

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

DECEMBER 2022

The logo for OIReScon, featuring the text "OIReScon" in a sans-serif font. The letter "e" is stylized with a small flag icon (blue, white, and red) integrated into it.

THE INDEPENDENT OFFICE FOR PROCUREMENT
REGULATION AND OVERSIGHT

Executive summary of the Annual Report on public procurement oversight in Spain. December 2022.

On 21 December 2022, the Independent Office for Procurement Regulation and Supervision (OIREscon) approved the Annual Procurement Oversight Report for Spain for December 2022 (IAS 2022), fulfilling the mandate of Article 332. 9 of [Law 9/2017, of 8 November, on Public Sector Contracts, transposing into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014](#) (LCSP). This report will be forwarded to the European Commission.

This annual oversight report includes, in compliance with the aforementioned article, the **main conclusions** of the control and oversight activity carried out by the competent Administrations, **a list of the main non-compliances detected by the external and internal control bodies** in the area of public procurement, **information on the prevention, detection and adequate notification of cases of fraud, corruption, conflict of interest**, as well as any **issues of collusion** detected.

It also includes **information on the most frequent sources of misapplication of legislation or legal uncertainty**, detected from the analysis of the activity of the advisory bodies, as well as through **supervisory actions directly carried out by OIREscon**. A new aspect of the latter is the supervision of the publicity of In-house Procurement Services (EMP for its Spanish acronym), as well as the usual content of the Annual Oversight Report (IAS for its Spanish acronym), which consists of the monitoring of the advisory activity in the area of public procurement, in order to show which issues have raised the most queries regarding the interpretation of the rules, the supervision of the principle of publicity and transparency required by the LCSP, the supervision of the phases of the bidding procedure, the current situation of electronic procurement or the professionalisation of public procurement as regards training.

In order to make its content more accessible and agile, the Modules structure has been maintained:

- I. Public procurement figures for 2021.
- II. Legal uncertainty in public procurement. Advisory activity.
- III. Collusive practices in public procurement.
- IV. Preventing and combating corruption in public procurement.
- V. Monitoring the principle of publicity and transparency in public procurement.
- VI. The publicity of In-house Procurement Services.
- VII. The preparatory phase of the contract.
- VIII. The tendering phase of the contract.
- IX. The execution phase of the contract. Amendments to contracts and subcontracting.
- X. E-procurement.
- XI. Public procurement oversight bodies.
- XII. Professionalisation.

As the **main conclusions of all the above**, the following are of particular relevance:

- Firstly, the **main figures for public procurement in 2021** have been analysed and reflected.¹:



In terms of tenders, 48.56% of all public sector procurement corresponds to the public sector, although in economic terms it is the regional public sector that has the highest percentage weight (36.57%).

71.94% of Public Sector contracting is managed according to the open or simplified open procedure. The average processing time for the open procedure is 162.76 days (5.4 months) and the median 124 days (4.1 months), while the simplified procedure has an average processing time of 101.03 days (3.3 months) and a median of 71 days (2.3 months).

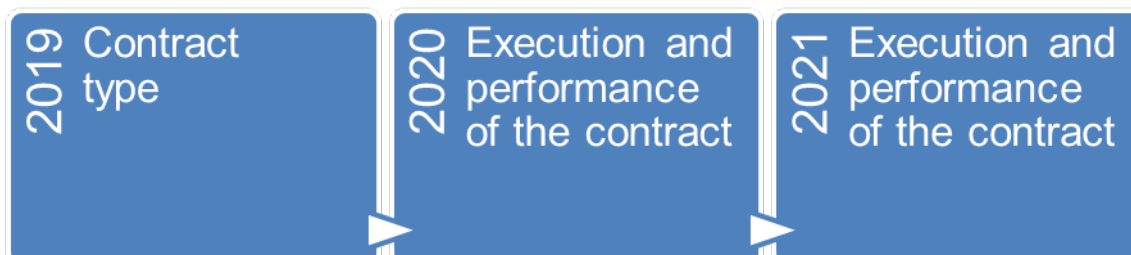
In terms of participation, the average number of bidders in the open procedure is 4.38 (4.68 in the "simplified" version) and a median of 3 bidders, with the Autonomous Public Sector having the highest average number of bidders in the open procedure (4.94 bidders).

In terms of the reduction in the economic cost obtained on the basis of the amount at which the tender is finally awarded, the simplified open procedure is the one that achieves the greatest reduction (16.17%). In the restricted and open procedures, the average drop is 14.30% and 14.29%, respectively.

As was already the case in the IAS 2019, 2020 and 2021, there is still no aggregate data on public sector procurement, meaning that no systematic analysis is possible.

¹ According to data from procurement platforms and not including minor contracts.

- With regard to **legal uncertainty in public procurement**, it can be concluded that the issues that have given rise to most uncertainty are those related to the execution and performance phase of the contract, with the following developments in this area in recent years:



Of particular note in the activity of the advisory bodies is the emergence of issues related to the Recovery, Transformation and Resilience Plan.

- On **collusive practices in public procurement**:

The analysis carried out by this Office on the basis of the information received by the competition authorities (CNMC and regional authorities) confirms the trend detected in the previous year of a change in administrative culture. The importance of ensuring competition in procurement is further strengthened, with public administrations becoming more aware of the need and obligation to ensure competition in procurement. This confirms the shift from a more corrective and sanctioning action to a more detective and *a priori* and even preventive action by the Administration and supervisory bodies.

The economic sectors most affected by collusive practices, according to the National Classification of Economic Activities (CNAE for its acronym in Spanish), are "Construction of roads and railways, bridges and tunnels", "General public administration activities", "Library, archive, museum and other cultural activities", "Building construction", and "Publicity".

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

The initiative of the Network of Anti-Fraud Offices and Agencies², of which OiReScon is a member, is the source of information for this analysis and

²In addition to OiReScon, it also includes the Anti-Fraud Office of Catalonia, the Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community, the Office for the Prevention and Fight against Corruption of the Autonomous Community 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 Metropolitan Area of Barcelona, the Corruption Prevention Section of the Consello de Contas of the Autonomous Community of Galicia, the Audiencia de Cuentas of the Canary Islands, and the Anti-Fraud Coordination Service for financial interests of the European Union of the General Comptroller of the State Administration.

oversight. In this regard, it is worth noting that 11.13% of the communications or complaints received in 2021 by the Anti-Fraud and Corruption Offices and Agencies related to public procurement, which reflects its importance. Service contracts are the most frequently reported type of contract (54.25%), with the main cause of complaint being alleged irregularities in the awarding of the contract, followed by contract splitting and irregularities in its execution.

It is worth noting that **the absence of a National Anti-Fraud Strategy**³ does not favour the coordinated action of all actors 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**:

The indicators already established in the IAS 2020 and 2021 have been followed in the supervision of this section, with the conclusion that the procurement platforms of the public sector as a whole are of high quality and efficiency and to a large extent meet the requirements established by the LCSP. However, there are still some areas for improvement.

There is no control or verification of the information published by each contracting body, nor is there any quantitative or qualitative uniformity of the information to be published in open data by PLACSP and the regional platforms, an aspect that directly affects the quality of the information offered.

In this regard, although it is worth noting that there have been important changes and advances in several procurement platforms, in particular the improvements and modifications to the PLACSP, there is still information that is not recorded or, if it is recorded, it is not readily accessible or easy to identify. The main shortcomings identified were in the publicity of the planning of the contractual activity and the execution phase of the contract.

As a main conclusion in this section, it should be stressed that the availability of open and reusable data from all procurement platforms across the public sector as a whole is not yet a reality. Furthermore, the lack of uniformity in the data or in their format makes their joint analysis and use difficult, which has a direct impact on the purpose of publicity and transparency in public procurement.

This situation leads to the conclusion that there is a need for a **single source of procurement data** (understood as a single source of information with which the requirements of publicity and reporting can be met) that would allow the

³ As of the closing date of this report, 13 December 2022, this Office has been informed that the activities foreseen in the drafting of the National Anti-Fraud Strategy of the responsible unit at national level, the Anti-Fraud Coordination Service for the protection of the financial interests of the EU, the OECD and the European Commission, are still ongoing. It is expected to be completed in June 2023.

contracting authority to fulfil its obligations and, in addition, provide complete and quality information on public procurement.

The existence of data of sufficient quality may eliminate the diversification of information to be submitted or published, thereby enhancing effectiveness and efficiency as well as reducing the workload of contracting authorities.

Reliable data are a source of solutions.

It serves as an example of both what to do (e.g. good practice) and what not to do (e.g. information on contractual resources).

This need has become urgent and pressing in view of the challenge posed by the management of the European Next Generation funds and the implementation of the Recovery, Transformation and Resilience Plan in terms of public procurement.

- With regard to **the oversight of EMP publicity**.

Given the lack of tradition of publicity of EMP in our legal system (or its predecessor, management entrustment), this Office considers very positive the fact that it has been able to detect and identify EMPs in practically all public sector procurement platforms.

In terms of publicity, a high percentage of compliance with all the points required in the LCSP has been identified, except in the case of the MP rates, where non-compliance reaches almost 60%. As regards the additional publicity required for EMPs of more than EUR 50,000 concerning the publication of their formalisation, a non-compliance of 12.22% has been identified.

- In the **direct oversight actions**, the monitoring and consolidation of the issues already addressed in the IAS 2020 and 2021 has been carried out, with these being structured in **the preparation, tendering and execution phases of the contract**.

In ***the preparation phase of the contract***, deficiencies continue to be detected in compliance with the publication of contract activity schedules, reaching alarming levels (97.99%), and in the reports on the conclusions or results in respect of preliminary market consultations (56.99%). It should be noted that this is also the phase in which the external control bodies have detected the most irregularities.

Furthermore, as regards the ***contract tendering phase***, the upward trend in the adoption of measures to adapt the solvency requirements in the specifications to the object of each contract has continued.

With regard to the award criteria, a predominance of the price criterion over the rest has been identified, leading to the recommendation to reflect on the appropriateness and justification of these criteria. The need to consider both

criteria that can be assessed by means of a value judgement and those whose assessment is the result of formulas, in order to obtain the best value for money, is also evident.

Non-compliance continues to be detected in the cost structure that must be included in the specifications in accordance with Article 100.2 of the LCSP, relating to the configuration of the base tender budget (PBL for its acronym in Spanish) based on the direct and indirect costs and other possible expenses calculated for its determination (26.06% in service contracts and 54.32% in supply contracts). The mention of market prices as a justification for the PBL and/or Estimated Contract Value (VEC for its acronym in Spanish) is of concern, as it is more of a "style clause" than a real justification, and this is identified as an area where there is clear room for improvement.

The lack of documentation of **the contract execution phase** in the public sector procurement platforms as a whole has been highlighted, which makes it difficult to monitor the contract execution phase. Also, there is still some confusion between contractual extension and contractual amendment as far as the publication of both formalities is concerned.

It remains unclear, in the light of the data available through the procurement platforms for the public sector as a whole, what the real weight of subcontracting is, and therefore what the actual amount of subcontracting is. On this point, it is insisted that the lack of information prevents the supervision of obligations imposed on the Public Administrations, such as whether the payment by the winning bidder to the subcontractors and suppliers is verified in the contracts in which it is mandatory in accordance with Article 217 of the LCSP.

- As regards the current situation of **e-procurement**:

The uniqueness of the year 2020 due to the Covid-19 pandemic has been reflected in the non-use of the electronic form in the processing of emergency contracts, altering the trend in the use of e-procurement in that financial year. Nevertheless, the figures for electronic, manual and mixed tendering in 2021 reflect a high degree of consolidation in e-procurement.

Significant efforts and improvements are being made to the functionalities of public sector procurement platforms as a whole, in particular to the e-tendering services offered to users free of charge.

- Concerning the analysis of the results of the work of the **administrative courts as internal control bodies** in the resolution of the special review in the field of public procurement:

5,151 special procurement appeals for 2021 have been analysed, thus consolidating the risk areas identified in previous IASs and incorporating issues identified in the current report:

Areas of risk identified through the analysis of the special procurement review	The grounds for the award decision, in relation to the evaluation of the bid.
	The drafting and definition of award criteria in the bidding specifications.
	The justification and breakdown of the PBL or VEC.
	The reasons for the "exclusion" of tenderers where this is on the basis of formal grounds.
	The justification of bids with allegedly abnormal values. Especially in those cases where an "exclusion" is founded.

Source: Prepared by OIReScon

The number of appeals that were inadmissible or dismissed for a reason other than a decision on the substance of the case (24.97%) continues to be significant, such as appeals that are time-barred, those lodged against acts that are not subject to appeal, those in which the object of the appeal disappears or those in which the appeal has been accepted.

- As regards the analysis of the results **of internal economic and financial control in the area of procurement (the Interventions)**, this is organised on the basis of the different territorial administrative levels.

Based on the results of the audits carried out by the General Comptroller of the State Administration (IGAE), the General Comptroller of the Defence (INTERGENDEF) and the General Comptroller of the Social Security (IGSS), the conclusion reached by these bodies regarding the dynamising function of the simplified open procedure and the achievement of a greater economic "low" using this procedure, the intensive use of minor contracts without analysing possible alternatives and the absence of planning and programming of the contracting activity is highlighted.

At the regional level, the majority of the objections reported by the Autonomous Regions relate to the recognition of the obligation with 62.64%. At the local level, this phase also stands out as the one in which most objections have been lodged, with a staggering 81.42%.

- As regards the results of the analysis **of the external control bodies** (Court of Auditors and External Control Bodies, OCEX):

The lack of justification of the nature and extent of the needs to be satisfied, the non-compliance with publicity obligations, the lack of sufficient justification of the PBL or VEC and the incorrect definition of the award criteria are again highlighted.

Most of the irregularities detected by both the external and internal control bodies are again concentrated in the preparation phase of the case.

- On **the professionalisation** of public procurement:

The analysis carried out on the training effort in 2021 shows that it is not sufficient to meet all the demand received by the training centres, a situation that has repeated itself in recent years, despite the intensification of virtual training, which represents almost 80% of the total.

The qualitative analysis of the training shows that there are improvements in terms of a reduction in basic training, especially on account of a significant reinforcement of intermediate training, which leads us to believe that programmes are being implemented for this training.

Finally, there is a lack of coverage of the needs arising from specialised recruitment activities such as the Recovery, Transformation and Resilience Plan or anti-fraud measures or integrity in administrations.

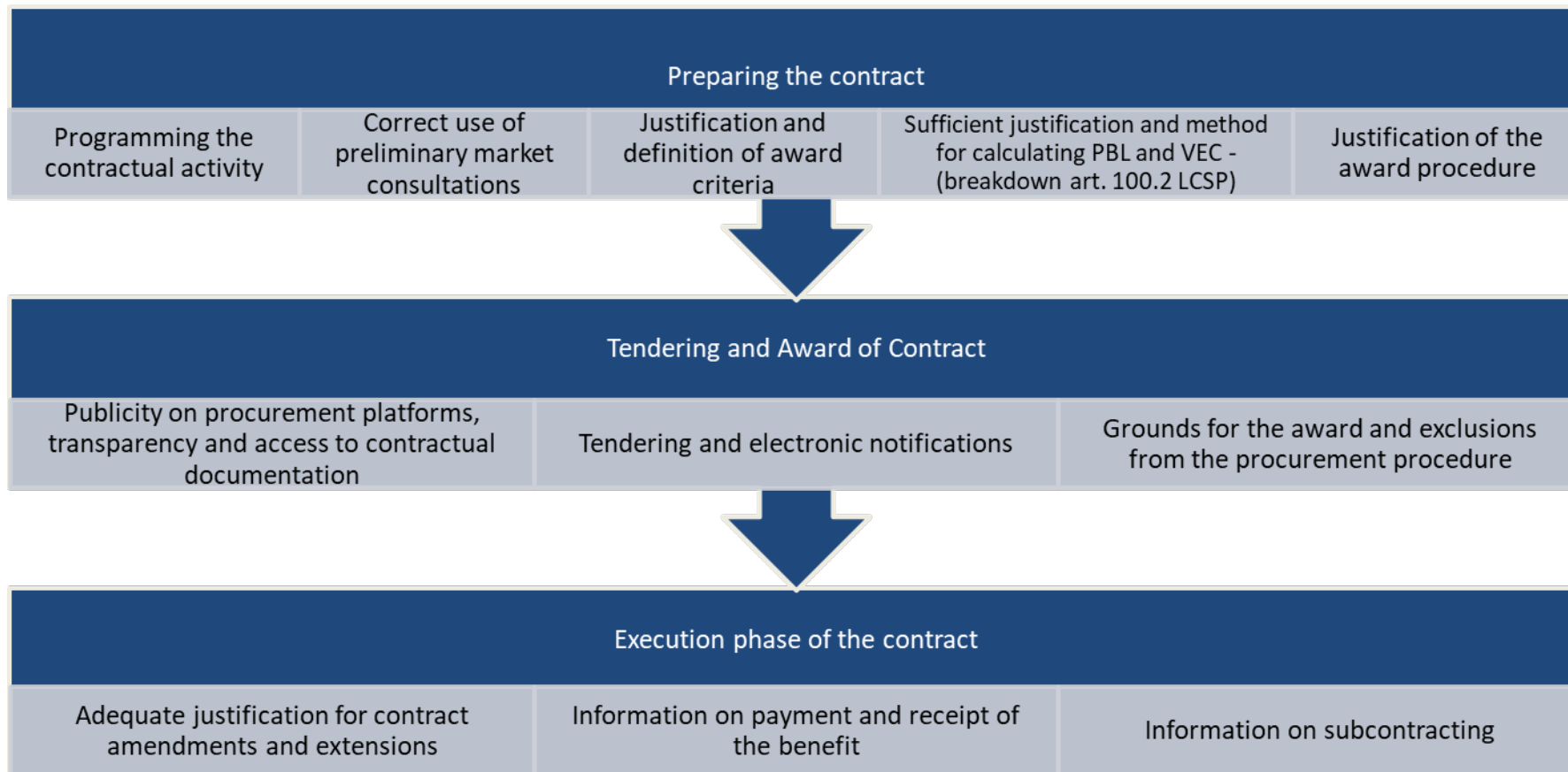
The **areas of risk in public procurement detected by the OIReScon are confirmed and updated** as a result of all the supervision and analysis carried out. Many of these areas coincide substantially with the results of the work carried out by the external and internal control bodies in the area of public procurement and, in turn, coincide with the areas in which there are most deficiencies in terms of publicity and transparency (the contract preparation and execution phases).

OIReScon:

the only public procurement supervisory body that systematises and integrates the actions of all the advisory, control and supervisory bodies in the field, pooling their conclusions and providing an overall picture of public procurement throughout the territory.

The joint processing and analysis of the conclusions of the internal and external control bodies, the agencies and offices for preventing and combatting corruption, the competition agencies and the direct supervisory actions of OIReScon, allows this Office to establish a series of **monitoring indicators** and, in turn, to outline **a public procurement risk map that is constantly updated** to enable the adoption of preventive and not only corrective measures in the field of public procurement.

The main focal areas with regard to this risk map are the following:



Source: Prepared by OIReScon

Lastly, and in the light of the results shown, in this IAS the OIReScon puts forward a series of **recommendations**, the most important of which are as follows:

- It is of the utmost importance that the actions of all actors involved in the unification of public procurement data be guided in **a single data source**, which allows contracting authorities to send the information and documentation required by the rules on publicity and transparency, as well as those on accountability, to internal and external control bodies at the same time. Furthermore, a single source of data will make information more accessible to citizens and minimise errors.



- Additionally, there is a need to establish mechanisms to verify and validate the information published, a key action in guaranteeing a minimum data quality of the information offered by the procurement platforms of the Public Sector as a whole.

Data quality in public procurement is everyone's responsibility, both procurement platforms (in terms of their configuration) and contracting authorities (in terms of their proper publication).

- With regard to **the preparation of the procurement procedure, the tendering process and its execution**, it is recommended that particular attention be paid to a number of points and issues, namely:
 - The publicity of **the procurement schedule** (definition of the object and need, choice of procedure, division into lots, cost structure and estimated duration of the service, and so forth).
The publicity of the schedule is essential and plays an important role in the execution of the Next Generation Funds, and is mandatory.
 - The **publicity** of the tender announcements, formalisation and award, and the information contained therein as well as respect for the minimum deadlines established in the LCSP.
 - **The drafting of the specifications governing the procurement** (classification and solvency appropriate to the subject of the contract, determination of abnormally low bids, eligibility conditions, measures to favour SMEs, insufficient or inadequate budgeting and conformity with the market price, award criteria and special execution conditions).
 - The **statement of reasons for the award decision** and the evaluation reports.
 - The **grounds for the exclusion** of bidders, especially in the case of bids with abnormal values.
 - **Specific measures should be put in place to control the payment to subcontracted companies** in the legally stipulated contracts, as well as to monitor that this obligation is fulfilled.
 - It is necessary to **reinforce the grounds for contractual amendments** and their clear differentiation from other concepts such as contractual extensions.
- The importance of training and knowledge management in public procurement is highlighted as an aspect of **professionalisation**. Training on integrity, anti-fraud, or collusive practices are essential in the consolidation of a proper administrative culture. Training is also essential in the correct use of procurement platforms and electronic processing services, a key element in the advance of e-procurement.
- Lastly, it insists on the idea of approving the **National Strategy to Prevent and Combat Fraud** against the European Union's financial interests,

including a specific section on contracts funded by the European Union. This is of particular and considerable importance given the implementation of the Next Generation Funds and the Recovery, Transformation and Resilience Plan.

The Independent Office for Procurement Regulation and Oversight

Madrid, December 2022