

EXECUTIVE
SUMMARY OF THE
ANNUAL REPORT ON
PUBLIC
PROCUREMENT
OVERSIGHT IN SPAIN

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OIR^eScon

OFICINA INDEPENDIENTE DE REGULACIÓN Y
SUPERVISIÓN DE LA CONTRATACIÓN

Executive summary of the 2021 Annual Report on public procurement oversight in Spain.

The Independent Office for Procurement Regulation and Oversight (OIReScon), on 22 December, 2021, has approved Spain's 2021 Annual Procurement Oversight Report (IAS 2021), in compliance with the mandate of article 332.9 of Law 9/2017, of 8 November on Public Sector Contracts, transposing into Spanish law the Directives 2014/23 and 2014/24 (EU) of 26 February, 2014 (LCSP) of the European Parliament and the Council. This report shall be sent to the European Commission.

This annual oversight report sets out, in compliance with the aforementioned article, the **main conclusions** of the monitoring and oversight actively carried out by the authorities with jurisdiction, **a list of the main breaches detected by the external and internal monitoring bodies** in the area of public procurement, **information on the prevention, detection and proper reporting of cases of fraud, corruption, conflict of interest**, as well as on any **collusion issues** detected.

Likewise, it includes **information on the most common sources of incorrect application of legislation or legal uncertainty**, through **oversight actions directly carried out by OIReScon**. Among these actions, those aimed at overseeing consultative activity in the area of public procurement stand out, with the aim of highlighting the issues that have raised the most doubts regarding the interpretation of the regulations, oversight of the principles of publicity and transparency required by the LCSP on the professionalization of public procurement in its formative aspect and in relation to access to the civil service.

As a new feature with respect to previous Annual Oversight Reports (IAS) and in order to make the content more accessible and agile, this year the report has been structured into the following Modules:

- I. Legal uncertainty in public procurement. Consultative activity
- II. The preparatory phase of procurement.
- III. Collusive practices in public procurement.
- IV. Prevention and Fight against corruption in public procurement.
- V. Oversight of the principle of publicity and transparency in public procurement.
- VI. The contract tendering phase.
- VII. The contract execution phase. Contract amendments and subcontracting.
- VIII. Public procurement control bodies.
- IX. Professionalization.
- X. Public procurement figures for 2020.

The **main conclusions of all of the** above are the following:

- With regard **to legal uncertainty in public procurement**, and following the analysis in the previous and current IAS, it can be concluded that the issues that have raised the most uncertainty are the following:



- **Collusive practices in public procurement:**

The analysis carried out by this Office based on the information received by the competition law authorities (CNMC and regional authorities) seems to indicate that the relevance of guaranteeing competition in procurement matters is beginning to settle in the authorities' culture and that Public Authorities are more aware of the need and obligation to ensure it. However, it has been detected that the "transport and mobility" sector is the one most affected by collusive procurement practices.

- In the area of **prevention and fight against corruption**, the following should be noted:

The initiative of the Network of Offices and Agencies for the Prevention and Fight against Fraud¹, of which OIReScon forms part, is the source of information for this analysis and oversight. In this regard, it should be noted that 11.42% of the communications or complaints received in 2020 by the Offices and Agencies for the Prevention and Fight against Fraud and Corruption related to public procurement, which reflects its importance, although it represents a decrease, compared to the 2020 IAS. Service contracts as the most commonly reported type of contract (68.46%), with alleged irregularities in the award of the contract being the main cause for complaint, followed by irregularities in the execution of the contract.

¹It also includes the Anti-Fraud Office of Catalonia, the Agency for Prevention and Fight against Fraud and Corruption of the C. Valenciana, the Office for the Prevention and Fight against corruption of the CA of the Balearic Islands, the Municipal Office against Fraud and Corruption of the Madrid City Council, the Ethics and Good Governance Mailbox of the Barcelona City Council, the Transparency Agency of the Barcelona Metropolitan Area, the Corruption Prevention Section of the Consello de Contas de la CA de Galicia, the Audiencia de cuentas (Court of Auditors) of the Canary Islands, and the Anti-Fraud Coordination Service for financial interests of the European Union of the Comptroller General of the General State Administration.

It is stressed that **the absence of a National Anti-Fraud Strategy**² hinders the coordinated action of all agents involved in the fight against fraud and corruption, especially in the area of public procurement.

- Regarding **the principle of publicity and transparency in public procurement:**

In the control of this section, the indicators already established in the IAS 2020 have been followed, concluding that the procurement platforms of the public sector as a whole are of high quality and efficiency, largely meeting the requirements established by the LCSP. However, certain aspects that could be improved have been detected.

In this regard and as already indicated in IAS 2020, there is no control or verification of the information published by each procurement body, neither is there a quantitative or qualitative uniformity of the information to be published in open data (OPEN DATA) by the PLACSP and regional platforms, an aspect that directly affects the quality of the information offered.

The existence of data of sufficient quality may mean the elimination of the diversification of information to be submitted or published, enhancing effectiveness and efficiency and reducing the workload of the procurement authorities.

However, it should be noted that there have been major changes and advances in various procurement platforms, highlighting, in particular, the improvements and amendments to the PLACSP and the renewal of the Basque Country procurement platform. Moreover, the improvement in open data across the different platforms is highlighted. In this regard, the implementation of the PLACSP tool "Open PLACSP" stands out, which allows any interested party to process the procurement data published in aggregated form by the PLACSP in a simple way and without the need for complex technological knowledge. Despite all this, there is information that is not recorded or if recorded, it is not easily accessible or identifiable. In this respect, shortcomings were mainly detected in terms of the advertising of the procurement activity schedule and the contract execution phase.

²As of the closing date of this report, December 15, 2021, there has been a significant boost in the development of the National Anti-Fraud Strategy, through the Project "*Strengthening the National Anti-Fraud Strategy in Spain*", with OIReScon forming part of the Commission in charge of this task.

Principle of publicity and transparency

- **Significant progress in open data** on public procurement platforms, mainly the PLACSP (inclusion of data and improvement of existing data). However, **there are still quantitative and qualitative shortcomings** that do not yet allow for comparison and benchmarking, making it difficult to have a complete picture of global public procurement.
 - Lack of information on the **procurement programming and the execution of the contract.**
- In **the direct oversight actions**, the monitoring and consolidation of the issues already addressed in the IAS 2020 have been carried out, structured in **the preparation, tendering and execution phases of the contract.**

In ***the contractual preparation phase***, shortcomings continue to be detected in compliance with the publication of the contractual activity scheduling and the reports on conclusions or results with regard to preliminary market consultations. It should be noted that this is also the phase in which the external control bodies have detected the most irregularities.

On the other hand, with regard to ***the contractual phase***, the upward trend in the adoption of measures to adapt the solvency requirements in the specifications according to each contract, has continued.

Furthermore, concerning the award criteria, a predominance of the price criterion over the other criteria has been identified, prompting the recommendation to reflect on the suitability and justification of these criteria and the need to bring those susceptible to value judgment into line with those obtained by the use of formulas, in order to obtain the best value for money.

On the other hand, a considerable shortcoming has been detected in the cost structure that must be included in the Bidding documents in accordance with article 100.2 of the LCSP, relative to the configuration of the PBL based on direct and indirect costs and other possible expenses calculated for determination. The mention of market prices and their adaptation to the PBL and VEC is more of a "style clause" than a true justification, so this point is clearly identified as an area for improvement.

It has been confirmed that the ***contract execution phase is not documented in the*** procurement platforms of the public sector as a whole, which makes monitoring difficult. Furthermore, there continues to be confusion between contractual extension and contractual amendments regarding the publication of both procedures. On the other hand, it is still not possible to know, in light of the data accessible through the Public Sector Procurement Platforms, the real weight

of subcontracting and, therefore, the amount actually subcontracted. In this sense, it is stressed that the lack of information prevents the supervision of obligations imposed on Public Administrations such as whether the payment of the awardee to subcontractors and suppliers is verified in the contracts in which it is obligatory in accordance with article 217 of the LCSP.

- Regarding **the supervision of the results of the performance of procurement control bodies in matters of public procurement:**

This analysis shows the role that OIReScon should play:

OIReScon is the only public procurement oversight body, which systematises and integrates the actions of all the public procurement control bodies, pooling the findings of the external control and internal control bodies, which is one of the most interesting contributions of this report for the analysis and improvement of public procurement.

With regard to the bodies with jurisdiction for the resolution of special procurement appeals (***Administrative Procurement Appeals Tribunals***), 4,020 special procurement appeals were analysed in 2020, reflecting a reduction on these figures for previous years. This decrease is explained, at least in part, by the incidence caused by the pandemic situation that has also left its mark on public procurement in the 2020 financial year.

The procurement risk areas identified by OIReScon coincide with the conclusions that can be drawn from the rulings of the Administrative Courts of Contract Appeals. Graphically, the risks detected in the analysis of special resources are concentrated on the following aspects:

Risk areas detected in the analysis of the Special resources in Procurement actions

The drafting and definition of the award criteria in the Specifications.

The justification for the exclusions of bidders.

The statement of reasons for the award decision, especially the contracting authority's assessment of the tender.

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Source: OIReScon's own creation

The analysis of **internal economic and financial control in the area of procurement (the Interventions)** is organised on the basis of different territorial levels of administration.

At regional level, most of the objections reported by the Autonomous Communities refer to the expenditure authorisation phase, affecting 74.84% of the PBL. At local level, the shortcomings reported with regards to the expenditure phases corresponding to authorisation, commitment and recognition of the obligation, show very similar percentages, with the recognition of obligation standing out slightly.

At regional level, this year there has been a change in trend with regard to previous IAS reports in the expenditure phase, which has frequently been the subject of objections, becoming the "**authorisation of expenditure**" phase.

At local level, the phase that has been the subject of the most objections is "**the recognition of obligation**" although with a percentage only slightly higher than the rest of the phases.

The results of the audits carried out by the Comptroller General of the State Administration (IGAE), the Comptroller General of Defence (INTERGENDEF) and the Comptroller General of Social Security (IGSS), highlight the conclusion reached by these bodies regarding the lack of planning and programming of procurement actions.

Finally, regarding the external control bodies, the Court of Auditors and External Control Bodies (OCEX) highlight the absence of justification of the nature and extent of the needs to be satisfied, the failure to comply with publicity obligations, the absence of sufficient justification of the PBL or VEC or the incorrect definition of the award criteria.

Most of the irregularities detected by both the external and internal control bodies are concentrated in the *preparatory phase* of the file.

- Regarding **the professionalization** of public procurement:

It is once again reflected, as in previous IAS reports, that there is a generalised lack of design of genuine specialisation pathways in a subject as complex as public procurement. Furthermore, based on the data analysed on the training provided, the number of employees trained or training expectations, it can be concluded that, despite the effort, the results achieved have not yet been sufficient to meet the needs demanded.

Regarding access to Civil Service bodies, despite the fact that a high percentage of the Services / Tiers examined at national level and all of them at regional level include recruitment in their access syllabuses, the share that this acquires with respect to the total number of subjects is relatively scarce and insignificant.

- Finally, the main **figures for public procurement in 2020 have been analysed and reflected³**:

Volume of public procurement in Spain in 2020		
132,327 public sector tenders		63,948.30 million euros
State Public Sector	27,531 tenders	19,826, 80 million euros
Regional Public Sector	45,680 tenders	24,037.85 million euros
Local Public Sector	59,116 tenders	20,083.65 million euros

In terms of tenders, 44.67% of all Public Sector procurement corresponds to Local Authorities, although in economic terms it is the regional public sector that has the highest percentage share (37.59%). The State Public Sector had the smallest share, both in economic terms (31.00%) and in the number of tenders (20.81%).

66.64% of Public Sector contracting is managed according to the open or simplified open procedure. The average processing time for the open procedure

³Excluding minor procurement

is 163.17 days (5.4 months), while the simplified procedure has an average processing time of 104.82 days (3.5 months).

In terms of participation, in the open procedure the average number of bidders is 4.83 (5.07 in the “simplified” version), with the highest average number of bidders reached in the regional public sector in the open procedure (6, 03 bidders) and in the local area in relation to the simplified open procedure. (5.53 bidders). In the case of negotiated procedure with advertising, competition is drastically reduced (3.49 bidders), being almost minimal in the negotiated procedure without advertising (1.36 bidders). In the competitive dialogue procedure the average number of bidders is 3.33.

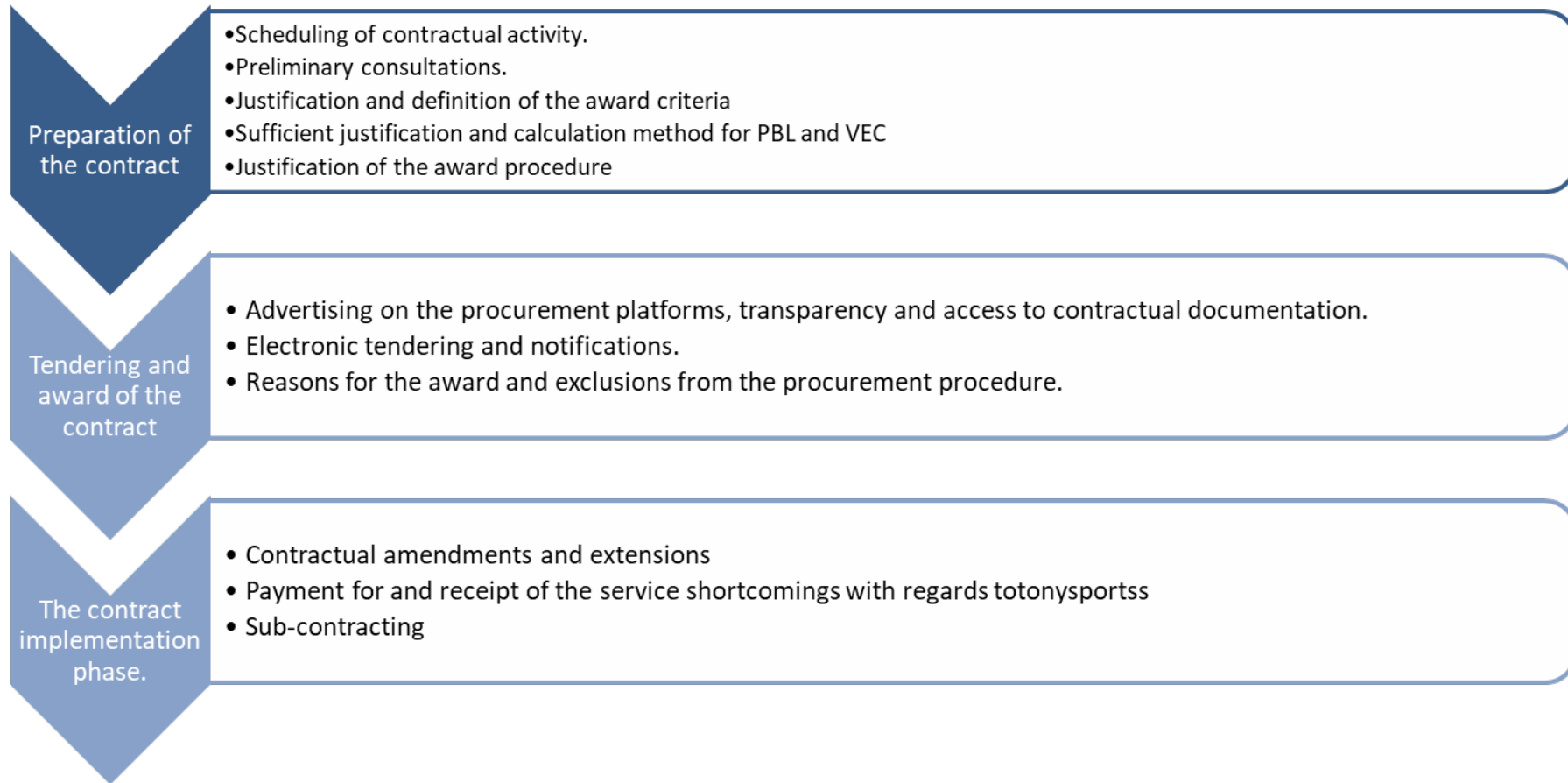
In terms of the reduction of the economic cost obtained with the amount with which the tender is finally awarded, the competitive dialogue procedure is the one that obtains the greatest reduction with 20.67%. In the open and simplified open procedures, the average drop is 14.70% and 16.44%, respectively.

As was already the case in IAS 2019 and 2020, there is still no aggregate data on minor public sector procurement, and no systematised analysis is possible.

As a result of all the oversight and analysis actions carried out, the **risk areas in public procurement detected by OIReScon are confirmed and updated**, which substantially coincide with the results of the work carried out by the external and internal control bodies in matters of public procurement and which, in turn, coincide with the areas in which most shortcomings with regards to publicity and transparency occur (the contract preparation and execution phases).

The joint processing and analysis of the conclusions of the internal and external control bodies, the agencies and offices for the prevention and fight against corruption, the competition agencies and the direct supervisory actions of OIReScon, allows this Office to establish a series **of monitoring indicators** and, **in turn, outline a constantly updated public procurement risk map** that allows preventive measures, not just corrective ones, in the area of public procurement. These aspects, in turn, should be integrated into the future **National Public Procurement Strategy**.

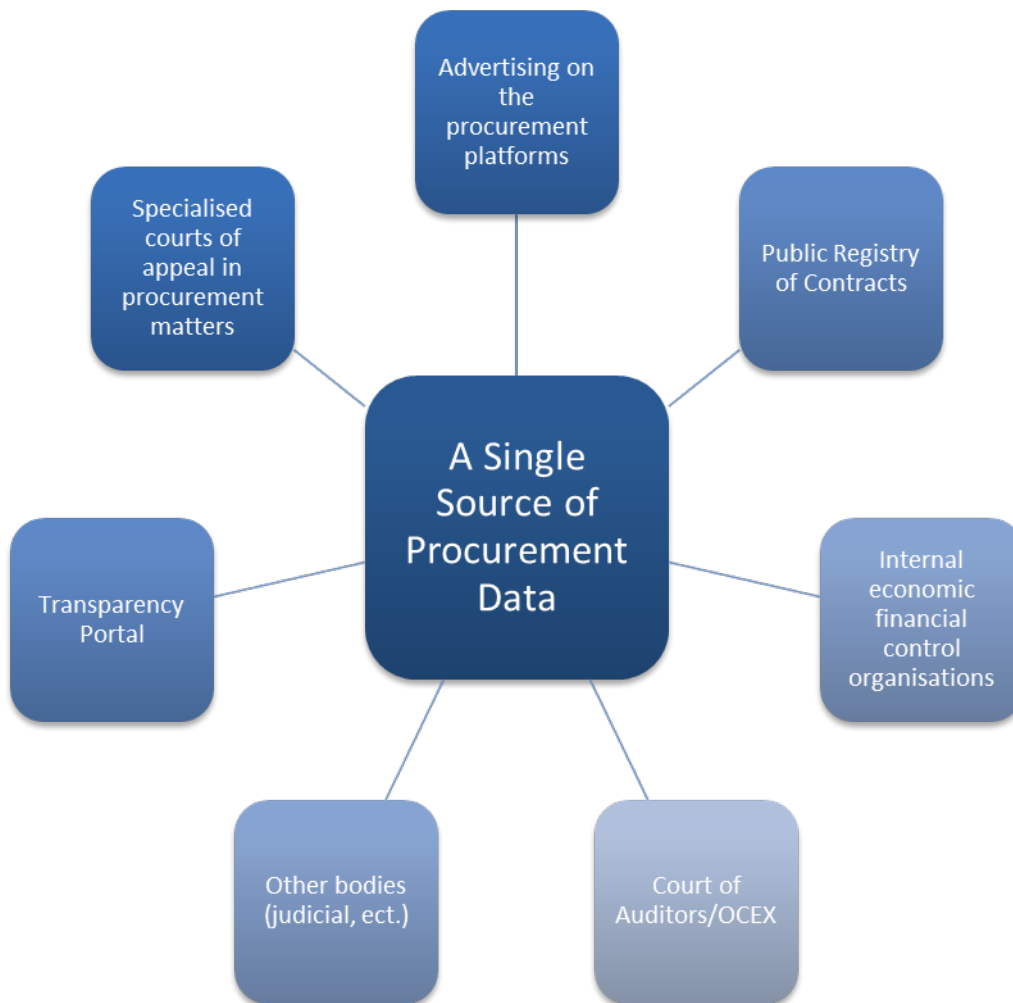
In summary, the main lines of attention are as follows:



Source: OIReScon's own creation

Finally, and in view of the results expressed, in this IAS, the OIReScon formulates a series of recommendations, of which the following should be highlighted:

- It is considered of paramount importance to guide the actions of all the agents involved in the unification of public procurement data in **a single data source**, which allows the contracting authorities to submit the information and documentation required by the regulations on publicity and transparency, as well as those relative to accountability, to internal and external control bodies, **at the same time**. On the other hand, a single data source will allow information to be made more accessible for citizens.



- Furthermore, mechanisms for verification and validation of the information published should be articulated.
- Regarding **the procurement procedure and its implementation**, it is recommended that particular attention be paid to a number of points and issues, specifically:

- In the advertising of **the contract scheduling** (definition of the purpose and need, choice of procedure, division into lots, cost structure and estimated duration of the service, among others). Advertising of the scheduling is essential for the fulfilment of its purposes.
- In **the advertising** of tender announcements and respect for the minimum deadlines established in the LCSP. Likewise, attention should be paid to the deadlines indicated with regard to the awarding of contracts and their formalisation.
- In **the drafting of the specifications governing the procurement** (classification and solvency appropriate to the purpose of the contract, determination of abnormally low tenders, admission conditions, and measures to favour SMEs, insufficient or inadequate budgeting, award criteria and special conditions of execution).
- In the **statement of reasons for the award decision** and the assessment reports.
 - In the **justification for the exclusions** of bidders.
 - **Measures must be established to control the payment of subcontracted companies** in the contracts required by law.
 - The **justifications for contractual amendments** and their clear differentiation from other concepts such as contractual extensions must be reinforced.
- The creation of training schedules aimed at specialisation and **professionalization in public procurement is recommended**, as well as the adaptation of the training offer to the existing demand, with practical content and not only theoretical, essential as a tool to support staff in the procurement units.
- The idea of promoting the drafting and approval of **the National Strategy to Prevent and Fight Fraud against the** financial interests of the European Union, including a specific section on contracts financed by the European Union, is insisted upon. This point is of special and considerable importance given the early implementation of the Next Generation Funds and the Recovery, Transformation and Resilience Plan.

Independent Office for Regulation and Supervision of Procurement. OIReScon

Madrid, December 2021