

PUBLIC PROCUREMENT

1. INTRODUCTION

1.1. Importance, concept, and need for regulating public procurement

The concept of public procurement and reasons for its existence

QUESTION: What is public procurement?

1. INTRODUCTION

1.1. Importance, concept, and need for regulating public procurement

The concept of public procurement and reasons for its existence

Why does public procurement exist?

- Because the administration
 - CANNOT + DOES NOT intend to develop in a direct manner many of its material activities

1. INTRODUCTION

1.1. Importance, concept, and need for regulating public procurement

The practical importance of public procurement

QUESTIONS

- What percentage of the EU's GDP does public procurement represent?
- What percentage of Spanish GDP does public procurement represent?
- What percentage of public expenditure in Spain does public procurement represent?

1. INTRODUCTION

1.1. Importance, concept, and need for regulating public procurement

Why regulate public procurement?

1. The spending of public money should be controlled + ensure the general interest.
2. To avoid corruption
3. To ensure the implementation of EU law principles

1. INTRODUCTION

1.1. Importance, concept, and need for regulating public procurement

Why regulate public procurement?

QUESTION: What are the main Spanish and EU regulatory instruments applicable to public procurement?

1. INTRODUCTION

1.2. Objectives

- Efficiency
- Equality
- Avoid corruption
- To promote other public interests/policies

QUESTION: How can specific public policy objectives be achieved through public procurement?

1. INTRODUCTION

1.3. Principles

Equality and non-discrimination (art. 132 LCSP)

- In access to public procurement calls
- IN PARTICULAR, between national and foreign companies

1. INTRODUCTION

1.3. Principles

Transparency and public information (arts. 132, 134, 135 and others)

- Objectives:
 - Fight corruption
 - Ensure equality
- Information provided on:
 - Current procedures
 - Previous contracts
- Obligation to provide reasons in many stages of the procedure

1. INTRODUCTION

1.3. Principles

Transparency and public information (arts. 132, 134, 135 and others)

- How is this information provided?
 - Official journals
 - Buyer profiles
 - Public contracts register

1. INTRODUCTION

1.3. Principles

Free competition (art. 132 LCSP)

- Contracts awarded on objective, reasonable + proportional criteria



OFICINA INDEPENDIENTE DE
REGULACIÓN Y SUPERVISIÓN DE LA CONTRATACIÓN

1. INTRODUCTION

1.3. Principles

Confidentiality (art. 133 LCSP)

Duty applicable to:

- Contracting authorities
- Contractors
 - 5 years

1. INTRODUCTION

1.4. Regulatory framework and influence of EU legislation

Regulation divided in two segments

- Firstly,
 - Preparation
 - Award
 - Formalisation
- Secondly,
 - Performance/ compliance
 - Subcontracting
 - Modification
 - Termination

1. INTRODUCTION

1.4. Regulatory framework and influence of EU legislation

- European public procurement law
 - MAINLY focuses on the first segment: preparation, award, and formalisation of public contracts.
 - For example, directive on public procurement:
 - Arts. 40-47: preparation
 - Arts. 48-55: publication and transparency
 - Arts. 56-69: choice of participants and award of contract
 - References to second segment: very limited:
 - Arts. 70-73: contract performance + termination

1. INTRODUCTION

1.4. Regulatory framework and influence of EU legislation

European public procurement legislation

- Four generations of directives
 - 1st + 2nd: 1970s-early 1990s
 - Objective: ensure that award of public contracts open to competition
 - 3rd: first decade of the 21st century
 - Objective: simplify procedures and improve regulation

1. INTRODUCTION

1.4. Regulatory framework and influence of EU legislation

European public procurement legislation

- Four generations of directives
 - 4th generation: 2014
 - Traditional purposes + new purposes
 - Directive 2014/24/EU on public procurement;
 - Directive 2014/23/EU on the award of concession contracts;
 - Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors
 - Directive 2014/55/EU on electronic invoicing in public procurement
 - Directive 2007/66/EC of the European Parliament and of the council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC about improving effectiveness of review procedures for awarding of public contracts
 - Council Directive 89/665/EEC of 21 December 1989 on the coordination of legislation, regulations, and administrative provisions for review procedures regarding public supply and public works contracts

1. INTRODUCTION

1.4. Regulatory framework and influence of EU legislation

Spanish regulatory framework

- Covers both segments:
 - Preparation, award, and formalisation
 - Performance + termination

QUESTION: Which territorial level has jurisdiction for regulating public procurement?

1. INTRODUCTION

1.4. Regulatory framework and influence of EU Law

Spanish regulatory framework

QUESTION: What is basic legislation (legislación básica) and what is the difference between basic legislation and legislation on bases?

1. INTRODUCTION

1.4. Regulatory framework and influence of EU legislation

Spanish regulatory framework

- Act 9/2017, of 8 November, on Public Sector Contracts (LCSP)

IN ADDITION:

- Royal Decree 1098/2001 of 12 October 2001, which passes the General Regulation on the Public Administration Contracts Act
 - Refers to the Public Contracts Act of 1995
- Royal Decree 817/2009 of 8 May 2009, partially implementing Act 30/2007 of 30 October 2007 on Public Sector Contracts.

AND:

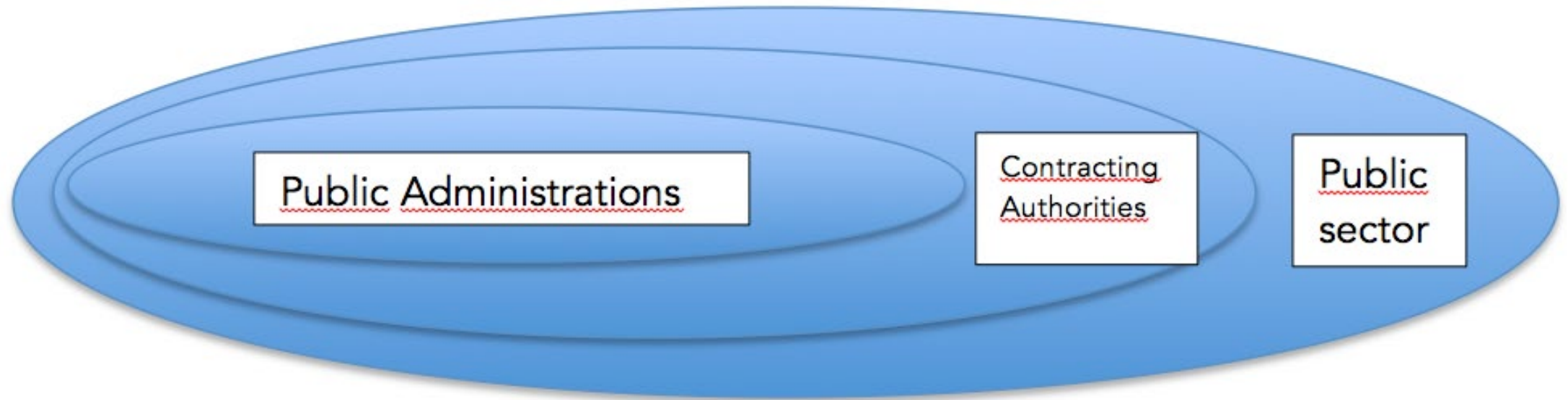
- Act 39/2015 on the Common Administrative Procedure = SUPPLEMENTARY

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

Three main categories of subjects:

- Contracting authorities that are public administrations
- Contracting authorities that are NOT public administrations
- Other public sector entities that are NOT contracting authorities
- Other entities

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT



2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

Three main categories of subjects:

- Contracting authorities that are public administrations
- Contracting authorities that are NOT public administrations
- Other public sector entities that are NOT contracting authorities



Degree of
intensity in the
application of
Act 9/2017

IN ADDITION:

- Act 9/2017 sometimes applies to private entities.

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

- Art. 2.1.1 of directive on public procurement:
 - state, regional, and local authorities,
 - bodies governed by public law
 - associations formed by one or more such authorities or one or more such bodies governed by public law.

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

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 - state, regional, and local authorities,
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2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

What is a body governed by public legislation?

- Art. 2.1.4 of directive on public procurement:
 - established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character
 - have legal personality
 - are either:
 - financed, for the most part, by the state, regional, and local authorities, or by other bodies governed by public legislation
 - subject to management supervision by those authorities or bodies
 - have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional, and local authorities, or by other bodies governed by public legislation

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Within the notion of contracting authorities, the Spanish legislator establishes two types of contracting authorities:

- Contracting authorities that ARE public administrations
- Contracting authorities that ARE NOT public administrations

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are public administrations

- Classification:
 - a) The general state administration, the administrations of the regional states, the autonomous cities of Ceuta and Melilla and the entities that make up the local administration
 - b) The management entities and the common services of the social security system
These include: the National Social Security Institute, the Institute of Migration and Social Services, the General Treasury of the Social Security and the State Unemployment Service
 - c) Independent administrations, public universities, and independent administrative authorities
 - d) Provincial councils and general assemblies of the historical territories of the Basque Country
 - e) Consortia

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are public administrations

- Classification:

f) Any entity that complies with the definition of a contracting authority AND also complies with the following two requirements:

- It is a public legislation entity
- It does NOT obtain most of its financing from market income

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are public administrations

- When and how does Act 9/2017 apply to them?
 - Possible classifications
 - Private vs. administrative contracts
 - Harmonised vs. non-harmonised contracts
 - **QUESTION:** What are harmonised thresholds for harmonised contracts?

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are public administrations

- When and how does Act 9/2017 apply to them?
 - Possible classifications
 - Private vs. administrative contracts
 - Harmonised vs. non-harmonised contracts
 - Possible combinations
 - Administrative + harmonised
 - Administrative NOT harmonised
 - Private + harmonised
 - Private NOT harmonised

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are public administrations

- When and how does Act 9/2017 apply to them?
 - Administrative + harmonised
 - Administrative NOT harmonised
- } Same legal regime: Act 9/2017 applies to ALL aspects of the contract

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are public administrations

- When and how does Act 9/2017 apply to them?
 - Private + harmonised
 - Act 9/2017 applies to first segment of the contract
 - Private law applies to the rest
 - EXCEPT special conditions for performance, modification, transfer, subcontracting, and termination

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are public administrations

- When and how does Act 9/2017 apply to them?
 - Private NOT harmonised
 - Act 9/2017 applies to first segment of the contract
 - Private legislation applies to the rest

Contracting authorities that are public administrations

QUESTIONS

1. For the following contracts identify and justify:

- Whether they are administrative or private contracts
- Whether they are subjected to harmonised regulations or not
- How Act 9/2017 applies to them
 - a. A contract in which the University of Valencia buys office supplies from a private company for a value of €50,000
 - b. A contract through which Valencia City Council hires a company to manage a sports centre. The company assumes the operational and financial risk of managing the facility. The value of the contract amounts to €4,000,000.

Contracting authorities that are public administrations

QUESTIONS

2. Is the Valencian Housing and Land Council (Entidad Valenciana de Vivienda y Suelo) a public administration? JUSTIFY your answer.

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are NOT public administrations

- Classification
 - Public foundations
 - Mutual insurance companies collaborating with social security
 - Any other entity that fits the description of a contracting authority provided by the EU Directive on Public Procurement
 - Any association of the aforementioned entities

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are NOT public administrations

- When and how does Act 9/2017 apply to them?
 - ALL of their contracts are PRIVATE
 - The only difference we must pay attention to is between:
 - Harmonised
 - Non-harmonised contracts

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are NOT public administrations

- When and how does Act 9/2017 apply to them?
 - ALL of their contracts are PRIVATE
 - Harmonised
 - Act 9/2017 applies to first segment of the contract
 - Preparation, award, and formalisation
 - Private law for the rest
 - EXCEPT special conditions for performance, modification, transfer, subcontracting, and termination

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.1. Contracting authorities

Contracting authorities that are NOT public administrations

- When and how does Act 9/2017 apply to them?
 - ALL of their contracts are PRIVATE
 - Non-harmonised
 - Act 9/2017 applies to first segment of the contract
 - Preparation, award, and formalisation
 - BUT with more flexibility
 - Private law for the rest
 - EXCEPT special conditions for performance, modification, transfer, subcontracting, and termination

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.2. Other public sector entities

Classification

- Any entity that has public participation and has an industrial or commercial character
 - Example: Navantia

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.2. Other public sector bodies

When and how does Act 9/2017 apply to them?

- All their contracts are PRIVATE
 - Rules that apply in the first phases of the contract (preparation + award)
 - Internal instructions respecting:
 - Principles of public announcements, competition, transparency, confidentiality, equality, and non-discrimination
 - Call for tenders published + documents for the procedure made electronically available
 - Reasonable deadlines
 - Contract awarded to best bid
 - Generally best quality-price
 - EXCEPTIONALLY, other objective criteria (previously published)
 - Selection of contractor made public

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.3. Other bodies (private or semi-private)

Classification

- Political parties
- Trade unions
- Business associations
- Professional associations created by members of profession (different from “Colegios Profesionales”)
- Foundations and associations created by or associated to any of the aforementioned bodies

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.3. Other entities (private or semi-private)

When and how does Act 9/2017 apply to them?

WHEN?

- Act 9/2017 will apply in part to these entities:
 - IF they have legal personality
 - AND have been created to satisfy general interest objectives
 - AND either:
 - mainly obtain their funds from another contracting authority
 - OR another contracting authority controls their management
 - OR appoints most members
 - AND they carry out harmonised contracts

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.3. Other bodies (private or semi-private)

When and how does Act 9/2017 apply to them?

HOW?

- Principles of public announcement, competition, transparency, equality, and non-discrimination
- Elaborate internal instructions on how to carry out public procurement procedures

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

2.3. Other entities (private or semi-private)

Specific case of subsidised contracts

- Private companies that carry out contracts subsidised by more than 50% by a contracting authority
- Public procurement rules apply to preparation, award, and formalisation of the contract

2. SUBJECTIVE SCOPE OF APPLICATION OF ACT 9/2017 ON PUBLIC PROCUREMENT

Classify the following entities according to Act 9/2017:

1. AENA
2. The two main political parties: PSOE + PP
3. Agriculture Department of the Generalitat Valenciana
4. Comisiones Obreras
5. FECYT

- FREMAP wants to externalise patient transportation services for an estimated value of €900,000
 - What type of entity is FREMAP?
 - Is this a harmonised contract?
 - How do we apply Act 9/2017?

3. OBJECTIVE SCOPE OF APPLICATION

3.1. Exclusions

Some general exclusions

- Public employment contracts (art. 11.1 LCSP)
- Contracts regarding assets/property (art. 9 LCSP)
- Contracts in field of defence and security (art. 5 LCSP)
- Contracts in the field of research, development, and innovation (art. 8 LCSP)

3. OBJECTIVE SCOPE OF APPLICATION

3.1. Exclusions

In-house provision

- Contracting authority exercises control over contractor
- Contractor is NOT a market player
 - 80% of activities for contracting authority
- Formal declaration as body for in-house provision

3. OBJECTIVE SCOPE OF APPLICATION

3.2. Types of contracts

Works

- Construction or civil engineering
 - Construction of buildings and infrastructure
 - Modification
 - Demolition and drilling

3. THE OBJECTIVE SCOPE OF APPLICATION

3.2. Types of contracts

Supply

- Acquisition/leasing of products
 - Delivery of goods during a period
 - Purchase/lease of computer equipment
 - EXCEPTIONS
 - Manufacture of goods according to certain characteristics
 - i.e.: benches for town hall square
 - Regular supply of energy
- 5 years (can be extended)

3. OBJECTIVE SCOPE OF APPLICATION

3.2. Types of contracts

Services

- Performance of an activity
- Anything that is not a work or supply contract

Include:

- Specific moment in time (report)
- Provision of service for longer period
- 5 years (can be extended)

3. OBJECTIVE SCOPE OF APPLICATION

3.2. Types of contracts

Works concessions

- Difference with works contracts
 - Economic regime
 - obtain money from fees paid by users
 - obtain money from fees paid by users AND be paid a sum of money by the administration.
- Duration: up to 40 years (can be extended)

3. OBJECTIVE SCOPE OF APPLICATION

3.2. Types of contracts

Services concessions

- Difference with service contracts
 - Economic regime
 - Obtain money from fees paid by users, or
 - Obtain money from fees paid by users, AND be paid a sum of money by the administration

3. OBJECTIVE SCOPE OF APPLICATION

3.2. Types of contracts

Service concessions

- Duration:

- 40 years: execution of works and operation of a service
- 25 years: operation of a service not related to the provision of health services
- 10 years: operation of a health service, UNLESS works have to be carried out

3. OBJECTIVE SCOPE OF APPLICATION

3.2. Types of contracts

Mixed contracts

- We apply the legal regime that applies to the main aspect of the contract
- Example: energy supply, public lighting, and maintenance

4. PARTS IN PUBLIC CONTRACTS

4.1. The administration

Contracting body

- Bodies
 - Central state administration
 - Ministers + secretaries of state
 - EXCEPT +€12 million = Council of Ministers
 - Public sector bodies: president or director
 - Local entities: mayors + presidents
 - +€6 million / +10% annual budget / -5000 pop. = town council
 - Regional governments
 - Generally, heads of departments

4. PARTS IN PUBLIC CONTRACTS

4.1. The administration

Contracting body

- Functions + obligations
 - Power to sign contracts on behalf of the administration
 - Adopt main decisions related to contractual activity
 - Updating buyer profile
 - Designate person responsible for the contract

4. PARTS IN PUBLIC CONTRACTS

4.1. The administration

Contracting body

- Modifications in competence
 - Can delegate competences to other bodies
 - Can create contracting boards (junta de contratación)
 - Possibility of centralising procurement procedures

4. PARTS IN PUBLIC CONTRACTS

4.1. The administration

Contracting committee (support body) (mesa de contratación)

- Evaluate bids presented by tenders
- Propose who should be awarded the contract
 - This proposal is non-binding
- Mandatory participation in most procedures
 - BUT NOT if contracting board

4. PARTS IN PUBLIC CONTRACTS

4.1. The Administration

Advisory bodies

- State public procurement advisory board
- Also exist in regional governments

4. PARTS IN PUBLIC CONTRACTS

4.2. The contractor

Personality

- General rule: only individuals or companies can participate in public procurement procedures.
 - EXCEPTION: temporary joint ventures

4. PARTS IN PUBLIC CONTRACTS

4.2. The contractor

Capacity

- Nationality
 - EU/EEA
 - Other states IF reciprocity

4. PARTS IN PUBLIC CONTRACTS

4.2. The contractor

Prohibitions on contracting

- convicted for crimes related to:
 - terrorism
 - corruption (influence peddling, bribery, prevarication, illegal financing of political parties)
 - fraud
 - crimes against public treasury and social security
 - crimes against workers' rights
 - crimes related to urban planning, protection of the environment, or historical heritage

4. PARTS IN PUBLIC CONTRACTS

4.2. The contractor

Prohibitions on contracting

- If sanctioned for infringements regarding:
 - Market competition
 - Discrimination of individuals with disabilities
- Not being up to date with tax or social security obligations
- For not having fulfilled obligations in a previous contract with a public administration

4. PARTS IN PUBLIC CONTRACTS

4.2. The contractor

Prohibitions on contracting

- Duration:
 - IF court resolution
 - determines prohibition
 - if not specified = max: 5 years
 - Other cases
 - 3 years

4. PARTS IN PUBLIC CONTRACTS

4.2. The contractor

Solvency

- Economic and financial standing
 - annual turnover / net worth of company
- Technical or professional ability
 - Similar contracts have been executed
 - Human + material means available
- Solvency criteria: published
- Classification required
 - Works contracts +€500,000

4. PARTS IN PUBLIC CONTRACTS

4.2. The contractor

Deposits

- Provisional deposit
 - To ensure that bids are not modified
 - Returned once contract is formalised
 - UNLESS unjustified withdrawal
 - Max. 3% of price
- Definitive deposit
 - To ensure that contract is properly performed
 - 5% of price offered by contractor

4. PARTS IN PUBLIC CONTRACTS

4.2. The contractor

Deposits

- Provisional deposit
 - To ensure that bids are not modified
 - Returned once contract is formalised
 - UNLESS unjustified withdrawal
 - Max. 3% of price
- Definitive deposit
 - To ensure that contract is properly performed
 - 5% of price offered by contractor

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.1. Preparation of contract

Preliminary studies and consultations (art. 115, Act 9/2017)

- Objectives
 - Gain knowledge of market
 - Inform possible tenderers of contract + requirements
- Must NOT distort competition

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.1. Preparation of contract

The contracting file

A) Specific administrative clauses (pliego de cláusulas administrativas particulares)

- This document states:
 - Solvency + other requirements
 - Rights and obligations
- Difference between documents that contain:
 - Specific administrative clauses
 - General administrative clauses

5. PROCEDURE FOR PREPARING AND AWARDED PUBLIC CONTRACTS

5.1. Preparation of contract

The contracting file

B) Technical prescriptions/specifications

- Define quality and technical conditions for execution of contract
- Must also differentiate between specific and general technical prescription documents

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.1. Preparation of contract

The contracting file

C) Certificate of budgetary appropriation

- Proving that contracting authority is authorised to spend money on contract

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.1. Preparation of contract

The contracting file

D) Justification of contract

- Need
- Type of procurement procedure
- Requirements for tenderers
- Estimated value of contract

5. PROCEDURE FOR PREPARING AND AWARDDING PUBLIC CONTRACTS

5.2. Publishing the contract notice

Publishing the contract notice (call for tenders)

→ Buyer profile

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Ordinary

A) Open

General open (Arts. 156-158, Act 9/2017)

- Anyone interested can submit bids
- Negotiation excluded

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Ordinary

A) Open

Simplified open (art. 159, Act 9/2017)

- Circumstances (cumulative)
 - Works contracts (up to two million euros), supplies or services (up to €100,000)
 - Subjective considerations in the criteria for awarding the contract
 - Generally, under 25%
 - Up to 45% in intellectual services

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Ordinary

A) Open

Simplified open (art. 159, Act 9/2017)

- Particularities:

- Tenderers must be classified
- No provisional deposit must be provided
- Tenders may only be submitted to the register identified as such in the notice (not to other registers)
- Declaration of responsibility + adequate solvency is required
- Submitted in a single envelope

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Ordinary

A) Open

Super-simplified open (art. 159.6, Act 9/2017)

- Can be applied to:
 - works contracts with an estimated value of less than €80,000
 - supply and service contracts with an estimated value of less than €60,000
- Can NEVER be used for intellectual services
- Characteristics:
 - Deadlines are shorter
 - No proof of economic and financial and technical or professional solvency
 - Automated evaluations possible

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Ordinary

B) Restricted

- Proposals are only presented after prior selection by contracting body
- Preselection of a minimum of 5
- More efficient: only those deemed capable are invited
- No negotiation

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Special

A) Negotiated procedures (arts. 166-171, Act 9/2017)

- Negotiation with at least 3 tenderers
 - THEN award contract
- Modalities:
 - Negotiated: the call for tenders is published and the contracting authority must negotiate the conditions of the contract with at least three candidates.
 - Negotiated without publicity: no prior publicity necessary and, in some cases, it may be possible for only one candidate to be considered instead of three.

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Special

B) Competitive dialogue procedure (arts. 172-176, Act 9/2017)

- Administration specifies needs to companies
- Dialogue: solutions gradually refined with possible tenderers
- Proposals presented + contract awarded

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Special

C) Minor contracts (art. 118, Act 9/2017)

- Contracts with an estimated value of less than
 - €40,000 for works contracts, or
 - €15,000 for service and supply contracts

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Special

D) Emergency processing (art. 120, Act 9/2017)

- When?
 - When the administration must act immediately due to:
 - catastrophic events
 - situations involving grave danger
 - needs affecting national defence

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.3. Procedures for selecting contractors

Special

D) Emergency processing (art. 120, Act 9/2017)

- What does it involve?
 - No obligation to process a procurement file
 - Contracting body SIMPLY orders execution of what is necessary
 - The object, in whole or in part, can be freely contracted, without being subject to formal requirements established in legislation
 - Even if budgetary allocation is insufficient
 - Once the agreement has been adopted, it will be allocated in accordance with provisions of general budgetary legislation.

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.4. Proposals presented by tenderers

- Requirements:
 - Respect content of administrative and technical specifications
 - Be accompanied by a declaration of responsibility, indicating that bidder meets all requirements for contracting
 - Include email address for notification purposes
 - Presented in sealed envelopes

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.5. Criteria considered to award contracts

- Referred to:
 - Economic aspects
 - Qualitative aspects
- Must be directly related to object of contract
- Must be formulated in an objective manner that avoids discrimination

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.6. The possibility of using electronic auction systems (art. 143, Act 9/2017)

- Initial full evaluation by administration of all tenders
- Invitation to an electronic auction to those who submitted admissible tenders
- Objective: lower price

5. PROCEDURE FOR PREPARING AND AWARDING PUBLIC CONTRACTS

5.7. Formalisation of contract

- 15 days after it is awarded
- If NOT due to contractor: PA can request 3% of price
- If NOT due to PA: compensation for damages

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.1. The administration's prerogatives

1. Unilateral interpretation of contract

- Private sector: disagreements regarding interpretation resolved by negotiation
 - IF NOT, trial/arbitration to resolve conflict
- Public sector: disagreements regarding interpretation decided by the administration.
 - Decision can be appealed

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.1. The administration's prerogatives

1. Power of modification (*ius variandi*)

2. ONLY IF:

-A) It was foreseen in the document of specific administrative clauses

- Max: 20% of price

-B) Unplanned modifications:

☐ ONLY when strictly necessary (cases in art. 205, Act 9/2017):

- To add additional works, supplies, or services IF:

- ⑩ Change of contractor NOT possible

- ⑩ AND change in original price by less than 50%.

- Unforeseeable circumstances (i.e. archaeological)

- ⑩ Change in original price by less than 50%

- When modifications are not substantial = change in original price by:

- ⑩ Less than 10% in works contracts

- ⑩ Less than 15% in other contracts

☐ Contractor must accept unplanned modifications that do NOT vary the initial price of contract by more than 20%.

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.1. The administration's prerogatives

1. Power of direction

- How contract is implemented
- Changes in prices/fees charged by contractors (in concessions)

1. Power of unilateral resolution of contracts

- When:
 - ⑩ The contract CANNOT be performed on the terms initially agreed
 - ⑩ AND modification is NOT possible
- The contractor has a right to a compensation of 3% of the full price of the contract

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.2. Principle of risk and venture and its exceptions: financial equilibrium of the contract

- General rule = contractor assumes risks in the execution of the contract
 - HOWEVER, there are mechanisms to protect the contractor to ensure that the contract is implemented.
 - Known as measures to guarantee the financial equilibrium of the contract. These include:
 - Reviewing contract price
 - Reviewing fees that concessionaires charge
 - Granting subventions to contractor, etc.

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.2. Principle of risk and venture and its exceptions: financial equilibrium of contract

- Cases in which these mechanisms can be used are:
 - *Force majeure* in works contracts (art. 239, Act 9/2017)
 - *Factum principis* (act of the prince) (arts. 270 and 290, Act 9/2017)
 - Unforeseeable risks

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.2. Principle of risk and venture and its exceptions: financial equilibrium of contract

Force majeure in works contracts (art. 239, Act 9/2017)

- In case of *force majeure* AND in following cases:
 - Fires caused by lightning
 - Natural phenomena with catastrophic effects (earthquakes, volcanic eruptions, etc.)
 - Damage caused violently in time of war, riotous robbery, or serious disturbances in public order

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.2. Principle of risk and venture and its exceptions: financial equilibrium of contract

Factum principis (act of the prince) (arts. 270 and 290, Act 9/2017)

- A decision made by the administration outside the contractual relationship that has consequences for implementation of the contract and is detrimental to it.

6. IMPLEMENTATION OF PUBLIC CONTRACTS

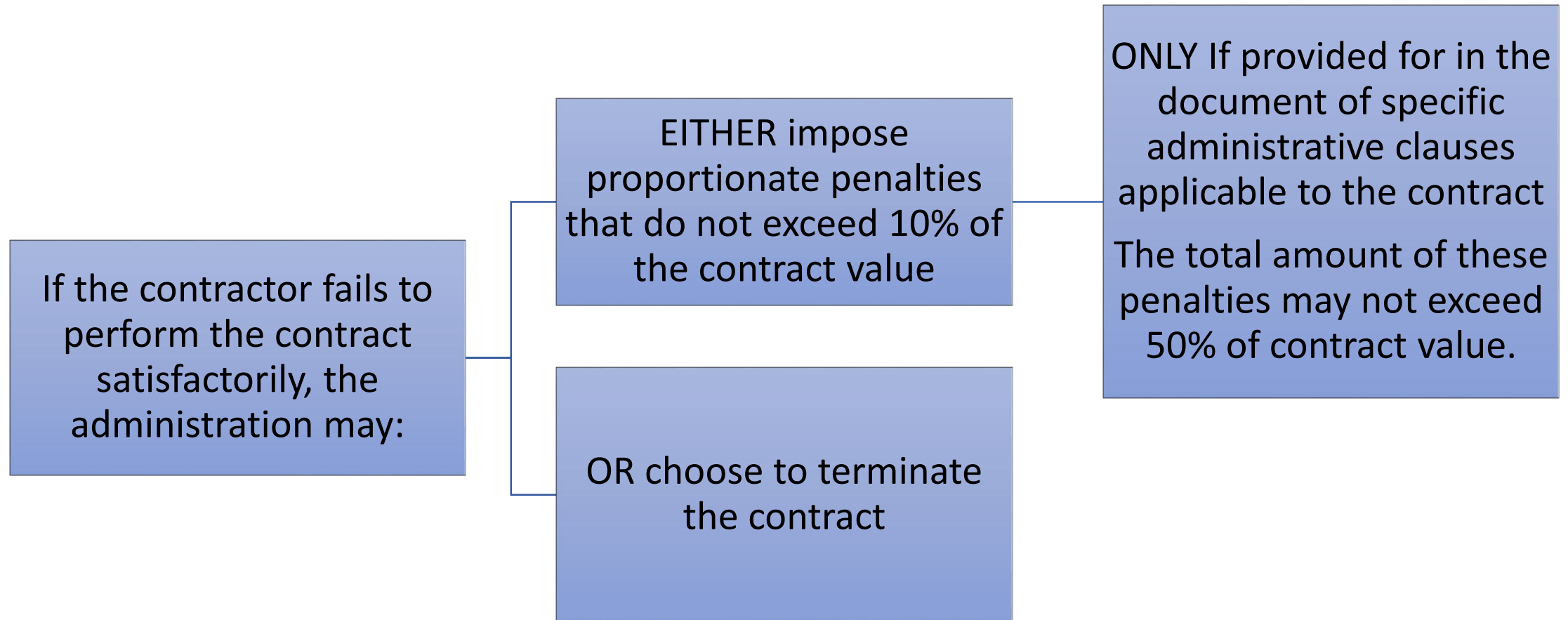
6.2. The principle of risk and venture and its exceptions: financial equilibrium of contract

Unforeseeable risks

- Supervening circumstances
- That the contractor could not reasonably foresee, even by using diligence beyond the norm
- That produce a very significant economic imbalance
- Expenses generated for contractor = disproportionate

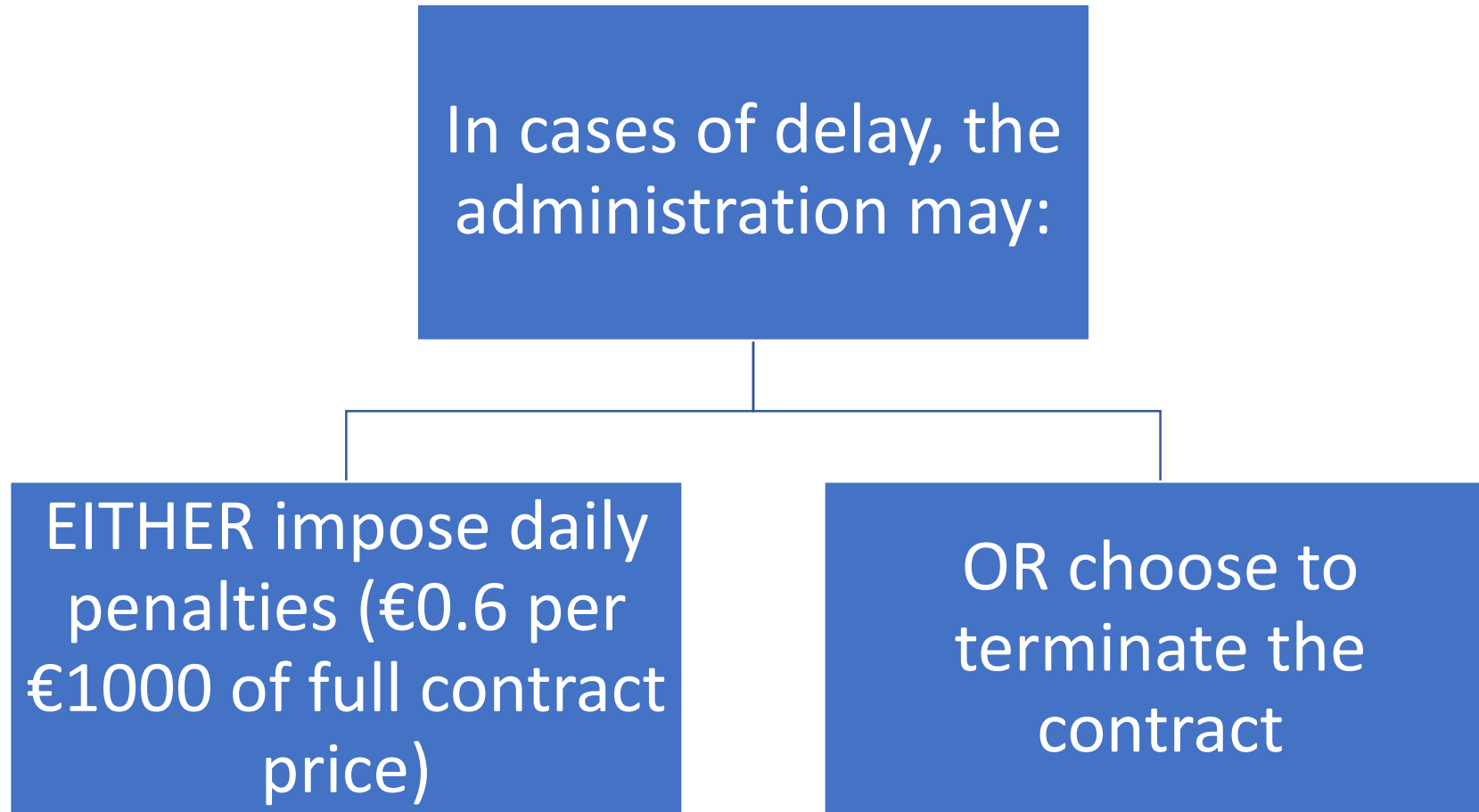
6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.3. Defective performance and delay by contractor (art. 192 and 193, act 9/2017)



6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.3. Defective performance and delay by contractor (art. 192 and 193, act 9/2017)



6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.4. Compensation for damage caused to third parties (art. 196, Act 9/2017)

- Contractor assumes obligation to compensate third parties for damages caused.
 - UNLESS damages result from the actions of the administration (i.e. an order given by contracting authority)
- Competent courts:
 - If the contractor is liable: civil courts
 - If the administration is liable:
 - First, an administrative liability procedure
 - AND, subsequently, administrative courts

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.5. Transfer and subcontracting

Transfer

- The transferee (who the contract is transferred to) replaces the successful tenderer and is subrogated in their rights, duties, and responsibilities before the administration.
- Requirements:
 - Provided for in the document of specific administrative clauses
 - Does not involve a restriction of competition
 - Prior and express authorisation of the contracting body
 - At least 20% of the contract already executed
 - The transferee has the capacity to contract and the necessary solvency
 - The transferee does not incur in a cause of prohibition to contract
 - The transfer must be formalised in a public document

6. IMPLEMENTATION OF PUBLIC CONTRACTS

6.5. Transfer and subcontracting

Subcontracting

Contractor hires third parties (subcontractors) for partial performance of contract

- Generally allowed UNLESS otherwise stated in contract documents
- The subcontractor must not be disqualified (*inhabilitado*) or prohibited from contracting.
- Subcontractors only respond before main contractor, who assumes total responsibility for the execution of the contract with the administration
- Subcontractors cannot take direct action against the administration.

7. TERMINATION OF CONTRACT

7.1. Fulfilment of contract

= Normal form of termination

→ When contractor has fulfilled obligations

↓ 1 month

- PA must have approved result

↓ 30 days

Payment of the full price of the contract

+ START of guarantee period

In concession contracts,
infrastructure/
installations are returned
to PA

Whatever the contract states,
BUT in works contracts at least 1
year + 15 years for hidden
defects

*When the guarantee period finishes = deposit is returned

7. TERMINATION OF CONTRACT

7.1. Fulfilment of contract

What if PA considers contract NOT properly implemented?

- Must require the contractor to remedy the defects and,
- IF contractor refuses: may reject the works or objects = termination of the contract due to non-performance by the contractor
 - Unilateral decision by administration
 - IF disagreement: Council of State/equivalent body in regional government intervenes (with mandatory BUT non-binding report)

7. TERMINATION OF CONTRACT

7.2. Resolution (early termination)

- Unilateral declaration by administration: *ex officio* or at the request of the contractor
- Requires opinion of the Council of State (or equivalent body in regional government) when contractor opposes (mandatory but not binding)

7. TERMINATION OF CONTRACT

7.2. Resolution (early termination)

Reasons

- Death or supervening incapacity of contractor (an individual)
- Winding up of the company
- Bankruptcy of contractor
- Agreement between administration and contractor
- Missed deadlines by contractor
- Delay in payment by administration (more than 6 months)
- Non-fulfilment of main obligation of contract or of the remaining essential contractual obligations
- Impossibility of executing service in terms initially agreed, when it is not possible to modify the contract
- Failure to pay salaries by contractor
- Non-compliance with conditions established in collective agreements
- Rescue for reasons of public interest (concession contracts):
 - Requires proof that direct management is more effective and efficient
 - Obligation to return deposit and compensate for damages

7. TERMINATION OF CONTRACT

7.3. Invalidity of public contracts

Causes

- Causes (art. 38, Act 9/2017):
 - Causes established by civil law
 - Causes established by administrative law
 - ESPECIALLY when there are defects in the preparation and award. These defects may determine that the contract is null and void or voidable.

7. TERMINATION OF CONTRACT

7.3. Invalidity of public contracts

- Cases in which the contract is null and void:
 - Causes of art. 47, Act 39/2015
 - In cases envisaged in Art. 39.2, Act 9/2017, i.e.
 - Lack of capacity to act or solvency of contractor
 - Lack of budget appropriation for contract
 - Failure to publish the announcement of the contract, etc.

7. TERMINATION OF CONTRACT

7.3. Invalidity of public contracts

- Cases in which contract is voidable:
 - Those provided for in Article 48, Act 39/2015
 - Others foreseen in Act 9/2017:
 - Non-compliance with circumstances and requirements for modification of contracts (arts. 204 and 205)
 - Decisions that grant advantages to companies that have previously contracted with the administration
 - Using in-house provision mechanisms without complying with requirements set out in law

8. APPEALS AGAINST THE DECISIONS MADE IN PUBLIC PROCUREMENT

8.1. Special appeal in contracting matters

There is a special mechanism to appeal some of the actions carried out in context of public contracts: a special appeal in contracting matters

Characteristics

- Free of charge
- Suspensive effects when the appeal is presented against the decision to award the contract
- Resolved very quickly
- Optional (*potestativo*)
- Puts an end to all administrative remedies
- Ordinary administrative appeals CANNOT be presented (*alzada + reposición*)

8. APPEALS AGAINST THE DECISIONS MADE IN PUBLIC PROCUREMENT

8.1. Special appeal in contracting matters

Requirements

Types of contracts in which it can be presented:

- Works and works and services concessions with estimated value of more than three million euros
- Supplies and services with value greater than €100,000

Who has legal standing?

- Tenderers
- Those affected, directly or indirectly (i.e. associations or representative bodies, such as professional associations or trade unions)

8. APPEALS AGAINST PUBLIC PROCUREMENT DECISIONS

8.1. Special appeal in contracting matters

Requirements

What can be appealed?

- Contract announcement (call for tenders)
- Tender documents
- Any qualified procedural decisions (which has decisive impact on award)
- Awarding decisions
- Contract modifications
 - when it is considered that a new contract should have been awarded instead of modifying the existing one
- Formalisation of in-house provision agreements
- Agreements to rescue concessions

8. APPEALS AGAINST PUBLIC PROCUREMENT DECISIONS

8.1. Special appeal in contracting matters

Requirements

Deadline for filing the appeal: 15 days from notification or publication of the appealed actions/documents

BUT up to 6 months in some cases (when contract is null and void)

8. APPEALS AGAINST PUBLIC PROCUREMENT DECISIONS

8.1. Special appeal in contracting matters

Competence

- In the central state administration: Central Administrative Court for Contract Appeals.
- The regional governments have created their own court or resort to the central one, through agreements.

Effects

- Automatic suspension of the processing of the file if the decision appealed is the award
- Suspension and other preliminary measures can also be requested in remaining cases

8. APPEALS AGAINST PUBLIC PROCUREMENT DECISIONS

8.1. Special appeal in contracting matters

Decision

- Deadline: two months for resolution. Negative administrative silence.
- If appeal is upheld:
 - actions/documents appealed can be declared null and void
 - contracting authority can be forced to remove discriminatory or illegal issues from tender documents
 - the contract can be awarded to a particular tenderer
 - may include compensation for the interested party

8. APPEALS AGAINST PUBLIC PROCUREMENT DECISIONS

8.1. Special appeal in contracting matters

Decision

- Rejection or inadmissibility:
 - May impose a fine on the appellant: €1000 to €30,000
 - If it considers appeal reckless (*temeridad*) or in bad faith
- Final decision ENDS ALL ADMINISTRATIVE REMEDIES and can only be appealed before administrative courts

8. APPEALS AGAINST PUBLIC PROCUREMENT DECISIONS

8.2. Other appeals

- For contracts and decisions in which it is not possible to present a special appeal in contracting matters, ordinary administrative or contentious-administrative appeals can be made.