

Guide on Public Procurement and Competition

Phase III. Preparation and
design of public tenders.

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1. Introduction

In recent years, the CNMC has been working on a process of updating its [Guide on Public Procurement and Competition \(2011\)](#) in order to promote competition in all phases of the public procurement cycle. Once the planning (phase I) and the use of in-house procurement and cooperation agreements (phase II) have been analysed, the preparation and design of public tenders (phase III) is now addressed¹.

This stage is crucial due to its impact on the levels of participation and effective competition in contractor selection procedures. Only through procedures that maximise participation can effective “*competition for the market*” be ensured and its benefits obtained: better prices, higher quality, greater innovation and sustainability of bids, and a wider range and variety of services, among others. At the same time, greater participation reduces the risk of collusion.

This Guide is intended for public sector entities that act as purchasers of goods and services in the market. Its purpose is to provide practical guidance to help them, in exercising their technical discretion, better understand the competitive impact of their decisions².

The Guide presents the following content³:

- Presentation of the principles relating to sound decision-making in the field of public procurement (Section 2).
- Identification of the main risks to competition and efficiency arising from decisions on the preparation and design of tenders, together with practical recommendations to prevent or minimise them (paragraphs 3 and 4).
- Information on the channels requesting advice and training from the CNMC on these matters (section 5).

¹ The updating project provides for the study of all the phases that make up the public appropriation cycle: I [Planning](#); II [Alternatives to public procurement \(in-house procurement and cooperation agreements\)](#); III Preparation and design; IV Award; V Execution; and VI Evaluation. More information on the [CNMC website](#).

² The [National Public Procurement Strategy 2023-2026](#) has confirmed the need for specialized training in competition among the professionalization measures of public employees linked to public procurement.

³ This work has taken into account the conclusions gathered from the [public consultation](#) carried out by the CNMC at the end of 2023 on the obstacles faced by SMEs to participate in the public procurement market.

- Recommendations to facilitate the participation of SMEs in procurement procedures (Annex I).
- Recommendations for public procurement of technology (Annex II).
- Recommendations for public procurement at local level (Annex III).
- Checklist to facilitate the verification of compliance with the recommendations contained in this Guide (Annex IV).



2. Guiding Principles for the Efficient Management of Procurement Procedures

In the preparation and design phase of public tenders and contracts, contracting authorities enjoy broad discretion in determining the requirements and conditions that best meet their needs. However, this does not mean they have unlimited freedom of decision; they must provide a clear justification for the choices made in each case and ensure that such decisions can be subsequently reviewed.

To maximise the openness of tendering procedures to competition, this Commission considers that public authorities **should exercise their discretion not only in accordance with the guiding principles of public procurement, but also in line with the principles of good regulation and administration that must govern any public intervention in the markets**⁴.

Box 1. Guiding Principles

Guiding principles of public procurement. To achieve the fundamental objective of efficiency in public spending (i.e. the selection of the most economically advantageous tender), several principles are established: freedom of access for tenderers and equal treatment, non-discrimination, the safeguarding of free competition, transparency, and integrity. These principles are cross-cutting in nature, as they must be respected throughout all stages of the procurement procedure. The inclusion of social, environmental or innovation-related criteria, in addition to meeting certain requirements of linkage to the subject matter of the contract, must also comply with the overarching objective of ensuring efficiency in the use of public funds.

Principles of Good Regulation (necessity, proportionality and non-discrimination, among others). The set of regulatory aspects and decisions adopted during the preparation and design of tendering procedures must not be based on requirements that are discriminatory, unnecessary, or disproportionate in relation to the public objective pursued, as these could unjustifiably restrict the participation of economic operators (competition for the market) and the formulation of the most competitive bids (competition in the market)⁶.

⁴ Among others, [Resolution 382/2021, of 15 October 2021](#), of the Administrative Court of Contractual Appeals of the Junta de Andalucía: "(...) such discretionary power is conditioned by a series of regulated elements and by the general principles of administrative law and contracting, including the safeguarding of free competition, non-discrimination and equal treatment between candidate entities, and, above all, the principle of proportionality referred to (Articles 1 and 132 of [Law 9/2017, of 8 November](#), on Public Sector Contracts (LCSP) and 4 of [Law 40/2015, of 1 October](#), on the Legal Regime of the Public Sector (LRJSP)]".

⁵ Articles 1 and 132 of the LCSP.

⁶ Article 4 of the LRJSP and Article 129 of [Law 39/2015 of 1 October 2015](#) on the Common Administrative Procedure of Public Administrations (LPACAP), as well as Article 5 of [Law 20/2013 of 9 December 2013](#) on the Market Unity Guarantee (LGUM).

Principle of Good Administration. This principle requires public authorities to act with due diligence to avoid potential dysfunctions or arbitrary outcomes resulting from their actions. It entails the duty to provide adequate reasoning for decisions and to demonstrate that these are adopted objectively and consistently with the public interest objectives that justify the intervention, considering all relevant factual and legal circumstances. Mere compliance with procedural requirements is not sufficient, as the aim is to ensure the full effectiveness of the guarantees and rights legally and constitutionally recognized for citizens⁷.

Principle of Competitive Neutrality. This principle requires ensuring that no economic operator obtains unjustified advantages in the public procurement procedure for purely subjective reasons (such as ownership, nationality, or legal form, etc.)⁸.

⁷ [CJEU Judgment of 7 November 2024, C-683/22](#) "the contracting authority must respect the general principle of Union law relating to sound administration, a principle that Member States must respect when implementing Union law". The Supreme Court ([Judgment 4357](#), of 23 October 2023) also considers that good administration is implicit in the Constitution (Articles 9.3 and 103), and recognized in Article 3.1.e) of the LRJSP and in Articles 41 and 42 of the Charter of Fundamental Rights of the European Union, as well as in some Statutes of Autonomy).

⁸ OECD (2021), [Recommendation on Competitive Neutrality](#), (OECD/LEGAL/0462); OECD (2024), [Competitive Neutrality Toolkit: Promoting a Level Playing Field](#).

3. Preparatory actions

Based on proper planning of public procurement needs and the corresponding scheduling, purchasing managers must carry out preparatory actions to define the essential elements of the future contract. Among these, market studies are particularly important, whether conducted internally by the contracting authority itself or through consultations with third parties (Article 115 of the LCSP).

3.1. In-house market research

Market studies are essential to have the relevant information that allows: to determine the needs of the contracting authority, to identify the solutions that the market could offer to satisfy them, to adequately prepare the tender procedure by favouring participation and to select the most efficient offer in terms of value for money.

In addition, making good use of the available data will lead to better value for money through proper planning of tenders, improve access for potential new bidders (in particular SMEs) and strengthen the fight against fraud and collusion.

The absence of this type of market analysis (*desk-based market research*) entails, among other complications, the following risks:

Box 2. Risks

- × Generates reluctance among tenderers to participate, as key aspects such as budget, technical specifications, or eligibility and award criteria may be beyond the capacities available in the market.
- × Makes it difficult to assess the reasonableness and suitability of bids and may even complicate the detection of potential collusion.
- × Hinders the implementation of an effective public procurement strategy to achieve complementary public objectives.
- × Complicates the prevention of issues during the subsequent tendering procedure.

From a competitive approach, theoretically the market is defined by two fundamental variables: the product and the geographical dimension.

⁹ CNMC Guide on public procurement planning as a tool to promote competition and efficiency ([G-2019-02](#)).

- The product market comprises all products and services that can be considered interchangeable or substitutable due to their characteristics, their price or the intended use of them.
- The geographic market comprises the area in which companies supply the relevant products or provide the relevant services, where competitive conditions are sufficiently homogeneous and which can be distinguished from neighboring geographic areas, particularly because the prevailing competitive conditions differ significantly from those in other areas.

Although these variables have particularities in terms of public procurement, given the presumption of the existence of a single market at the EU level, their knowledge is relevant to understand its internal functioning and characteristics.

Similarly, it should be noted that the supervisory bodies (state or regional) may have carried out on the market in question, especially, but not only, by the competition authorities. Through its different instruments (analysis of anti-competitive behaviour, business concentrations, sectoral studies, etc.), knowledge of the functioning of the market in question can be greatly improved¹⁰.

This analysis will allow an approximation of potential suppliers, market trends, availability of alternatives, developments and innovations, costs of provision, market prices and information on the life cycle of goods and services.

¹⁰ In that regard, mention should be made in particular [of the CNMC's website](#).

These are some of the variables that, without being exhaustive, should be present in the analysis:

Box 3. Variables for a market study

Demand

- Determination and estimation of needs with a strategic perspective, rather than merely extrapolating from historical requirements. Artificial Intelligence (AI) tools now enable predictive analysis of needs based on data, improving public procurement planning.
- Results of ex post evaluations of similar tenders (public and private): information on the level of participation and the profiles of tenderers and awardees, the average contract value awarded by CPV code and by lot, discounts obtained, or analysis of the bids submitted.
- Product segmentation: analyzing the different market segments, whether for goods or services, is essential to understanding their competitive dynamics. In markets where products are highly differentiated, substitutability between them will be lower than in markets where all goods are essentially homogeneous. Homogeneous products can generate greater price competition than those with differentiation, as the latter allows companies to compete on variety and quality. Substitute products, on the other hand, exert competitive pressure on the market, limiting the exercise of market power by supplying companies.
- Level of demand concentration and bargaining power: highly concentrated demand will have greater bargaining power vis-à-vis suppliers, whereas fragmented demand generally lacks negotiating capacity. It is also advisable to analyze the potential switching costs for changing suppliers. The higher the switching costs, the lower the bargaining power of demand, and vice versa. Moreover, coordinated or concentrated demand serves as a counterbalance to suppliers' market power.

¹¹ For example, in the purchase of technology (ICTs, Cloud) there is frequent concentration of supply and imbalance with respect to contracting authorities (especially with respect to small ones). See the recommendations for technology procurement in Annex III to this Guide.

Offer

- Market characteristics and lines of development: diversity and profile of active operators (SMEs and non-SMEs); existence of barriers to entry (e.g. regulatory, economic) and possibilities of new entrants; business demography (exit and entry of companies); future trends, technological developments and innovations; economic-financial indicators; price evolution. Through the massive processing of sectoral and public procurement data, new technologies, such as AI systems, make it possible to obtain this information.
- Competition indicators: degree of market concentration (static and dynamic); competitive tension and fundamental variables of competition, such as price, quality, product differentiation, innovation or productivity rate; the stability of market shares; the receipt of public aid from potential bidders¹²; potential risks of collusive practices (e.g. precedents of sanctioning decisions by competition authorities) or sectors with high levels of concentration of supply, existence of barriers to entry or excessively transparent.
- Production process: in the case of particularly technical markets, such as energy markets or some industrial product markets, a detailed explanation of the process of making the product or service should be included to better understand its characteristics and the technical difficulties faced by producers. The aim is to assess the substitutability of the offer and thereby also contribute to the delimitation of the relevant market.
- Profitability and profits: in a competitive market, although there are differences in corporate profits between companies and over time, there will be a tendency for returns to tend in the long run to approach the cost of capital. A situation in which profits remain consistently above the cost of capital, with no entry of new firms into the market, could indicate that there are constraints on competition.

¹² It should be recalled that the Spanish public procurement legislation envisages the receipt of aid by linking it to the possibility that it has affected the submission of abnormally low tenders, to verify whether they comply with the State aid regulations (Article 149.5). However, it seems appropriate to point out that the receipt of aid by potential tenderers (even more so if it is received by the tenderers actually submitted) is one more element of relevance that the contracting authorities can become aware of, for example, through the references contained in the subsidy databases. Similarly, it should be remembered that there is EU regulation (Regulation 2022/2560 on foreign subsidies that distort the internal market) that includes a series of obligations in this regard for companies from outside the EU that have received them.

The collection of the information needed for research can be obtained from a wide range of sources, from official portals (e.g. procurement platforms, official statistical institutes, transparency portals) to catalogues of products or services.

While analyzing historical information (e.g., about past tenders) is a good place to start, it should be supplemented with other sources for market analysis to be effective. Thus, contracts tendered in the past may have been based on non-competitive procedures, may have been affected by collusive agreements, or market conditions may simply have changed, which reduces the usefulness of such data.

On the other hand, the exchange of experiences and knowledge between different contracting bodies is very useful to improve the design of tenders and maximize efficiency in public procurement¹³. In particular, the establishment of collaborative networks between local contracting bodies is relevant as a tool for support and learning, as well as for exploring possible forms of joint procurement, creating economies of scale and sharing resources¹⁴.

The implementation of new technologies such as artificial intelligence (AI) tools in the field of public procurement is a key transformation to improve efficiency, transparency and competition in tenders, benefiting both administrations and economic operators:

¹³ For example, the "[Big Buyers Working Together](#)" project launched by the European Commission in 2023 to support cooperation between high-net-worth public sector buyers and encourage the wider use of innovative and sustainable solutions in strategic public procurement.

¹⁴ For example, through the formation of associations of municipalities in order to optimise activities such as the management of public services (water, waste, lighting, etc.), tourism and cultural promotion, rural development or environmental protection; or the creation of open digital platforms for the exchange of knowledge and information on local public procurement (see Annex III of this Guide on procurement recommendations local public).

- Improve internal management and data-driven decision-making. Specifically, it makes it possible to optimise resources and reduce errors in all phases of the procurement procedure. For example, in the preparatory phase, it allows the massive processing of data to analyse the market without the need for preliminary consultations, identifying similar experiences and predicting the results of tenders¹⁵; improving the drafting of specifications, verifying the coherence and completeness of the requirements and the establishment of solvency and award criteria that are appropriate and proportionate to the object of the contract¹⁶.
- Increase efficiency and effectiveness. AI enhances the efficiency of procedures by analysing large volumes of data, identifying risks and optimising solvency and award criteria, facilitating their evaluation and verification.
- It encourages competition, and particularly the participation of SMEs. It facilitates the identification of bidding opportunities, automates and streamline processes, simplifies procedures, guarantees transparency and reduces participation burdens and costs. In addition, it makes it possible to minimise errors that generate legal uncertainty and mistrust among potential interested bidders.
- It reinforces integrity, transparency (accountability) and the fight against fraud, including the detection of anti-competitive practices such as collusion, encouraging dissuasive behavior among operators¹⁷.

These analytical tools can be particularly useful in addressing the difficulties faced by smaller local authorities in the preparation and design of their tenders, largely due to a lack of technical and human resources¹⁸.

¹⁵ The "[Public Procurement Data Space](#)" project aims to promote access to data by integrating different European and national databases into a platform and the application of analysis tools based on advanced technologies allowing decision-making and the design of evidence-based public policies, the exchange of knowledge, greater digitalization and effective detection of fraud and collusion. Access to calls will also be improved, particularly for SMEs. [Communication from the Commission Public procurement : A data space to improve public spending, boost evidence-based policy-making and improve access for SMEs to tenders 2023/C 98 I/01](#) (C/2023/1696).

¹⁶ AI is also useful in the bidding phase to, among other things, prevent conflicts of interest, verify compliance with access requirements, automate the evaluation of bids using formulas or percentages and ensure objectivity and motivation in value judgments; and reduce time and errors in publications. Regarding the execution phase, it optimizes the monitoring and control of contractual compliance in real time and detects patterns of cost overruns and non-compliance, preventing conflicts of interest and fraud in subcontracting, among other aspects.

¹⁷ For example, the CNMC's BRAVA tool (*Bid rigging Algorithm for Viligance in Antitrust*) which classifies bids submitted by bidders as competitive or as potentially collusive.

¹⁸ Recommendations in this regard are set out in Annex III.

In any case, the implementation of these new technologies and AI tools in public procurement requires, in addition to proper oversight by procurement officers, the following elements: the deployment of strategic planning tools, training of public employees in specific skills, collaboration among public entities, digitisation of tendering processes, and the availability of relevant, high-quality, up-to-date, and reliable data¹⁹.

3.1.1. Recommendations

Box 4. Market analysis

- ✓ Maximise analytical capacity through a rigorous prior market study that allows understanding of the main characteristics of both supply (general market features and competitive dynamics) and demand (adjusted estimation of needs and ex post evaluation of similar tenders), especially for complex, innovative, or strategic needs.
- ✓ Use tools such as AI to predict needs, analyse the market, and obtain valuable information to assist contracting authorities in decision-making. To ensure correct use of these tools, data must be of high quality, used by specialised personnel, and measures must be adopted to guarantee the protection of personal data and commercially sensitive information.
- ✓ Promote collaboration among contracting authorities and share good practices and experiences. However, it should be noted that available historical information must be critically reviewed.
- ✓ Strengthen staff training within the contracting authority in market analysis techniques.

In particular, a box with **recommendations for technological public procurement can be consulted in Annex II of this Guide.**

3.2. Preliminary Market Consultations

To fill information gaps, contracting entities can implement different third-party advisory strategies (e.g. experts, academia, independent authorities) including interaction with the market (operators). In this context, particular mention should be made of preliminary market consultations (PMCs), as provided for in Article 115 of the LCSP.

¹⁹ The CNMC has applied AI systems for the market study of various tenders in the exercise of its advisory function, for example: [INF/CNMC/456/23](#) on the Framework Agreement for Works at Army bases, barracks and establishments and other reports accessible on the [CNMC website](#).

PMCs are very useful in harmonizing the satisfaction of public needs with the reality of the markets. In addition, they can promote the access of bidders to public procurement, particularly SMEs and new entrants, since their collaboration in consultations does not prevent their participation in the procurement procedure that, if any, is subsequently tendered, and they could also become familiar with the needs demanded by the contracting entity²⁰.

However, a poor approach or design of the consultations can entail certain risks:

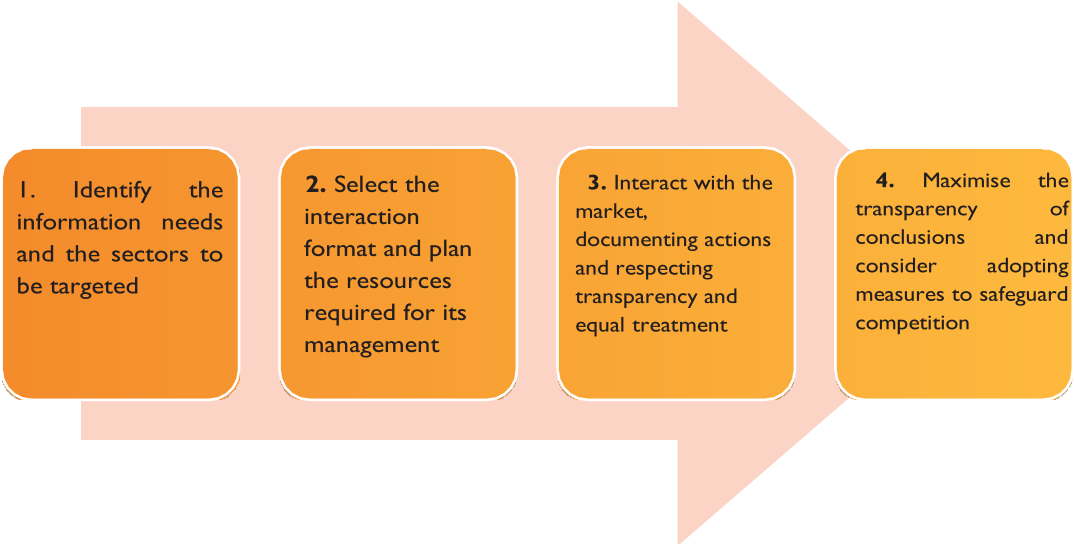
Box 5 Risks

- x Unjustifiably strengthen the competitive position of certain operators, to the detriment of access to tenders under conditions of equality, non-discrimination, and free competition²¹.
- x Encourage conflicts of interest and collusive practices.
- x Unnecessarily prolong procurement procedures.

A more detailed analysis of the different phases of PMC is provided below:

3.2.1. Consultation Process

Graph 1. Steps to interact with the market or third parties ("*Meet the market*")



Source: own elaboration.

²⁰ Likewise, the publication of annual procurement plans favours the participation of operators in procurement procedures (CNMC Guide on public procurement planning as a tool to promote competition and efficiency ([G-2019-02](#))).

²¹ For example, [Resolution 539/2024, of 26 April, of the Central Administrative Court of Contractual Appeals](#) (TACRC) in which it declares that the action of a contracting authority infringed the legally applicable rules, causing an undue privilege and violation of the principle of competition in favour of the successful tenderer, which had prior knowledge of the project as it had been prepared by itself, and allowed it to participate in the tender in question in an advantageous position.

1. Identify information needs and select sectors to target

The contracting authority must assess the usefulness of using a PMC, the purpose of which may be, in any case, very varied²². For correct use of the figure, it is advisable to:

- Assess the degree of complexity and innovation or the strategic nature required by the need demanded and the information gaps not covered through the previous analyses, so as to define the need and the object of the contract and verify the specific *state of the art* in which the market finds itself. This is especially relevant in constantly evolving markets, such as technology.
- Consider the actors and sectors or subsectors that could contribute knowledge to the issues raised (e.g. companies, third sector, researchers, manufacturers, etc.). The selection of the object of interaction with third parties and the target audience should be considered as broadly as possible (avoid approaching a specific supplier or a group of suppliers or specific professional or business organizations without sufficient justification) and, in any case, not restrict the participation of any other interested entity or person. In addition, all participation must be carried out individually and independently, and the information provided must be truthful and verifiable.
- Guide the dialogue with operators towards defining technical specifications (in terms of functional or performance requirements), and avoid any reference to brands, patents, or operators that may favour or disadvantage certain companies. It must be ensured that participation in consultations and the definition of technical specifications does not grant exclusive rights that would violate the principles of equality, non-discrimination, and competitive participation.
- In the case where the advice and consultancy for the implementation of the PMC is outsourced, the contracting authority must justify the selection of the sources consulted (the identity of the natural or legal persons consulted or collaborating in the preparatory phase) and the methodology used. They must also consider measures to avoid cases of conflicts of interest or distortion of competition if the persons or entities that have been involved in the preparatory phase are related to potential bidders (e.g. third-party experts or consultants who advise potential bidders).

²² For example, to select the appropriate procurement procedure and to improve its planning, preparation and management; to identify access requirements and award criteria that foster the conditions for the market to offer the best available solutions; to set technical requirements that are not closed to a specific solution, leaving room for new ones; to identify opportunities for the implementation of strategic public procurement; and to increase the trust and credibility among suppliers and their participation, among other issues. In public procurement of innovation, for example, which involves the provision of new solutions, going to the PMC is especially advisable.

2. Select the format and plan the necessary resources

For the PMC process to be useful, the resources available for its preparation and management, as well as for the analysis of the results obtained, must be considered. Similarly, the format (e.g., supplier workshops and presentations, trade fairs, questionnaires, interviews, written consultations, etc.) is not neutral in terms of safeguarding free competition.

It is recommended that the model that meets these parameters be chosen: that offers the greatest guarantees of operator involvement; that allows for the solicitation of inputs from all potential stakeholders; and that avoids contacts and exchanges of information between them in order to prevent the risk of collusion (e.g. if a training session is convened and all potential bidders are present, a potential risk scenario of collusive behaviour is created)²³.

3. Publish the call for PMCs and document the actions

Once the consultation has been designed, it is recommended:

- Maximise the dissemination of the call, beyond the mandatory channels (contracting authority's profile) and offer clear information on the purpose of the call (and even add the possible CPV affected if possible), the format and requirements for making the contributions, as well as the identification of the third parties who are going to participate and their justification (advisors, experts, independent authorities, etc.).
- Encourage participation by paying particular attention to the requirements and deadlines contemplated and the criteria for the treatment of information collected that may be considered confidential or commercially sensitive by the participants.
- To centralise and archive all the information on the actions in this phase and to update it to the extent that any new developments occur so that it is accessible to all those who may be interested in the consultation, including those potentially interested in the subsequent tender.
- If the contracting authority detects indications of concertation in the responses received, it must inform the corresponding competition authority (CNMC or regional) in accordance with the provisions of Articles 132 and 150 of the LCSP²⁴.

²³ In 2018, the Mexican Competition Authority (COFEC) sanctioned several companies that manipulated the price information provided in the market research phase prior to bidding procedures ([press release](#)). The CNMC has recommended avoiding contacts between potential bidders (e.g., [INF/CNMC/018/16](#) Report on the Framework Agreement for the Adoption of Types of Supplies of General and Specialized Furniture; and [INF/CNMC/008/16](#) Report on the Framework Agreement for the Adoption of Types of Supplies of Non-Inventoriable Office Supplies).

²⁴ [CNMC Guide to Public Procurement Bodies for the Submission of Indications of Anti-Competitive Conduct](#) (2024).

4. Publish the results and conclusions of the actions carried out

The contracting authority must contrast, process and evaluate the information provided. Subsequently, it must prepare and publish, in any case in the contracting authority's profile, a report with the results of the actions carried out (e.g. the studies carried out and their authors, the entities consulted and those that have participated, the questions that have been asked and the answers to them).

The publication of this report is necessary even though it is decided that it is not appropriate to promote a tender later, since it is useful information for other contracting bodies. As for the information to be included in the report, it is recommended that, when presenting the results and conclusions of the PMC, it should be done in an aggregated form, so that each response is not identified with the participating operator. In addition, the safeguards provided with respect to confidential or commercially sensitive information must be respected.

3.2.2. Recommendations

Box 6. Preliminary market consultations

- ✓ Assess the usefulness of conducting a PMC considering the nature of the need (complex or innovative solutions versus recurring purchases) and the availability of information that allows the need to be defined and the tender to be properly prepared.
- ✓ Preferably design consultations open to all potential interested parties, maximising the dissemination of the call and setting participation deadlines appropriate to the content. Provide adequate justification for targeting specific recipients and sources consulted, as well as for the format and methodology employed.
- ✓ Preferably raise questions of a technical or technical-economic nature, but not exclusively economic, considering the reasonable timeframe allowed for responses, and ensuring they do not impose a disproportionate burden on participants.
- ✓ Require that participation by the various interested operators be independent and that the information provided is truthful and verifiable. Take measures to prevent conflicts of interest or distortion of competition if individuals or entities involved in the preparatory phase have links with potential tenderers (e.g., consultants, advisors).
- ✓ Centralise all information related to consultations and interactions with the market and their results, without prejudice to the publication obligations on the contracting authority profile (e.g., clarification of questions during the process). Link the PMC information to the subsequent tender, particularly by including the report of conclusions and results in the procurement file and ensuring access to it throughout the process for any interested party.

- ✓ Critically assess the information collected and avoid letting it influence the definition of a contractual object so narrowly specified that it only fits the technical characteristics of one or a few participants. This requirement becomes particularly relevant when participation is low.
- ✓ Do not publish or disclose information that is confidential and/or commercially sensitive, relating to solutions proposed by participants, or to industrial, technical, or commercial secrets, and/or industrial or intellectual property rights, when disclosure could be contrary to the legitimate commercial interests of participants and/or harm fair competition in the sector.
- ✓ Indicate whether the information collected and processed is useful for the design and preparation of a tender and avoid delaying its publication in order not to discourage participation. In any case, a reasonable period must be provided for submitting bids.
- ✓ Prevent potential tenderers who participated in the PMC from having privileged access to contractual information or documentation that would place them in a competitive advantage in the subsequent tendering process.
- ✓ Exclude participants in the consultation from the tender (including entities linked to them) only if there is no other way to ensure competition and equal treatment are not distorted; in any case, they must be given the opportunity to provide evidence to the contrary.
- ✓ Monitor and analyse the results of the consultation to detect, if applicable, indications of collusion in responses. In case of suspicion, report it to the relevant competition authority.

4. Design of public tenders

The contracting authorities have discretion to design the procedure and to configure the specifications in the most appropriate way to meet their needs, but in any case, they must avoid establishing provisions that unjustifiably limit effective competition in the process (Article 132 LCSP).

Hence the importance that, in the procurement file, the contracting authorities sufficiently justify their decisions, especially those that limit both the participation and the ability to compete of the bidding companies, especially SMEs, as they are decisive in obtaining the best offer in terms of value for money.

In addition, the promotion of the participation of SMEs is an integrating principle of public procurement (article 1.3 of the LCSP) and to achieve this it is essential that the design of public tenders contemplate measures that reduce barriers and facilitate their access. Without prejudice to the general recommendations contained in this section, **Annex I of this Guide includes specific measures to facilitate access by SMEs to public procurement.**

Box 7. Good practices to promote participation, especially by SMEs

The Riba-Roja de Túria City Council has implemented various measures that have increased participation levels in its public tenders, particularly among SMEs²⁵:

- ✓ Centralisation of all information and documents on a “tenderer portal” website.
- ✓ Simplification and standardisation of procedures and tender specifications: use of summary tables and templates.
- ✓ Maximise transparency and accountability: dissemination of procurement activity through social media; publication of annual procurement plans; live streaming of tender evaluation committees; questionnaires to tenderers about their experience in the process to identify areas for improvement; real-time updated viewer of tendered and awarded contracts; and publication of annual performance reports with relevant information (SME participation and savings achieved).
- ✓ Replacement of the minor contract with dynamic purchasing systems.
- ✓ Tenderer support service through various communication channels (office, telephone, email, social media) and training and guides for SMEs.
- ✓ Professionalization of the contracting authorities and other staff of the City Council.

²⁵ For more information, please consult [the website of the Riba Roja de Túria City Council](#).

4.1. Subject matter of the contract

The definition of the contract object must reflect the need to be met, with its precise and clear determination being essential to attract potential tenderers. However, a failure to adequately identify the nature and scope of the needs to be addressed by the contract may result in:

Box 8 Risks

- ✗ Restrict the entry of potential tenderers who could offer more advantageous solutions in terms of quality, innovation, price, etc.
- ✗ Unjustifiably limit competition among the bids submitted.

To define the subject matter of the contract correctly, all solutions or, where appropriate, products and services that can be considered interchangeable or substitutable due to their characteristics, their price or the intended use of them must be considered.

It can be defined according to the specific needs or functionalities that are intended to be satisfied, without being closed to a single solution. In particular, they will be defined in this way in those contracts in which it is considered that technological, social or environmental innovations can be incorporated that improve the efficiency and sustainability of the goods, works or services that are contracted (e.g. contract for the supply, installation and maintenance of LED luminaires in public lighting to improve energy efficiency and safety).

When defining the subject matter of the contract, especially in contracts for services or supplies related to information systems, interoperability aspects must be taken into account²⁶.

Likewise, the instruments for standardising public procurement should be appropriately used to encourage the maximum participation of suppliers in tendering processes and to guarantee the principle of transparency²⁷.

In this sense, when linking a CPV with the object of the contract, special attention must be paid to the level of specification available (also assessing other existing CNAEs codes, if they are in line with the reality of the market)²⁸, so as to allow the need demanded to be precisely determined, since it will be decisive for the requirements of solvency and business classification, as well as for other aspects, such as determining whether it is a service or a possible Reserved contract.

²⁶ [Regulation 2024/903 of 13 March 2024](#) of 13 March 2024 laying down measures to ensure a high level of interoperability of the public sector across the Union.

²⁷ For example, [Resolution 27/2023](#) of 17 January 2023 of the Administrative Court of Public Procurement of the Community of Madrid upheld the appeal brought against the CPV selected by the contracting authority on the grounds that it was not linked to the subject matter of the contract as it was a generic code. Consequently, the Court annulled the specifications and other documents.

²⁸ It is essential that the CPVs and CNAE are updated in accordance with the changes that may have occurred in the market.

Box 9. Definition of the subject matter of the contract

In a framework agreement for the supply of passenger vehicles divided into five lots (by vehicle type), the CNMC recommended expanding the contract object to include “0 km” vehicles, as these, if meeting the required technical specifications, could satisfy the demand at competitive prices. Additionally, it was proposed to consider the option of renting light service vehicles (with or without driver) without a purchase option. Occasional vehicle rental would allow the public sector to meet the same personnel transport needs more flexibly, take advantage of new service delivery models, and introduce competition into the process, as other companies beyond vehicle manufacturers and distributors could participate in the framework agreement²⁹.

4.1.1. Recommendations**Box 10. Definition of the subject matter of the contract**

- ✓ Define the contract object precisely and in functional terms, considering the needs to be met and the expected outcomes.
- ✓ Define the contract object neutrally, without introducing unjustified biases in favour of specific operators, leaving room for potential tenderers to propose their best solutions.
- ✓ Properly use categorisation tools (CPV, CNAE codes) to ensure consistency with the contract object and alignment with market realities:
 - ✓ Select the CPV code that best fits the contract object.
 - ✓ Choose multiple codes if no single specific code is adequate, including the most generic and complementary codes.
 - ✓ Compare and analyse the results obtained in terms of competition, such as the level of participation and economic efficiency, from using different CPV codes for similar contracts.

4.2. Division into lots

The contracting authority must decide on issues such as whether to divide the subject matter of the contract, the design of the lots, and the imposition of limits on the number of lots that a tenderer may bid for or be awarded (Article 99 of the LCSP).

²⁹ [INF/CNMC/159/17](#) – CNMC Report on the Framework Agreement for the supply of passenger cars.

All these decisions have a clear impact on the level of participation and competition in each tender, hence the importance of providing proper justification to minimise the existence of risks such as the following:

Box 11. Risks

- x Discourage participation by certain types of operators, in particular, but not only, SMEs.
- x Lead to suboptimal results in terms of quality and price.
- x If previously used design structures are maintained, the risk of collusive behaviour would increase.

4.2.1. Division into lots: design and limits

If the nature of the contract allows for the performance of its subject matter independently, the division into lots favours competition because it promotes the competition of bidders, especially SMEs and potential new entrants.

In particular, they are provided with access both quantitatively and qualitatively. Quantitatively, because the size of the lots may correspond better to the capacity of these entities and, qualitatively, because the content of the lots may correspond more closely to their sector of expertise.

In addition, lot disaggregation avoids dependence on a single supplier, particularly if there are high switching costs, and risks diversify in the face of potential impacts on contract performance.

Exceptionally, the legislation allows limiting both the number of lots for which a bidder can submit a bid and the maximum number that can be awarded. Both limitations must be considered as restrictions on competition and must be interpreted as an exception to the general rule of free competition which may reduce efficiency if it hinders the obtaining of tenders that best represent the value for money, so that a restrictive and duly reasoned application of them must be made.

Such constraints may facilitate the sharing of contracts among bidders (especially if the value of the different lots is similar) and may also discourage participation and reduce competitive pressure, as some operators may not consider the effort worthwhile if they can only win one or a few lots.

In any event, it is preferable to limit the number of lots that can be awarded to a tenderer rather than to choose to restrict the number of lots for which tenders can be submitted, where this is necessary to preserve competition or ensure reliability of supply (especially in markets where there is a risk of hoarding lots by a single operator, as in those with few competitors, high barriers to entry and high switching costs). The benefits of applying this limitation to the award must outweigh the consequent loss of competition.

For example, when market analysis reveals the presence of new operators specialised in the services covered by the contract, imposing limits on the number of lots that incumbents can be awarded may promote participation and competition for each lot, improve tender outcomes, and generate a positive impact on medium-term competitive dynamics in the sector.

As for the possibility of contemplating integrating offers, it should be considered that it can favour large operators over small ones and facilitate cross-subsidy strategies, which may have dynamic effects of closing the market in successive tenders. However, it can also provide efficient solutions in specific circumstances (e.g. innovative offers) and even favour the participation of operators with different profiles, and it is essential that the contracting authority assesses the viability of these offers. Therefore, a comparative analysis of the gains in efficiency against the competitive damage that it would entail is recommended.

4.2.2. No division into lots

Exceptionally, the non-disaggregation into lots may be justified by the specific circumstances that must be sufficiently justified by the contracting authority³⁰. According to the LCSP, it is presumed that the following are valid grounds:

- ✗ The risk of unjustifiably restricting competition. In such cases, the contracting authority must request a prior opinion from the relevant competition authority to comment on the assessment of this circumstance³¹.

Lotting can also entail risks for competition: if its design is not adequate, it can facilitate collusive behaviour³² or it can reduce competition by being seen as a less efficient model (e.g. by renouncing the operators' use of economies of scale). Sometimes, not dividing the contract into lots can be more attractive to operators and encourage the participation of a greater number of competitors with different levels of specialization.

In any case, only through an adequate analysis of the market and the need demanded, will it be possible to assess for each specific case whether the division (and if so, its design) or the non-disaggregation can restrict competition or not in the specific case.

³⁰ Resolutions [435/2023](#), of 13 April and [602/2023](#), of 18 May, of the Central Administrative Court, among others.

³¹ In the case of the CNMC, through its electronic register: https://sede.cnmc.gob.es/tramites/_remission-writings-Public Administrations

³² [OECD-SIGMA Checklist for protecting competition when splitting contracts into lots](#), *Public Production Toolbox*; OECD (2018), [SMEs in Public Procurement: Practices and Strategies for Shared Benefits](#).

- × The risk of the proper execution of the various contract services from a technical perspective, or due to the need to coordinate the execution of different services, which would not be feasible with multiple lots and a plurality of contractors. These circumstances must be properly justified in the file in accordance with the guiding principles set out in this Guide, and it must be ruled out that there is no alternative lot design that would ensure successful contract execution.

Box 12. Division into lots uniforms supply contract

The tender specifications for the supply of Army uniforms grouped the manufacture of a wide variety of textile and footwear items and the provision of distribution services into a single lot. The contracting authority argued that this design was necessary to ensure coordination among different operators, facilitate monitoring and compliance control, and guarantee supply. This scheme, which had been used in previous calls, did not promote competition and participation, and excessively encouraged participation in the form of joint ventures (JVs/consortia).

Considering the nature of the contract, the market analysis carried out, and the experience from other public contracts with a similar object, the CNMC questioned the reasons provided to justify the appropriateness of a single lot and recommended dividing the contract object to encourage participation by different operators, particularly SMEs, thereby promoting effective competition in the tender. It was proposed to explore different lot design options—based on economic activities, items requested, delivery areas, profile of applicants, and order type—that varied in size and were not directly aligned with the potential number of tenderers, as preventive measures against collusive practices.³³ Finally, the contracting authority divided the contract into 20 lots, one dedicated to the logistics operator and the rest covering the various clothing, footwear, and other materials.

Box 13. Lot design that restricts competition

In a framework agreement for the supply of medical materials and the provision of equipment necessary for haemodialysis, the design of one of the lots arbitrarily and disproportionately favoured a single tenderer and excluded the rest, since one of the services included in that lot could only be provided by a single company. The reasons given to justify the lot configuration are not proportionate to its restrictive effect on competition, and the fact that only one bid was submitted (presumably the favoured one) is an indication that the lot configuration restricts competition, with alternative configurations available that are more consistent with the principles of open access to the contract and the safeguarding of free competition³⁴.

³³ [INF/CNMC/484/23](#) Procurement of the supply of clothing for the Army. Other reports in which the division into batches has been analysed to improve the levels of competition and competition : [INF/DP/0007/14](#), [INF/CNMC/136/18](#) and [INF/CNMC/124/24](#) on centralised telecommunications contracts for the AGE in which a greater disaggregation of lots has been recommended and in [INF/CNMC/033/19](#) Public procurement of the IMERSO tourism program for the 2019/2020 and 2020/2021 seasons in which a different design of the lots was proposed.

³⁴ [Resolution 089/2024 of 17 May 2024](#) of the Administrative Body for Contractual Appeals of the Autonomous Community of the Basque Country.

4.2.3. Recommendations

Box 14. Lots Design

- ✓ Provide for the division into lots to maximise competition, especially for SMEs, provided that the nature or subject matter of the contract allows it to be carried out independently, in accordance with the LCSP.
- ✓ Provide sufficient reasons for decisions regarding the design of lots and the restrictions on participation or awarding, beyond appealing to the formal grounds contemplated in the LCSP. This type of question must be based on a rigorous market study and the characteristics of the need to be met.
- ✓ Carefully analyse market conditions and the need to be met that justify not dividing into lots due to the risk of unjustifiably restricting competition. While this effect cannot be entirely ruled out in some cases, the impact on competition is generally greater when lots could be created but are not.
- ✓ Assess, with respect to demand aggregation techniques (e.g. centralised contracts, framework agreements), an appropriate lots design that minimises solvency or classification requirements, relating them to the amount and specialisation of each lot, and that allows the participation of a greater number of companies (particularly SMEs).
- ✓ Consider the limitation on the number of lots that can be awarded to the same bidder as preferential rather than restricting the number of lots for which bids can be submitted, in the case where it is justified as necessary to prevent undesirable effects, such as excessive dependence on a given supplier.
- ✓ Take precautions to prevent collusion:
- ✓ Encourage the largest number of participants: the greater the number of bidders, the lower the risk of collusion, as it increases the difficulty of reaching a collusive agreement.
- ✓ If divided into lots, it is advisable to:
 - ✓ Avoid symmetry so that the number of lots, their estimated value or geographical distribution, where appropriate, does not approximate or replicate the market structure (number of operators and their market shares).
 - ✓ Opt, as far as possible, for a greater number of lots than potential bidders because it makes it difficult to allocate.
 - ✓ Alter as much as possible the division and configuration of lots from past tenders to make it difficult for operators to agree or at least be an element that can destabilize it.
- ✓ If it is not divided into lots, monitor the joint participation of bidders (e.g. joint ventures/consortia) that do not respond to an objective justification considering the characteristics of the companies and the context in which they occur. In this case, notify the corresponding competition authority³⁵.

³⁵ Article 69.2 LCSP and [Guide to Public Procurement Bodies for the submission of indications of anti-competitive conduct](#) (CNMC, 2024). UTE is an instrument that is in principle legitimate and legally authorised for use by tenderers, unless it conceals an agreement restricting competition. The CNMC Sanctioning Resolution of 19 August 2023, [S/0008/21 MILITARY MATERIAL TENDERS](#), which includes the case law on the illegality of UTEs from the perspective of competition regulations, is illustrative.

4.3. Economic and budgetary variables

The contracting authorities have to estimate certain economic issues such as the tender base budget and its breakdown into direct and indirect costs; the estimated value that reflects the potential economic interest of the contract and that is transcendental for the determination of the legal, publicity and resources regime; the valuation of the life cycle of goods and services or the operational risk in concessions.

All of them have a clear impact on the conditions of competition, since they are decisive in attracting the interest of the private sector and making an efficient allocation of public funds (arts. 100 and 101 LCSP). From an incorrect assessment of these variables, certain risks arise:

Box 15. Risks

- x Disincentives to participation and effective price competition (including the evaluation of abnormally low bids), leading to an inefficient allocation of public resources.
- x Contract modifications and price adjustments.
- x Overcompensation of contractors, potentially affecting State aid rules.

According to the LCSP, the base tender budget (PBL) must be adequate to market prices and represent the maximum expenditure limit. In contracts for labour-intensive services (e.g. surveillance and security, cleaning, consultancy, etc.), it is mandatory to break them down into direct costs (e.g. materials, transport, labour costs based on the reference labour agreement, etc.), indirect costs and other possible expenses³⁶ (both are usually calculated by applying a percentage of direct costs - between 10% and 20% of general costs and between 6-10% of industrial profit). Only for works contracts, the current regulations establish indexes³⁷.

The other side of the PBL coin is the contract price, which will be determined in the award process (art. 102 LCSP). Therefore, it is important that the PBL is well calculated to allow there to be effective competition between the offers (it is presumed that the reductions will be lower if the PBL is very adjusted to the market, but at the same time it allows competing in other qualitative variables. In addition, in such cases, adjusting in industrial profit may improve interest in competing.)

³⁶ The Administrative Courts of Contractual Appeals have determined that the obligation to disaggregate applies to service contracts in which the main economic cost is labour costs because it makes it possible to verify that the budget is sufficient to cover those salary costs and other costs necessary for the proper provision of the service (among others, RTACRC [84/2019](#) and [633/2019](#), [TACPA 44/2021](#), [OARC 120/2021](#)).

³⁷ Art. 131 of [Royal Decree 1098/2001 of 12 October 2001](#) approving the General Regulation of the Law on Public Administration Contracts.

The estimated value of the contract (VEC) must consider the costs derived from labor regulations and other costs of the material execution of the services, the general costs of structure, the industrial profit, in addition to considering possible extensions and modifications (art. 101 LCSP). In this estimate, the reference should be the usual prices in the market.

It should be recalled that public procurement rules do not prohibit an operator from entering a public tender having received State aid, if this is in accordance with the provisions of EU law³⁸.

But the calculation of these essential economic variables of the contract is relevant from the point of view of State aid. The aim is to ensure that public procurement operations do not confer undue advantages on certain successful tenderers beyond what could be obtained on the market, otherwise this could distort competition and contravene EU State aid rules (Articles 107 et seq. TFEU).

To conclude, it is essential that the tendering procedure is competitive, transparent and non-discriminatory, allowing the most advantageous offer to reflect the market value. On other occasions, such as when a market price cannot be determined in procedures negotiated without prior publication or when only one offer is submitted, the contracting authority should sufficiently justify that the price is appropriate³⁹.

4.3.1. Recommendations

Box16. Determination of the economic variables

- ✓ Understand both the economic weight of the needs to be met and the main economic variables of the market (production costs, market prices, etc.) to design procedures that encourage participation and the submission of competitive bids, while minimising the risk of subsequent modifications or issues during contract execution.
- ✓ Justify in the file the actions aimed at establishing the estimated contract value (ECV) and the base tender budget (PBL) as well as the contract price (specialised advice, cost studies, preliminary market consultations, analysis of these variables and any changes compared to past tenders or similar contracts, etc.).
- ✓ Ensure that no undue economic advantages are granted to the successful bidders beyond what would constitute ordinary market remuneration, to avoid conflict with State aid regulations.

³⁸ Supreme Court Judgment [3972/2023](#), of 2 October 2023.

³⁹ [COMMUNICATION](#) from the European Commission: Guidance on public procurement in innovation (2021).

4.4. Strategic public procurement

Public procurement has enormous potential for the promotion of other public policies in environmental, social, innovation and development matters, the promotion of SMEs and social economy enterprises, and the defence of competition (preamble to the LCSP).

The LCSP establishes the incorporation of criteria of this nature (CPE) in the specifications in a transversal and mandatory manner, if they are related to the subject matter of the contract and their inclusion provides a better quality-price ratio in the contractual performance, as well as greater and better efficiency in the use of public funds⁴⁰.

The challenge to be met is to integrate these criteria in a manner consistent with the promotion of free competition and not at the expense of it, in line with what is stated in the preamble of the LCSP itself. Otherwise, several risks would occur:

Box 17. Risks

- x If not embedded in companies' internal policies, they may involve a cost, especially but not only for SMEs, which could discourage their participation or provide an unjustified advantage to companies with greater capacity.
- x Linking (proximity) local procurement to requirements of territorial presence.
- x Use of "convenience" joint ventures (JVs) or consortia formed solely to enable participation, which can sometimes lead to internal management issues among the participating companies and affect proper contract execution.

To prevent the use of strategic public procurement clauses from being burdensome for competition and competition, compliance with the legal requirements (link to the subject matter of the contract and respect for the guiding principles of procurement) must be sufficiently motivated and the impact it generates on potential bidders must be considered. Therefore, these criteria must be further analysed from the point of view of the principles of good regulation and administration (necessity, proportionality and the minimum distortion of competition).

Regarding its design, contracting authorities must consider strategically what the purpose pursued is and first assess the impact of its inclusion on the different phases of the procedure (as a criterion of solvency, award or as a special condition relating to the performance of the contract), since its effects are normally very different in each one.

⁴⁰ Article 202 LCSP for special conditions of execution.

For example, if required as a solvency criterion, the potential to create an unjustified barrier to entry is greater if it is not properly justified in relation to the contract object. However, if it concerns special execution conditions, tenderers can assess the cost they would incur if ultimately awarded the contract, so that the longer the execution period, the greater the incentive to meet the requirements in question (cost amortisation).

Box18. BIM (building information modeling) technology

- ✓ This BIM technology (Building Information Modelling) is a way of working in the construction sector based on collaboration among different stakeholders (contracting authority and contractors) around digital models of constructions, to which different types of information are associated, from the design phase through to the execution and maintenance of public construction projects.
- ✓ Its use in public procurement has a positive impact on cost reduction (improving the efficiency of public spending), transparency, and the quality and sustainability of construction contracts. It also contributes to the digital transformation of the construction sector by fostering innovation, in line with strategic public procurement.
- ✓ However, its introduction should be gradual and progressive, considering the adaptation needs of sector operators, since due to its high costs and the requirement for specific staff training, it can constitute a barrier to entry that limits competition in the bidding for construction contracts, particularly for SMEs. Additionally, its impact as a solvency criterion should be considered, with its use being preferable as a technical specification or special execution condition⁴².

4.4.1. Local public procurement

There is a risk that (proximity) local procurement will be linked to criteria related to the origin, registered office or any other indication of a company's territorial presence.

The CJEU has clarified the negative elements that would prevent their use: that they are applied in a discriminatory manner, that they are not justified by imperative reasons of general interest, that they are not suitable to ensure the achievement of their intended objective, or that they go beyond what is necessary to achieve that objective⁴³.

⁴¹ Section 6 of the fifteenth additional provision of the LCSP and [Plan for the Incorporation of the BIM Methodology in Public Procurement](#) (2023).

⁴² Among others, Resolution [1543/2023](#), of 30 November, of the TACRC.

⁴³ Judgment of the CJEU of 27 October 2005, [C-234/03](#), *RECORD*.

In this regard, case law has held that territorial presence requirements cannot be considered as a suitability criterion for contracting with the public sector, nor as an award criterion, as they violate the principles of equality and non-discrimination and are contrary to Article 18.2(a) of the LGUM⁴⁴.

However, the use of territorial requirements as a commitment to allocate resources or as a special condition related to the execution of the contract has been admitted, provided that the CJEU's criteria set out above are sufficiently justified by the contracting authority: their necessity for the proper execution of the contract, their compliance with the principle of proportionality, their relationship with the object and amount of the contract and their adequacy to the principles of consistency, equality and non-discrimination⁴⁵.

In any case, provisions for local products or local public procurement should not be aimed at benefiting specific local companies. If the claimed public interest relates to sustainability, objective measurement systems should be used, such as those concerning carbon footprint quantification or the requirement for short distribution cycles, rather than the location of potential suppliers. Similarly, in food procurement, if the quality of the product is to be promoted, the criterion should be oriented towards seasonal or fresh products, without the proximity of the supplier necessarily having to be a key factor in this regard⁴⁶.

Therefore, the establishment of territorial requirements in order to directly benefit local companies should be avoided, without prejudice to the fact that the contracting authorities decide to prioritise sustainability, quality and innovation in their contracts.

⁴⁴ Article 18(2)(a) of Law 20/2013 of 9 December 2013 on the guarantee of market unity (LGUM) provides that discriminatory requirements are those that are based directly or indirectly on the place of residence or establishment of the tenderer. In addition, see, among others, the [JCCPE Report 9/09](#), of 31 March 2009; Resolution [184/2021](#), of 26 February, of the TACRC: "*The conditions of territorial roots are discriminatory when they are configured as solvency requirements or as award criteria, being admitted, on the contrary, when they are required as a commitment to allocate resources to the successful tenderer or as conditions of execution provided that, in this case, they respect the principle of proportionality and are related to the subject matter of the contract.*"; or Resolution 967/2022, of 28 July, of the TACRC, on justified reasons for requiring a certain territorial implementation in the provision of the service (home telecare).

⁴⁵ The CJEU judgment of 27 October 2005, C-234/03, stated that the requirement to have an office open at the time of submission of tenders, even if the existence of such an office could be considered adequate to ensure the correct performance of the contract, was manifestly disproportionate and, on the other hand, there was no obstacle to establishing it as a condition to be fulfilled during the performance of the contract. the commitment to have it being sufficient in the award phase. Also, Resolutions 101/2013, of 6 March, and 187/2013, of 23 May, of the TACRC.

⁴⁶ Among others, [Report 2/2023](#), of 19 January, of the Canary Islands Advisory Board.

Box 19. Local procurement and school caterings

The CNMC analysed the draft Royal Decree on the awarding of catering service concessions, which introduced sustainability criteria in the specifications affecting school catering, specifically local public procurement or the use of short distribution channels.

If the public interest reason is environmental, the CNMC recommends relying on objective measurement systems of the carbon footprint of the entire process (collection, transport, distribution of products), since the operator closest to the school is not always the one that provides the best performance in this regard.

Therefore, it recommended clearly defining the concept of local public procurement to prevent contracting authorities from exercising excessive discretion, avoiding equating proximity with territorial presence (which could favour certain companies), and avoiding linking it to the geographical proximity of the supplier. Consequently, it advised a product-based approach (rather than a producer-based one) using objective measurement systems, and analysing which type of contractual requirement can best minimise potential negative effects on competition. The Royal Decree finally adopted followed the CNMC's recommendation⁴⁷.

4.4.2. Labels and certificates

The contracting authority may, with proper justification, use social or environmental labels or certified management systems (Articles 93, 94, and 127 of the LCSP), provided that they are linked to the contract object, strictly necessary, and comply with the principles of equivalence (allowing alternative certificates and any other appropriate means of proof), proportionality, and non-discrimination.

For this reason, the determination of the certificates or labels to be required as technical solvency must be carried out taking into account their accessibility to all interested parties, without these being restricted to certain bidders (e.g. when it is found that both obtaining them and maintaining them requires economic resources, specialization and time that cannot be easily assumed by a certain profile of operators) and always that it does not constitute an unjustified obstacle to competition.

⁴⁷ [IPN/CNMC/024/24](#), on PRD development of the Food and Nutrition Law, the report and [Royal Decree 315/2025, of 15 April](#), which establishes rules for the implementation of Law 17/2011, of 5 July, on food security and nutrition, for the promotion of healthy and sustainable food in educational centres (Article 4.1.b)). In this regard, the [IPN/CNMC/044/21](#) on the APL for the promotion of emerging business ecosystems and [the CNMC Recommendations to the public authorities for an intervention in favour of market competition and inclusive economic recovery](#).

In addition, if they are provided for as an award criterion, their reasoning must be strengthened with regard to their direct and specific link with the subject matter of the contract (not to a characteristic of the company itself) and the ability of the certificates or labels to allow an objective and comparative evaluation of the performance of the tenders (e.g. if the certificate in question is available, it is demonstrated that the execution of the contract will be carried out in a superior manner compared to offers that do not include it)⁴⁸.

4.4.3. Reserved contracts

The reservation of lots or contracts to a certain profile of operators is a measure that aims to create a protected area of public procurement where operators whose main objective is the social and professional integration of disabled or disadvantaged persons compete only with other operators in comparable circumstances, since they cannot be expected to be able to compete under normal market conditions due to their significant social contribution.

This measure should be used exceptionally and restricted to situations in which this type of operator cannot compete to be awarded non-reserved contracts because this has been established in a practical way⁴⁹.

Box 20 Reserved contracts

The CNMC has recommended that the reservation of lots or contracts for a specific profile of entities, as a measure to promote strategic public procurement, be carried out considering legal requirements and the principles of equal treatment and proportionality.

It advises assessing ex ante whether the level of effective competition and the efficient allocation of public funds achieved through restrictions on the profiles of beneficiaries of reserved contracts is adequate. When establishing minimum levels of reservation, it recommends that demand (needs to be tendered) and supply (social initiative insertion companies and special employment centres that could potentially participate in the tenders whose contracts or lots are subject to reservation) be planned and analysed in advance.

At the same time, other alternatives should be considered to encourage the participation of such entities in public tenders (such as division into lots or training in this field), since, in principle, if they demonstrate the capacity to compete with other operators without the need for reservation, this open market approach would always be preferable.

⁴⁸ Inter alia, Judgment of the European Court of Justice of 24 January 2008 ([C-532/06, Lianakis and Others](#)) and TARCYL Resolution [117/2023 of 7 September 2023](#) on a contract for the maintenance of radiology equipment considered that including the ISO 27001 quality certificate (cybersecurity) as an award criterion relates to the undertaking as a whole, not to the service demanded and has no relation to the service that is the subject of the contract.

⁴⁹ [IPN/CNMC/011/23](#) Report on the Comprehensive Draft Law on the Promotion of the Social Economy.

In order to strike an appropriate balance between the strategic use of public procurement and the avoidance of unjustified impacts on competition, it is recommended to:

4.4.4. Recommendations

Box 21. Strategic public procurement

- ✓ Promote adequate planning and preparation that allows a truly strategic approach to public procurement policy (social, environmental, or innovation), identifying the procurement procedures where achieving these objectives is most feasible
- ✓ Integrate these criteria consistently with the promotion of free competition and not at its expense. Therefore, the added value of such clauses (in terms of efficiency) must be justified in each case, and their compatibility with other guiding principles of public procurement must be ensured.
- ✓ Avoid imposing disproportionate burdens on SMEs or new entrants, evaluating their impact in terms of participation and competition.
- ✓ Provide reasoned justification as to whether they should be configured as suitability criteria, award criteria, or special execution conditions. In theory, the latter could minimise the impact on competition, as they are only required of the successful bidder and allow the cost to be amortised, especially in long-term contracts.
- ✓ Require or evaluate, with justification, certified management systems, technical standards, labels, or marks, provided that alternative equivalent instruments are allowed, are linked to the subject matter of the contract, and are strictly necessary and proportionate.
- ✓ Establish a methodology for evaluating results (monitoring and compliance indicators) capable of determining the impact of environmental, social, or innovation clauses in terms of cost-benefit.

4.5. Types of legal transactions

In response to a public need, there are sometimes different legal transactions to satisfy it (public works, supply, and services contracts; public service and works concessions; concerted action; special administrative contracts; concessions of public assets; property contracts; collaboration agreements, etc.), which also entails the application of different rules (e.g., public procurement, property law, local government regulations, etc.) and approaches regarding the promotion of effective competition⁵⁰.

⁵⁰ For example, in the field of social services, the legislation provides for the non-contractual figure for the provision of these services (e.g. concerted action) or through contractual mechanisms based on participation and free competition, which can be designed in such a way that they comply with the principles of quality, continuity of care, accessibility, affordability, availability and comprehensiveness, taking into consideration the special nature and importance for our society of the benefits that encompass this type of service. ([Report of 9 February 2024 of the ACCO on the Draft Law on the Instruments for the Provision of the Public System of Social Services](#)).

In general terms, it should be clear that the purpose of public contracts is to achieve a public objective specific to the contracting authority, whereas in authorisations or concessions of public assets, the purpose is private for the party that obtains the enabling title, without prejudice to the fact that the private activity may be open to the public⁵¹.

In any case, certain risks can be identified:

Box 22. Risks

- x Giving preference to certain legal instruments to the detriment of public procurement rules without first analysing the needs, the purpose pursued, and the available options to choose the one that delivers the best results in terms of efficiency and public interest.
- x Choosing award procedures that do not ensure competition and open participation (e.g. property law regulations provide for procedures involving direct awards or lotteries).

Although not all legal transactions are public contracts, to the extent that the decision of the public entity may have an impact on the market or on the development of economic activities, the necessity, proportionality and non-discrimination of the solution chosen as the basis for its justification should be analysed⁵².

For example, to carry out some economic activities, private operators have to make use of public space (e.g. in markets, festivals, fairs, etc.) and it is necessary to have an administrative title (authorisation, licence or concession). Patrimonial legislation provides for different mechanisms for the granting of such administrative titles (e.g., procedures on a competitive basis, direct assignments, drawings of lots, etc.) including through instruments such as agreements.

For an efficient allocation of the corresponding rights of use and exploitation, it is necessary to ensure competition and free competition. Some public administrations choose to do so through the application of the guiding principles of the LCSP and, others, have incorporated, in the multiple procedures established for this purpose in the patrimonial regulations, conditions that guarantee the principles of concurrence and competition⁵³.

⁵¹ Among others, [Report 3/2025, of 13 February](#), of the Advisory Commission on Public Procurement of Andalusia, on the differences between service contracts, service concessions and public contracts.

⁵² Public procurement within the meaning of Article 2 and Recital 4 of EU Directive 2024/24.

⁵³ See the document [Pro-competitive management of public space for the development of economic activities](#). Catalan Competition Authority (ACCO, 2024).

4.5.1. Recommendations

Box 23. Types of legal transactions

- ✓ Effectively combine the satisfaction of the identified public need with the implementation of procedures that ensure effective competition and participation among interested operators, considering the nature of the need and the public institutional objectives.
- ✓ When dealing with transactions excluded from the Public Sector Contracts Law (LCSP), adopt procedures that, as far as possible, guarantee transparency, competition and open participation.
- ✓ Give priority to competitive procedures for granting any administrative titles provided for under property law (licenses, concessions or authorisations) required for the development of economic activities, ensuring that their award conditions are objective, non-discriminatory, necessary and proportionate.

4.6. Public Procurement Rationalisation Techniques

The various instruments for the technical rationalisation of procurement (Articles 218 et seq. LCSP) are used to aggregate demand and standardize suppliers (centralized contracts, framework agreements, and dynamic purchasing systems). These techniques, if properly planned and designed, can lead to efficiency gains using economies of scale, which allow for more advantageous offers in terms of economy and quality.

However, their use is not without risks for competition:

Box 24 Risks

- ✗ It discourages the participation of certain types of operators, in particular SMEs and new entrants, who may not meet the required solvency criteria.
- ✗ Compared with other procurement instruments, the framework agreement entails the closure of the market in favour of the awarded operators, increasing the risk of collusion and the level of market concentration in the medium and long term.

4.6.1. Framework agreements

Particularly, with respect to framework agreements (FA), characterized by closing the market during their validity, the design of lots is essential to allow the entry of different bidder profiles and maximize participation.

Moreover, the duration is also a relevant factor and should be adjusted according to the nature of the services and the investment amortisation needs, avoiding excessively long terms that may prevent the contracting authority from receiving more economically or technically advantageous offers, thus reducing the flexibility of the procurement process and hindering its adaptation to new demands. All this is without prejudice to any provisions that may be introduced regarding the contracts awarded under the framework agreement.

Additionally, it should not be overlooked that framework agreements increase the risk of collusion among participants, as they foster the creation of a small and closed environment in which the identity of potential tenderers is fully known⁵⁴.

Box 25. Framework agreements and collusive practices

In the case concerning institutional advertising campaigns of the Central Government (AGE), the CNMC fined five companies and three executives for exchanging commercially sensitive information with the aim of sharing out the awards of the call-off contracts under Framework Agreement 50/2014, thereby restricting competition in the Spanish advertising intermediation market. These practices took place between December 2014 and May 2016, when inspections were carried out at the premises of some of the companies involved. The CNMC initiated the proceedings ex officio while reviewing the tenders based on the aforementioned Framework Agreement, following a prior consultation from the Centralised Procurement Board of the Ministry of Finance in response to complaints submitted by two bidders⁵⁵.

4.6.2. Dynamic Purchasing Systems

From the point of view of promoting competition and competition, the figure of dynamic purchasing systems (DPS) is preferable, mainly because they keep open the entry of new operators after their award and avoid the closure of the market produced by framework agreements.

For this reason, DPS preserve the efficiency gains derived from centralised procurement while the risk of adverse effects on competition is substantially lower than in framework agreements. In addition, the risks of collusion are much lower, both due to the higher (in principle, unlimited) number of tenderers and the advantages provided by electronic processing.

In addition, DPSs have proven to be an agile and simplified procurement mechanism that could replace the minor contract while guaranteeing the principles of transparency, equal access and free competition, favoring the participation, especially of SMEs and new entrants.

⁵⁴ [Communication from the European Commission on tools to combat collusion in public procurement and guidance on how to apply the related ground for exclusion \(2021/C 91/01\)](#).

⁵⁵ CNMC Council Resolution of 3 May 2018, [S/0584/16](#), Media agencies.

4.6.3. Electronic catalogues

These techniques (FA and DPS) can be combined with other very useful tools such as electronic catalogues, in which offers are presented in a structured and standardised format that facilitates their updating, comparison and automated evaluation, being particularly appropriate for DPS and FA with a large number of buyers and suppliers of products and services that are frequent and easy to describe and specify (e.g.: computer equipment, workshop supplies, office supplies).

This tool has the potential to simplify the procurement process for thousands of users who may not know the procurement rules in detail, reduce the number of acquisitions made through non-competitive procedures, encourage the participation of bidders, allow better centralized control and monitoring of public expenditure and obtain information that is very useful for the design of procurement strategies⁵⁶.

Box 26. DPS, FA and Electronic Catalogues

The University of Almería, with the aim of establishing an agile and simple procurement process to replace the use of direct awards (“contrato menor”), has implemented framework agreements (e.g. office supplies or laboratory materials) and dynamic purchasing systems (e.g. IT equipment) combined with electronic catalogues. The tender documents set out the technical specifications and the requirements for submitting offers in the form of electronic catalogues.

These measures have resulted in a catalogue of 150,000 products accessible to numerous university users (purchasers) through a highly user-friendly interface (virtual market). This new purchasing system has enabled access to a wide variety of up-to-date products of different kinds and has greatly simplified the procedure through a fast, electronic, automated, and online purchasing process (like the “shopping cart” used in e-commerce platforms).

In this way, the University has achieved greater efficiency and effectiveness in public procurement management for many users and has promoted broader participation by attracting new suppliers, including a significant presence of SMEs. Moreover, using Artificial Intelligence, the University is analysing off-framework and off-DPS purchases with a view to integrating them into these systems⁵⁷.

4.6.4. Use of joint purchasing and central purchasing bodies

The use of these procurement formulas aims to achieve more efficient management of public resources, in addition to standardising procurement conditions, simplifying the procurement methodology of contracting authorities, reducing burdens and deadlines and promoting transparency.

⁵⁶ In this regard, see the [EU Report on Electronic Catalogues \(2017\)](#).

⁵⁷ More information on the website of the University of Almería:
<https://www.ual.es/universidad/servicios-generales/serv-contratacion/contratacion-compras>



In any case, their use must ensure that competition and open participation are not distorted, mainly due to the risk that demand aggregation may unjustifiably restrict the participation of SMEs and/or consciously or unconsciously facilitate collusion among operators.

Particularly at the local level, the use of these tools is especially useful to achieve economies of scale in the procurement of common goods and services, especially in those entities of smaller size, population and means⁵⁸.

4.6.5. Recommendations

Box 27. Use of rationalization techniques

- ✓ Avoid using these rationalisation techniques abusively or in a way that hinders, restricts, or distorts competition. For this purpose, it is necessary in each specific case to assess whether they are the appropriate instrument based on:
 - ✓ Needs to be met and expected outcomes: for example, FA, DPS are useful for obtaining a catalogue of frequent and standardized service or supply providers. The combination of these techniques with tools such as electronic catalogues makes it possible to simplify and mostly standardize the procurement process.
 - ✓ The characteristics of each rationalisation technique and of the market itself, with particular attention to the degree of concentration and the risk of collusion: framework agreements (FA) and dynamic purchasing systems (DPS) are suitable if they allow the creation of a diverse catalogue of pre-approved suppliers. FA involves market closure during their term, increasing the risk of collusion, whereas DPS remain open and facilitate the participation of companies that might otherwise face access difficulties (SMEs). In addition, DPS offer greater flexibility to adapt to market conditions.
 - ✓ The greater or lesser ability to define the subject matter of the contract: FA are presented with a certain degree of indeterminacy (e.g., variables such as price or specific tasks to be performed) compared with a standard open procedure, which provides greater specificity. DPS, in turn, allow for even greater indeterminacy than FA. Suppliers' strategies for preparing their bids will differ depending on the type of procedure and the uncertainty they face (e.g., in an FA they do not know whether they will ultimately be awarded a contract or, if so, to what extent, facing greater long-term uncertainty, which may lead them to submit more flexible and sustainable offers over time, as opposed to more aggressive bids in an open procedure).
- ✓ Ensure their design includes sufficient safeguards to prevent undermining the principle of free competition, to maximise participation and reduce the risk of collusion. When designing framework agreements (FAs), it is recommended to:
 - ✓ clearly and precisely define the subject matter and conditions of the contract.
 - ✓ opt for the open procedure.
 - ✓ design lots based on the market analysis carried out, with special attention to access by SMEs.

⁵⁸ As provided for in additional provisions 2^o.10 and 3^a. 6 of the LCSP. For example, among others, the [Central Procurement](#) of the Spanish Federation of Municipalities and Provinces (FEMP) which has more than 2,854 affiliated entities or those established by various provincial councils.

- ✓ Avoid awarding framework agreements (FAs) to a single operator and do not limit the number of signed operators.
- ✓ Opt for second-stage tenders for call-off contracts when there are guarantees of a sufficient number of bidders and the risk of possible collusion is minimized
- ✓ Avoid predictability in the call-off contract tenders and promote competition between bids (price and quality).
- ✓ Limit the duration of the FA with justification and use extensions only exceptionally.
- ✓ Limit the execution of call-off contracts to the duration of the framework agreement (FA), except for reasonable justification, and avoid awarding contracts once the estimated maximum value of the FA has been reached. Maximise monitoring of operators' behaviour in the call-off contract tenders under these rationalisation techniques.

4.7. Types of procurement procedures

The legislation provides various procurement procedures which, from the point of view of promoting competition, can be classified into those that are open (including their simplified variants) and those that limit publicity, transparency and competition to some extent or totally⁵⁹. On the other hand, the use of the figure of the minor contract (direct award) and the options of accelerated processing of procedures (urgency and emergency) are not innocuous in terms of transparency, publicity and competition.

Decisions concerning the type of procedure or the accelerated processing of cases entail a series of risks from the point of view of promoting competition:

Box 28. Risks

- x Significant efficiency losses and a higher risk of collusion if procedures do not ensure a minimum level of participation.
- x Consolidation of advantageous competitive positions in favour of certain operators.

Therefore, these types of decisions are strategic and must be justified in each specific case, focusing on the need to be addressed and seeking the most efficient model to achieve the expected outcome, bearing in mind that, in general terms, higher participation leads to greater competition and, consequently, greater efficiency (while also reducing the risk of collusive practices)⁶⁰.

⁵⁹ The LCSP provides for different modalities: ordinary (open, open simplified and super simplified and restricted) and non-ordinary (negotiated, negotiated without prior publication, competitive dialogue, innovation partnership, etc.).

⁶⁰ Resolution of the Council of the CNMC of 11 May 2021, [S/0627/18](#) CONSULTANTING FIRMS, the infringing companies manipulated public contracts through "cover bids" in procedures negotiated without prior publication and minor contracts (direct awards).

However, the mere use of the procedure does not guarantee these objectives, so it is essential to correctly design the rest of the key elements such as those analysed in this Guide (e.g. solvency criteria, award criteria, lots, etc.).

4.7.1. Open procedure vs. procedures restricting competition

- **Open procedure:** It is the procedure that ensures, from the outset, transparency, equal opportunities, publicity, and competition, as it allows the participation of all companies that meet the required capacity and solvency. A properly designed open procedure, by generating greater competitive pressure, promotes efficiency gains. In addition, its simplified variant allows for reduced administrative burdens and a fast, straightforward process, without compromising publicity, transparency, or competition.

Box 29. Relationship between participation and efficiency

In 2019, the CNMC conducted a study evaluating the impact that efficient public procurement would have had in Spain. It concluded that Public Administrations would have saved at least €1.7 billion between 2012 and 2016 if competitive procedures had been used, since open, transparent, and competitive procedures produce an average saving of nearly 10% in award amounts compared with negotiated, restricted, or dialogue procedures. The study showed that the participation of an additional company in a tender lead, on average, to a 2% reduction in the contract price. Furthermore, during the period analysed, approximately one-third of tenders received only a single bid, and in two-thirds of cases there were three or fewer operators⁶¹.

Data on participation in tenders ([European Commission](#), [European Court of Auditors](#) and [Oirescon](#)) show a clear deficit in levels of participation.

4.7.2. Restrictive procurement and award modalities

- **Restricted procedure:** although it is ordinary, it involves a priori restriction of the number of bidders (minimum of five). This procedure is useful in specific cases, when it is not necessary to negotiate or interact with the bidders and special solvency must be required (e.g. intellectual services of special complexity such as architecture or consultancy) provided that its application is duly justified and competition is not unjustifiably restricted.

⁶¹ [E/CNMC/004/18](#) Radiography of public procurement procedures in Spain.

- **Negotiated procedure:** limited to cases exhaustively provided for in the LCSP, such as when there are conditions pending to be determined by the nature of the subject matter; in the case in which ordinary procedures have failed with the same subject matter of the contract due to irregular or unacceptable bids; or when people in a situation of vulnerability that may be increased by a discontinuity in services are affected. The specifications must clearly delimit the needs demanded, the conditions and the economic and technical aspects of the contract to be negotiated⁶².

Maximum transparency of the negotiation and non-discrimination between participants (generally, at least three) must be ensured at all times. In the choice of these, it must be ensured that the invitation is addressed to companies that are objectively capable of executing the contract and, therefore, compete in the tender, without there being a maximum limit and accepting the participation of any interested party (whether previously invited or not)⁶³.

- **Negotiated procedure without publicity:** Along the same lines as the negotiated procedure, it sets out the exceptional cases in which its use is allowed, making the precise definition of the negotiation conditions key. Among the exceptional circumstances justifying recourse to this procedure, which must be properly justified in each case, are: when competition is not possible or does not exist due to market- or product-specific reasons (specificity, exclusivity, or lack of technical competition) and when no applications to participate or offers were submitted, or the submissions were inadequate, in prior ordinary procedures.
 - The absence of competition for technical reasons and the protection of exclusive rights, including intellectual property rights, will only apply when there is no reasonable alternative or substitute with sufficient capacity to satisfy the public need demanded and when the absence of competition is not the result of a restrictive configuration of the requirements and award criteria⁶⁴. In these cases, to sacrifice the principle of competition and allow direct award, it is necessary to prove rigorously and objectively that there are technical reasons or rights of exclusivity and that these reasons make it necessary to award the contract to a specific operator.

⁶² Resolution [1043/2024 of 11 September 2024](#) of the TACRC annuls a negotiated procedure without publicity because the specifications do not determine the economic and technical aspects that will be the subject of negotiation.

⁶³ JCCPE Reports 65/2009 of 23 June 2010 and 33/2009 of 1 February 2010.

⁶⁴ Among others, CJEU judgment of 14 September 2004, C-385/02, *Commission v Italy*.

In this sense, arguments of mere organizational convenience, high degree of complexity, immediacy or subjective criteria of the contracting authority with respect to the quality or capacity of the operator in question are not valid⁶⁵.

- In cases in which no bids have been received in previous ordinary procedures or these have been inadequate, unacceptable or irregular, the reasons that have led to such a result must be analysed, and it must be assessed that the design of the tender concerned is reviewed, in order to ensure that the general principles set out above are fully effective in the new procurement process.

Box 30. Procurement of postal services

The CNMC has emphasised that the procurement of postal services by public entities must be carried out with particular care to avoid discriminating between the operator designated to provide the universal postal service (Correos) and any other authorised postal operator. In particular, administrative notification services may be provided by any postal operator with the appropriate legal guarantees, if proof of delivery is ensured. The CNMC specifically recommends opting for open and transparent procedures for awarding these services rather than negotiated procedures without prior publication, which should be exceptional as they limit participation and competition⁶⁶.

- **Competitive dialogue:** unlike negotiated procedures, it is not possible to precisely define the specifications and all aspects of the contract can be negotiated. Based on a descriptive document, the object of the service is specified through dialogue with the candidates and then the candidates who present the best solutions are invited to present their offer. This model is useful in particularly complex contracts (e.g. in strategic sectors or innovative solutions). At least three bidders must be invited and allow the payment of premiums to participants.
- **Partnership for innovation:** it is intended for cases in which R+D is necessary to develop innovative products, services and works that do not exist on the market (research phase) and includes the purchase of the resulting product or service (commercial phase).

⁶⁵ Resolution [254/2024 of 27 June 2024](#) of the TARC of Madrid annuls a negotiated procedure without publicity for the contract for the Legal Advisory Service in Administrative and EU Law for lack of sufficient justification of the technical reasons. The contracting authority is based on satisfaction with the service provided by the current contractor and on the conviction that a change by the successful bidder could deteriorate the quality of the service.

⁶⁶ Among others, [INF/CNMC/032/20](#) consultation of the City Council of Almería on the tender for postal services and [INF/DP/0012/14](#) report on the specifications of the AGE postal services contract.

Box 31. Public Procurement of Innovation (CPI)

Pre-commercial procurement (PCP) allows addressing real challenges and needs for which the market does not offer a solution meeting the quality, performance, and price requirements set by the contracting authority. In this context, the European Commission (EC) published guidance highlighting its importance for modernising public services, improving efficiency, and fostering economic growth, particularly to help SMEs and startups expand through public procurement. The guidance recommends assessing needs, conducting market consultations (CPM), simplifying administrative burdens, promoting participation, using flexible procedures, setting functional or performance-based requirements, and establishing an intellectual property strategy. It also provides guidelines for choosing the award procedure and ensuring that innovation procurement does not constitute hidden state aid that distorts market competition⁶⁷.

- **Minor contract:** it is a direct award that is provided for specific, non-repeated needs, and of little amount and duration (art. 118 LCSP). To compensate for the shortcomings in terms of competition, it is recommended to invite enough companies (at least three) to submit bids⁶⁸ as well as to disseminate the request in the contractor's profile. In any case, its formalization is subject to publication obligations and must be sufficiently reasoned⁶⁹.
- **Urgency procedure:** it allows the processing times to be reduced for needs that cannot be postponed or whose award must be accelerated for reasons of public interest and respecting the essential principles of transparency, equality and competition. The file must include the declaration of urgency, duly reasoned, made by the contracting authority and in any case guarantee respect for the essential principles that govern any procurement process.
- **Emergency procedure:** It is strictly provided for catastrophic events that pose serious danger or involve needs affecting national defence and entails a waiver of the principles of competition, equal treatment, and non-discrimination. Its use is envisaged only when it is demonstrated that less restrictive procedures ensuring free competition are insufficient, and it must be limited to what is strictly necessary (both in scope and duration) to prevent or remedy the damage arising from the situation. In any case, the cause of the emergency must not be attributable to the contracting authority itself, meaning that the emergency could not have been avoided through diligent action by the authority⁷⁰.

⁶⁷ EC Communication [Guidance on Public Procurement of Innovation](#) (2021/C 267/01)).

⁶⁸ The [2019 OIRESCON Instruction](#) recommends soliciting at least three tenders in order to ensure the highest attendance.

⁶⁹ [Decalogue of good practices in the processing of minor contracts by local entities](#) (2022), prepared by the Basque Competition Authority within the framework of the Municipalities and Competition project.

⁷⁰ For example, European Commission Guidance on the use of the public procurement framework in the emergency situation related to the COVID-19 crisis 2020/C 108 I/01 ([C/2020/2078](#)). Also, the Report of the Advisory Board on State Public Procurement 8/2024, of 2 July 2024.

4.7.3. Recommendations

Box 32. Determination of the procedure or type of procurement process

- ✓ Preferably choose the open procedure, as it offers greater safeguards for competition, an essential instrument for achieving efficiency.
- ✓ Provide sufficient justification for the use of procedures other than the open procedure, demonstrating not only that the legally established conditions are met, but also that the choice is properly aligned with the principle of good administration:
 - ✓ The participation thresholds set for procedures that limit the number of candidates should be regarded as minimums, and it is advisable to increase the number of invitations to ensure effective competition in the process. In any case, the identity of the invited companies should not be disclosed to reduce the risk of collusion.
 - ✓ The conditions and aspects for negotiation must be clearly established in the tender documents or descriptive documents.
 - ✓ Negotiations must be conducted with guarantees of equal treatment, transparency, and non-discrimination, avoiding the risk of arbitrariness and limiting discretionary scope.
 - ✓ Avoid both excessively short deadlines for submitting requests and bids, and any bias in favour of established operators.
- ✓ The award of contracts through procedures involving interaction with bidders must be justified from the perspective of being the option that best represents the quality-price relationship.
- ✓ When the use of procedures limiting participation is allowed due to the failure of prior ordinary procedures, first assess the reasons that influenced that outcome and consider, as far as possible, redesigning a new tender that promotes participation and competition. In any case, if there is suspicion of signs of collusion, it must be reported to the competition authorities (Arts. 132 and 150 LCSP).
- ✓ With respect to minor contracts (direct awards):
 - ✓ Strengthen planning and scheduling efforts⁷¹ to avoid resorting to restrictive models in cases where it could be prevented (e.g., direct awards for recurrent and predictable needs). If the aim is to meet low-value needs quickly, it is preferable to use simplified open procedures or dynamic purchasing systems rather than direct awards. For the processing of direct awards, prior publication is recommended, and at least three offers should be compared.
 - ✓ For urgency procedures, the existence of the justifying causes (unpostponable need or reasons of public interest) must be rigorously documented, and, as far as possible, the standard deadlines for steps such as the submission of bids should be maintained.

⁷¹ CNMC Guide, Phase I [Public Procurement Planning](#) (2020).

- ✓ Emergency procedures must be used exceptionally and with justification, in the strictly defined cases, and only when the expected outcome cannot be achieved through less restrictive procedures regarding publicity and participation (e.g., urgent procedures).
- ✓ Exercise heightened oversight in procedures limiting participation due to the risk of collusion.

4.8. Access requirements

Only natural or legal persons, national or foreign, who, in addition to not being subject to debarment, can demonstrate their economic and financial, technical, or professional solvency—and, where applicable, classification (Article 65 LCSP)—may contract with the public sector. These access requirements aim to ensure the proper execution of the contract and to guarantee that the contracting companies meet minimum standards to assume all responsibilities arising from it.

The access requirements represent more intense limits than the award criteria so far as the application of the latter does not result in the exclusion of interested parties from the procedure (except in cases where the tender is classified as abnormally low). The same applies to the special conditions of execution, since these are only required of the successful bidders⁷².

The following risks can be identified:

Box 33. Risks

- ✗ If unnecessary or disproportionate requirements are set in relation to the subject and characteristics of the contract, entry barriers are created that can undermine competition and efficiency in tenders.
- ✗ The participation of SMEs and newly established companies is directly affected by the non- application of flexible measures to demonstrate solvency (for contracts not subject to harmonised rules or non-HR contracts) and by the choice of means to prove it (HR contracts).

⁷² For example, [TARCR Resolution 1127/2022](#) of 29 September 2022, considers a supply contract for the acquisition of Microsoft Office software licenses in which possession of a Microsoft Gold Partner certificate was required as an admission criterion. The Tribunal held that, although many companies can obtain the certificate, it cannot be required as proof of solvency because it is not among the specific means allowed to demonstrate it (Article 89 LCSP) and is restrictive of competition since it applies to all bidders. It could, however, be considered as a special execution condition that must be met only by the bidder proposed as the awardee, provided there are well-founded reasons justifying the need for such a certificate in relation to the subject -matter of the contract.

Contracting authorities must justify the appropriateness of the capacity and experience requirements at the lot level (if applicable), as well as the means considered suitable to demonstrate compliance, avoiding standardised formulas that do not fit the contract being tendered.

In certain cases, nothing would prevent the contracting authority from assessing whether it is necessary to require prior experience for the execution of smaller or less complex contracts and considering its replacement with deterrent sanctions in case of non-compliance, which could include debarment from contracting with the Public Administration⁷³.

When entities interested in participating in a tendering procedure do not meet the required participation requirements on their own, they may explore: on the one hand, the constitution of a joint venture to accumulate the solvency of its members (Article 69 LCSP) or, on the other hand, integrate solvency or classification with external personal or material resources (Article 75 LCSP)⁷⁴. Likewise, to simplify and facilitate participation, alternative and voluntary means of accreditation should be considered, such as registration in the register of bidders (Article 337 LCSP⁷⁵).

4.8.1. Solvency and classification requirements

The regulations determine the means of proof to prove solvency in HR contracts, while for the rest of the contracts other means of proof may be admitted (Articles 87-91 LCSP). In addition, it recalls that these requirements must be proportionate to the subject matter of the contract and must not in any case constitute an obstacle to the participation of SMEs. It is essential that exceptions and flexibility measures are provided for these, as well as for newly created companies (less than 5 years old).

- **Economic and financial solvency:** Among the various means for demonstrating it provided by LCSP, the most commonly used parameter is turnover, established as a maximum limit rather than a minimum (*the minimum annual turnover required must not exceed one and a half times the estimated value of the contract*). By the principle of proportionality, this maximum should not be set by default except for justified reasons (e.g., special complexity or special risks). In any case, the company's minimum annual turnover is normally understood to refer to the best of the last three available financial years, depending on the date of establishment or start of activities, and should be compared with the annualised estimated value of the contract (at the lot level).

⁷³ [E/CNMC/006/19](#) Study on intercity passenger transport by bus (2022).

⁷⁴ For example, [Supreme Court Judgment 4197/2024](#) of 23 July 2024 analyses both the concept of the joint venture and the integration of solvency by external means into a contract for the regular public transport of passengers by road.

⁷⁵ Registration is mandatory in the simplified open procedure.

However, turnover is more an indicator of company size than of its financial health, which could be better demonstrated using financial indicators provided by the LCSP, such as net assets, solvency ratio or financial leverage, average payment periods for obligations, etc. Additionally, it is advisable to allow a variety of alternative means to demonstrate economic solvency, so as not to discriminate between operators with sufficient economic capacity (besides those mentioned, the submission of guarantees or financial bonds, or the availability of professional indemnity insurance, should also be considered)⁷⁶.

If professional liability insurance is required, it should be requested as a commitment to obtain coverage in the event of being awarded the contract. The insured amount should be proportional to the estimated value of the contract, considering the potential economic risks that may arise during its execution.

In non-HR contracts, when for a valid reason the bidder is not in a position to submit the documents required to prove solvency (e.g. a newly created company that has not yet deposited its annual accounts in the Mercantile Registry), it will be authorized to prove its economic and financial solvency by means of any other document that the contracting authority deems appropriate (Article 86 LCSP).

- **Technical or professional solvency:** the most common is to require experience measured through certificates of good execution in respect to the main supplies, works and similar services carried out in the last 3 years (5 for works). Where necessary to ensure an adequate level of competition, contracting authorities should extend these reference periods (more than 3 years and, in the case of works, 10 years). This requirement of minimum prior experience should not discriminate by type of entity (e.g. public or private) or territories⁷⁷.

Moreover, in non-HR contracts for services and supplies and works below €500,000, this experience requirement is not applicable to newly established companies, and the tender documents must specify the other alternative means chosen by the contracting authority.

In any case, in HR contracts, although it is not possible to establish a differentiated regime for demonstrating technical solvency based on the characteristics of the companies participating in the tender, contracting authorities may choose means other than prior experience that they consider appropriate⁷⁸.

⁷⁶ [E/CNMC/006/19](#) Study on interurban passenger transport by bus (2022).

⁷⁷ Article 45 of [Law 14/2013 of 27 September 2013](#) on support for entrepreneurs and their internationalisation prohibits the granting of any direct or indirect advantage to companies that have previously contracted with any Administration.

⁷⁸ Resolution [588/2024](#), of 9 May, of the TACRC and [Report 44/23](#), of 21 March 2024, of the Advisory Board on State Public Procurement.

The LCSP provides other means, such as the description of personnel (qualifications, minimum experience), facilities, machinery and equipment, products to be supplied, quality controls, or environmental management certificates. If accreditations, labels, or certificates are required, it is necessary to allow equivalent or alternative certificates to those specified in the tender to ensure that the requirement is not disproportionate or discriminatory⁸⁰.

In any case, technical or professional solvency should not be demonstrated through economic criteria, as this creates an overlap between the two types of solvency (e.g., a requirement linked to a turnover or annual contract value [70%] is more akin to economic solvency).

Box 34. Disproportionate prior experience

The tender for the concession of the on-street regulated parking service in certain streets of the municipality of Getxo (670 spaces) required as a technical or professional solvency condition a minimum of three years' experience providing the same service in four different municipalities, each with a population over 15,000 and 1,000 regulated spaces.

The National Court upheld the CNMC's appeal against this clause, as it constituted a clear restriction on access to an economic activity that was neither justified nor supported by compelling reasons of general interest, thereby violating the principles of necessity and proportionality under Article 5 LGUM⁸¹.

Box 35. Technical solvency in intercity bus transport tenders

Five key aspects for setting technical solvency requirements, when the technical complexity of the service justifies it, to ensure the minimum necessary impact on competition:

- ✓ Extended period for which solvency is required – Opt for using an average size of operations over the last three years rather than requiring compliance in each individual year.
- ✓ Broad definition of relevant services – Include related activities (discretionary, tourist, or international transport) to demonstrate experience in passenger transport.
- ✓ Objective parameters to quantify prior experience – Requiring a fleet equal to or larger than that assigned to the tendered service favors incumbents and reduces incentives for efficiency.

⁷⁹ Resolution [778/2022 of 23 June 2022](#) of the TACRC on the requirement of personal and material resources and their necessary motivation and proportionality.

⁸⁰ For example, the requirement of experience in a specific tax management application without admitting experience in other similar or equivalent computer applications ([UM/010/22](#) Report Article 26 LGUM of 8 February 2022).

⁸¹ [UM/035/18: PUBLIC PROCUREMENT. GETXO PARKING MANAGEMENT](#) Article 27 LGUM – and [Judgment of the National High Court 2965/2023](#), 6 June 2023.

- ✓ Impact on competition of the minimum threshold or absolute level of experience required – Avoid the risk of information asymmetry and potential influence of incumbents (e.g., number of vehicles and assigned staff) or consolidation of larger companies by requiring a fleet or resources equal to or greater than those of the contract.
- ✓ Joint ventures (JV/consortia) participation – Allow the aggregation of technical solvency among the companies forming the JV⁸².

- **Business classification:** It allows demonstrating solvency for entering into contracts of the same type and value for which it has been obtained and is mandatory for works contracts exceeding €500,000 (Article 77 LCSP). Therefore, as a certificate that replaces possible specific solvency requirements, to promote competition, the tender documents should indicate the minimum required group, subgroup, and category corresponding to the contract's object, so that operators have the alternative option to demonstrate their solvency through business classification, regardless of whether it is mandatory for the contract in question.
- **Assignment of personal or material resources as additional solvency requirements:** it must be reasonable, justified and proportionate to the entity and characteristics of the contract (e.g. technical complexity), so that it does not limit the participation of companies in the tender (article 76 LCSP).

Box 36. Unjustified personnel requirements

In a framework agreement for the supply of textbooks in the Community of Madrid, the tender required at least one person per lot (27 across geographic zones) for personalized attention to schools, who could not be the same person designated in the Technical Specifications as responsible for the contract.

This requirement violates the principle of freedom of business self-organization and disproportionately affects small and medium-sized bookstores, which have fewer staff and less flexibility in reallocating personnel. Moreover, it is not related to the ability to provide better service. For these reasons, the CNMC recommended revising the technical or professional solvency criterion, focusing less on staff size and more on the ability to fulfill the supply under the required conditions⁸³.

⁸² [E/CNMC/006/19](#) Study on interurban passenger transport by bus (2022).

⁸³ [INF/CNMC/038/19](#) – Reply to the Ombudsman's Consultation on the Framework Agreement for the Supply of Textbooks in the Community of Madrid.

4.8.2. Prohibited requirements

- × **Requirement for a specific legal form or profit-making purpose:** such a requirement unnecessarily limits competition and, in particular, affects the principle of competitive neutrality, by excluding potential economic operators who, nevertheless, can demonstrate their economic and financial standing and technical and professional ability to properly perform the contract. Likewise, the contract design should not compel the formation of temporary joint ventures (consortia or joint bidding groups), as this would unduly restrict the freedom of organisation of undertakings and could unnecessarily increase the risk of collusive coordination among their members⁸⁴.
- × **Discrimination on territory grounds:** contract clauses that may give rise to differentiated treatment based on the nationality, language, domicile or territorial location of the tenderer or contractor, even indirectly (e.g. by giving preference to experience linked to a specific geographical area, or by requiring the location of facilities of potential contractors within the contracting authority's territory), are considered discriminatory⁸⁵.

Box 37. Discriminatory requirements on territorial grounds

In a cleaning services contract, the contracting authority required, as a condition of technical and professional capacity, that tenderers hold “Regional Branch Offices” (*Delegaciones de Zona*) in each province where the contract is to be performed. The Contract Review Tribunal (*TACRC*) considered that this requirement is not essential for the proper performance of the contract and constitutes a clear restriction of competition, as it is unnecessary, disproportionate and contrary to the principle of free competition. Furthermore, the contracting authority cannot invoke its necessity to deal with operational incidents, since the tender specifications already include, as a special performance condition, the obligation to designate a contract manager or contact person who must be readily available to ensure the prompt resolution of any incidents⁸⁶.

A tender for the dismantling, removal, and management of construction-demolition waste from a wastewater treatment plant in Ibiza required the official residence of the project manager and the health and safety coordinator to be on the island. This requirement restricts the freedom of movement prohibited under Article 18 LGUM, as residency on the island is not necessary to ensure professional performance. Weekly site visits can be guaranteed without imposing territorial residence, thereby promoting free competition and non-discrimination in the market⁸⁷.

In the tender specifications for the audit services contract of Aguas de Cádiz, S.A., tenderers were required to have experience auditing local water utilities within Andalusia, and additional award criteria valued experience of the engagement partner and team leader in that region. These conditions were found to be unnecessary and disproportionate, thus infringing the principles of necessity and proportionality under Article 5 of the Law on Market Unity (LGUM)⁸⁸.

⁸⁴ [INF/CNMC/038/19](#) Report on the Specifications governing the conclusion of the Framework Agreement for the supply of textbooks to public schools in the Community of Madrid; [INF/CNMC/033/19](#) Public procurement of the IMSERSO tourism programme.

⁸⁵ Article 18 of the LGUM. In any case, the above should be taken into account with regard to the criteria of territorial rootedness (section 4.4.1).

⁸⁶ [Resolution 101/2013](#), of the TACRC.

⁸⁷ [UM/039/24](#) Report on Article 28 LGUM, of 25 June 2024.

⁸⁸ [UM/0087/22](#) report article 28 LGUM of 19 January 2023. Another example, [UM/048/21](#) Report Article 26 LGUM of 22 July 2021, in which the complementary services contract was required to

- × **References to types, brands, or technical specifications** should not determine access to the tender, unless justified by the object of the contract or, exceptionally, when it is not possible to provide a sufficiently precise and intelligible description of the goods. In such cases, the reference to brand, patent, or type must be accompanied by the phrase “or equivalent” (see the following section on technical specifications).

Box 38. Brand references

In a framework agreement for office supplies, references were made to commercial brands (“manufacturer’s brand”) and preference was given when evaluating bids (over “white-label” or distributor brands). The CNMC recommended avoiding such brand references and instead including a list of items with objectively described technical and quality specifications. Likewise, the differentiated evaluation of bids was questioned, since if the required characteristics and quality of the products are specified, the brand should neither be a requirement nor condition the submission of bids, in line with the principle of non-discrimination⁸⁹.

- × **Disproportionate economic burdens:** These should be avoided, for example, requiring civil liability insurance of an excessive amount unrelated to the subject matter of the contract. Similarly, postponing payments beyond the general regime (30 days) is prohibited, as it effectively imposes an economic or financial solvency requirement to participate in tenders. Supporting extended payment periods demands enhanced economic or financial capacity, unjustifiably limiting the participation of potential operators⁹⁰.
- × **Specific quality certifications:** certification issued by any accredited certification body must be accepted. In addition, the requirement of a certain quality certification to demonstrate the solvency of the bidder must constitute a mere accreditation alternative, without this implying the exclusion of possibilities of accreditation by other means. In any case, the required quality certificates must be related to the object and development of the contract and consider their impact on competition, since it may imply that part of the market does not have them since both obtaining and maintaining them involves a cost that may be disproportionate for certain companies, such as SMEs or new entrants.

to have previous experience in municipalities with a large population or at least 75,000 inhabitants, without the experience accumulated in other territorial administrations being valid.

⁸⁹ [INF/CNMC/008/16](#), Framework Agreement for Non-Inventoriable Office Supplies.

⁹⁰ Article 108.2 LCSP; [Case 28.21](#). Public Sector Contracting. Deferral of payments.



- × **Reserved activities:** must avoid restricting the participation of operators who are adequately qualified to provide the contract's subject matter under the required conditions⁹¹. Similarly, specific academic degrees or certifications not supported by the legislation governing the relevant activity should not be required, due to the risk of excluding professionals with sufficient technical competence. Such requirements should be expressed in terms of “technical capacity” of the professionals, which may encompass a broader range of qualifications rather than a single degree.

Box 39. Reserved activities

In several road construction tenders, holding a Master's in Civil Engineering and a Master's in Geological Engineering was required to perform the tasks of Team Leader and Technician, excluding graduates in Geology, Geological Engineering, or Civil and Territorial Engineering. This requirement of specific degrees constitutes a restriction on access to economic activity, contrary to the principles of necessity and proportionality under Article 5 of the LGUM⁹².

⁹¹ For example, requiring the double requirement of having a degree in teaching and history in a contract for the management of didactic activities in an Archaeological Museum, without it being considered necessary and proportionate to the activities demanded and excluding other profiles such as archaeologists ([INF/CNMC/125/21](#), Report on the consultation of the Inspectorate of Services Ministry of the Balearic Islands).

⁹² [UM/061/20](#) Report art. 26 LGUM, of 14 October 2020. The CNMC has ruled on numerous occasions on activity reservations contrary to the principles of necessity and proportionality, which have the effect of restricting competition in public tenders within the framework of the LGUM. For example, the exclusive reservation in favour of architects in tender for the drawing up of plans in a football stadium, excluding technical architects ([UM/020/24](#) Report art. 28 LGUM, of 15 April 2024).



Box 40. Discriminatory requirements: unjustified exclusion of operators

In some tenders for regular school transport in low-density population areas, and for labour and non-urgent non-assisted medical transport, participation of operators was unjustifiably restricted — for example by requiring exclusively taxi vehicles in some cases, only PHVs in others, or mandating a specific vehicle type like buses or ambulances. Consequently, in the three sectors analysed there was a low level of competitive pressure in terms of the number of bidders, which resulted in winning bids being very close to or equal to the tender base budget, generating a negative impact in terms of loss of economic efficiency and of quality and innovation for service users. According to the CNMC's recommendations, such restrictions hinder competition and efficiency⁹³.

In a framework agreement for advertising space in media outlets, participation was limited solely to media owners, excluding advertising agencies, media agencies and other economic operators. Since there was no adequate justification for excluding operators capable of providing the service, the Tribunal concluded that this access requirement unjustifiably and discriminatorily restricted competitive participation⁹⁴.

Box 41. Principle of competitive neutrality and access to public procurement

The CNMC was consulted on the possibility of a subsidiary of the public business entity ENAIRE participating, through public tenders organized by AENA, in the market for air traffic control services, considering that ENAIRE is AENA's majority shareholder and the potential impact on the principle of competitive neutrality.

In line with the OECD Recommendation on Competitive Neutrality (2021), the OECD Guidelines on Corporate Governance of State-Owned Enterprises (2016), and the LCSP itself, in order to promote the participation of operators and effective competition among them, the participation of all suppliers (public or private) with the required aptitude and capacity should be allowed on equal terms, with procedures that are open, transparent, and non-discriminatory.

Therefore, AENA must exercise special caution in designing tender procedures to maximize operator participation, avoid unjustified restrictions on competition, and ensure the principle of competitive neutrality. Additionally, it must take appropriate measures to effectively prevent potential conflicts of interest in its tenders (Article 64 LCSP). If it fails to do so, it may be necessary to exclude the operator, i.e., ENAIRE (or its subsidiary), from the tender⁹⁵.

⁹³ [PRO/CNMC/002/19](#). Report on public tenders for road passenger transport services in tourist vehicles (school, work and health).

⁹⁴ [Resolution 1/2020](#) of the Administrative Court of Contractual Appeals of Castilla y León, of 9 January 2020.

⁹⁵ [INF/CNMC/004/23](#): Report on the consultation of the public business entity, ENAIRE, on the participation of the state-owned trading company, ENAIRE GLOBAL SERVICES S.A. in public tenders.

4.8.3. Recommendations

Box 42. Setting access requirements

- ✓ Justify and properly weigh, for each contract (or per lot), the need for solvency, classification, and resource requirements, since they can act as barriers to entry—especially for new entrants and SMEs.
- ✓ Ensure access requirements are linked to the contract's object, proportional to its need and value, justified, and aimed at promoting effective competition, avoiding discriminatory restrictions that could limit qualified bidders or unfairly favor certain operators.
- ✓ Consider flexibility measures to facilitate proving solvency, such as using external resources or forming consortia (UTES/joint venture) to pool experience and capacity, if this complies with competition law.
- ✓ For non-HR supply and service contracts or works under €500,000, apply flexible rules for newly created companies, without requiring prior experience.
- ✓ For HR contracts, choose appropriate means to demonstrate technical solvency, which can differ from prior experience if not essential, to avoid unjustified access restrictions.
- ✓ Avoid unjustified activity reservations, arbitrary requirements, or strengthening of competitive positions due to prior public sector contracts.
- ✓ Promote administrative simplification measures for proving access requirements, such as registration in the bidders' registry (ROLECE) or classification, which facilitate participation by interested operators.

4.9. Technical Specifications

The determination of the technical aspects of the contract (e.g. quality, materials, processes and methods, social, labour, environmental impact, etc.) reflects the conditions under which the contract is to be performed. Although the contracting authorities may configure the object of the contract in the most appropriate way to satisfy their needs (Article 99 LCSP), they may not establish technical requirements that unjustifiably impede access to the tender, harming competition (Article 126 LCSP)⁹⁶.

⁹⁶ Recent CJEU judgment of 16 January 2025, [C-424/23](#), and of 16 January 2025, [C-424/23](#); Resolution [174/2021](#), of 2 December, of the TAR of Castilla y León.

Box 43. Risks

- ✗ Set technical requirements that in practice can only be met by a single product or are accessible to only one bidder, or under conditions so burdensome for interested parties that they constitute an effective barrier to competition.
- ✗ Demand arbitrary requirements that are not strictly necessary to achieve the objective pursued by the contract, which could equally be fulfilled with alternative technical solutions, thereby unjustifiably limiting the submission of efficient and innovative solutions.

In order to facilitate the participation of all operators interested in the tender, especially SMEs, the technical requirements should describe in a concise and clear manner the needs to be solved, the requirements for this and the expected result. A balance must be found between two factors: reducing the margin of uncertainty due to different interpretations, but without limiting bidders' ability to innovate with respect to the solutions they can offer to properly execute the contract⁹⁷.

Box 44. Discriminatory technical specifications

In a contract for the supply of breast prostheses, it was required to hold a certificate proving approval by the U.S. Food and Drug Administration (FDA), in addition to the EU CE marking certificate. This double requirement affects the principle of competition due to the discriminatory treatment it produces against certain bidders (the FDA certificate is only granted to companies that market their products in the United States) and constitutes a breach of Article 126.6 of the LCSP, which prohibits technical specifications from referring to a specific origin or procedure characterizing the products.⁹⁸

⁹⁷ OARC Resolutions 116/2014, 7/2016, 111/2017 and 70/2018; Judgment of the TSJPV 217/2021, of 28 May 2021.

⁹⁸ [TACRC Resolution 1137/2021](#), of 9 September.



Box 45. Indeterminate technical requirements

In the Tourism Program for Older People and Maintenance of Employment in Tourist Areas (IMSERSO program) contract, certain technical requirements were established for tourist accommodation establishments that lacked precision and clarity, creating a risk that the contracting authority would have to make a technical judgment and potentially exclude certain establishments (*"Bidding companies must submit detailed documentation of all elements necessary to assess the suitability of the facilities"; "Sufficient space for cultural and recreational activities"; or "Lunch and dinner menus must include medium-quality table wine"*). It was recommended to develop clear minimum requirements and consider alternative ways to assess the suitability and quality of available establishments (e.g., certifications, user ratings, etc.).

Regarding coach characteristics, requirements such as *"comfortable and ergonomic seats"* were imposed without further specification, and vehicles could not be older than five years from the date of first registration. It was noted that if vehicles comply with technical and safety regulations, imposing additional requirements could favor larger operators.

Additionally, it was required to have a representative at each hotel while also maintaining a *call center* for customer service. It was recommended to reconsider the obligation of having a physical representative if the other information and communication requirements sufficiently cover customer service.⁹⁹

4.9.1. Recommendations

Box 46. Setting technical specifications

- ✓ Ensure the principle of transparency and equal treatment of all bidders and avoid placing some bidders at an unjustified or disproportionate advantage over others relative to the objective pursued by the contract.
- ✓ Draft technical specifications in terms of performance requirements (expected results) and functional demands to encourage innovation and avoid artificially restricting competition.
- ✓ Allow submission of bids that reflect the diversity of solutions and technical specifications available in the market, respecting the principles of technological neutrality and transparency. Avoid technical requirements that:
 - ✓ Involve unnecessary technical complexity or imprecision.
 - ✓ Can only be met by one or a few specific operators (e.g., reproducing key characteristics of supplies, services, or works typically offered by that operator);
 - ✓ Are overly detailed, as this increases the risk of favoring products from a particular manufacturer.

⁹⁹ [INF/CNMC/033/19](#) Public procurement of the IMSERSO tourism programme. Likewise, requirements of generic, insufficient and imprecise content (e.g. *"Continuing training plan for personnel"*) [Resolution 089/2024, of 17 May](#), of the Administrative Body for Contractual Resources of the Autonomous Community of the Basque Country.

- ✓ Are unnecessary or disproportionate, where their added value to the contract's object does not justify their restrictive effect on competition.
- ✓ Allow, regarding the requirement of specific technical standards, labels, seals, or certificates, their alternative accreditation through any other valid means that provides an equivalent level of reliability.
- ✓ Refer to a brand, patent, origin, or specific production only in exceptional and duly justified cases, when it is not possible to provide a sufficiently precise and intelligible description of the contract's object.

4.10. Award criteria

Award criteria should ensure effective competition between tenders, be linked to the subject matter of the contract and be objective, transparent and non-discriminatory. The LCSP requires that the variables be determined with clarity, transparency and objectivity, encouraging the plurality of economic and qualitative criteria. In other words, it is key to guarantee effective competition to select the offer that best responds to the satisfaction of the needs linked to the object of the contract in terms of quality-price (Article 145 LCSP).

In its determination, the following risks are warned:

Box 47. Risks

- ✗ Use discriminatory criteria that provide unjustified advantages to certain bidders (e.g., previous contractors).
- ✗ Introduce excessive discretion for the contracting authority, arising from a lack of precision regarding the evaluable aspects.
- ✗ Weight the different criteria (quantitative, qualitative, and those subject to judgment) in a way that discourages competitive and/or high-quality bids.

4.10.1. Weight the basic variables with precision and neutrality

The general rule is to consider a plurality of award criteria, differentiating between qualitative criteria (quality, aesthetic and functional characteristics, accessibility, environmental, social or innovation aspects, organization, qualification and experience of the personnel assigned to the contract or after-sales service and technical assistance), and those based on costs (whether price or a cost-based approach, such as life cycle cost).



In any case, each criterion must be duly weighted and detailed in terms of its content and method of evaluation in the specifications to avoid ambiguities and promote transparency and effective competition in the evaluation of bids¹⁰⁰.

In general terms, the use of various economic and qualitative criteria favours the participation of different profiles of operators (including SMEs) and hinders collusion between bidders. However, where exceptionally, only one award criterion¹⁰¹ is used, it must be of an economic nature and be related to costs, price or life-cycle cost.

Likewise, the inappropriate or excessive weight of criteria that are scarcely relevant for the execution of the service or that impose additional costs on bidders in relation to the current successful bidder (e.g. subrogation or continuity of employment) must be avoided. If these conditions can be considered essential, it is preferable to establish them as special conditions of execution in the specifications themselves.

Although the regulations are clear in this regard, it is recalled that the assessment of the company's experience or characteristics that grant an unjustified competitive advantage to previous contractors¹⁰² (e.g. preferential rights in sectoral regulations¹⁰³ or territorial requirements) is not admissible, as it affects the principle of equal treatment, non-discrimination and competitive neutrality.

Exceptionally, experience (usually required as a solvency criterion) may be used as an award criterion if it refers to the personnel assigned to the contract who will carry it out, and the quality of such personnel significantly affects its optimal execution (e.g., training or consulting service contracts). In any case, it should be used to assess the quality of the offer, must not be given a disproportionate weight relative to other criteria, and cannot create entry barriers that unjustifiably limit competition.

As for the possibility of admitting improvements with respect to the requirements set out in the specifications, they must be sufficiently specified (requirements, limits, modalities, characteristics of these and weighted score) and be linked to the object of the contract. Generic or indeterminate descriptions are not admissible. In any case, the improvements proposed by the successful bidder will become part of the contract and may not be subject to modification (Article 145.7 LCSP).

¹⁰⁰ [INF/CNMC/456/23](#) Framework agreement for the selection of companies to carry out works at Army bases, barracks and establishments in the national territory.

¹⁰¹ An exception to this rule would be contracts that include intellectual services of art. 145.4 LCSP.

¹⁰² Article 45 of [Law 14/2013 of 27 September 2013](#), on support for entrepreneurs and their internationalization, prohibits granting any direct or indirect advantage to companies that have previously contracted with any public administration.

¹⁰³ For example, preferential rights in favor of concessionaire companies in the event of a tie in bids in the regular intercity passenger transport sector.

On the other hand, a deadline for the submission of bids must be considered that allows operators a reasonable period to prepare and submit their bid, considering the complexity of the subject matter of the contract and whether a preliminary market consultation has been carried out in the preparatory phase of the tender (Article 115 LCSP).

Box 48. Weighting of award criteria and competitive neutrality

In the framework agreement for the supply of automotive fuels in the state public sector, some lots evaluated various award criteria in addition to price, while others considered only the discount. In the first case (multiple criteria), the proposed discount and the number of locations covered by the operator in the corresponding territorial area were used, with a weighting of 50% for the discount and 50% for the number of locations. Furthermore, in Lot 1, the broad geographical definition (Peninsula and Balearic Islands) and the fact that up to 50 points could be awarded for the number of locations included in the offer meant that large operators could compete from a preferred position (since the weight of the number of locations in the tender could reduce price competition for the larger operators, while smaller operators would have to make a greater effort to enter the framework agreement via price discounts).

To facilitate effective competition for smaller operators, the CNMC recommended increasing the weighting of the discount and reducing that of the number of locations, thereby providing greater incentives to compete among the different types of potential bidders. This recommendation was accepted and included in the tender documents¹⁰⁴.

Box 49. Proportionality and competitive neutrality

In the award criteria of the postal services tender documents, it was established that if administrative notifications were carried out through the designated postal operator (incumbent), 10 points would be awarded, as this operator enjoys legal presumption of proper delivery of administrative notifications under Article 22.4 of Law 43/2010.

The CNMC determined that this award criterion is contrary to the principle of proportionality recognized in Article 5.2 of the LGUM, because the contracting authority had not justified assigning 10 points to bids using the designated postal operator's network and 0 points to others that, although using a different postal network, included a tracking system that compensates for the advantages inherent to the legal presumption of delivery¹⁰⁵.

¹⁰⁴ [INF/DP/001/14](#) Report on the specifications of the framework agreement for the supply of automotive fuels.

¹⁰⁵ [UM/078/22](#): Report of art. 26 LGUM of 18 October 2022, Public procurement - Servicios Postales Cartagena

4.10.2. Objective evaluation instruments

In any case, for the evaluation of bids to be neutral, it is necessary to use objective measurement instruments. The economic criteria allow an objective and precise assessment to assess the degree of efficiency of the bidders¹⁰⁶. The rest of the (qualitative) criteria must always be accompanied by an economic criterion (Article 146 LCSP).

Regarding evaluation methods (objective via formulas or assessment through value judgments), as a general rule, the LCSP favors, whenever possible, giving greater weight to contract-related characteristics that can be assessed through figures or percentages obtained by the mere application of the formulas set out in the tender documents (Article 146.2 LCSP).

There are different formulas that can be applied depending on the case, although there are several elements of design of the formulas that it is advisable to respect to ensure that there is an adequate margin of competition in the award criteria. In general, the aim will be to award the highest score to the lowest economic offer and the rest of the offers will be scored proportionally¹⁰⁷. In this sense, the result of its application cannot be arbitrary or illogical or violate the principle of equal treatment between bidders, and must:

- ✓ Respect the basic rule of attributing the highest score to the best economic offer (e.g. lowest price, lowest maximum compensation to be paid by the Administration, or the largest number of shipments or services) and not receiving a score for those that do not offer improvements with respect to the minimum parameters set out in the specifications.
- ✓ Maintain an appropriate proportion in the allocation of points to intermediate bids, so that the full available score is distributed among the offers received, allowing bidders to compete across the entire scoring range provided.
- ✓ The increase in points should be proportional to the improvement offered relative to the minimum required in the tender specifications, so that bids equidistant from the minimum receive the same point difference¹⁰⁸.
- ✓ The reason for choosing the method and its suitability for the contract in question should be duly and reasonably justified, especially if any form of modulation to linear proportionality is introduced.

¹⁰⁶ [INF/CNMC/033/19](#) Public procurement of the IMSERSO travel program.

¹⁰⁷ Among others, [INF/CNMC/008/16](#) Regulatory specifications for the framework agreement on non-inventoriable office supplies and [E/CNMC/006/19](#) Study on interurban passenger transport by bus.

¹⁰⁸ This implies that the formula used must be continuous and linear, since non-linear or stepwise formulas distort the weight of the evaluated criterion over the overall offer.

For the evaluation of quality criteria, linear formulas can also be used to reflect the proportionality between the score assigned and the difference between the most advantageous offer and the submitted offer, or scores can be assigned based on ranges corresponding to objective characteristics related to the contract's subject, such as price, delivery time, warranty period, lower energy consumption, greater measurement capacity, etc.

The criteria that are evaluated by means of a value judgement must clearly define their content, indicating what is to be assessed and how the score is to be awarded (e.g. if a work plan is evaluated, it must be indicated how aspects such as methodology, schedule and resource allocation will be scored), and making explicit the different elements of the bids that are evaluated, avoiding overlap, even partial, between the different criteria chosen (which could distort the real weighting of the factors evaluated).

4.10.3. Maximum and minimum thresholds

Both saturation thresholds (once reached, any additional improvement is not scored) and satisfaction thresholds (below which no points are awarded), as well as criteria for identifying abnormally low bids (Article 149 LCSP), are useful tools to ensure that award procedures are transparent and competitive, avoiding unrealistic or reckless offers and promoting the viability and sustainability of the required service.

However, setting maximum limits on the evaluation of economic aspects must always be based on a thorough understanding of the market to avoid restricting healthy competition between bids, which could even invalidate the price criterion entirely, negatively affecting efficiency in public spending. Moreover, there may be cases in which a bidder is willing to offer a further price reduction without any loss of quality, from which the contracting authority could not benefit if a saturation threshold is set.

Specifically, the assessment of abnormality in the tender must be carried out by the specialised technical service, particularly in those sectors where there are information asymmetries between the contracting authority and the market, or when the incumbent operator is dependent on the costs of providing the service¹⁰⁹.

In any case, the thresholds must be duly justified in relation to the services that are the subject of the contract and must comply with the general principles of public procurement, such as those of equality, proportionality, transparency and free competition¹¹⁰.

¹⁰⁹ [E/CNMC/006/19](#) Study on interurban passenger transport by bus approved on 29 June 2022.

¹¹⁰ Judgment of the Supreme Court [1786/2024](#), of 5 March 2024.

Box 50. Limits on the evaluation of bids

The CNMC analyzed the design of the award criteria established for the centralized procurement of telecommunications services in the AGE in 2024.

Regarding criteria that can be evaluated using formulas, satisfaction thresholds (below which no points are awarded) and saturation thresholds (above which no additional points can be obtained beyond the maximum score for the criterion) were established. It is important that both thresholds are correctly designed to avoid distorting competition and to ensure that decision-making is properly justified. For example, for variables that are not fundamental to service delivery, the saturation threshold should not be set too high, to prevent certain operators from offering conditions unrelated to the object of the contract while exploiting a potential competitive advantage in the market.

On the other hand, some criteria are evaluated using a YES/NO logic, assigning zero points to companies that cannot reach the full value, even if they are close. These criteria could be replaced by more gradual quantitative scales that reduce polarization and prevent certain operators from gaining an undue advantage based on criteria that, in any case, do not appear decisive for service delivery.

Regarding criteria that cannot be evaluated using formulas, a minimum threshold of 50% of the maximum total score is established for each lot, so that a bidder can access the second phase, that is, the evaluation of the formula-based award criteria. The convenience of establishing this threshold must be justified, since the variables determining pre-selection may involve potential subjectivity and assume that bidders might not progress to the second phase without having been evaluated according to purely objective criteria.

Additionally, it was recommended to eliminate or significantly reduce the weight of criteria evaluated by judgment, advising their conversion, when possible, into formula-based criteria.

Finally, in the absence of a specified deadline for the submission of bids in the tender documents, it was recommended that, although the LCSP establishes a minimum period of 35 days (art. 156 LCSP), considering the complexity of the contract, it is essential to ensure that the deadline is sufficient to analyze the costs associated with providing the required solution, proposing that it be at least two months¹¹¹.

¹¹¹ [INF/CNMC/124/24](#) centralised procurement of telecommunications services in the 2024 AGE.

4.10.4. Recommendations

Box 51. Award criteria

- ✓ Give preference and assign greater weight to quantifiable criteria that can be evaluated using formulas due to their higher objectivity, rather than to criteria whose assessment involves subjective judgment.
- ✓ Avoid allowing criteria that are difficult to evaluate with objective parameters to undermine the score of the economic offer or to be decisive in awarding the contract.
- ✓ Design criteria based on rigorous market studies and apply potential limits on economic offers with caution.
- ✓ Maximize transparency and precision in defining evaluation criteria. Preferably use continuous and linear formulas that are simple and easy to understand, allowing points to be distributed proportionally according to the improvement each offer represents over the minimum required in the tender.
- ✓ Do not unduly favor established operators by awarding points for satisfactory performance in previous contracts.
- ✓ Justify the assessment of the professional team's qualifications in terms of necessity and proportionality, ensuring it adds value to the execution of the contract and avoiding overlap with solvency requirements.
- ✓ Avoid evaluating discriminatory criteria based directly or indirectly on the operator's place of residence, attachment, or establishment.
- ✓ Use a variety of criteria (economic and qualitative) as this generally reduces the risk of collusion among bidders.

4.11. Duration

The legislation sets maximum durations and outlines the parameters for determining the contract term: the nature of the service, the financing characteristics, the depreciation period of the investments, and the need to periodically tender the services (Article 29 LCSP).

Fixing the duration of contracts presents risks:

Box 52. Risks

- ✗ Excessively long contract durations, even if within the legal limits, create entry barriers for new operators, preventing their access to the market throughout the contract term.
- ✗ Extremely short durations may hinder the amortization of necessary investments to provide the contract service and, consequently, discourage competition while granting advantages to established operators who do not need to make such investments.
- ✗ Extensions prevent contract execution conditions from being adjusted over time to market circumstances and may effectively close the market for long and potentially indefinite periods.

Determining the appropriate duration of a contract is crucial to ensure an adequate level of competition, as it can incentivise the participation of companies, avoid market closures and promote efficiency. Therefore, the term must be motivated based on objective parameters (e.g. amortization of investments) and balanced consideration of the negative effect of market closure that occurs, especially in dynamic and fast-changing sectors (e.g. telecommunications)¹¹². Also, in services where there are low costs of entry into the market, reduced durations should be established.

On the other hand, in long-term contracts, operators, especially SMEs, are suffering from the rigidities of the price review regime, which leads to greater uncertainty and discourages competition.

With respect to concessions, the duration must be determined according to the works and services affected. If it exceeds 5 years, the maximum duration must be adjusted to the reasonable period for the recovery of the investments that the concessionaire must carry out for the correct execution of the obligations provided for in the contract. Although by their very nature concessions may be of long duration, excessively long periods that close the market and imply an unjustified restriction of competition must be avoided¹¹³.

¹¹² [INF/DP/0007/14](#) open procurement procedure for consolidated telecommunications services of the General State Administration (AGE) phase I, [INF/CNMC/136/18](#) Contract for consolidated telecommunications services of the AGE and other public entities, phase II and [INF/ CNMC/124/24 Specifications for the contracting of telecommunications services AGE and other public entities](#), phase III.

¹¹³ For example, the duration of works concession and service concession contracts involving the execution of works may reach 40 years (Art. 29.6 LCSP).

Box 53. Duration of bus passenger transport concessions

The CNMC analyzed the concession system in Spain and, among other issues, recommended improving the design of tender specifications to remove barriers to competition, facilitate the participation of more companies, and enhance the efficiency of the system. Specifically, it proposed favoring shorter contract durations. Excessive durations generate inefficiencies by reducing competitive pressure on the current concessionaire and limiting the service's ability to adapt to unforeseen changes in demand. In any case, contract durations should be tailored to the specific characteristics of each concession, avoiding the general application of the maximum legally permitted term for all concessions.

It was also recommended that expired concessions be re-tendered in a timely manner and that the two-year extension provided for in Article 82.2 of the Land Transport Management Act be used only in emergencies and for the minimum time strictly necessary. Finally, the exceptional nature of contract extensions was emphasized: public authorities should refrain from broadly extending the concessions under their control. Extensions should be treated as an exceptional mechanism compared to re-tendering the service and should be justified by the amortization conditions of the operator's assets that are significant for service provision. In this regard, investment costs in rolling stock are relatively recoverable, as this equipment can continue to be used in the liberalized market once the contract expires¹¹⁴.

Box 54. Duration of Telecommunications Services

The tender specifications for the centralized procurement of telecommunications services in the AGE established that price revisions would not be allowed during the contract term (4 years plus a 2-year extension), which prevented taking advantage of the benefits of a highly dynamic and competitive sector, as illustrated by the negative trend in sector-specific CPI indices.



The solution proposed by the CNMC (which was accepted) was a reduction of the contract extension. Other possible solutions included a negative price adjustment scheme (CPI-X) or the requirement to submit annualized bids¹¹⁵.

¹¹⁴ [E/CNMC/006/19](#) Study on interurban passenger transport by bus.

¹¹⁵ [INF/DP/0007/14](#): Specifications of the open procedure for contracting consolidated telecommunications services of the General State Administration.

4.11.1. Recommendations

Box 55. Duration Fixing

- ✓ Justify the contract duration based on objective parameters (nature of the service, amortization of investments, etc.) while ensuring that competition for the market occurs periodically and recurrently.
- ✓ Interpret the durations provided in the regulations as maximum periods, meaning it is not necessary to exhaust the full intervals.
- ✓ Adjust economic-financial solvency requirements to the annual value of the contract (when its duration extends beyond one year) to mitigate the entry barrier that would result from requiring solvency based on the aggregated estimated value.
- ✓ Specify the express duration of any extension, considering its exceptional nature; planning of contractual activity should prioritize avoiding extensions and, in all cases, their use must be justified.
- ✓ Consider the effect of the duration of framework agreements on market closure for new entrants and explore less restrictive alternatives for competition, such as dynamic purchasing systems.
- ✓ Assess the costs associated with compliance with social, environmental, or other types of clauses.

4.12. Special execution conditions

Special performance conditions are additional requirements that successful bidders must meet during the execution of the contract, such as economic considerations and environmental, social or innovation criteria (Article 202 LCSP). This type of clause must be linked to the subject matter of the contract, not discriminatory and not infringe EU law.

They pose certain risks if they are not well designed:

Box 56. Risks

- ✗ Reduce the participation of potential interested operators if they are non-transparent, unnecessary, or disproportionate.
- ✗ Cause discrimination by unduly favoring certain operators (e.g., local or already established companies) or by hindering the entry of new competitors or SMEs.
- ✗ Generate a loss of economic efficiency due to the transfer of costs that they may entail.

If properly designed, they can be a useful tool to achieve social and environmental objectives. To this end, they must avoid unjustified impacts on free competition, should not be elements unrelated to the contracted service, and must not constitute unjustified barriers due to being unnecessary or disproportionate, benefiting certain operators or even facilitating collusion.

4.12.1 Recommendations

Box 57. Determination of special execution conditions

- ✓ Ensure they are proportionate and justified in relation to the object of the contract.
- ✓ Link them to the particularities of contract execution, not to the characteristics of the awarded company.
- ✓ Include specific monitoring and compliance measures in the tender documents, as well as penalties in case of non-compliance.
- ✓ Design them based on objective and verifiable criteria and allow for different forms of compliance, avoiding favoring certain operators or accreditation processes.
- ✓ Weigh the expected benefits against the potential impact on competition.

4.13 Consequences arising from competition law infringements

Collusion between bidders is a very serious violation of competition law that undermines public spending efficiency and reduces innovation and quality to the detriment of society as a whole.

There is broad consensus on the need to strengthen companies' deterrence against collusive behavior. For this reason, it is recommended to include in the tender documents and specifications information on the consequences of breaching competition law in public procurement ¹¹⁶.

¹¹⁶ Among others, by the [European Commission](#), the [OECD](#) and the CNMC.

In this regard, it should be noted that administrative sanctions for anti-competitive practices in the context of public procurement (Article 1 of Law 15/2007 of 3 July on Competition Defense, and even Article 101 of the Treaty on the Functioning of the European Union) may **include fines** of up to 10% of the infringing company's turnover in the financial year immediately preceding the imposition, and up to €60,000 for its legal representatives or executives. Such sanctions can also include a **ban from participating in public procurement** (Article 71.1(b) of the LCSP¹¹⁷). Additionally, these practices may constitute a **criminal offense** under Article 262 of the Spanish Penal Code¹¹⁸.

It is also advisable to include in the tender documents information about the [leniency program](#), which allows companies involved in collusive practices (cartels) to benefit from exemption from fines, provided they submit evidence enabling the Competition Authority to detect the infringement. Additionally, such companies would not be subject to the aforementioned prohibition from contracting if they are ultimately sanctioned (Articles 72.5 LCSP and 65.4 LDC).

It is also appropriate to provide information in the specifications about the [leniency programme](#) that allows companies that are part of collusive conduct (cartel) to benefit from exemption from payment of the fine, provided that they provide evidence that enables the Competition Authority to detect them. In addition, the aforementioned prohibition from contracting would not apply to these companies if they were finally sanctioned (articles 72.5 LCSP and 65.4 LDC).

Similarly, it is recommended to inform in the tender documents about [external channels for citizen collaboration](#), through which anyone, anonymously if they wish, can report anticompetitive practices to the CNMC. It is also reminded that contracting authorities have at their disposal reporting channels for indications of collusive practices, as provided in Articles 132 and 150 LCSP¹¹⁹

It may also be required that bidders submit a declaration stating that they have prepared their bid independently and autonomously, without coordination with other bidders.

¹¹⁷ In this regard, [Communication 1/2023, of 13 June](#), of the CNMC, on criteria for determining the ban on contracting due to distortion of competition.

¹¹⁸ Judgment of the National High Court 4/2025 of 5 February 2025 has applied Article 262 of the [Criminal Code](#) relating to the crime of price alteration in public tenders in the firefighting air navigation market to 12 natural persons with prison sentences (ranging from six months to one year and twelve months). In addition, a ban on contracting with the public administration for a period of nine months has been imposed on the companies involved.

¹¹⁹ In the case of the CNMC, they can be submitted through its electronic headquarters.

Additionally, contracting authorities may include in the tender documents both the possibility of terminating the contract and imposing penalties, as well as the right to claim damages arising from anti-competitive practices, specifically in cases where the awardees breach competition law affecting those tenders¹²⁰. Through claims for such damages, contracting authorities contribute, on the one hand, to being financially compensated for the harm caused to public funds, thereby reinforcing citizens' confidence in proper public management, and on the other hand, to deterring future anti-competitive behavior.

4.13.1. Recommendations

Box 58. Raise awareness of the consequences arising from violations of competition law

- ✓ Include in the tender documents information on the sanctioning consequences of anticompetitive practices in public procurement, the leniency program, and the channels for communication with competition authorities.
- ✓ Inform in the tender documents of the contracting authority's power to claim damages, and include a precise clause providing for contract termination or the imposition of penalties in cases where a competition law infringement affects the contract in question.
- ✓ Require bidders to submit a declaration stating that they have prepared their offer independently and autonomously from other bidders.

¹²⁰ For example, [Communication from the European Commission on tools to combat collusion in public procurement and guidance on how to apply the related ground for exclusion 2021/C 91/01](#), and the [CNMC Guide](#) for quantifying harm from competition law infringements (2023). Special attention must be paid to the design of these clauses so that they are linked to the subject-matter of the contract (Resolution [1112/2022](#), of 27 September, of the TACRC).

5. Guidance and training by the CNMC

Public procurement is an area to which the CNMC devotes special attention within the framework of its competition promotion functions.

Firstly, it provides guidance in the exercise of its consultative role in this field (former Article 5.2 of Law 3/2013, of 4 June, establishing the CNMC). This function is complementary and in no case substitutes the supervisory or auditing responsibilities assigned to other authorities.

In addition to being empowered to issue general guidance on public procurement and competition, such as this Guide, the CNMC reviews draft public tender specifications from the perspective of promoting competition and efficient economic regulation principles.

This analysis focuses on identifying specific clauses that, in the opinion of this authority, could be improved in order to maximize participation and competition in the tender, while simultaneously preventing the risk of collusion. The recommendations are presented in a report by the CNMC Council, which is published on the Commission's website¹²¹.

Secondly, the CNMC actively promotes the improvement of the skills of public procurers to ensure that their actions are consistent with the aforementioned principles, through its training program for public employees on public procurement and competition¹²².

Finally, the CNMC has prepared and disseminated support materials for the filing of claims for damages arising from breaches of competition law¹²³.

¹²¹ Section dedicated to public procurement and promotion of competition: <https://www.cnmc.es/we-promote-competition/public-procurement>

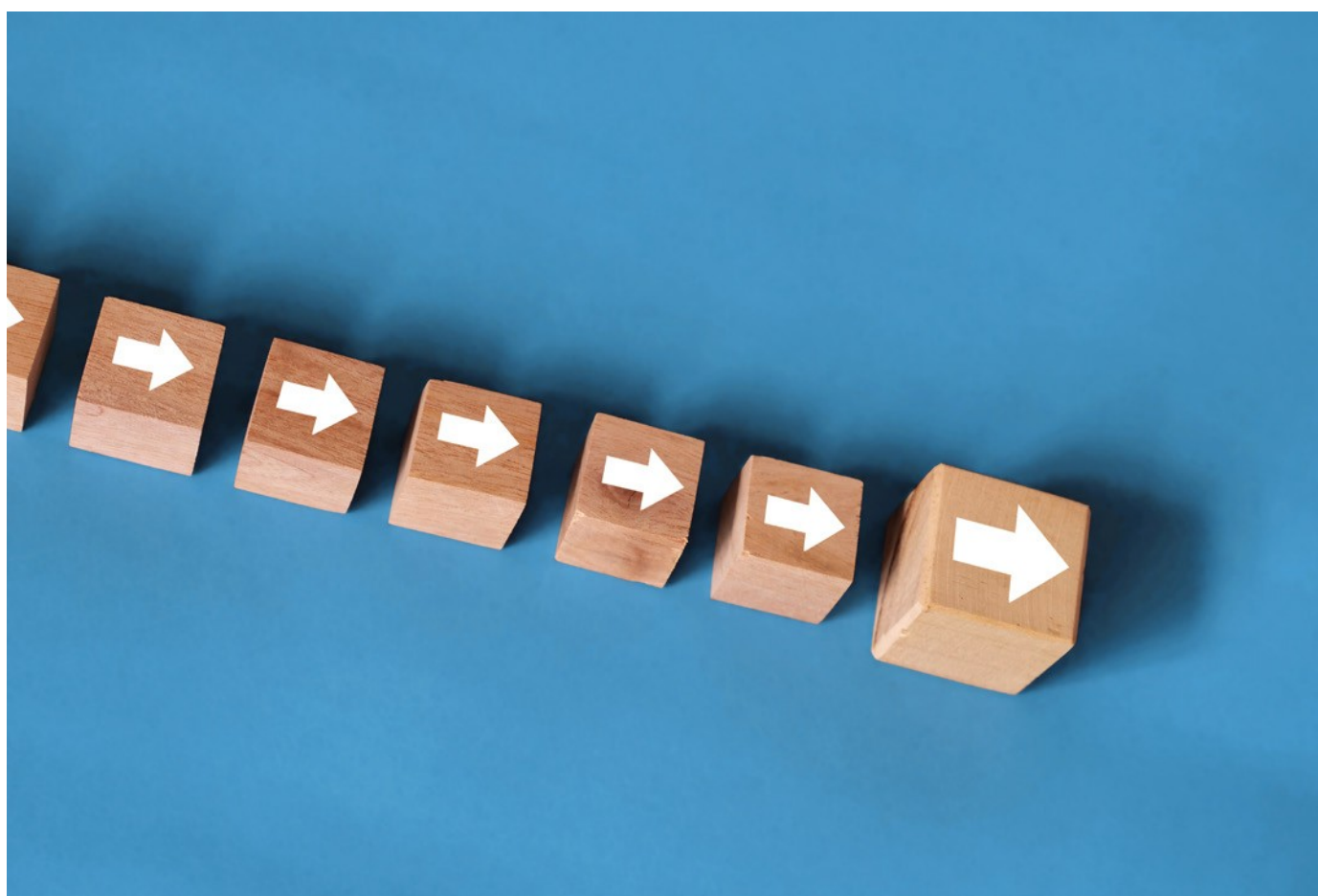
¹²² More information at <https://www.cnmc.es/impulsamos-la-competencia/contratacion-publica/pro-program-of-training-of-public-employees>

¹²³ Also, the [CNMC Guide to the quantification of damages](#) (2023) and the [ACCO Guide to damages caused to public administrations by anti-competitive practices](#) (2023).

5.1. Recommendations

Box 59. Support from competition authorities

- ✓ Review the extensive guidance and reports already available from the CNMC on public procurement.
- ✓ Consider the possibility of requesting advice from the CNMC regarding draft regulations, draft tender documents, or administrative decisions on public procurement.
- ✓ Request CNMC training on public procurement. This training may include aspects related to tender design, better detection of signs of collusion, and claims for damages.



Annex I. Participation of SMEs in public procurement

A series of recommendations to create a more accessible and competitive environment for SMEs in the field of public procurement are set out below¹²⁴.

Recommendations

Box 60. Measures for contracting authorities to enhance SME participation

- ✓ Conduct a market study, paying particular attention to the presence and role of SMEs in the sector and the main competitive variables (price, quality, specialization, innovation, etc.). If SME participation in public tenders is low, the study should determine the reasons and assess possible corrective measures.
- ✓ Maximize the dissemination of tender notices beyond mandatory channels and facilitate access to information on public procurement processes (e.g., additional publication on social media, trade magazines).
- ✓ Publish annual procurement plans (including non-harmonized contracts) and centralize all procurement information in dedicated sections of the contracting authority's website (e.g., portals with information on calls, requirements, deadlines, and answers to queries), without prejudice to the information obligations under public procurement platforms.
- ✓ Encourage and support SMEs to understand and familiarize themselves with public procurement procedures, increasing their confidence to participate (e.g., workshops, courses, open rapid-response systems for queries and information). These initiatives must be open to all interested operators, ensuring no situations arise that could increase the risk of collusion.
- ✓ Simplify requirements, procedures, and documentation in the tender specifications to reduce administrative and bureaucratic barriers. Eliminate unnecessary or disproportionate requirements, ensuring processes are straightforward and accessible. Avoid unnecessary complexity without compromising technical rigor or quality. Provide clarity on the needs and requirements. Accept quality certificates or other proof methods equivalent to the required standard.
- ✓ Prefer open and accessible award procedures over non-competitive procurement methods, such as minor contracts. Consider using simplified variants of the open procedure where appropriate. For centralized procurement, prioritize dynamic purchasing systems.

¹²⁴ In the [public consultation](#) carried out by the CNMC, numerous obstacles were identified, including technical and regulatory complexity, lack of training and information, unnecessary and disproportionate entry and performance requirements, and discriminatory award criteria. In addition, other issues were pointed out, such as the requirement of guarantees (especially in small contracts), forced extensions and the rigidity of the price review regime.

- ✓ Adjust access requirements to the minimum necessary and proportionate in relation to the nature of the subject – matter of the object. Apply flexibility measures for new entrants to demonstrate their capacity and assess the need to require prior experience. Allow the accreditation of capacity through external means. Accept participation of operators in joint ventures (JVs) provided their formation does not breach competition law.
- ✓ Divide the contract into lots when the nature of the object allows, providing reasonable justification when division is not advisable, taking into account market characteristics and the risk of dependence on one or a few operators.
- ✓ Design lots to ensure heterogeneity in size, considering the different capacities and specializations that SMEs can contribute. Reconsider mixed contracts that may hinder SME participation due to the diversity of contract objects, favoring division into lots instead.
- ✓ Allow subcontracting provided maximum transparency is ensured to enable monitoring and control (particularly regarding compliance with the main contractor's payment obligations and potential direct action by subcontractors against the contracting authority in case of non-payment). However, to encourage SMEs to act as main contractors, allow experience gained as subcontractors to count towards demonstrating capacity.
- ✓ Combine different award criteria (economic and qualitative) and consider the main competitive variables in the sector. When qualitative criteria are used, base them on objective, quantifiable parameters.
- ✓ Set submission deadlines appropriate to the complexity of the contract, bearing in mind that statutory deadlines are minimums and can be extended. If procedural deadlines are shortened, do so by reducing steps that do not negatively affect competition.
- ✓ Consider financial constraints that hinder SME participation, such as the requirement for guarantees (or, where appropriate, establishing them via retention of the contract price) and provide for the possibility of partial payments by phases.
- ✓ Ensure that the inclusion of social, labor, environmental, or innovation criteria in the tender documents does not constitute an unjustified barrier to entry that reduces effective competition. Mitigate this risk by treating such criteria as special execution conditions, and therefore only enforceable on the successful bidder.
- ✓ Promote the professionalization of contracting authorities and strengthen preventive measures against anticompetitive practices in the preparation and design of tenders.

Annex II. Technology public procurement

In the preparation and design of tenders, contracting authorities must consider the relevant market and assess key factors such as the existence of effective competition, the applicable regulation, the capacity of suppliers, and strategic objectives. These considerations are particularly relevant in rapidly evolving markets, such as technology sectors, which require a strategy different from that applicable to more recurrent or stable procurement markets.

The dynamic nature of markets such as emerging technologies and ICT (e.g., AI solutions, software, cloud services, etc.), combined with concerns over data security, means that contracting authorities must carefully monitor their decisions and consider exit and transition strategies from legacy systems.

One of the main risks of technology procurement is vendor *lock-in* dependency, which makes public entities unduly dependent on a single brand or supplier beyond the term of the initial procurement contract, harming competition for future purchases. This risk may imply in the short term a reduction in the supplier base and the exclusion of new suppliers and alternative solutions and, in the medium term, a stagnation of the market¹²⁵.

To prevent the problem and increase competitive pressure in this type of strategic and essential purchases for public entities, considering the absence of regulation in this regard¹²⁶, a series of measures are proposed in line with the recommendations provided in this Guide.

Recommendations

Box61. Guidelines for Contracting Authorities on Public Procurement of Technology

- ✓ Strengthen the strategic planning of these types of procurements and the capabilities of the managers responsible for them.
- ✓ Design contracts focused on the need to be addressed (the outcome) rather than specifying the solution. Therefore, avoid defining an overly specific object or requiring technical functionalities of the technological solution that only one operator can fulfill, which would restrict participation. Leave room for suppliers to innovate and submit alternative technological solutions.

¹²⁵ [INF/CNMC/133/18](#) Report on Framework Agreement 13/2018 for the supply of server storage systems and infrastructure software.

¹²⁶ The European Commission, through the Public Buyers Community platform and the artificial [intelligence procurement community](#), has recently updated the standard contractual clauses for AI.

- ✓ Conduct market studies and preliminary market consultations to ensure a level playing field for all suppliers (e.g. start-ups, SMEs, incumbent operators) and to understand risks such as dependency, collusion or bid manipulation.
- ✓ Use market investigations to clarify key aspects such as the precise definition of the contract's scope and the drafting of neutral technical specifications aligned with available innovations and new technologies. This information should support the design of procurement procedures that genuinely meet the contracting authority's needs. Engage with other public institutions to exchange knowledge and practical experience in this field.
- ✓ Favour award procedures that ensure publicity and competition, such as innovation-oriented public procurement, and avoid negotiated procedures without prior publication — except where the contracting authority objectively proves that only one operator can deliver the service (excluding reasons of mere convenience or opportunity).
- ✓ Prioritise Dynamic Purchasing Systems due to their open nature, rather than framework agreements.
- ✓ Use award criteria combining price with quality and project feasibility.
- ✓ Test different strategies, such as dividing the contract into lots, to attract more bidders — particularly SMEs and start-ups.
- ✓ Ensure technological neutrality in technical specifications, avoiding trademarks and promoting open standards and reference benchmarks.
- ✓ Include clauses clearly defining IP ownership, ensuring system and platform interoperability, and providing for migration or knowledge-transfer plans to reduce *vendor lock-in* risks.
- ✓ Require algorithmic transparency, traceability and explainability to justify and audit decisions of AI systems and ensure accountability.
- ✓ Ensure compliance with applicable regulation, including personal data protection and the EU AI Regulation, with appropriate data-security and confidentiality safeguards.
- ✓ Provide for periodic reviews to assess performance and results of AI (or other tech) solutions, and to plan technological upgrades.
- ✓ Link payments to achieving specific outcomes or performance metrics, especially in long-term contracts or those requiring high upfront investment.

Annex III. Public procurement at the local level

The Public Sector Contracts Law establishes a common regulatory framework for all public administrations, including local authorities. However, most local entities are small municipalities with limited populations that face significant challenges in strategically planning their procurement needs and using procedures that ensure effective competition, due to the lack of specialised technical and human resources in legal, economic, technological, and management matters¹²⁷.

The following are some general guidelines for dealing with these challenges:

Recommendations

Box 62. Guidance for Public procurement at the local level

- ✓ Strengthen the strategic planning of goods and services needs in line with the priorities of the local authority:
- ✓ Identify recurring, common and repetitive purchases that can be rationalised (framework agreements, dynamic purchasing systems) or channelled through central purchasing bodies.
- ✓ Flag purchases that are more complex or have a greater impact on the authority (e.g. due to their innovative nature, their value or strategic importance, or market-specific challenges such as supplier lock-in or limited supply), in order to design a procurement strategy that mitigates those risks (e.g. conducting preliminary market consultations or requesting support from other public bodies such as Provincial Councils).
- ✓ Draw up an annual procurement plan that provides transparency over the contracting activity of the authority (regardless of value) and encourages bidder participation.
- ✓ Implement e-procurement and digitalisation of procurement information so that electronic management tools enable real-time extraction, analysis, and monitoring of contracting data, enhancing transparency and traceability and supporting evidence-based decision-making while reducing administrative burden.
- ✓ Carry out regular monitoring and evaluation of the plan's implementation, drawing conclusions for improvement in future processes.
- ✓ Promote full digitalisation of procurement files, as it greatly improves monitoring and evaluation, as well as compliance with the Public Sector Contracts Law, particularly in contexts with scarce resources.

¹²⁷ [Guide to integrity in local public procurement](#) prepared by the FEMP (2021).

- ✓ Maximise transparency and participation of economic operators:
 - ✓ Centralise all information related to contracting activity in an accessible and open format (e.g. a bidder portal on the authority's website).
 - ✓ Strengthen dissemination of the annual procurement plan and tender notices (e.g. municipal notice boards, social media, local media, and neighbouring administrations such as provincial councils).
 - ✓ Promote business participation — particularly of SMEs — to enhance competition¹²⁸, support the local economy, and tackle depopulation, through measures such as:
 - ✓ Provide bidder support services to help operators familiarise themselves with procurement procedures and adapt to electronic means, ensuring maximum transparency and equal treatment.
 - ✓ ✓ Avoid territorial-based requirements aimed at directly favouring local operators. If sustainability objectives are pursued, rely instead on objective and measurable criteria (e.g. carbon footprint calculation or requirements regarding short distribution chains) that do not focus on the geographical location of potential suppliers.
 - ✓ Implement training measures for economic operators to address gaps in knowledge and digital capabilities.
 - ✓ Strengthen transparency in direct award procedures by allowing any interested operator to submit an offer or, alternatively, by requesting at least three quotes whenever possible
- ✓ Simplify the procedures and documentation required:
 - ✓ Use standard sheets adjusted to each need.
 - ✓ Replace the minor contract for recurring or foreseeable services with ordinary agile procedures such as simplified or super-simplified open procedures and with rationalization techniques, especially dynamic procurement systems and central purchasing systems.
 - ✓ Consider the residual nature of the minor contract as a tool for needs of low value and temporary duration.
- ✓ Strengthening cooperation and collaboration between public administrations:
 - ✓ Establish inter-municipal collaboration networks to exchange knowledge and good practices (e.g. virtual communities).
 - ✓ To explore joint purchasing between local entities and the use of purchasing centres (their own or by adhesion to those already established, for example, by the state, regional, provincial councils or federations of municipalities such as the FEMP) to achieve economies of scale and management that result in greater economic and administrative efficiency.

¹²⁸ Consider recommendations to facilitate the participation of SMEs in public tenders (Annex I to this Guide).

- ✓ Seek support from Provincial Councils to obtain legal, economic and technical assistance throughout all phases of the procurement process (preparation, design, award and contract execution), as well as for the implementation of full electronic and digital procurement systems.
- ✓ Invest in professionalisation and capacity-building, and in technical resources:
 - ✓ Prioritise the professionalisation of public procurement within the local authority to ensure efficient public management, resulting in budgetary savings and improved quality of public services.
 - ✓ Provide continuous training for procurement officials, for example through Provincial Councils.
 - ✓ Support and train staff in the use of new technologies to streamline processes and reduce administrative burdens, while enhancing transparency and traceability throughout all stages of the procurement cycle.
 - ✓ Engage with competition authorities for guidance so that procurement decisions are aligned with the principles of open competition, efficiency, and the prevention of collusive practices.



Annex IV. Checklist to verify compliance with recommendations

The following guidance outlines key considerations for the preparation and design of tenders, aimed at fostering competition and minimizing the risk of collusion during the procurement process.

I. PREPARATION PHASE		
Identify the need to be satisfied and understand the market that will provide the solution	Yes	No
✓ Has the contracting authority defined the procurement need in terms of the desired outcome, avoiding excessive specifications that could exclude viable alternative solutions?		
✓ Is up-to-date information available on the main characteristics of the relevant market where the procurement will take place?		
✓ Has a market study been carried out internally to ascertain the capacities of the private sector (solutions, interested operators, prices) and the main variables of competition in the sector? Has it been complemented with information from similar public and, where appropriate, private tenders?		
✓ If a Preliminary Market Consultation (PMC) is necessary due to insufficient market knowledge:		
✓ Has it been widely publicised and access facilitated to all potential economic operators? Do the format and methodology ensure transparency and equal treatment? Has the exchange of sensitive information between participants been prevented?		
✓ Has the information obtained been verified and cross-checked? Have the results of the PMC been publicised, linked to the procurement file, and measures taken to protect confidential business information? Have proposed solutions (including pricing) been published without identifying the economic operators' participants?		
✓ If a procurement procedure follows the PMC, have measures been taken to avoid undue competitive advantage for participants in the consultation? Has the deadline for submission of tenders been adjusted accordingly? Have measures been taken to prevent conflicts of interest, including advisers involved in the PMC and subsequent procurement procedure?		

	Yes	No
✓ Has it been checked whether there are precedents of anti-competitive behaviour in the target market, whether potential tenderers are subject to exclusion grounds for competition law infringements, or whether market conditions facilitate collusion (predictability, transparency, homogeneous products/services, high concentration, entry barriers, operator symmetry)? If signs of collusion are detected, has the matter been reported to the competition authority?		
✓ Have annual procurement plans (including contracts not subject to harmonized regulation) been published? Have tenders been planned with different deadlines, quantities and budgets to avoid predictability?		
✓ Have training sessions been held for SMEs to familiarise themselves with public procurement processes and increase their confidence to attend (e.g. workshops, courses, open systems for rapid resolution of queries and information)?		

II. DESIGN PHASE		
Structuring the procurement to maximize competition	Yes	No
✓ Are the procurement documents (contract notice, tender specifications, terms of reference) clear, comprehensive, and drafted in plain language? Have measures been taken to simplify participation and reduce administrative burdens for tenderers?		
✓ Is the subject-matter of the contract defined in functional or performance-based terms ("what is required"), allowing for innovation and alternative solutions (without focusing on the "how")?		
✓ Are the technical specifications necessary, relevant, proportionate, and non-discriminatory? Are references to specific trademarks, patents, or production processes avoided unless duly justified?		
✓ Regarding references to quality certificates, is the admissibility of other equivalent certificates expressly provided for?		
✓ Has the subject-matter of the contract been divided into lots of different sizes? Has the market structure been considered in its design, particularly the presence of SMEs? In both cases —whether divided into lots or not— have the reasons been sufficiently justified?		
✓ Where possible, has an open procedure been chosen to allow participation from all interested economic operators?		

	Yes	No
✓ If a procedure restricting participation is justified, has a sufficient number (above the legally established minimum) and varied number of candidates been invited?		
✓ As for the access requirements, such as solvency and classification, assignment of resources, technical prescriptions, have they been verified to be necessary and proportionate to the object and dimension of the contract? In the presence of newly created companies potentially interested in competing, are there any measures to make them more flexible to prove solvency?		
✓ As regards SMEs, have any measures been taken to ease the financial constraints that hinder their participation, such as requiring guarantees (or, where appropriate, establishing them by retaining the contract price) and providing for the possibility of partial payments in phases? Likewise, to encourage their participation as main contractors, is the validation of the experience obtained as subcontractors included when accrediting their solvency?		
✓ Have the requirements been determined in accordance with the principle of competitive neutrality (e.g. without creating advantages for operators because they are prior contractors, geographical location or because they are publicly owned entities)?		
✓ With regard to technology purchasing, have clauses been included that determine the ownership of intellectual property rights, prioritise interoperability between systems and platforms and provide for a technology migration or transfer plan and knowledge management, in order to minimise the risk of technological lock-in?		
✓ Has the identity and number of bidders, invitees, or candidates been avoided until at least the bid evaluation phase?		
✓ As regards demand aggregation (rationalization) techniques, have framework agreements and centralised contracts been divided into lots to encourage the participation of SMEs? Has the preference for dynamic purchasing systems over framework agreements been assessed? Has concentration risk been considered of the medium-long term supply? Especially at the local level, have recurrent purchases that are susceptible to rationalization (framework agreements, dynamic systems) or channeling through central purchasing centers been identified? Have inter-municipal collaboration networks been established to exchange knowledge and good practices and explore joint purchasing between local entities and the use of central purchasing centres?		
✓ In order to select the offer that best represents value for money: Have various objective and easily verifiable economic and qualitative criteria been considered, which generate sufficient competition between the offers? Do they improve the performance of the contract and are they linked to its object? Is their weighting in accordance with their relevance and proportional to the improvement they introduce in the contract? Have they chosen, as far as possible, valuation rules that prioritise objectivity over value judgements?		

	Yes	No
✓ Is there an adequate deadline for submission of tenders in relation to the technical complexity of the contract?		
✓ Do the procurement documents include information on the potential sanctions and exclusion from public procurement for infringement related to anti-competitive conduct, as well as on the contracting authority's power to terminate the contract and to claim damages arising from breaches of competition law?		





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