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SPANISH ADMINISTRATIVE LAW UNDER EUROPEAN INFLUENCE

"THE NEW APPROACH AND SCOPE OF APPLICATION OF SPANISH LAW ON PUBLIC PROCUREMENT"

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Public procurement; Administrative procurement; European Law; general principles; contracts subject to the harmonized regulation.

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LEGISLATION

ABBREVIATIONS

LCSP: Spanish Public Sector Contract Law (30/2007)

TRLCAP: Spanish Royal Legislative Decree approving the codified text of the Law on public procurement of 16 June 2000 (2/2000)

SUMMARY

1.- Introduction. Decisive influence from European Union on the recent evolution of Spanish law on public procurement.

European Community law has decisively influenced the development and recent evolution of Spanish legislation on public procurement. Since Spain entered the European Community in 1986, the legislative norms on public procurement have been to a great extent the transposition of Community directives on this matter.

Above other objectives which are in many occasions more emphasized by the Spanish legislator (such as the fight against corruption or the improvement and simplification of procurement procedures), the adaptation of Spanish law to Community directives and case-law on public procurement constituted the direct and immediate cause for approving the norm which marked a turning point on the matter: *Ley 13/1995, de 18 de mayo, de Contratos de las Administraciones Públicas*, which substituted the former *Ley de Contratos del Estado de 8 de abril de 1965* and whose main objective was the implementation of Directives 92/50, 93/36 and 93/37/EEC, concerning the award of public service contracts, public supply contracts and public works contracts respectively.

Also approving the present *Ley 30/2007, de 30 de octubre, de Contratos del Sector Público* (LCSP) is the response as primary objective to the Spanish Government need of implementing the provisions of Community Directive 2004/18/EC of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. This is also the case of *Ley 31/2007, de 30 de octubre*, which is the applicable norm regulating procurement procedures of entities operating in the water, energy, transport and postal services sectors, which incorporates the provisions established by Directive 2004/17/EC.

Nevertheless despite the taxing character of the Spanish LCSP with respect to European law is recognized in the preamble of that law, the legislator presents immediately – in the third section of whereas I of the Exposition of grounds- other objectives pursued with the new legislation which seems to be created as a political initiative `as a response to the petitions presented from multiple channels (administrative, academic, social,

business) to introduce improvements in the legislation and solve certain problems which have become manifest by the application experience of the LCAP.

It seems relevant that the State Council, in the Decision No 514/2006 on the LCSP draft -delivered on 25 May 2006- considers that the implementation satisfies the requirements of incorporation of Community law into our internal legislation (paragraph IV.2.B of the Decision consideration) while some aspects of the Draft included in the text by decision of the Spanish Government and not by imposition from Europe are strongly criticized, such as the new structure adopted which, in the opinion of the high consulting body, presents an error of construction (paragraph VII.C).

2.- Breach by the Spanish Government of Community law on public procurement

The infringement of Community law on public procurement has been a constant feature in Spain since it was obliged to apply European legislation on this matter. One of the last proofs of this is that from 31 January 2006, expiry date of transposition of Directives 2004/18 and 2004/17, until the date of enforcement of Laws 30/2007 and 31/2007 in May 2008[1], Spain once again failed to comply with Community law on public procurement. In fact, The European Commission decided to bring an action against our country in March 2007 before the European Court of Justice for failure to communicate its national dispositions of application of Community Directives on public procurement[2].

But the Court of Justice of the European Communities had declared long before –during the period of application of LCE- that the adaptation of Spanish Law to

[1] Both Law 30/2007 and Law 31/2007 came into force six months after their publication in the Official Spanish Gazette on 31 October 2007.

[2] Actions brought on 30 May 2007 by the Commission of the European Communities v Kingdom of Spain (case C-254/07 and C-255/07, published respectively in the OJEU C 170, of 21 July 2007 and C 183, of 4 August). The intention of the Commission is to obtain a declaration that by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March 2004, or in any event by not communicating such measures to the Commission, the Kingdom of Spain has failed to fulfil its obligations under the mentioned directives.
Concerning the state of the transposition of Community directives on public procurement 2004/17/EC 2004/18/EC, see Trybus, M. and Medina, T. (2007), 89-118.

Community Law constituted an unavoidable and urgent obligation for the Kingdom of Spain which, as long as the content of Community directives on public procurement was not incorporated into our legislation, the Government was seriously failing to fulfil Community law. This had already been pointed out in judgement of 17 November 93 (case C 71/92, Commission v Spain), which sentenced the Kingdom of Spain for maintaining operative a series of dispositions both from the Law on State Contracts of 1965 and its Regulations of 1975 which opposed to European Community legislation on procurement. More specifically, in the case mentioned, the Commission appealed against thirty provisions of that Law and Regulations, on the grounds that they created legal insecurity and therefore did not comply with the requirements formulated by the Court of Justice for the correct adaptation of internal Law to directives.

Before the LCAP of 1995 had been passed, the European Court of Justice had sentenced the Spanish Government in several occasions for allowing the use of direct award systems in cases not permitted by Community directives. In particular, in judgement of 18 March 1992, the Court declared that the Kingdom of Spain had failed to fulfil its obligations under Council Directive 71/305/EC concerning the coordination of procedures for the award of public works contracts, " as a result of the decision of the governing council of the Complutense University of Madrid, to award by private treaty contracts for the extension and renovation of the Faculty of Political Science and Sociology and the School of Social Work", with no real argument of extreme urgency as reported by the University.

Also in judgement 3 May 1994, the Court of Justice declared that the Kingdom of Spain had failed to fulfil its obligations under Council Directive 77/62/EEC , " by requiring in the basic legislation concerning social security that the administrative authority award public contracts for the supply of pharmaceutical products and specialities to social security institutions by way of a single-tender procedure, and by awarding directly nearly all of those supply contracts without publishing a contract notice in the Official Journal of the European Communities".

In 2003 Spain was first seriously sentenced for incorrect transposition of the scope ratione personae of Community rules on contracts, question which from that moment gave rise to serious rulings against Spain from the highest interpretative body of

Community law. Case C 214-2000 sentenced Spain, by failing to extend the system of review procedures provided for by Directive 89/665/EEC to decisions adopted by companies governed by private law established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character, have legal personality, and are financed for the most part by public authorities or other entities governed by public law or are subject to supervision by the latter, or have an administrative, managerial or supervisory board more than half of whose members are appointed by public authorities or other entities governed by public law; the ECJ judgement also warned that it was not correct to adopt by general rule the possibility of all types of appropriate interim measures being granted in relation to decisions made by the contracting authorities, to the need first to appeal against the decision of the contracting authority.

In similar terms the Case C-283/00 declared that Spain had failed to fulfil its obligations by failing to comply with all the provisions of Council Directive concerning public works contracts in connection with the call for tenders for the execution of works for the Centro Educativo Penitenciario Experimental de Segovia (Experimental Educational Prison, Segovia) issued by the Sociedad Estatal de Infraestruturas y Equipamientos Penitenciarios S.A. (SIEPSA).

Later the relevant Case C-84/03 (also declared Spain in breach of its obligations by excluding from the scope of the LCAP, in the codified version, more particularly in Article 1(3) thereof, the private law undertakings fulfilling the requirements laid down in the first, second and third indents of the second subparagraph of Article 1(b) of those directives; by excluding absolutely from the scope of that law, in Article 3(1)(c) thereof, cooperation agreements concluded between public authorities and the other public undertakings and**,** therefore, also agreements which constitute public contracts for the purpose of those directives; and by permitting, in Article 141(a) and Article 182(a) and (g) of that law, the negotiated procedure to be used in two cases which are not provided for in those directives[3].

[3] The judgement of the ECJ of 13 January 2005 ordered immediate reform of the LCAP by *Real Decreto Ley 5/2005, de 22 de marzo*, of "urgent reforms to promote productivity and to improve public procurement" (incorporating in section IV

More recently, the Case C-444/06, Commission v Spain, declared Spain in breach of its obligations under Article 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 by failing to lay down a mandatory period for the contracting authority to notify the decision on the award of the contract to all the tenderers and by failing to provide for a mandatory waiting period between the award of the contract and its conclusion.

For the Court, in as far as the awarding act implies *de iure* the contract conclusion, it can be deduced from this that in Spain, with the regime derived from the Contract Law (Royal Legislative Decree 2/2000), the Law on Administrative Procedures (Law 30/1992) and the Law on Contentious Administrative Jurisdiction (Law 29/1998), the decision by the awarding entity by which it selects the successful tenderer among the candidates can not be subject to specific review prior to the signing of the contract. Furthermore, there is no minimum time limit established for the signing of the contract and it can be executed as soon as the successful tenderer has accredited the constitution of definitive guarantee, the only legal requirement being that the said constitution be established at the latest within fifteen days after reception of the awarding notice. Therefore, the execution of the contract may start before all required awarding notices have been made. It can be deduced from this for the ECJ that, in specific cases, there is no useful review against the award act that can be lodged prior to the execution of the contract itself, while the purpose of the directive concerning reviews consists in guaranteeing that appeals against unlawful decisions by awarding authorities can be lodged in an effective way and as quickly as possible[4]. The possibility to enjoy the power to lodge an appeal for annulment of the contract itself can not compensate the impossibility to act against the awarding act in itself prior to the conclusion of the contract.

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modification of articles 2.2, 3.1.c), 3.1.1), 141.a), 210.a) and of the sixth additional disposition of Royal Decree Law 2/2000).

[4] See C-470/99, Universale-Bau and others, 2002, Rec. p. I-11617, paragraph 74.

3.- Incorporation of Community law to the Spanish Public Sector Procurement Law of 2007 (LCSP). The change of approach necessary to analyze and apply Spanish legislation on public procurement.

At last the LCSP has incorporated to Spanish law on public procurement the change of perspective which European Community law had imposed for many years in this sector although Spanish legislation was resisting to fully assume it[5]. This can explain the reason why the new Law defines in the core article 1 its purpose and objective by refering to the general principles of free access to tenders, publicity and transparency of procedures and non discrimination and equal treatment of candidates.

In contrast to the Spanish tradition, extended to the *Real Decreto Legislativo 2/2000, de 16 de junio, que aprueba el Texto Refundido de la Ley de Contratos de las Administraciones Públicas* (TRLCAP), which emphasized as fundamental objective of the legislation on this matter the guarantee of public interests within the contract, with the legislation based on the figure of administrative contracts and in defence of public prerrogatives in the contracts, the LCSP is directly founded in Community law on procurement and its main purpose is to ensure non discrimination in awarding procedures in order to guarantee the establishment of the home market and to avoid unfair competition[6].

[5] García de Enterría, E. (2004), 82, had already warned after analysing the scope of application of the Law on Contracts of 1995 that this law was not a law on administrative contracts and that the norm had been adopted under the influence of Community law, from an approach different from traditional views in our procurement Law on contracts by the Administration.

[6] See Meilán Gil, J.L., (2008), 93 and following.

According to article 1 of the LCSP aforementioned, the main norm in Spanish procurement legislation which is also applied due to its character as public legislation to all authorities, bodies and public entities in Spain, in conjunction with the guarantee of equal treatment, publicity and transparency establishes as novel objectives of the norm " to ensure, in conexion with the aim of budgetary stability and expenditure control, the efficient use of funds destined to works execution, acquisition of goods and to contract services by requiring previous definition of the needs to be satisfied, the safeguard of free competition and the selection of the most economically advantageous tender".

This explains that when the LCSP points out in subparagraph 2 of the said article 1 that "the purpose of this law is also the regulation of the legal status applicable to the effects, execution and termination of administrative procurement contracts, considering the institutional ends of public character pursued by those goals", it recognizes the secondary and partial role of this norm with respect to its main objectives stated in the previous paragraph. Thus prerrogatives or exorbitant clauses can only be applied to some of the public contracts concluded by public administrations, typical or special administrative contracts, and not to contracts concluded by the remaining awarding authorities and public sector entities, which, on the contrary, are under the general principles of public procurement and must therefore respect the rules derived from free competition. [7]

In summary, the principles of objectivity, transparency, publicity and non discrimination based on National rules[8] and Community rules[9] of constitutional nature indisputably prevail nowadays over any other normative function on procurement[10]. These principles constitute at present the foundation of all public rules on procurement and are characterized by their transversality as they cover and are manifest in all stages of the contract - preparation and performance- in contrast to, for example, European Directives on procurement contracts or to WTO Agreement on Government Procurement regulating mainly the stages of preparation and awarding of contracts[11]-.

[7] Prerogatives or exorbitant clauses of the Administration in administrative contracts are stated in Chapter II, Title I of Book IV of the LCSP –articles 194 and 195-.

[8] The Spanish Constitutional Court had already pointed out in judgement of 22 April 1993 that the basic legislation on administrative procurement is mainly aimed at

4.- Terminology, definitions and regulations of the LCSP reproduced from Directive 2004/18/EC: the most economically advantageous tender, abnormal or disproportionate tender, definition of typical contracts, techniques for rationalization of procurement, electronic tenders and competitive dialogue.

Community influence can be much more clearly appreciated in the new Spanish LCSP than in the LCAP and the codified version of that law (TRLCAP). This influence goes from the terminology used to the definitions and regulations of different institutions of public procurement.

It seems quite significant that the LCSP even leaves aside traditional terms of Spanish law on administrative procurement contracts such as `auction´ (Spanish:*subasta*) and `contest´ (Spanish: *concurso*) and chooses to introduce the European Community concept of the most economically advantageous tender. Thus the open or restricted

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providing guarantees of publicity, equal treatment, free competition and legal safeness so as to ensure equal treatment to citizens on the part of all public administrations.

[9] The basic objective of European law is to ensure transparency, objectivity and non discrimination in the award of contracts so as to ensure the establishment of the internal market and avoid unfair competition. The prohibition of all discrimination on the basis of nationality (article 12 of the Treaty) is considered by the Court as the foundation of all the system of public procurement at Community level (Case C-243/89, 1993)

See Piñar Mañas, J.L. (1996), 50.

[10] See Huerga Lora, A. (2005), 234.

[11] From the traditional concern by the legislation regarding the preparatory and award stages of contracts (expressed by approving in 1971 several directives, first on awarding procedures of public works contracts and public supply contracts and later on public service contracts, of procedures known as special sectors and review procedure in all these procedures), in recent years there is a move towards contemplating the anticipation of special conditions of execution of the contracts (provisions under directive 2004/18 to this regard have been incorporated by the innovative and with great practical scope article 102 LCSP, to impose obligations on payments by contractors and subcontractors (Directive 2000/35/EC, of the European Parliament and of the Council of 29 June 2000, establishing measures to fight against non –payments in business transactions, incorporated to Spanish legislation by Law 3/2004 of 29 December , laid down in articles 200 and 211 LCSP), on the duration of contracts , regime of time extensions and regarding modifications of contracts (in order to noticeable limit its use – as stated in article 202 of the LCSP- after the remarks to the LCSP draft of the Directorate General for Internal Market of the European Commission delivered 12 December 2006, rejecting compatibility with Community Law on the possibility to modify the contract on the grounds of "new necessities").

procedure whose only awarding criterion is the lowest price shall be the equivalent to `auction´ (the term *auction* is reserved for electronic tenders in the LCSP) and the open or restricted procedures in which several selection criteria are considered have the same meaning in the text as contest (term which is at present used for the contest of projects as defined by article 168 of the LCSP).

In the parliamentary procedures of the draft of the LCSP, an amendment[12] was approved to the exposition of grounds itself of the norm to clarify that

> "from a formal approach, Community terminology on procurement has been incorporated so as to facilitate, from the semantic level, interoperability with European systems on procurement. This means giving up certain traditional denominations in our legislation, but not of the corresponding concepts, which still exist under names which better adjust to European context. In particular, the terms `concurso´ (contest) and `subasta´ (auction) – which in the National legislation referred in a quite deceptive way to `forms of awarding´ contracts as an instrument which should be used in conjunction with "awarding procedures"- are now summarized under the expression `economically most advantageous tender´ which refers, in short, to the criterion that the contracting body should take into account to assess tenders by candidates in the different open, restricted or negotiated procedures, and whether a single criterion (price as in the former `subasta´) or considering multiple criteria (as in the former "concurso")- paragraph IV.4-.

However, the concept of "most economically advantageous tender" of the LCSP is broader than the concept used in Directive 2004/18, as it covers both the strict notion present in the Community norm – which presumes the use of multiple parameters in the community norm-, and the criterion of "lowest price", which is formally distinguished from the former[13]. The exposition of grounds of the LCSP specifies on this respect that

[12] Amendment No 148 of the Socialist Parliamentary Group of the Congress, BOCG of 29 March 2007, series A. No. 95-22, p. 224- (Spanish Parliament Official Gazette)

[13] Article 53 of Directive 2004/18 establishes that the criteria on which the contracting authorities shall base the award of public contracts shall be either:

> "(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and

the law has considered both Community concepts under the same denomination so as not to force the usual linguistic value of the expressions used (it would not be understood that the cheapest tender , when the price is the only criterion to be assessed, was not qualified as the "most economically advantageous" tender) and so as to facilitate its use as guideline remarking the necessity to consider effectiveness criteria on procurement´[14].

In a technically more precise form, Law 31/2007 on procurement procedures in special sectors, which also leaves aside the terms "subasta" (auction) and "concurso" (contest) defined in article 24 of Law 48/98 as awarding criteria of contracts, and adopts now the use in article 60 of the new Law the concepts of "the lowest price only" and "most economically advantageous tender".

The traditional Spanish concept of *`baja temeraria´* (risky low tender) is also substituted in the LCSP for the term used in Community law of "abnormal tender" or "disproportionate". This can be appreciated in a context of multiple criteria to consider; It needs not mean exclusively low price but may also refer to other values.

The new legislation emphasizes the need to hear the tenderer before declaring the abnormal character of the tender and the requirement of a special guarantee is eliminated, as previously established by our legislation on procurement contracts although it was not required by Community law[15].

The basic aim of Community rules on the regulation of abnormally low tenders is to prevent automatic rejection of those tenders without previously verifying an analysis of

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technical assistance, delivery date and delivery period or period of completion, or
(b) the lowest price only".

[14] Gimeno Feliú, J. Mª. (2007), p. 3, is against the inclusion in the LCSP under the same criterion notions considered as two concepts both by Directive 2004/18 and by the codified text of the LCAP.

[15] Article 83.5 of the codified text of the LCAP states that "when a contract is awarded in favour of the candidate whose proposition had initially been included under the assumption of risky tender, a definitive guarantee of 20 % of the awarding amount shall be required".

such tenders for the purpose of determining their possible execution. Article 55 of Directive 2004/ 18/EC on awarding procedures of public works contracts, public supply contracts and public service contracts establishes that if, concerning a specific contracts, any tender is considered abnormally low in relation to the service provided, before rejecting that tender, the contracting authority shall require written specifications as may be considered pertinent on the constituent elements of the tender[16]. Those details may relate in particular to "(a) the economics of the construction method, the manufacturing process or the services provided; (b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services; (c) the originality of the work, supplies or services proposed by the tenderer; (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed; (e) the possibility of the tenderer obtaining State aid.

On the other hand, the definition of the different typical administrative contracts is based in the definition provided by Directive 2004/18/EC, in particular in article 1 and annex I and II, although the LCSP specifies a new type of contract: the cooperation contract made between the public and private sector[17], despite the Community directive on that matter has not yet been approved[18] and shall not be approved in the short or medium term due to lack of consensus on those issues among European countries.

[16] A similar provision was found in article 30 of Directive 93/37/EEC, on public works contracts, articles 26 and 27 of Directive 93/36/EEC, on public supply contracts, articles 36 and 37 of Directive 92/50/EEC, on public service contracts, and article 34 of Directive 93/38/EEC, on contracts of the denominated special or excluded sectors..

[17] Facing the initial indecision of its initial configuration, in the parliamentary procedures of Law 30/2007 the subsidiary character of the contract – which can only be used when, in order to satisfy collective needs by administrations, concession contracts for public works, services, works, supply or management of public services are not allowed to be used.
On the new type of contract see Chinchilla Marín, C. (2006) p. 609 and fol. and González García, J.V. (2006), p. 22 and fol.

[18] See the Green Paper of the Commission on public-private cooperation and Community law on public procurement and concessions [COM (2004) 327 final].

In Book III of the LCSP, concerning the selection of tenderer and the award of contracts, the norm includes Title II under the imprecise denomination of "Technical rationalization of procurement[19]" , actually presenting some new techniques – at least on issues providing its general regulation in that law- directed to endow public procurement with certain flexibility and to facilitate its simplification in some cases. Framework agreements, dynamic purchasing systems and central purchasing bodies are regulated in this way. Thus all these techniques come from Directive 2004/18 EC and are almost literally transposed by the LCSP:

Community law is deeply concerned about the need to make awarding procedures more flexible. The Green Paper of the Commission of 27 November 1996 already expressed this concern ("Public procurement in the European Union: exploring the way forward") which was later presented in the Commission Communication of 11 March 1998 ("Procurement in the European Union").

In order to rationalize and control the award of contracts, the Public Administrations may conclude framework contracts, articulate dynamic systems or centralize works contracts, service contracts and supply contracts in specialized services.

Directive 2004/18 states in whereas 16 that "in order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive". The LCSP transposes this Directive by regulating framework agreements in articles 180-182, dynamic purchasing systems in articles 183-186 and central purchasing bodies of contracts of works, supplies and services in Articles 187-191.

[19] The statement of Law 31/2007 seems more correct, as these new concepts are included: "Procurement techniques" (Title V of that law).
It must be noted that the content of Title V is broader than that in Title II of Book III of Law 30/2007 as it includes electronic auctions, which, in my opinion, does not seem very appropriate; I also consider inadequate to place electronic auctions in the LCSP (art.132), as in neither case the notion is systematically classified within the corresponding norms, that is, those concerning the selection of contractors.

A ‘framework agreement’ is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged (LCSP 180.1).

The definition of framework agreement can be found in articles 1.5 of Directive 2004/18/EC and 1.4 of Directive 2004/17/EC.

The concept was introduced in Community Law by Directive 93/38/EEC on procurement in the denominated `special sectors´ (immediate precedent of Directive 2004/18/EC). According to Article 5(1) of Directive 93/38, `contracting entities may regard a framework agreement as a contract within a meaning of Article 1 (4) and award it in accordance with this Directive´. The definition of the new concept of contract, whose introduction in the Directive came from the United Kingdom, was under article 1(5) of the Directive, which defined `framework agreement´ as an agreement between one of the contracting entities as defined in Article 2 and one or more suppliers, contractors or service providers, the object of which is to establish the terms of the contracts to be awarded during a given period, in particular with regard to price and, where appropriate the quantities envisaged´.

In Spain the possibility to sign a framework agreement was contemplated in Article 6 of Law 48/1998 of 30 December establishing awarding procedures of entities operating in the water, energy, transport and telecommunication sectors ; norm transposed to Spanish legislation from Directives 93/38/EEC, aforementioned, and 92/13/EEC on `review procedures´ in the special sectors.

With the incorporation of the Directives of 2004 to Spanish law, framework agreements have been included in the instruments for the technical rationalization of procurement. Indeed the concept of framework agreement pursues this rationalization as it is intended to make possible the conclusion and award of public contracts in the terms and conditions established by a previous agreement for that purpose (mainly concerning price and quantities). Article 180 of the LCSP gives the following definition of framework agreement: `the contracting bodies of the public sector may enter into a

framework agreement with one ore more undertakings in order to establish the conditions on which the contracts to be awarded during a given period shall be based, as long as the use of these instruments in not abusive or in such a way that it may not hinder, limit or distort or competition´. Article 2.4 of Law 31/2007 defines a framework agreement as an agreement between one or more contracting entities and one or more economic operators `the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period´.

Concerning the so-called dynamic purchasing system (DPS), the term refers to a fully electronic procedure established for an ordinary purchase. Article 33 of the Directive regulates the operation of these dynamic systems. In contrast to framework agreements, a DPS is developed by a procedure open to any contractor satisfying the conditions of the tender and allows the submission of tenders during all the development of the system. The LCSP regulates all the dynamic systems of procurement in Articles 183-186, adopting the guidelines of European legislation.

Concerning a `central purchasing body´ (central contracting bodies in the LCSP, Article 187), as defined by Directive 2004/18, is a contracting authority which `acquires supplies and/or services intended for contracting authorities, or awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities´, as expressed in Article 187 (2) of the LCSP.

Finally another important new concept to be remarked from Directive 2004/18 was the regulation of electronic auctions (defined in Article 1.7 and developed in Article 54) and the term competitive dialogue (defined in Article1.11, c) and explained in Article 29), which are incorporated just by imitation in Articles 132 and 163-167 respectively to the LCSP.

5.- Adequate but limited introduction of electronic, computerized and telematic means in procurement procedures.

It is unquestionably positive that the LCSP has opted for the maximum application of Directive 2004/18 concerning electronic purchasing systems, section which that

directive had left at the discretion of each Member State concerning the incorporation of different procedures and requirements.

Indeed, the lack of coherence with the intended impulse on electronic purchasing systems by Directive 2004/18 can be criticised as it did not impose forceful transposition concerning these means into the different national systems, thus allowing Member States to choose whether contracting authorities may use any option proposed; but of course establishing that once the transposition had been performed this should be carried out under the terms defined and regulated by this Directive. This is expressly stated in whereas 16 of Directive 2004/18/EC: `In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive´.

The decision by the Spanish legislator on this matter is correct but it could still have been better if the law had decided to go beyond Community norms and truly support the use of electronic means in public procurement[20], in line with the regulations established by the relevant Law 11/2007 of 22 June, concerning electronic access to Public Services by citizens, which improving the outdated LRJPAC (Law on the legal system of Public Administrations and ordinary administrative procedures) regarding electronic aspects, establishes the relation with Public Administrations using electronic means as a right for citizens and a correlative obligation for the Administrations. Moreover, this law also establishes a time period for application of this right, which in the scope of the General Administration of the State and its dependent public bodies shall be exercised in relation to all procedures and acts under their competence from January December 2009.

[20] As proposed in his appearance as expert before the Commission of Public Administrations of the Parliament assigned with the procedures of the draft of the bill of Law on procurement of the public sector, Domínguez-Macaya, J., President of the Advisory Board on administrative procurement of the Basque Autonomous Community and General Director of heritage and procurement of the Basque Government, BOCG (Spanish Parliament Official Gazette) No 748 of 19 February 2007, pages 37 and following.

However the Spanish LCSP has not moved forward to perform the necessary review of the traditional procurement procedure[21].

Nowadays the service to citizens requires the establishment of their right to communicate with the Administrations using electronic means, and the sector of goods and services purchase by Public Administrations and their dependent or related bodies or entities seems specially indicated for the use of ICT [22]. For this reason in the new strategic framework `i2010, European Information Society 2010´, which boosts an open and competitive digital economy and highlights the impulse of ICT for the promotion of inclusion and quality of life, public procurement is considered a key sector to be promoted in order to achieve better public services which are more accessible and more profitable [23].

Moreover the introduction of electronic and telematic means in procurement procedures shall mean a great increase of transparency and efficiency in procurement procedures [24] for the Administrations. As highlighted by the Communication of the Commission on the role of the electronic Administration (e-government) in the future of Europe of 26 September 2003, the use of information technologies and communications may increase quality and efficiency of public procurement apart from implying significant savings for taxpayers and may also contribute to improve relations with suppliers, satisfaction of users, the use of human resources in procurement procedures and transparency of public expenditure. These evident advantages of the use of telematic and electronic means in public procurement which had long been emphasized by Community institutions, makes less understandable and more criticisable that, apart from the good declaration of intentions, the European Union has not approved up to the present moment firm and clear resolutions for the development of electronic public procurement. In this sense, procurement directives of 2004 are just a timid approximation that despite including specific norms concerning electronic

[21] Gallego Córcoles, I. (2008), 610.
[22] See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and to the Committee of the Regions of 19 November 2004:`Challenges for the European Information Society beyond 2005 [COM(2004) 757 final - not published in Official Journal].
[23] See Domínguez-Macaya, J. (2006), 34 and following.
[24] See Gallego Córcoles, I. (2005), 226 and following.

procedures for the award of public contracts, still leaves far behind the full diffusion of electronic public procurement in Europe.

The Spanish LCSP, using a legislative and systematic technique not very adequate, states in two additional dispositions the regulations of the main aspects concerning the use of electronic, computerized and telematic means in procurement procedures, as mentioned previously, one of the main new contributions from that law, directly influenced by Community law. These general rules should have been included within the articles of the norm and could have been situated next to other precepts of that law concerning the use of telematic means under a specific chapter, thus facilitating LCSP users its application and use.

6.- The problematic scope ratione personae of the Spanish legislation on public procurement.

One of the key aspects of Community law on procurement contracts, the scope ratione personae, has been the reason why the Spanish government has been condemned by the Court of Justice of the European Union on several occasions, as previously mentioned in judgements of 15 May and 16 October 2003 and 13 January 2005.

In the new LCSP Article 3 establishes, in a truly complicated style and using notions operating in concentric circles, the scope ratione personae of the norm. All the structure of the LCSP currently effective is founded on the typology of entities established thereto.

In fact, within the public sector entities under the LCSP and defined in the mentioned Article 3 (1), three main categories must be singularized, which surprisingly do not coincide with those derived from Community law, neither with the categories of Spanish administrative law l[25] - for this reason the legislator insists in all paragraphs of

[25]In this sense the definition of public administration found in Article 3(2) of the LCSP excluding commercial public entities is substantially different from the definition given for general purposes by the LOFAGE (Law on the organization and operation of the General Administration of the State) (Law 6/1997 of 14 April) or the LRJPAC (Law on

Article 3 that the notions in use are exclusively `for the purpose of this law-: Public administrations – Article 3(2)- , contracting authorities other than public authorities- Article 3(3)- and the residual category of `remaining entities on the public sector´, expressed in paragraph 1 and composed of those cases not included under the two previous categories.

Despite Article 3 of the LCSP tries to incorporate the scope ratione personae from Community law on public procurement, previously intended in Articles 1, 2 and the sixth final disposition of the LCAP and the TRLCAP, the codified version of that law, the transposition has been performed again in a peculiar and rather confusing way by overlapping different concepts (public sector entities, contracting authorities and public administrations) [26], disregarding the easiest way which is more in accordance with Directive 2004/18 of reproducing its content, although this has been done in the LCSP concerning many other issues (definition of new contracting procedures and awarding systems such as competitive dialogue, electronic auction, framework agreement or dynamic purchasing system)[27] or the option to adjust to the interpretation in this regard established by Community case-law (as performed by the Law of Navarra 6/2006 of 9 June on public procurement contracts in Navarra in Article 2[28]).

Spanish legislators and authorities have been specially reluctant concerning the adaptation of internal law to the scope ratione personae of Community legislation on procurement, reason for which constant reforms to the dispositions have been necessary.

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the legal system of Public Administrations and ordinary Administrative Procedures), (Law 30/1992 of 26 November).

[26] See Gallego Córcoles I. (2008), 36 to 46 and (2009), p. 76 and following.

[27] As remarked by Gimeno Feliú, J.M. (2009), 65, in Article 3 of the LCSP the gender – contracting authority- is mistaken for the species – the different contracting entities subject to that law-.

[28] In the section mentioned the Law of Navarra places under its regulations `business public entities, commercial and labour societies, foundations and other entities, or any association of them, whether provided with legal personality, whether public or private, related or dependent on the entities aforementioned, which satisfy the following cumulative requirements :

-established for the specific purpose of meeting needs, at least partially, in the general interest which do not have an industrial or commercial character.

-financed for more that half of its activity by the public administrations of Navarra, whether directly or indirectly, or having predominant influence on those activities through mechanisms of management control or allowing an administrative, managerial or supervisory board more than half of whose members are appointed by the said public authorities´ (Article 2(1)e).

In fact the variety of subjects under the codified text of the Procurement Law of 2000 were widened by the reforms of the norm carried out in 2003 (Law 62/2003 of 30 December), 2005 (Royal Decree Law 5/2005 of 11 March) and 2006 (Law 42/2006 of 28 December on the General State Budget for 2007), although the correct adaptation of the National legal system to Community requirements on that matter was not successful.Proof of which are the declarations by the ECJ.

The adaptation of the scope ratione personae of the Spanish legislation was necessary to such extent that facing a period of six months from its publication in the `Spanish Official Gazette´ for the enforcement of the norm included in the eleventh final disposition of the LCSP, the regulations concerning the subjects above mentioned came into force the day after its publication, that is, on 1 November 2007.

The LCSP lays down in Articles 3(1)(h) and 3.3 (b) thereof the definition of body governed by public law, taken from procurement directives, as defined in Article 1.9 of Directive 2004/18/EC. But the term is defined in a confusing way, hindering the interpretation of the norm by repeating the same definition within Article 3 of that law but in the end presenting different categories with different unspecific points in the clauses –paragraph 1(h) in contrast to the remaining cases of the norm defining authorities, bodies and public sector entities; and paragraph 3(b) only in contrast to public administrations only-.

Thus the LCSP defines contracting authorities on the grounds of some requisites from Community directives which have already been the focus of advanced case-law interpretation: the authorities, bodies or entities must be established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character, and be financed for the most part by one or more subjects considered as contracting authority or be subject to supervision by them, or have an administrative, managerial or supervisory board more than half of whose members are appointed by those subjects.

The European Court of Justice in Luxembourg has delivered decisions concerning the scope ratione personae of procurment directives in numerous occasions from the relevant Case 31-1987, *Beentjes*, 1988. In accordance with European case-law, all directives on public procurement approved from 1993, including Directives 2004/17/EC and 2004/18/EC in force, incorporate a functional definition of public body [29].

While the LCSP refers to contracting authorities, Directive 2004/18/EC distinguishes between contracting authorities and bodies governed by public law. In particular Article 1.9 of that Directive states (underlining is added):

> "`Contracting authorities´ 'means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.
> A 'body governed by public law' means any body:
> (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
> (b) having legal personality; and
> (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law".

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to above for bodies governed by public law are set out in Annex III as examples.

[29] Concerning the broad scope ratione personae of Community legislation on public procurement see Martín Lizárraga, M.M. (2000), p. 15 and following; and Gimeno Feliú, J. M. (2006), p. 30 and following.

The concept of body governed by public law is specified by the consolidated case-law of the European Court of Justice, establishing that the three legal conditions therein are cumulative (Case C-44/96, Mannesmann Anlagenbau Austria and others, 1998, subparagraph 21).

This concept belongs to Community Law and as such must be given autonomous and uniform interpretation throughout the Community. The concept is defined from a functional point of view in connection only to the three cumulative conditions stated in Article 1(9) of Directive 2004/18/EC (see Case C-470/99, Universale-Bau and Others, 2002, Rec. p. I-11617, paragraphs 51- 53; Case C 214/00, Commission/Spain, C-214/00, 2003, Rec. p. I-4667, paragraphs 52-53, and Case C-283/00, Commission/Spain, 2003, Rec. p. I-11697, paragraph 69).

7. The highly limited special review procedure on procurement contracts.

One of the main new contributions made by the LCSP is the creation of a new special review procedure on procurement issues which intends to incorporate Community requirements on this matter into Spanish legislation. However according to Article 37 of the LCSP, it can only be applicable for specific contract decisions adopted in awarding procedures of contracts subject to harmonization regulations)[30], including subsidized contracts and some contracts not subject to harmonized regulation:

[30] The creation of a category for contracts under harmonization regulations is new in LCSP, the purpose of which is to identify those contracts which, on the grounds of the contracting entity, its type and quantity are subject to Community legislation.
As explained in the exposition of grounds of the LCSP in section IV the legislator intends by positivation of this category to allow the modulation of applicability of the norms of that Directive to the different contracts of the public sector, by restrictions when considered appropriate only for cases so established by Community dispositions. In the same way and by exclusion, the concept is also valid, according to the exposition of grounds, `to define the group of contracts respect to which the national legislator enjoys complete freedom concerning the structure of its legal status´.
However the problem is that the category provokes more confusion than clarity. The legislator approach on the establishment of the figure of contracts subject to harmonization regulations has not been maintained, neither could it possibly be maintained, to its ultimate consequences, but it is only partially used. Thus although it is true that contracts subject to harmonization regulations identify `the normative scope

- Service contracts comprised in categories 17 to 27 of Annex II (`non priority services´ in Community terminology) of value equal or over 206,000 euro.

- Contracts of management of public services in which the budget of first establishment is over 500,000 euro and the period of duration of more than 5 years.

These last cases were added during the parliamentary procedural stages of the LCSP, when several transactional amendments were passed extending the scope of application of the special proceedings and of the consequent provisional measures. Its purpose was to allow the review procedure also for those contracts with practical and economic significance equivalent to that of contracts subject to harmonized regulation.
In any case it should be highlighted that the limitation on the scope of application of the special review procedure was disapproved by both the Economic and Social Council[31] and the State Council[32] stating that:

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underlying Community rules´, this is only partially done, as many obligations derived from Community directives are extended by the LCSP to all contracts concluded by the administrations, contracting authorities or the remaining bodies governed by public law: e.g. rules on the capacity to conclude contracts with the public sector, tender assessment criteria, etc… The requirements derived from European directives applicable to contracts subject to harmonized regulation (mainly special review procedure and advertising in the OJEU) are many fewer than those established for contracts which are not considered subject to harmonization regulations according to the LCSP.
Therefore the significance of the new category is much less important in the LCSP than announced in the exposition of grounds (section IV.2) or deduced from its systematic position and its regulation in the Preliminary Title, `General Dispositions´ of that law. Form the three type of subjects recognized in Article 3 of the LCSP, contracts not subject to harmonization regulations are not applicable to bodies governed by public law of paragraph 1 which are not contracting authorities (according to the definition in Article 13.1 of the law) and the category lacks transcendence in relation to contracts concluded by public administrations which, whether considered as contracts subject to harmonization or not, are under the same legal status.
The difference is mainly applicable for contracts concluded by contracting authorities other than the Administrations. For them the conclusion of contracts subject or not to Community regulations implies that either its legal status is very similar to that of administrative contracts (those between public administration in the new LCSP) or can be subject to a flexible status and escaping from juridical-public procurement rules. However, this legal construction was unnecessary to achieve this differentiation pursued long ago by the Spanish legislation (it is just enough to see the condemnatory judgements of the ECJ against Spain concerning the award of procurement contracts).
[31] Opinion 4/2006, 20 February 2006.
[32] Opinion 514/2006, 25 May 2006.

> `this distinction between the control mechanisms of one type of contracts or the other lacks enough justification and could generate certain level of legal insecurity, reason for which its extension to all contracts should be considered. The new review procedure and the special system of precautionary measures are finally aimed at guaranteeing that the control on awarding procedures is rapid and effective so that the incidences which may arise are presented and resolved before adopting decision on the award of the contract. The advisability of rapidness and effectiveness in the resolution of the incidences on awarding procedures can be extended to any type of contract, whether subject or not to harmonized regulations´.

Also in this respect it should be considered that Community case-law and the Commission interpretative Communications on Community law applicable on contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJEU C 179 of 1 August 2006) insists that all persons affected by a public contract are entitled to effective judicial protection of the rights granted by EU legal system[33].

The extension of the scope of application of the especial proceedings was therefore insufficient and the limitation of the guarantees of tenderers occurred in contracts not subject to harmonization regulations. This regulation of the special proceedings in procurement may be contrary to European requirements, in particular to the doctrine by

[33] See Case C-129/04, 2005; Case C-26/03, 2005 and Case C-230/2002, 2004.
In the mentioned Communication the Commission points out that `In order to comply with this requirement of effective judicial protection, at least decisions adversely affecting a person having or having had an interest in obtaining the contract, such as any decision to eliminate an applicant or tenderer, should be subject to review for possible violations of the basic standards derived from primary Community law. To allow for an effective exercise of the right to such a review, contracting entities should state the grounds for decisions which are open to review either in the decision itself or upon request after communication of the decision. In accordance with the case-law on judicial protection, the available remedies must not be less efficient than those applying to similar claims based on domestic law (principle of equivalence) and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection (principle of effectiveness) .

the ECJ established in the Alcatel judgements of 28 October 1999 and Commission v Spain of 3 April 2008[34].

But apart from that serious evidence, the legal status derived from a systematic reading of Article 37 and the different provisions of that law concerning contract awards (in particular Article 27 and 135), allows to conclude that provisional award lacks true meaning for contracts signed by public authorities which are not considered subject to harmonized regulation. In fact in the LCSP the distinction between provisional and definitive award is applied, on the one hand, to all contracts concluded by public authorities, not considering their characteristics, and on the other hand, to those of the remaining public sector entities in case the contract is subject to harmonized regulation. That `period of procedural freezing´ (using the terms of the preparatory papers of the review of the Directive on remedies[35]) from provisional to definitive award established by the LCSP for all contracts of public authorities shall only be effective (for review applications) in the case of contracts subject to harmonised regulation. For the remaining contracts signed by the authorities, the meaning is in question and this may even imply a serious procedural obstacle for contracting bodies which are obliged to provisionally award the contract and later, in a new decision, to definitive award the contract, which can only be corrected by this definitive award (Article 27.1 LCSP)

8.- The risk of evasion from the general principles due to the broad possibility to use procurement procedures of exceptional character and to massively approving internal procurement rules.

Although the LCSP recognizes from Article 1 that the foundation of all procurement rules is the respect for the general principles of public procurement, the need to respect those principles is seriously endangered in Spanish procurement legislation due to the existence of exceptional procedures, as the minor contract and the negotiated procedures, used by Spanish contracting bodies with general character. The situation was already quite worrying during the legal force term of the TRLCAP but it could be

[34] See López-Contreras González, 2008, 289 and following.
[35] See proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts (Commission of the European Communities, 4.5.2006, COM 2006 195 final).

even worse with the LCSP, as the new Law increases considerably the thresholds of use of the negotiated procedure and the minor contract.

It must be kept in mind that in Community law on public procurement the figure of minor contract does not exist, being exclusively defined by Spanish legislation depending on the value of the contract; those which according to the LCSP permit the use of this procedure only with regard to its quantity are neither defined in the regulated assumptions of use of the negotiated procedure.

This is one of the most serious problems of public procurement in Spain which has not been solved by the new legislation. Unfortunately, all objectives of the rule, grouped now in Article 1 of the LCSP, are jeopardised if the contracting bodies decide –as a current massive practice by our authorities, in particular by local authorities- to make use of the figure of minor contract, selecting the contractor at will.

For many Spanish District Councils the award of public works contracts over 50,000 euro or any other type of contract whose value exceeds 18,000 euro (figures which will now allow to use the minor contract in accordance with article 122.3 of the LCSP) is really quite exceptional under the LCSP.

This abusive use of minor contracts clearly violates the general principles of public procurement of free competition, equal treatment and non discrimination and the Spanish legislation is infringing Community law on public procurement as Community case-law –Case 458/03, *Parking Brixen GMBH,* 2005- obliges to respect the general principles in all contracts entered by public authorities, as it has also been clarified in the Commission interpretative Communications on Community law applicable on contract awards not or not fully subject to the provisions of the Public Procurement Directives.

But the LCSP also allows another relevant possibility to evade from the general principles with the broad extent of freedom given to the internal instructions which must be approved by the contracting authorities in contracts not subject to harmonised regulation and the remaining public sector entities and bodies in all their contracts – as these in no case sign contracts subject to harmonised regulation under Article 13.1 of the LCSP-. All these public entities, of great importance in the current Spanish

administrative organization, at State level and also at autonomic and local level, depending on the extent of introduction of their own procedural specialities and rules on procurement, may hinder general access to tenderers, being very difficult for them to have knowledge of all such norms and prepare their tenders to participate in the calls opened, if that possibility is opened to them, -and do not face the utilization (in many cases by making use of these instructions) of minor contracts and negotiated procedures without previous advertising or even with values over those established by the LCSP, or with any other procedure limiting competition as they may establish[36] -Smaller firms will be more affected. Free competition and equal access to tenders may consequently be seriously affected ; and all this despite the procurement principles of all instrumental entities not only under Article 1 of the LCSP but also under Article 123 and in particular 175(a) and 176.1 of the LCSP are still effective.

[36] Gimeno Feliú, J.M. (2009, 67), warns about the danger of this procedural delegalization.

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