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THE PRINCIPLES OF THE EUROPEAN DIRECTIVES ON PUBLIC PROCUREMENT IN THE SPANISH SYSTEM[1]

Prof. Patricia VALCÁRCEL FERNÁNDEZ[2]

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[2] Associate Professor of Administrative Law (with qualification for Full Professor), University of Vigo.

3.5 Principle of competition

1. INTRODUCTORY APPROACH

European public procurement Law is a sector in which the relevance of the principles of law can be seen in a highly particular way. As Professor Moreno Molina has pointed out, in Spain, this is a field that is subject to the observance of a series of "general principles" rather than to the rules of positive Law. In this field, it is especially easy to see how regulations are merely a constant expression of how the major principles upon which the aforesaid rules are based materialise in a positive setting. In particular, principles such as freedom of access to tenders, publicity and transparency of procedures, non-discrimination and equal treatment of candidates or objectivity, based on national rules of a constitutional nature and of EU Law, constitute the basis for all the provisions issued in the matter and are constantly and transversally expressed in the same and in the interpretation thereof. The special and crucial role played in this sector by general principles, which prevail over any other function of the regulations on procurement, is evidenced by the fact that they apply to any contract from which public status can be assumed, irrespective of the amount thereof, of the public or private nature of the public sector entity that concludes it, and of the contractual moment at which we find ourselves (preparation, tender, adjudication, execution or extinction)[3]. Moreover, the CJEU has used general

[3] Moreno Molina, José Antonio; "Principios generales de la contratación pública, procedimientos de adjudicación y recurso especial en la nueva ley estatal de contratos del sector público", *Revista Jurídica de Navarra*, 2008, nº45, 47; y "El sometimiento de todos los contratos públicos a los principios generales de contratación", *Administración*

principles, interpreting European Directives, to add obligations that were not expressly established therein, but which can be understood to derive from the effectiveness of said principles; *i.e.*, to establish specific obligations that are deduced in a manner that is complementary to the rules appearing explicitly in the Directives[4].

All the principles which underlie the EU regulations in this sector are aimed at safeguarding the same objective: to guarantee a real and effective opening of the public procurement markets in the member States, leading to the existence of a genuine single public procurement market.

The establishment of this objective as an ultimate aim explains the existence of a strong interrelation between the different principles. Of course, each one has its own specific meaning, but they all converge in a common intersection zone, because, as we have already said, they all seek to contribute to the same goal.

On this basis, European Public Procurement Directives have listed these principles in their regulations, including obligations with regard to respecting them, and the jurisprudence of the CJEU that has dealt with interpreting them is abundant and profuse. In particular, current Directive 2014/24 / EU in the first paragraph of its first recital is clear when stating that: *"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty*

y justicia: un análisis jurisprudencial (Liber amicorum Tomás-Ramón Fernández), tomo II; Thomson-Civitas, Cizur Menor, 2012, 3429 y ss.

[4] Arrowsmith, Sue; "EC Regime on Public Procurement", *International Handbook of Public Procurement*, edited by Khi V. Thai, Auerbach Publications, Taylor & Francis Group, 2009, 267.

on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency".

2. THE PERSPECTIVE OF THE PRINCIPLES OF EUROPEAN PUBLIC PROCUREMENT IN SPANISH LEGISLATION

In Spain, general principles, as higher values upon which the legal system is based, are recognised as a source of law in Article 1.3 of the Civil Code. Although the relevance of legal principles is latent throughout the regulatory system, it is particularly evident in the framework of public Law, and even more singularly in the specific framework of public procurement that interests us here.

Owing what it does in particular to the public procurement sector, Law 9/2017, of November 8, on Public Sector Contracts (herein after, LCSP), not only lists the principles that must govern this sphere of activity, underscoring their importance in a number of initial and isolated precepts, but also, constantly and patently throughout the text thereof, there are multiple occasions in which it reiterates this requirement and/or imposes obligations aimed at guaranteeing respect for the same.

Additionally, this is an area in which it is extremely easy to find decisions from the bodies that resolve disputes that arise by arguing their reasoning on the explicit invocation of one or more of the principles of public procurement.

Thus, in the case of the LCSP, from the preamble through which it is presented, mention is made, on several occasions, of the principles that must be

respected in this sector. Particularly relevant is the reference therein alluding to the existence of a legal "system" for public procurement, wherein the principles have an irrefutable role. Specifically, it indicates that: *"The legal system for public procurement established in this Law seeks to clarify the current legislation, in the interest of greater legal security, and it seeks to ensure that public procurement is used as an instrument to implement both European and national social policies in matters pertaining to the environment, innovation and development, promotion of SMEs, and defence of competition. All of these issues constitute true objectives of the Project, pursuing efficiency in public spending and respect for the principles of equal treatment, non-discrimination, transparency, proportionality and integrity at all times (section III, paragraph 1)".*

Furthermore, the preamble of the regulation itself recognises that the primary objective pursued by Spanish legislators with the enactment of this Law is directly related to one of the principles of public procurement, the observance of which clearly contributes to the realisation of other principles. Specifically, in section II, it affirms that: *"The objectives that inspire the regulation appearing in this Law are, firstly, to achieve greater transparency in public procurement and, secondly, that of attaining greater value for money".*

As far as the section of articles is concerned, instances in which the obligation to respect the principles of public procurement is mentioned are not hard to find.

It is highly significant that, when explaining the object and purpose pursued with the same, the first article of the Law makes literal mention of the principles that should transversally inspire procurement conducted in the public sector. Thus, article 1.1 establishes that: *"The object of this Law is to regulate public sector procurement, with the aim of guaranteeing that it conforms to the principles of freedom of access to tenders, publicity and transparency of procedures, and the non-discrimination and equality of*

treatment among tenderers; and of ensuring - in connection with the objective of budgetary stability and expenditure control, and the principle of integrity - the efficient use of funds earmarked for the performance of works, the acquisition of goods and the contracting of services, through the requirement of the prior definition of the needs to be met, the safeguarding of free competition, and the selection of the most economically advantageous tender".

It should be noted that the transcribed precept already mentions most of the public procurement principles referred to in the European Directives. It is true that certain principles, such as that of proportionality, are not literally cited in this precept, although it is alluded to it in other articles of the Law. On the contrary, said article 1 does contain some other principles that are not formulated as such in European public procurement law, but which Spanish legislators wish also to act as a guideline for action in this sector. This is the case with the principles of budgetary stability and of integrity.

Also, with the vocation of being a general precept, mention should be made of Article 132 of the LCSP, entitled precisely: *"Principles of equality, transparency and free competition"* and wherein, in summary, it is indicated

a) That contracting entities shall treat tenderers and candidates in an equal and non-discriminatory manner and adapt their actions to the principles of transparency and proportionality.

b) That in no case in procurement may participation be limited by the legal form or profit-making intent, except in contracts that may be reserved for certain entities.

c) That procurement shall not be conceived with the intention of evading the requirements of publicity or those related to the appropriate adjudication procedure, nor of artificially restricting competition, by either favouring or unduly impairing certain entrepreneurs.

d) That, throughout the award procedure, the contracting entities shall ensure the safeguarding of free competition. In particular, both they and the State Public Procurement Advisory Board or, where appropriate, the consultative or equivalent bodies on public procurement in the Autonomous Communities, and the bodies competent for resolving the special appeals in the matter of procurement must notify the National Commission of Markets and Competition or, where applicable, the regional competition authorities, of any facts of which they may become aware in the exercise of their functions and which may constitute an infringement of anti-trust legislation. In particular, they must communicate any indication of agreement, decision or collective recommendation, or concerted or consciously parallel practice among the tenderers, which is intended to produce, produces or may produce the effect of preventing, restricting or distorting competition in the procurement procedure.

Apart from these more global or general references, in different articles distributed throughout its text, the LCSP refers more specifically to the need to observe the principles of public procurement regarding specific procedures or actions. In addition, at the time of doing so, in many cases it establishes specific obligations that are incumbent on the economic operators participating in public contracts or on the contracting entities that conclude them. That is to say, legislators themselves do not stop at establishing principles, but impose positive obligations that can be demanded from contracting entities that are aimed directly at safeguarding the observance of the

principles of public procurement. By way of example, the following precepts can be highlighted:

Article 3.4 of the LCSP establishes that political parties, when concluding contracts that exceed the European thresholds, *"... shall act in accordance with the principles of publicity, competition, transparency, equality and non-discrimination without prejudice to respect for autonomous free will and confidentiality when appropriate"*.

Article 28.1 on "Necessity and suitability of the contract and efficiency in procurement", determines that *"Public sector entities may not conclude contracts other than those that are necessary for the fulfilment and realisation of their institutional aims. To this end, the nature and extent of the needs intended to be covered by means of the proposed contract, as well as the suitability of its object and content to satisfy the same, when awarded by an open, restricted or negotiated procedure without publicity, must be determined with precision, with this being stated in the preparatory documentation, prior to initiating the award procedure for the same"*.

Article 63 imposes stringent publicity obligations on the contracting entities. It refers to all the documents and information that must be published in their respective contractor profiles.

Article 64 on "Fight against corruption and prevention of conflicts of interest", establishes in section 1 thereof that: *"Contracting entities must take appropriate measures to combat fraud, favouritism and corruption, and to prevent, detect and effectively resolve any conflicts of interest that may arise in tender procedures in order to avoid any distortion of competition and ensure transparency in the procedure and equal treatment for all candidates and tenderers"*.

In Article 115, as it regulates preliminary market consultations, reference is made to transparency and equal treatment that should preside over them.

Article 16.4, requires that, in the contracts concluded by Public Administrations, numerous aspects be justified in the "contract file", including: a) The choice of the tender procedure to be used; b) the classification required of participants; c) the criteria for technical or professional solvency, and economic and financial criteria, and the criteria to be taken into consideration to award the contract, as well as the special conditions for the performance thereof; d) the estimated value of the contract with an indication of all the items that comprise it, always including labour costs, if any; e) the needs of the Administration which it is intended to satisfy through the procurement of the corresponding provisions; and the relationship thereof with the object of the contract, which must be direct, clear and proportional; f) or, where applicable, the decision to not split the object of the contract into lots. All of these matters are particularly bound up with respect to competition, to integrity.

Article 133 is devoted entirely to regulating the confidentiality that economic operators may claim for part of their offers.

With the aim of safeguarding the principle of competition, Article 150.1 envisages that *"(...) If in the exercising of its duties, the contract award committee or (in the absence thereof, the contracting authority) has well-founded evidence of collusive behaviour in procurement procedures, prior to awarding the contract, it shall notify the National Commission for Competitive Markets (or, where applicable, the corresponding competent autonomic authority) thereof, in order for them to issue a statement on the same in an expeditious procedure. The referral of said indications will have the effect of suspending the procurement procedure. (....)"*.

Article 166.2 refers to the need to ensure the principles of publicity and competence in negotiation procedures. Along these lines, the importance of respecting the principle of equal treatment in certain procedures, such as tendering with negotiation (Article 169.4), competitive dialogue (Article 175.2) and partnership for innovation (Article 179.5), is emphasised.

Article 207 requires contracting entities that have amended a contract during its term - irrespective of whether it is subject to harmonised regulation and of the grounds that justify the modification - to publish, in any case, an amendment notice in the contractor profile of the contracting entity within 5 days of its approval. If the contract also exceeds European thresholds, as a general rule, any such modification must also be published in the OJEU.

Article 321.1 guarantees that the awarding of contracts by public sector entities that do not have the status of contracting authorities also conforms to the principles to which we refer. It establishes that: *"The competent bodies of these entities shall approve instructions wherein they regulate the contracting procedures in a manner that guarantees the effectiveness of the principles of publicity, competition, transparency, confidentiality, equality and non-discrimination, and that the contracts are awarded to who present the best offer (...)"*.

Article 332 creates an Independent Procurement Regulation and Supervision Office, with the purpose of ensuring the correct application of the legislation and, in particular, of promoting competition and combating illegalities, in relation to public procurement. In the development of its activity and the fulfilment of its purposes, the Office will act with full organic and functional independence.

Although no part of the LCSP is specifically dedicated to the principles, the manner in which they are integrated into the legislation does allow us to affirm that they are codified in a systematic way.

These principles embraced by the LCSP are applicable to all public contracts, regardless of the amount and purpose thereof, and whether the contracting entity is a Public Administration or not, or a contracting authority or not. Additionally, it is recognised that the principles govern all stages of the life of the contract; *i.e.*, from the preparation and adjudication until the performance and extinction thereof. In this regard, in line with the jurisprudence of the CJEU, for Spanish legislators, the essential division in the matter of public procurement between contracts above and below the European thresholds loses all its meaning when it comes to applying the principles of public procurement.

It is true that Spanish legislators make special reference to the imposition of specific obligations linked to the principles in relation to contracts concluded by public administrations, and to procedures that mainly affect the awarding phase. However, it can certainly be concluded that, in Spanish legislation and the interpretation made by the bodies that interpret the same, the principles of public procurement as such are binding on all public sector entities and they must be respected throughout life of the business. Moreover, it is recognised that these principles acquire particular relevance in a legislation whose complexity has been increasing over time, and in which is prone to constant change. Hence, it is understood that they are directly applicable and, they also constitute guidelines for interpreting the entire system of public procurement law.

The Spanish Constitutional Court itself has reiterated the value of these principles for all public procurement and the guarantee offered in regard thereof by the basic State legislation on the matter, which the Autonomous Communities must

respect in their legislative developments. Worthy of note in this regard are SSTC 237/2016, 84/2015 and 56/2014.

3. PRACTICAL APPLICATION OF THE PRINCIPLES BY THE INSTITUTIONAL STRUCTURE LINKED TO PUBLIC CONTRACTS

One fundamental aspect is that, in Spain, the attention that both the doctrine and the different bodies that comprise the institutional structure related to public procurement pay to the principles on which this field rests is very intense. This is patently evident, for example, in the myriad doctrinal works that exist on the subject[5]; in the preparation by public sector entities of guidelines on specific

[5] As an example: Razquin Lizarraga, Martín María; "Los principios generales de la contratación pública", en *Tratado de Contratos del Sector Público*, (Dir. Eduardo Gamero Casado; Isabel Gallego Córcoles), Tirant Lo Blanch, Valencia, 2018, 189-191; Moreno Molina, José Antonio; "Novedades en relación con los principios generales de la contratación pública", *Consultor de los ayuntamientos y de los juzgados: Revista técnica especializada en administración local y justicia municipal*, núm. 23, 2017, 2799-2811; Cerrillo i Martínez; Agustí; "La integridad y la transparencia en la contratación pública", *Anuario del Gobierno Local*, nº 1, 2018, 77-127; Gómez Fariñas, Beatriz; "El principio de proporcionalidad como parámetro de interpretación y control en materia de contratación pública", *Observatorio de los contratos públicos 2016* (Dir: José María Gimeno Feliú), Thomson Reuters Aranzadi, Cizur Menor, 2017, 387-404; Valcárcel Fernández, Patricia; "Connotaciones del principio de transparencia en la contratación pública", *Por el Derecho y la Libertad*, Vol II, (Dir. José Eugenio Soriano García. Coord. Manuel Estepa Montero), Iustel, Madrid, 2014, 1901-1931; Bernal Blay, Miguel Ángel; "El principio de objetividad en la contratación pública", *Documentación Administrativa*, nº 289, 2011, 129-150.

practical aspects of public procurement in which the principles have a major role[6]; in the studies that the different competition authorities have encouraged to analyse the best way to promote or respect compliance with some of the basic principles of public procurement, such as competition[7]; in the approval of different reports on public procurement advisory bodies that analyse the scope in specific situations of some of the principles of public procurement[8]; or in the existence of an inordinate number of resolutions from bodies that resolve conflicts in the matter - either administrative or jurisdictional bodies - which resolve the controversies brought

[6] Example: 'Guía de Integridad en la Contratación Pública'. Red de Entidades Locales por la Transparencia y Participación Ciudadana de la FEMP. La guía se estructura en 7 capítulos, vertebrando la norma a través del principio de integridad la visión de la contratación pública en la LCSP. http://femp.femp.es/files/3580-2054-fichero/GU%C3%8DA%20DE%20INTEGRIDAD%20EN%20LA%20CONTRATACI%C3%93N%20P%C3%9ABLICA%20LOCAL.pdf; "Guía para la inclusión de cláusulas ambientales y sociales en la contratación de la Junta de Andalucía" http://www.mitramiss.gob.es/ficheros/rse/documentos/ccaa/andalucia/1-GuiaClausulasSocialesContratacion_JuntaAndalucia.pdf; "Instrucción para la incorporación de cláusulas sociales y ambientales en la contratación pública del Cabildo Insular de Tenerife y su sector público", https://heytenerife.es/export/sites/hey-tenerife/.galleries/documentos-propuestas-gobierno/Version-Publica-INSTRUCCION-CLAUSULAS-SOCIALES-CABILDO-TENERIFE.pdf

[7] Example: Autoridad Vasca De La Competencia; "Guía sobre Contratación Pública y Competencia"; 2018: http://www.competencia.euskadi.eus/contenidos/informacion/guias_gidak/es_guias/adjuntos/GUIA_CONTRATACION_COMPETENCIA_es.pdf; Autoridad Catalana De La Competencia; "Guía para la prevención y detección de la colusión en la contratación pública", 2010: https://www.crisisycontratacionpublica.org/archives/649.

[8] Por todos, Informe 15/2012, de 19 de septiembre, de la Junta Consultiva de Contratación Administrativa de la Comunidad Autónoma de Aragón. Asunto: Confidencialidad de las proposiciones de los licitadores. Ejercicio del derecho de acceso a un expediente de contratación: https://docplayer.es/10021260-Informe-15-2012-de-19-de-septiembre-de-la-junta-consultiva-de-contratacion-administrativa-de-la-comunidad-autonoma-de-aragon.html.

before them by applying reasoning constructed on the interpretation of the principles that may be affected in each case.

The foregoing allows us to conclude that, in Spain, the validity and application of the basic principles that affect public sector contracts is not merely formal, but that there is a deep-rooted awareness of their importance and, institutionally, genuine and verifiable efforts are made to consolidate the validity thereof.

In order to demonstrate that the principles of public procurement are in good health in Spain, and for illustrative purposes, the following pages offer a small selection of examples regarding the most salient principles in this matter, giving an account of the attention that they have been given. In doing so, particular attention is paid to the rich doctrine that over time has been constructed over these principles by contractual appeal bodies in matters of public procurement, as this is a clear sign of the legal effect of the principles.

3.1 Principle of equal treatment and the principle of non-discrimination

In Decision 410/2015 of the TACPJA, the matter of territoriality was raised in relation to a contract for the "Andalusian Health Service's Internal waste management service". In the documents, both contractual as well an adjudication criteria, the existence of a waste treatment plant in the Autonomous Community of Andalusia was assessed and justified with the argument that the aim was to minimise environmental and health risk. Nonetheless, the Andalusian administrative tribunal dismissed the same, understanding that *"the distance between the centres and the treatment plant is a purely accidental issue, which prevents it from being considered as directly linked to the object of the contract"*; accordingly, the aforesaid

adjudication criterion of violated the principles of equal treatment and non-discrimination, as well as that of free competition. (In the same sense, Decision 365/2015 of the TACPJA and Decision 69/2015 of the TACRC).

In turn, Decision 407/2017 of the TACRC analyses the requirement of registration in the Carbon Footprint Registry set by the Tender Documents for the conservation and maintenance of a municipality's gardens. The administrative tribunal does not consider this requirement to be directly related to the object of the contract, and it is also contrary to the principle of equality. It reasons that: "*(...) the establishment of this criterion for evaluating tenders, when assessing the registration in the Carbon Footprint Registry, it will be difficult for companies not resident in Spain but resident other EU countries, with activity therein, to attend to this registration, so that the aforesaid criterion would favour companies resident in Spain, resulting in its being discriminatory and contrary to the general principles of public procurement. A violation of the principles of equal treatment and non-discrimination among potential tenderers is appreciated".*

Also of interest is Resolution 38/2017 of the TACRC, wherein it is argued and explained how the submission of tenders in sealed envelopes and the maintenance of the secrecy thereof until the act of opening, in addition to a condition of equality for all tenderers, also constitutes a safeguard of the integrity of the contracting procedure, to prevent favourable treatment towards any of the tenderers.

3.2 Principle of proportionality

This principle is mentioned in Article 1.1 of the LCSP among the principles of public procurement, and it is reiterated thereafter by various precepts for specific issues. Thus, for example, article 74. 2 indicates that: *"The minimum solvency requirements to be met by the entrepreneur and the documentation required to*

accredit the same shall be indicated in the tender notice and shall be specified in the contract document; they must be linked to its object and be proportional to the same". While Article 49 of the LCSP alludes to the fact that the requirement of guarantees from tenderers or contractors must be proportionate.

Accordingly, different decisions from administrative tribunals of special appeal in this matter have based their decisions in respect of this principle. Thus:

In Decision 355/2017 of the TACRC, it is reasoned that proportionality also limits the evaluation of the social clauses in a contract. It is established that: *"On the other hand, this administrative tribunal, when it has admitted social clauses as criteria susceptible to evaluation in the awarding of contracts, has considered the necessary proportionality that must exist in comparison with all the other criteria, both subjective and objective. Within the value of the subjective ones, the allocation of 20 points for quality in employment is markedly superior to the other one, the service provision work plan, and also represents a very high percentage of the total score, which may be decisive for the awarding of the contract".*

The principle of proportionality also serves to remedy formal defects, as stated in Decision 497/2017 TACRC: *"This administrative tribunal, reiterating the doctrine of the JCCA, has repeatedly pronounced on the issue (....) we have configured a doctrine conducive to the correction of formal defects in the documentation accrediting compliance with the requirements of tenderers, but not of the existence of the requirement at the moment in which it is required. This doctrine is based on that of the Constitutional Court (...) regarding procedural requirements, which it declares lack their own substantivity, constituting means aimed at achieving certain purposes in the process, such that the possible anomalies thereof cannot become mere formal obstacles that are preclusive to such ends, resulting necessarily in an interpretation presided over by the criterion of*

proportionality between the purpose and actual entity of the defect detected and the consequences that may arise from the assessment thereof for the exercise of the right or of the action, a perspective that favours the remedying of defects whenever possible".

In turn, Decision 648/2017 of the TACRC analyses proportionality in solvency requirements, and, reiterating that already said in other resolutions, it affirms that *"this requirement of proportionality is merely intended to prevent entrepreneurs fully qualified to perform the contract from being excluded from the tender owing to excessive solvency requirements".*

Likewise, Decision 252/2019 of the TACRC, considers an appeal filed *"against the Tender Documents for the invitation to tender issued by Benidorm City Council Service to contract "the external technical environmental assistance service for the drafting, processing and execution of municipal planning and public works; annulling point 5.b) of article 10 of the PCAP and, consequently, rolling back the file to the moment of its approval in order for the contracting body to establish new forms of accrediting solvency that are proportionate to the object of the contract without any unjustified restriction on competition".*

Proportionality is bound to free competition, as Decision 621/2017 of the TACRC reiterates: *"The determination of minimum solvency levels must be established by the contracting entity, although with absolute respect for the principle of proportionality, so that minimum solvency levels that do not observe the appropriate proportion with the technical complexity of the contract and its economic dimension must not be requested, without forgetting that they must be linked to the object of the contract".*

3.3 Principle of confidentiality

Article 133 LCSP refers specifically to confidentiality, and, in line with the requirements of Art. 21 of Directive 2014/24/EU, states that, without prejudice of the legislation on access to public information (ie LTAIPBG) and the other LCSP provisions on the advertising of awarded contracts and to the information that must be furnished to candidates and tenderers; CA shall not disclose information forwarded by economic operators which designate as confidential when submitting their tenders, but CA must verify that said designation is properly made.

Confidentiality affects, among other issues, data protection, technical or commercial secrets, and any other types of information which may be used to distort competition, either in the current tender process or in subsequent ones. That said, immediately thereafter, the regulation qualifies that said duty of confidentiality cannot be extended to the entire content of the tender, nor to the entire content of the reports and documentation which, where applicable, the contracting authority generates in the course of the tender procedure. Additionally, confidentiality does not affect documents which can be consulted by third parties because are publicly accessible.

For some time now, both consultative and control bodies in the field of public sector contracts have been issuing relevant guidance on the scope of confidentiality regarding commercial secrets, and the influence of their doctrine is now patent in the LCSP. In this regard, as a general rule, given that confidentiality seeks to safeguard private interests, its protection may only be granted by the contracting authority if the owner of the confidential information requests its protection. Accordingly, denying access to information requested by other tenderers without a prior request for confidentiality from the interested party must be exceptional (e.g., that the information requested be classified as secret or reserved). On the other hand, the request for confidentiality from tenderers is necessary, but not binding on the contracting authority, which must verify whether the aspects labelled

as confidential by the economic operators deserve said qualification. When doing so, a balance between conflicting interests must be guaranteed. It should be acknowledged that the LCSP is pro-transparency, and that it provides for limited confidentiality. Although there are not general guidelines, when assessing the relationship between transparency and confidentiality, the public procurement control bodies insist on the fact that in the conflict between the unsuccessful tenderer's right of defence and the successful tenderer's right to the protection of its commercial interests, a necessary balance has to be sought so that neither of them are adversely affected beyond what is strictly necessary. In any case, the LCSP requires the contracting authority to provide sufficient reasons for a decision on whether to protect or not confidential information. What is necessary is that any decision adopted by a contracting authority on these matters be sufficiently well-founded and should contain in detail all the information needed in order the subject affected for it, if he deems it appropriate, can file a sufficiently substantiated appeal.

In practice, tenderers habitually apply for confidentiality for some parts of their tenders, particularly in contracts related with communications and telecommunication services or, ultimately, in contracts for the procurement of innovation. However, it is not unusual that they insist on confidentiality for some parts of their tenders in other types of contracts, and, where appropriate, this confidentiality is recognised by contracting authorities. Despite the Law's clarity, in practice, tenderers often apply for confidentiality for their whole tenders. When this occurs, the contracting authorities may proceed in different ways. It may be the case that, from the outset, they notify the tenderer that the generic confidentiality statement is inadmissible, and it must specify which concrete parts it deems confidential. In other cases, the contracting authorities only request clarification from the tenderer when a request for access to the tender is made by another tenderer. In order to facilitate the contracting authorities verification tasks, in practice, it is not

uncommon for tenderers to be asked not only to clearly indicate which tender documents should be covered by the confidentiality, but to submit a report justifying the grounds or circumstances on the basis of which said status should be recognised, and the specific damages that the disclosure of such documents could give rise to.

There are numerous decisions from administrative tribunals of special appeals in matters of procurement that address the outlines of the principle of confidentiality. These include Decisions 288/2014; 592/2014; 559/2018; 927/2018; 166/2019 and 360/2019 of the TACRC. Worthy of note within the scope of the Autonomic administrative tribunals is Decision 8/2016 of the TACP of Madrid, which alludes to the fact that the rights of access and confidentiality are applied in all phases of public procurement, not only to the awarding phase.

3.4 Principles of publicity and transparency

The principle of transparency is inextricably linked to the publicity and information that must be afford to both potential tenderers or candidates interested in a procurement procedure and to those who eventually become participating tenderers.

Transparency has received a notable fillip in the LCSP, to the point of it being indicated in its Preamble that transparency in this sector is the main objective pursued with this legislation. This is based on the belief that effective transparency in public procurement is the best mechanism for guaranteeing genuine competitive internal market in this sector.

Among the possible perspectives of transparency, the LCSP has paid particular attention to the so-called active transparency.

In LCSP "active transparency" to a large extent is organised by means of two website mechanisms: buyers' profiles and the Public Sector Procurement Platform (PSPP).

The buyer's profile refers to a suitably identified space which each contracting authority reserves on its official website for publishing the different items of information and documents on the contracts it concludes. The system created in 2007 but owing to the large number of entities with buyers' profiles existing in Spain[9], it was very difficult for economic operators interested in participating in public tenders to identify through these profiles those contracts which they may be interested in tendering for. To mitigate this problem, LCSP increased the role of PSPP. PSPP[10] is a State single electronic platform in which the buyers' profiles of all contracting authorities and public sector entities must be hosted, with a view to centralising information of all public procurement into one single portal. Through the PSPP, internet publicity is given to the calls for tender and the results thereof, as well as to additional information as may be obligatory or considered relevant to publish by State contracting authorities. In turn, the seventeen Autonomous Communities, as well as the two Autonomous Cities of Ceuta and Melilla, may choose between establishing platforms similar to the State's central one, or using the PSPP. In order to enforce compliance with the inclusion of all buyers' profiles in these platforms, Art. 39(2)(c) LCPS/ 2017 has linked the validity of the tendering procedures to the publication of the contract notice in a buyers'

[9] There are more than 20 000 public entities with buyer´s profile.

[10] https://contrataciondelestado.es/wps/portal/plataforma.

profiles hosted in the PSPP or in a equivalent Platform at the autonomous community level. That is, the lack of publication of the contract notice in these platforms, determines the nullity of the contract.

Art. 63 LCSP provides that all public contracting authorities must publish a minimum series of data in freely accessible format in their buyer's profile. Many of these data must be uploaded prior to the award of a contract. Other data are published at later date, owing to the logical order of the proceedings to which they refer. The minimum information that these entities must compulsorily publish in their profiles is as follows: (i) The general information which may be used to interact with the contracting authority; (ii) Information pertaining to each of the contracts concluded by the contracting authority and at least, the following: (a) A report justifying why the celebration of the contract is needed; in the case of service contracts, the report on 'means test' explaining that the means available to the contracting authority are not sufficient to meet those services needed; justification for the procedure chosen for the award when other than open or restricted; contract documents (with administrative clauses and technical prescriptions governing the contract), or equivalent documents; file approval document; (b) Detailed object of the contract; term, base budget and the amount of the award, including VAT; (c) Prior information notices, calls for tender, notices of the adjudication and formalisation of contracts, notices of modification and the justification thereof, notices of design contests and the results of design contests, with the characteristic exceptions of procedures negotiated without publicity; (d) The means (*i.e*: Official Gazettes, Platforms, OJEU), through which the contract has been published, and links to said publications; (e) The number and identity of the tenderers participating in the procedure; all minutes of evaluation boards pertaining to the award procedure or, where applicable, the decisions of the corresponding contracting authority; the evaluation report on the adjudication criteria quantifiable by means of a value

judgement on each of the bids; where applicable, reports on bids presumed to be abnormal; the contract award decisión; (iii) Any decisions on not awarding the contract, or on withdrawing the award procedure, as well as the lodging of appeals and any possible suspension of the contract owing to the lodging of appeals must also be published in the buyer´s profile; (iv) Information pertaining to minor contracts; (v) Composition of evaluation boards assisting the contracting authorities, as well as the appointment of the members of the experts committee or the specialised technical organisations for the application of the adjudication criteria which depend on a value judgement in those proceedings in which they may be necessary; (vi) Also the formalisation of public contracts between entities within the public sector (in-house providing) which amount is in excess of EUR 50,000. Information relating to assignments in excess of EUR 5,000 must be published in an aggregate manner at least quarterly; (vii) Any other data and documents pertaining to the contracting authorities' procurement activity.

The LCSP requires all information contained in the buyer´s profiles to be published in open, reusable formats. The information published must be readily available to the public for at least 5 years, without prejudice to permitting access to previous files in the event of information requests. If the contracting authority decides not to publish some information in the buyer´s profile, the LCSP requires that this be duly justified in the file.

Recommendation 1/2014, from the Public Procurement Advisory Board of Aragón, refers to the scope of transparency in public procurement.

Numerous decisions from administrative tribunals of special appeals on the matter of procurement refer to the relationship between confidentiality and transparency. Thus, for example, we can mention Decision 95/2017 of the Administrative Procurement Appeal tribunal of the Government of Andalusia, which

states that: *"a suitable balance must be found between the right of defence and that of protection for the commercial interests of tenderers. so that none of them suffers any disadvantage; nor can confidentiality cover the entire offer, or publicity and transparency imply unconditional access to the contracting file and the offers of all other tenderers"*. Or Decision 718/2015 TACRC, in which the tension arising from the opposition of confidentiality vs. publicity and transparency is addressed and it is explained that the declaration of confidentiality made by the successful tenderer cannot be extended to all documentation, with the obligation of reviewing this incorrect qualification falling on the contracting entity.

3.5 Principle of competition

The initial claim of the EU Directives on public contracts was to open up the public procurement market to competition.

Free competition means that all economic operators can participate on equal terms within the market. The distortion of competition may arise from both the performance of the contracting entities and from the economic operators in the award procedure.

In the LCSP, greater emphasis has been placed on free competition from the two perspectives involved.

On the one hand, the LCSP fosters rules that help to prevent the distortion of free competition, such as the aforementioned rules on active transparency. It also includes measures to encourage competition in public procurement procedures, such as the general obligation to split the the object of a contract into lots whenever possible.

In this regard, from a practical-functional point of view, Decision 211/2017 of the TACRC analyses whether the non-division of a contract into lots affects the arm's length principle. While Decision 976/2018 of the TACRC analyses whether a system of evaluating the economic offers established in a PCAP document infringes the principle of competition when establishing a threshold as of which the score for improvements in the price is not increased.

On the other hand, the LCSP also improves the techniques for preventing collusive practices. For instance, a duty under Art. 150(1) LCSP to notify the CNMC (or, where applicable, the corresponding competent autonomic authority), prior to awarding the contract, of any well-founded evidence of collusive behaviour in procurement procedures, in order for the CNMC to issue its views on the potential collusion in an expeditious procedure. The referral of said information will have suspensive effect on the procurement procedure. The suspensive effect of the award procedure when - during its development - the contracting authority detects signs of a possible collusive agreement is a new measure included by the LCSP. The previous legislation did not require it, and there are cases in which, in spite of the signs appeared before the award decision, the contract was finally awarded to a bider that was later found guilty by a competition authority.