrected, are harmful to the interests of the government, potential competitors and, ultimately, citizens and taxpayers.

The absence of the necessary competitive pressure may lead to average overshoots of (estimated) 25%¹⁰ of the budget in public procurement. In Spain, in aggregate, this could mean as much as 4.6% of annual GDP, approximately €47.5 billion a year, or more than €1000 a year per capita.

In short, we consider it essential that an accurate diagnosis be made of the current problems in contracting and procurement. The CNMC, in its independent capacity, wishes to improve and intensify the use of the instruments at its disposal in its areas of competence, and to cooperate with the

⁸ For example, in 2011 there were 250,000 different contracting authorities in the EU, according to the "[Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation](#)" European Commission, 2011

⁹ With regard to the multiplicity of procedures, in 2009 more than two million procedures were carried out for the award of public contracts in the EU. "[Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation](#)" European Commission, 2011.

¹⁰ Source: [Transparency International](#).

public authorities in ensuring the maximum possible competitive tension before, during and after each public tender process¹¹. At the same time, the CNMC proposes to play an active part, making specific proposals for the public sector to equip itself with the economic, legal and technological resources needed in order for public procurement to be rebuilt on the principles of free competition¹² so as to become a strategic function of public administrations¹³.

As a clear plus point, the CNMC sees a number of strengths with which Spain starts out, and at the same time, some clear opportunities for improvement.

As regards the strengths, we are witnessing the consolidation in [EU¹⁴](#) and [national](#) legislation of a series of robust legal principles to guide public sector procurement¹⁵. Spain stands out in particular for:

- i) the explicit inclusion of the principle of safeguarding competition in the public procurement legislation in force¹⁶,
- ii) the creation of the [Commission for the Reform of Public Administrations](#) within the Programme of Government Reforms, recognising the need for an austere and efficient government that will be a competitive value for Spain and
- iii) the recent progress made in transparency¹⁷ in acquisitions both in contracting [and in-house providing](#).

On the other hand, we must stress some new and extraordinary opportunities for substantial improvement in public procurement: **during the past thirty**

¹¹ See for example, the OECD's [Procurement Toolbox](#)

¹² See Caldwell, N., Walker, H., Harland, C., Knight, L., Zheng, J., & Wakeley, T. (2005). Promoting competitive markets: The role of public procurement. *Journal of Purchasing and Supply Management*, 11, 242–251.

¹³ See Matthews, D. (2005). Strategic Procurement in the public sector: A mask for financial and administrative Policy. *Journal of Public Procurement*, 5, 388–399.

¹⁴ The extent of the EU legislators' determination to thoroughly define and implement these principles can be inferred from the high degree of consensus attained in the approval of the Directives: on the Directive on public procurement: 620 votes in favour, 31 against and 30 abstentions; on the Special sectors Directive: 618 in favour, 36 against and 26 abstentions; and on the Directive on concessions: 598 in favour, 60 against and 18 abstentions.

¹⁵ Not for nothing does Article 18 of Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on Public Procurement state, under Principles of Procurement, that “Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner (...)”.

¹⁶ Article 1 of [Royal Legislative Decree 3/2011 of 14 November approving the consolidated text of the Public Sector Contracts Act](#). (hereinafter TRLCSP).

¹⁷ See [Law 19/2013 of 9 December on Transparency, access to public information and good governance](#). See [Position of the CNC with regard to the Draft Bill on Transparency, access to public information and good governance](#).

years economic¹⁸, legal¹⁹ and IT²⁰ instruments have been developed which, if well designed, implemented and supervised, can facilitate structural changes to the public procurement system, making it more transparent, more favourable to competition and consequently more efficient.

There are also various topical issues that make it particularly **opportune** for the CNMC to approve this proposal as a public document for reflection, explaining its views and giving a preview of its action plans in this field.

In the first place, the recent approval of the **new EU Directives** on public procurement²¹ (also referred to as “fourth generation public procurement Directives”) entails their mandatory transposition²² into Spanish law and consequently a far-reaching reform of the law on public contracts. Secondly, the increase in transparency and in instruments for prosecuting anti-competitive practices has facilitated the **detection of anti-competitive practices**, particularly those relating to public procurement. Lastly, greater awareness on the part of citizens and businesses due to the ongoing **economic crisis which started in 2008**, with the consequent reduction in available funds and the knock-on effects on procurement of public goods and services.

¹⁸ See for example, [Laffont, Jean-Jacques, and Jean Tirole. A theory of incentives in procurement and regulation, 1993](#), [Polinsky, A. Mitchell, and Steven Shavell. The economic theory of public enforcement of law. No. w6993. National Bureau of Economic Research, 1999](#)

¹⁹ See for example, [Beth, E. Transforming procurement into a strategic function: What are the challenges faced?. OECD](#), Moreau, O. Central purchasing systems in the European Union. OECD.

²⁰ Thirty years ago computers were practically a novelty, and Spain's most advanced Data Processing Centres (DPCs) were almost non-existent. The first version of the Spanish tax agency AEAT's DPC, the RITA supercomputer, started operating in 1986. The most powerful supercomputers of the time, such as the [CRAY X-M](#), had a speed per processor of 200 MFLOPS (200x10⁶ FLOPS) for a total of 400 MFLOPS. In comparison, the CELL microprocessor used in the previous generation of domestic video consoles such as PlayStation 3 operate with 256 GFLOPS at more than a thousand times this speed (256,000 MFLOPS, or 256x10⁹ FLOPS). At present, supercomputers are performing in terms of PFLOPS ([10¹⁵ FLOPS](#)) and [Big data](#) and [Open data](#) technologies for example are perfectly mature and ready to be fully applied to public procurement, especially public bidding processes.

²¹ [Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public procurement and repealing Directive 2004/18/EC](#), [Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on Procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC](#), and [Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the Award of concession contracts](#).

²² Pursuant to these Directives, Member States must transpose them into their legislation by April 2016, except for certain matters relating to electronic contracting which must be transposed by November 2018. Several Member States have already directly transposed these Directives, which we do not recommend in the case of Spain, since we believe maximum use should be made of the leeway granted for Member States to enact legislation that is more favourable to competition.

Public opinion and economic operators are demanding urgent corrective measures from all bodies of the administration, the CNMC included ²³. Indeed, in the past few months the CNMC has seen an appreciable increase in the number of consultations on this subject, and it is clear that the CNMC can contribute, within its scope of action, to improving the competitive conditions of public procurement. Set out hereunder are some of the main areas for improvement identified in public procurement which, in the CNMC's judgement, hinder, or in some cases even prevent, the existence of appropriate effective competition. Then, **the general lines of the actions to be carried out** by the CNMC in relation to the **promotion and defence of competition in public procurement and especially public bidding processes** will be described.

II. ANALYSIS OF THE MAIN DEFICIENCIES IN PUBLIC PROCUREMENT IN SPAIN

The CNMC observes various problems leading to lower competitive tension and less efficiency in public procurement²⁴ than are desirable.

II.1. Need for greater access, transparency and openness:

Greater transparency in public contracting is considered internationally as the fundamental factor for further improving efficiency in government procurement in the twenty-first century ²⁵.

In Spain, levels of transparency have improved appreciably in the past few months. Nonetheless, the opportunity for greater openness and transparency have to be seen through a triple prism:

- Firstly, it implies **further improving access to information for actual and potential bidders**, in terms of both greater availability of data and lower costs of obtaining information in order to facilitate access to bidding processes as much as possible. This greater openness and transparency should find expression in, among other aspects, the characteristics of the

²³ Thus the CNMC's Action Plan for 2015 includes provisions relating both directly and indirectly to these matters.

²⁴ For a more detailed description of the multiplicity of practices restrictive of competition attributable to public administrations and economic operators, reference can be made to the documents on public procurement and competition already referred to and available at www.cnmc.es.

²⁵ See www.oecd.org/governance/procurement/toolbox/ y www.oecd.org/gov/ethics/integrityinpublicprocurement.htm

procedures, tender specifications and the contract themselves, the general and particular conditions of the contract and any contractual specificities.

This interpretation would include, among other matters, the following:

- i) the need for better justification for the procedure chosen,
- ii) the eradication of ambiguous or excessively discretionary selection criteria,
- iii) the elimination of procedures that do not provide sufficient assurance of openness²⁶,
- iv) the elimination of insufficiently clear or excessively subjective assessment criteria, giving preference to price whenever possible,
- v) the move to ensure that information reaches the greatest possible number of economic operators, and
- vi) the availability of all the information on the procedure, symmetrically, in a timely manner and in the proper form, to all operators that might be interested.

This greater transparency, as well as bringing greater empowerment to users and consumers, would also lead to easier access and increased credibility and reputation of procurement procedures, maximising the number of potential participants and consequently the degree of competitive tension.

- On the other hand, it implies the need to **further increase the transparency and openness²⁷ of the government itself in relation to all completed, open or planned procedures.**

Increased transparency on the part of the government would lead to greater predictability, as well as to strengthened commercial and legal certainty, which would encourage operators, national and foreign, to participate competitively in a more decisive way.

²⁶ In this regard the provisions of the new Directives limiting the use of negotiated procedures without prior publication to exceptional situations only is welcomed. (See Recital 50 and Article 32 of Directive 2014/24).

²⁷ The importance of the principle of openness in public bidding processes can be directly observed in the provisions of the new procurement Directive, which for example establishes the requirement to publish modifications to contracts in certain cases (See Article 72 and Recital 107). This provision, emanating from EU case law, is nothing new in the Spanish context: The Aragonese legislation has had similar provisions since 2012, while at national level, Article 8.1.a of Law 19/2013 of 9 December on transparency, access to public information and good governance recently came into force.

It would also facilitate internal control on the part of the contracting authority and its managers, as well as continued progress of procedures and the development of best practices, thanks to:

- i) the disciplining effect of openness and transparency, and
- ii) the possibility of comparing, by benchmarking, with other analogous public administrations or other supplies of similar products.

Lastly, it would allow greater economic analysis of procurement procedures, as will be discussed in the following section.

- Thirdly, greater transparency would encourage greater **standardisation**²⁸ in the various **categories of contracts** and, even more important, in the **various expense categories** included²⁹.

Standardised measures would significantly facilitate efficiency and access to bidding, and would consequently also increase the number of real or potential bidders.

²⁸ We would highlight the European standardised forms [SIMAP](#) for public procurement.

²⁹ The *Common Procurement Vocabulary* or [CPV](#) can also be reviewed in this regard and suggestions for improvement made. For example, see Maniatopoulos, G., & Leukel, J. (2005). *A comparative analysis of product classification in public vs. private e-procurement*. *Electronic Journal of E-Government*, 3, 201–212.

TABLE 1: EFFICIENT ACCESS TO INFORMATION

There is need to **increase transparency**, and also to ensure **efficient access to information**³⁰.

In Spain³¹ the Law provides for a [State Contracting Platform](#) and a [Register of Contracts](#)³² to whom all central and regional procurement agencies must send the information relating to contracts awarded, in accordance with [Article 333 of the TRLCSP](#)³³.

Empirically, four problems can be detected:

- i) Firstly, incomplete or inaccurate information provided by the public administrations obliged³⁴ to provide such information. In this regard, more rigorous compliance with the law and rules already in force may alleviate this deficiency.
- ii) Secondly, the insufficient value for economic analysis of the data available in the procurement files on the Platform or in the Register including at sub-national level.
- iii) The current e-procurement system in Spain is still limited almost entirely to platforms for publishing information. But it should also incorporate technological innovations that are already of regular use in the private sector, in order to facilitate two-way communication in e-procurement³⁵.
- iv) The large number, non-standardisation and lack of interoperability of these platforms. There is currently no practical way for businesses, research centres or supervisory bodies to aggregate data or to conduct

³⁰ The importance of the existence of databases to promote efficient access to information has been pointed out on several occasions by the competition authority, notably in the CNC's [report on the Draft Bill on Transparency, access to public information and good governance](#), which pointed to the need, for the various competition authorities and other public bodies and for interested citizens, to have sufficiently powerful and extensive databases. The report also made specific recommendations as to the content of these databases.

³¹ At European level, the [TED](#) (Tenders Electronic Daily) is the online version of the "Supplement to the Official Journal of the European Union", dedicated to European public procurement, which contains more than 1,500 announcements of public tenders in the European Union, the European Economic Area and elsewhere, in the 24 official languages of the European Union.

³² Since December 2014 the Spanish public sector has also published data relating to public procurement, agreements, in-house providing and subsidies at www.transparencia.org.es

³³ Royal Legislative Decree 3/2011 of 14 November, approving the TRLCSP

³⁴ By way of example, at the time of writing this document, the Register of Public Sector Contracts indicated that in 2013, of the 19,527 contracts registered, only [nine were restricted procedure contracts](#) in all the ministries.

³⁵ Although in 2013 practically all the OECD countries (91%) used some system of e-procurement to announce their calls for tender, only 44% offered operators the possibility of presenting bids electronically at central government level. As an example of good practice, South Korea's Public Procurement Service has allowed bids to be submitted using a mobile phone "app" since as long ago as 2011. See [Government at a Glance 2013: Procurement Data. OECD Meeting of Leading Practitioners on Public Procurement](#).

general searches of completed, open or planned procedures.

Appendix I to [Royal Decree 817/2009](#)³⁶ determines the data that must be included in the Register of Public Sector Contracts: type of contract, year, contracting authority, execution timeframe, CPV (Common Procurement Vocabulary) code, etc.

However, this database shows data only up to 2012³⁷, aggregated by ministries without references to specific bidding processes and with a significant time lag³⁸. These information gaps compromise the purpose of creating this Register as an instrument for, *inter alia*, **supervising competition and transparency in public markets**³⁹ in accordance with Article 333 of the TRLCSP

II.2. Need for evaluation of economic efficiency and effective competition.

Competition and economic efficiency⁴⁰ constitute the CNMC's [mission, vision and objectives](#). For the other public administrations⁴¹ competition is, apart from a public interest deserving protection, a **basic means** of efficiently attaining their own objectives.

The **basic objective of the legislation on public procurement and public contracting is also the efficient use of public funds and the safeguarding of free competition**, which is entirely in line with the aims of the CNMC.

Economic efficiency is achieved through competition, and neither is optional. [Article 1 of the TRLCSP](#) establishes that they are binding and imperative principles for all public bodies involved in procurement⁴².

³⁶ [Royal Decree 817/2009 of 8 May, partly developing Law 30/2007 of 30 October on Public Sector Contracts](#).

³⁷ December 2014 saw the publication of the data relating to public sector (state) contracts of 2013, which include aggregated information on amounts and procedures. These procedures are classified only into a) open, b) restricted and c) "other".

³⁸ For example, the data on procurement in 2012 appeared on the website of the Register of Contracts in April 2014.

³⁹ Article 333.2 of the TRLCSP indicates, in the second paragraph: "*The Register shall constitute the public authorities' instrument for the continuous review and improvement of the procedures and practices of public procurement, the analysis of the quality, reliability and efficiency of its suppliers and the supervision of competition and transparency in the public markets*".

⁴⁰ See [Seo, K. Use of Professional Procurement Agency & e-Procurement. South Korea](#) and [Bertok, J. Assessing the performance of procurement systems. OECD](#)

⁴¹ With the exception of the Regional Competition Authorities, which share with the CNMC this objective of defence and promotion of competition.

⁴² Article 1, Purposes and objective, of the TRLCSP indicates that "*the purpose of this Law is to regulate public sector procurement in order to ensure that it conforms to the principles of freedom of access to the bidding processes, openness and transparency of procedures, and*

PRO/CNMC/001/15 Analysis of Public Procurement in Spain: Opportunities for improvement from the point of view of competition

From the economic point of view, though not necessarily from the legal one, our public procurement system **requires simultaneous internal and external evaluations of the degree of compliance with economic efficiency**.

II.2.1 Need for economic evaluation by the contracting authority itself.

According to the information gathered by the CNMC and in its experience, contracting authorities do not carry out, except to a very limited extent, evaluations in terms of economic efficiency⁴³ of all the decisions they take in the course of the public procurement process. They do not judge their economic appropriateness.

By way of example, when instead of a public bidding process public administrations opt for **other administrative instruments permitted by the Law**, such as an in-house provision or an agreement, the **economic inefficiencies** due to the **absence of competition** should be evaluated ⁴⁴.

In other circumstances, these inefficiencies are perhaps less visible, but they can also be easily evaluated if there were sufficient access to the relevant information. Such is the case, for example, of the **estimated costs included in tender budgets**. These budgets are usually drawn up using processes that are

*non-discrimination and equal treatment among candidates, and to ensure, in connection with the objective of budgetary stability and cost control, **efficient use of the funds** allocated to the carrying out of works, the acquisition of goods and the procurement of services by requiring the prior definition of the needs to be met, **safeguarding free competition and selecting the offer that is most economically advantageous**".*

⁴³ While we acknowledge a certain difficulty in measuring efficiency in public procurement, the European Commission itself makes estimates of certain standards relating to efficiency and comparisons among Member States, pointing to considerable disparities. Thus for example, although the average time between issuing the call for tenders and awarding the contract averages is 108 days, irrespective of the procedure, the difference between the fastest contracting authorities and the slowest is 180 days, with the consequent implications for the efficiency and cost of the procurement procedures. This same document "*Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*" (European Commission 2011) also estimates that the average cost of running each procedure is approximately €28,000, and that in the case of contracts for less than €125,000 the cost of the public procurement contracting process may be as much as 29% of the contract value. Lastly we would point out that in general terms procurement is considered to be more efficient in the private sector than in the public sector, but at the same time much less transparent and competitive.

⁴⁴ See "[Report on the use of government's own resources and in-house providing: Implications of their use from the point of view of promoting competition](#)" (2013) for an estimate of the potential discounts on the amount initially committed that can be obtained when there is a market and the administration does not opt for an in-house provision as the means of procurement.

insufficiently transparent and bear little relation to effective market prices⁴⁵. The CNMC has frequently observed that a significant reduction of the estimated budget in a candidate's offer does not necessarily reflect an efficiency gain relative to market prices, much less an abnormally low bid, but rather an inadequate approximation by the contracting authority to the estimated costs.

Similarly, other instruments such as **cost audits**⁴⁶ are useful both *ex ante*, to prepare the tender budget, and *ex post*, for contracts where there may be a price revision in the event of contingencies, thus seeking to steer prices towards costs.

TABLE 2: REDUCTIONS IN PUBLIC TENDER BUDGETS DUE TO PROCEDURES

In its study of the use of government's own resources, the CNC analysed the differences between the tender and award budgets in available consultancy contracts over the period 2007-2011. The results are shown in the following table.

MINISTRY	DIFFERENCE BETWEEN TENDER AND AWARD PRICE	NO. OF TENDER CASES
Ministry of Agriculture, Food and the Environment	-23.04%	52
Open	-23.92%	50
Negotiated	-0.96%	2
Ministry of Defence	-0.73%	9
Open	-2.14%	3
Negotiated	-0.03%	6
Ministry of Public Works and Transport	-19.08%	12
Open	-19.08%	12
Negotiated	--	0
Ministry of Industry, Energy and Tourism	-25.97%	31
Open	-27.49%	29
Negotiated	-3.96%	2
TOTAL SAMPLE	-21.52%	104

Source: "The use of government's own resources and in-house providing: implications of their use from the competition perspective". CNC.

As can be seen, **the economic gains** and therefore the efficiency gains deriving from the use of open procedures in public procurement **are around 20% in this sample**. This saving on procurement could be used to cover other needs of the State.

⁴⁵ There are numerous ways in which the contracting authority could first guide and subsequently evaluate its decision in setting the initial price. For example, market studies, cost audits, comparisons with procurement processes in the private sector, etc.

⁴⁶ If the base tender budget is not obtained by preparing an efficient cost matrix, it is impossible to determine whether or not reductions obtained against the base budget are due to efficiency gains.

The importance of using these procedures is also seen in the latest data published by the Register of Public Sector Contracts, which shows that in 2013 **41.1% by value** (49.6% in number) **of the contracts of all ministries together used⁴⁷ procedures with reduced or totally eliminated competitive tensions** (restricted, negotiated, competitive dialogue, direct adjudications⁴⁸)

II.2.2 Need for evaluation of economic efficiency and the level of competition by a specialist outside body:

Another area where there is room for improvement in current Spanish public procurement is the absence of a **specialist outside body that could evaluate, globally or individually, the economic efficiency and level of competition of procurement procedures.**

Although regulation on public procurement acknowledges the existence of a series of controls both internal⁴⁹ and external, reality has shown that most of them suffer from an **excessive focus on a biased analysis of legality, ignoring** compliance with **efficiency** and **competition** considerations which public procurement should encourage, as well as in many cases from **delay** in carrying out these controls, **which renders them almost useless⁵⁰**. Even on the part of the competition authorities, their control deriving from the powers conferred to them to investigate and sanction bid rigging is less than ideal, among other reasons due to the lack of data and the lack of inter-administrative cooperation, as already pointed out.

These controls must be both preventive, prior to signing the contract, and *ex post*, in order to analyse efficiency matters⁵¹ and to detect punishable cases, so to set examples.

⁴⁷ Moreover one cannot but wonder whether these data include all contracts awarded by the State in the period, as mentioned previously.

⁴⁸ The Register of Public Sector Contracts does not provide information about the procedure used to award certain contracts. Those contracts are also included in the calculation.

⁴⁹ Also, it would by no means be a bad idea to take a fresh look at the current degree of professionalisation and the composition of procurement panels and to round out their training with other considerations relating to the quest for efficiency. None of which detracts from the advances made with the introduction of qualified channels for appeal to specialised bodies.

⁵⁰ An example of this lack of controls, in this case internal, is the cases where at the time to establish the tender budget the contracting authority may be influenced by operators who have previously been awarded contracts and/or who may potentially be awarded a contract, with the consequent dangerous incentives.

⁵¹ One particularly problematic case in Spain is that of modifications to contracts, both contracts subject to the TRLCSP and those relating to public concessions. The absence of an effective control of these modifications (other than formalistic compliance with legal requirements), their

In this regard, Article 83 of the above-mentioned new Directive on public procurement states that **one or more authorities** of the various states **shall oversee the application of the laws and regulations on public procurement**.

TABLE 3: COMPETITION AND PUBLIC PROCUREMENT IN SWEDEN

Since 2014, the Swedish Competition Authority, [Konkurrensverket](#), (KKV) has been responsible for the *ex ante* and *ex post* control of public procurement previously carried out by different administrative agencies and bodies⁵².

On 1 January 2014 responsibility and resources for overseeing procurement were transferred from Sweden's Innovation Agency [Vinnova](#) to KKV. On 1 March the public procurement functions of the Swedish Legal, Financial and Administrative Services Agency, [Kammarkollegiet](#), established in 1539, were transferred and finally, on 1 July the procurement competences of the Swedish Environmental Management Council ([SEMCO](#)) were transferred to KKV.

The reason for this decision stemmed from consideration of the possible synergies between knowledge of the competition laws and rules and the [experience built up](#) by KKV and the other Swedish bodies relating to [public procurement](#).

Although this organisational change was made in 2014, the Swedish bodies had been preparing for it for some time. In fact, KKV was already entrusted, as Competition Authority, with the *ex post* control of [bid rigging](#) or [collusion in public bidding processes cases](#). Additionally, it built up prior experience in the analysis of matters such as [promoting efficient procurement](#), [the possible application to public procurement of experience in private sector procurement](#) and competitive neutrality, both [private and public](#), in contracting and procurement processes.

II.3 Need to make greater use of new information technologies:

As has already been remarked, public tendering processes cannot remain unaffected by the technological advances seen in the last few decades in all areas. Beyond the benefits that can be derived from more extensive use of electronic procedures in public procurement, which is the subject of later headings, **the development and use** of such technologies represent an

effects on the budget initially committed to and on the market itself are very significant, for which reason they should be used only in the most exceptional circumstances.

⁵² See [The Swedish Competition Authority: Tasks and Organisation](#): *The objective of the Swedish Competition Authority is to promote effective competition in the private and public sector and efficient public procurement. The vision of the Swedish Competition Authority is 'Welfare through well-functioning markets'.*

important opportunity for improving access to micro-economic **information** about public procurement.

In this regard it would be appropriate to push for **systematic, exhaustive and mandatory use of the new information technologies** for these purposes⁵³. In particular, it would be advisable to make the fullest use of the possibilities currently offered by IT systems based on [open data⁵⁴ and big data](#).

Constructing and maintaining specially designed global, interoperable databases at the most disaggregated level possible could enable specialised bodies to oversee economic efficiency⁵⁵. These bodies could for example make appropriate comparisons, and carry out econometric, systematic or sampling analysis of the data in order to detect any irregularities or opportunities for improvement. This oversight could also facilitate and encourage contracting authorities and administrative supervisory bodies to carry out proper self-assessment from the competition and economic efficiency perspectives.

This, together with the creation, as suggested, of a **specialist body, with access to massive databases properly designed for the purpose of overseeing public procurement, would make it possible to notice opportunities for economic improvement as well as detect irregularities and inefficiencies**, thus ensuring the economic rationality of public procurement and the promotion and defence of competition.

II.4. Need for greater cooperation among public administrations.

Good practice in public procurement must be based, among other things, on administrative cooperation, both vertical, i.e. between different levels of public administrations, and horizontal, i.e. within a given administration. Different contracting authorities buy the same goods and services, so **greater inter- and intra-administrative cooperation would reduce information asymmetries** in

⁵³ This increased recourse to quantitative approximations and use of new instruments for data analysis may be considered as a general trend in the field of design and evaluation of public policy. See “*New Approaches to Economic Challenges: Reflection and Horizon Scanning*” OECD

⁵⁴ These technologies are starting to be used in public procurement in some cases in Spain. See for example, the [contractor's profile of the Municipality of Lorca](#) in Open Data format, or [the contractor's profile of the Municipality of Zaragoza](#) in semantic format.

⁵⁵ The Spanish Administration is particularly advanced in the computerised management of budget, thanks in particular to the decisions of the competent department of the ministry, the resources allocated to this function and the commitment to information technology on the part of the Tax Office (AEAT) and the Office of the General State Comptroller (IGAE). The outflow of funds involved in public procurement can be seen as analogous, in both economic and accounting terms, to a negative revenue item or a “refund”. State aid implications as of Article 107 of the Treaty on the Functioning of the European Union (TFEU) may also arise in certain cases.

public contracts and information or experiences could be shared that could be very useful when estimating tender budgets, thus reducing the need for contacts with the private sector, thus avoiding certain perverse incentives.

Similarly, and still in relation to problems of transparency, while the legislation recognises, as has been mentioned, the **obligatory provision of information** about public contracts, it is not known to what extent this obligation is fulfilled or whether sanctions have been or could be imposed on non-compliant bodies.

We also find, by way of example, that in spite of the requirement⁵⁶ for contracting authorities including the *Junta Consultiva de Contratación Administrativa del Estado* (Consultative Council on Public Procurement, hereinafter JCCAE) to notify the CNMC of any facts or events that could constitute a violation of the Competition Law, in practice the use of these cooperation mechanisms leaves much to be desired. The reasons behind this may be the fear of possible delays to public bidding processes caused by the exchange of information, or even unawareness on how to communicate.

In this regard, there is a need to **strengthen the cooperation mechanisms** already in place, and also for the CNMC to take *ex officio* action, which would no doubt **reduce the number of bid rigging cases** and thus enhance efficiency.

II.5. Need to simplify public procurement procedures

II.5.1. Simplification of the procedures:

One of the objectives of the [Europe 2020 Strategy](#), and by extension, of the promulgation of the new Directives relating to public procurement in Europe, is to achieve a real European space for public procurement in the framework of the internal EU market. To this end, simplifying public procurement procedures appears as one of the basic tasks⁵⁷ to be achieved. Indeed, the existence of excessively complex and technical rules and procedures often leads contracting authorities to resort to procedures and systems they are familiar with, despite the fact that they may imply less competition and therefore worse price/quality

⁵⁶ See 23rd Additional Provision of the TRLCSP. Also, with regard to the provision established in this clause, it is interesting to note its inclusion in the TRLCSP and in the Eighth Additional Provision of Law 24/2011 of 1 August on Public sector contracts for defence and security, but not in other laws such as Law 31/2007 of 30 October on Procurement procedures in the water, energy, transport and postal services sectors and Law 33/2003 of 3 November on the Assets of the public administrations.

⁵⁷ This is how it is expressed for example in the third "task" of the [Report of the European Parliament on the modernisation of public procurement \(2011/2048\(INI\)\)](#): "Simplifying the rules and allowing more flexible procedures".

ratios. Failure to simplify procedures is therefore likely to lead to further repeated losses of efficiency in procurement.

On the one hand, this simplification could come from **more extensive use of electronic procedures** in public procurement. As set out in the [Green Paper on expanding the use of e-Procurement in the EU \(2011\)](#)⁵⁸, facilitating access to information on possible tenders will lead to higher levels of effectiveness and efficiency in handling procurement, simplifying access to information for all potential bidders in the European sphere, promoting the implementation of the principle of equality and thus allowing greater participation in the various processes. Such increased competition cannot but lead to procurement on more advantageous terms for the taxpayer. The importance of this, which is also reflected in the wording of the above-mentioned new Directives⁵⁹, has not yet been effectively transferred to **Spain**, where **very little use is made of electronic procurement procedures**.

TABLE 4: ELECTRONIC PROCUREMENT IN PORTUGAL:

The implementation and use of electronic procurement systems has been one of the main priorities of the European Union in the past few years, deriving from the multiplicity of benefits that it brings to Member States in terms of efficiency and effectiveness in the use of public funds.

However, the reality is that in practice very few Member States have effectively developed electronic procurement systems⁶⁰, for a number of reasons including technical, logistical and administrative.

Portugal stands out as an example of good practice. Since November 2009⁶¹ the use of electronic means has been mandatory for all public acquisitions using contracting procedures, whether open, restricted or negotiated, from the publication of the call for tenders through to the award of the contract. The Portuguese public procurement market is thus open to all private operators wishing to take part just providing they meet

⁵⁸ And yet this is not the first call for greater use of electronic procurement on the part of the European Union. As long ago as 2005 the "Manchester Ministerial Declaration" established that at least 50% of public procurement should be carried out electronically by 2010.

⁵⁹ Thus recital 52 of Directive 2014/24 determines that: "*Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures, as they greatly enhance the possibilities of economic operators to participate in procurement procedures across the internal market*".

⁶⁰ The use of electronic means in 2010 was estimated at less than 5% on average of Member States' total public procurement budget.

⁶¹ Although this is the launch date of the project, various studies had been carried out since 2001 in preparation for the measure.

certain basic requirements (safety and accreditation), in line with the principles of non-discrimination and free access, and therefore competition.

The benefits from the introduction of this system in Portugal were immediate and widely publicised. In the first place, against the 50% objective for the use of electronic systems, Portugal is currently showing figures of close to 90%. The length of open procedures have been reduced from 88 days to 49 days, with even greater reductions in other kinds of procedures, with the consequent undeniable implications for efficiency.

In short, in economic terms, it is estimated⁶² that the implementation of e-procurement in Portugal **brought net savings of around €650 million in the first year alone (2010)**, and that this figure could **increase** if the system is extended to all contracting authorities. In relative terms, this represents savings of between 6% and 12% in total procurement costs for both consumers and bidders, basically deriving from the increase in transparency, equal access and therefore greater competition in the market.

Additionally, and closely related with this matter, as well as taking advantage of efficiency gains deriving from the use of electronic procurement procedures⁶³, better IT access to data should also be provided. For example, by **digitising** all data in a **single database** at state level for all public administrations and contracting authorities, containing in reliable form both open and already completed procedures, thus simplifying access to information and doing away with the large number of superfluous and in many cases incomplete sources of information now existing⁶⁴.

On the other hand, this simplification could come from **greater use**, where possible and advisable, of **recourse to centralised procurement**⁶⁵ in line with

⁶² [A strategy to reduce public expenditure based on e-tendering and procurement business intelligence: The case of Portugal](#). European Vortal Academy 2011.

⁶³ See [Electronic procurement in the Spanish public sector - present and future](#). IESE Business School 2011. This report states that "of the nearly 8,100 local governments in Spain, fewer than 1% make active use of electronic procurement".

⁶⁴ See, for example:

- i) Arlbjørn, J. S., & Freytag, P. V. (2012). *Public procurement vs. private purchasing: Is there any foundation for comparing and learning across the sectors?* International Journal of Public Sector Management.
- ii) Kumar, N., & Qian, P. (2006). *Strategic alliances in e-government procurement*. International Journal of Electronic Business, 4, 136–145.
- iii) Tadelis, S. (2012). *Public procurement design: Lessons from the private sector*. International Journal of Industrial Organization, 30, 297–302.

⁶⁵ There are very few estimates of economic gains deriving from centralised purchasing. In principle they could be in the range of 10% to 15%. See *Should an organization join a purchasing group?*, Nolle, J. and Beaulieu, M. (2005).

the moves already initiated by the DGRCC (General Directorate of Procurement Rationalisation and Centralisation).

In these cases, the benefits would come from greater speed in the processes, greater savings of economic and staff resources by taking advantage of economies of scale as well as, in general terms, of greater transparency.

II.5.2. Reduction in legislative dispersion in respect of public procurement:

The wide dispersion in public procurement legislation entails risk of reduced legal certainty on the part of operators and of efficiency shortfalls in decisions taken by public bodies.

On the one there is a **growing body of rules** governing public procurement: the TRLCSP approved by Legislative Royal Decree 3/2011, Law 31/2007 on Special sectors, Law 24/2011 of 1 August on Public sector contracts in the area of defence and security and Law 33/2003 of 3 November on the Assets of public administrations. Secondly, and even more importantly, there has been an increase in the **different compliance criteria** for principles that are absolutely fundamental⁶⁶ competition, such as openness and freedom of access.

Although many of these provisions **come from** the transposition **of EU law**, basically of Directives on public procurement, there is wide margin for manoeuvre for **the Spanish legislator to establish more demanding requirements** offering maximum assurance of effective competition among bidders and efficient use of public funds.

III. ACTIONS ENVISAGED BY THE CNMC:

The following is a more detailed breakdown of the actions contained in the Action Plan⁶⁷ approved by the CNMC in the field of public procurement and contracting:

⁶⁶ For example, the differences that have arisen as a result of the option opened up by Article 191 of the TRLCSP which envisages a less protective system for contracts not subject to harmonised regulation.

⁶⁷ The CNMC's first Action Plan, approved on 17 December 2014, details the lines of activity that the Competition and Markets Authority proposes to **carry out in 2015**. In particular, the Action Plan develops the CNMC's [strategic plan](#), approved by the plenary session of 8 May 2014, breaking it down into 148 specific actions. In addition to such horizontal actions as may be related to public procurement, such as actions 4.10, 6.2, 8.1, 10.4 and 14.1 for example, **actions 3.1, 5.4, 5.5, 5.6, 8.2, 8.6, 10.5 and 12.1 of the Action Plan are specifically aimed at public procurement.**

III.1. Participation in the transposition of the new EU Procurement Directives

The actions to be carried out by the CNMC are geared to an active presence in the transposition process, through its consultative function, making recommendations, upon request or on its own initiative, so that the transposition is made in the most pro-competitive way possible.

Additionally, the upcoming legislative process presents a particularly timely opportunity to introduce further-reaching pro-competitive reforms. As an example, some amendments to the law on temporary business consortia could be recommended so to introduce greater transparency in the objectives pursued through such form of joint bidding, the incorporation of the above-mentioned 23rd Additional Provision of the TRLCSP into the law proper, or the delimitation and clarification of supervision of subcontracting.

III.2. Coordination between the CNMC and the various contracting authorities

There should be increased coordination between the CNMC and the various contracting authorities. The CNMC will thus work to facilitate, *inter alia*, i) meetings, ii) training, iii) greater cooperation through exchange of information relating to the role played by the CNMC in public procurement.

Among other matters, these actions will facilitate the exchange of knowledge and best practices in public procurement, as well as the drawing up of pro-competitive terms of reference and specifications by contracting authorities, including the CNMC itself, as indicated in its Action Plan.

It will also encourage contracting authorities to consult the CNMC on their draft terms of reference and specifications, and to detect and report suspicious conduct on the part of bidders.

III.3. Actions relating to the JCCAE and the State Contracting Platform

An intensification of relations between the CNMC and the [JCCAE is proposed](#)⁶⁸, as well as with the managers of the State Contracting Platform, with a view to gaining in-depth knowledge of their actions and thus being in a better position to give advice.

⁶⁸ The JCCAE, under the Ministry of the Treasury and Public Administrations, is a consultative body to central government, its autonomous bodies and other state entities, in the field of government procurement.

Among other things, the CNMC will seek to collaborate on, among others, ways to exchange information, registered data and format, formalities for CNMC's access to data⁶⁹, relations among Platform-Register-Transparency Portal, etc.

As soon as the necessary meetings have been held, the CNMC will seek to **implement screening techniques** to detect and analyse any irregularities in public procurement from the competition perspective, basically in contracts pending award.

Also, for **those specific cases** considered of **interest**⁷⁰ the CNMC might propose **actions**, for example **access to data** and to all **terms of reference and specifications** of the tender.

Additionally, the CNMC **will issue reports** from the competition perspective, on tender terms of reference and specifications so to, by expressing its opinion and making recommendations in its consultative capacity, contribute to **a better economic result of tenders for the public sector and to promote more competitive terms of reference and specifications for future tenders**.

This prior analysis and the publication of the reports will presumably reduce the likelihood of finding anticompetitive clauses or clauses facilitating anti-competitive practices in the terms of reference and specifications of other contracting authorities, thus of procedures initiated by the CNMC to challenge them as of Article 5.4 of **Law 3/2013 of 4 June creating the CNMC** (Law 3/2013) or Article 27 of **Law 20/2013 of 9 December, the Guaranteed Single Market Act**.

Also, by means of access to the data on the Contracting Platforms **indications of collusive practices in public might be detected**, for the benefit of the contracting authority, the public sector, taxpayers, consumers and, thanks to the more competitive functioning of these markets, the general interest.

III.4 Training of supervisory bodies on procurement:

As has been pointed out, one of the current deficiencies in public procurement in Spain is the limited use made of the channels established for reporting deviations from rules. This under-use stems, at least in part, from the

⁶⁹ Article [28.3](#) of **Law 3/2013 of 4 June creating the CNMC** indicates: **3. The CNMC shall have access to the registers provided for in State legislation regulating the sectors falling within the scope of this Act. Central Government shall also have access to the databases in the possession of the CNMC. To that end, the appropriate IT upgrades will be implemented in order to facilitate the electronic access referred to in the previous paragraph, so that the information contained in the databases and registers can be consulted in conditions which ensure the security, confidentiality and integrity of such information.**

⁷⁰ For example when the sector concerned is one that has always been problematic in terms of competition, or because of the contract volume, etc.

Competition Authority's inadequate dissemination among the professionals involved in public procurement of the rules of competition and the way to access the CNMC or the competent bodies for resolving conflicts.

In this respect **training programmes** will be planned and formal and informal channels of **communication** established between the CNMC and supervisory or other bodies directly involved in the control of public procurement such as the General State Comptroller (IGAE), the Public Prosecutor's Office and Public Contracts Administrative Tribunals, both central and regional.

III.5 Review of the rules on public procurement

Taking advantage of the transposition of the EU Directives, a thorough review of the legislation on public procurement is proposed.

In the first place, the CNMC will collaborate on and push for **reforms aimed at eliminating or reducing the dispersion of legislation on public procurement, bringing it into line with the principles of effective competition and efficient economic regulation**. Secondly, the CNMC will produce such **reports on draft legislation⁷¹** or **proposed amendments to current legislation⁷²** as may be appropriate in order to render it more competitive and efficient.

From an internal point of view the CNMC's Action Plan for 2015 also contains specific actions⁷³ in the area of public procurement.

Lastly, an international benchmarking exercise on the functions, resources, synergies and best practices of other competition authorities in the area of public procurement will be carried out.

III.6 Update of the Guide to public procurement and competition

Since its creation on 7 October 2013 the CNMC has in its consultative role collaborated with the Commission to Reform the Public Administrations (CORA) as regards tender specifications for centralised acquisitions by central government and has developed some technical knowledge, both of which combine to make it advisable to update the [Guide to Public Procurement and Competition](#) of 2011.

⁷¹ In the context of Article 5.2 of Law 3/2013.

⁷² According to Article 5.1 of Law 3/2013.

⁷³ In particular, three actions have been included in this regard.

Thus, after the forthcoming amendment of the TRLCSP, the CNMC will produce a new guide, which will be accompanied by a communication and training strategy to maximise its impact on the competent bodies and on public opinion.



CNMC

COMISIÓN NACIONAL DE LOS
MERCADOS Y LA COMPETENCIA

www.cnmc.es