**The control of Public Procurement in Spain. In particular the role of administrative independent Authorities created to transpose Directive 89/665/CEE**

by

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1. general considerations. meaning and relevance of the eu remedies directives and the principle of institutional autonomy at national level

It is an obvious fact that EU procurement Directives have left an indelible mark on the rules about this field enacted in the different Member States. Nonetheless, when the first EC Directives on public procurement were adopted in the early 1970s no effective supervision at the EC level about their enforcement was established. However, it soon became clear that the effective achievement of these substantive objectives, also requires the complement of effective rules to enforce the substantive Law when it is breached. In short, the establishment of review procedures in this field responds to the need to ensure that the contracting authorities comply with the sustantive EU legislation and the principles regarding public contracts.

Moreover, as some academics have discussed[[1]](#footnote-1), at stake is the right of all citizens to “good administration” -recognized in Article 41 of the Charter of Fundamental Rights of the European Union- which, within public contracts procedure, principally arises in the form of impartial and fair treatment of the tenderers, reasoning the decisions taken by the contracting authorities in relation to them, and compensation for any loss that might have been suffered. The core instrument that makes real this “right to good administration” is precisely an effective system of reviews in the field of public procurement.

However, it is clear from the EU Remedies Directives that to ensure a genuine respect of EU principles and, ultimately, the achievement of a genuine Internal Market in this subject, it is very important, that the remedies systems enacted by Member States settle an alternative in which breaches of the Law can be totally corrected before the conclusion of the contract. In other words, it is essential that the system of remedies are based on the idea to implement a restorative justice instead of a compensatory one. (restorative justice vs. compensatory justice).

Mechanisms settled in EU Remedies Directives shall be applied at national level in accordance with the legislation of the respective Member State. The Remedies Directives provide Member States broad discretion to determine how to legally guarantee the effective protection they have to assure. This procedural free choice is the expression of the principle of institutional autonomy at the procedural level. Although in the transposition of the Remedies Directives EU Member States must establish and develop the specific requirements settled on them taking besides into account the principles of the EC Treaty, and the case law of the European Court of Justice. However, it is beyond question that the capacity of a system of remedies to enforce the law will largely depend on its features, in terms, particularly, of legal costs, short terms to take solutions, as well as of the likelihood of a case being won at trial[[2]](#footnote-2). This autonomy is particulary evident regarding the establishment of the type and nature of the bodies they could designate as responsible to identify and correct the potential breaches of the public procurement EC Law.

In the following pages we will focus on the independent and specialized review bodies that have been created in Spain to comply with the requirements of the Directive 89/665/CE. Although the system is a good one that provides good results, we shall also comment some weaknesses that should be corrected in order to improve it.

# the special spanish remedies system in public procurement: a precontractual solution

## *Introduction. The limited scope of the special appeal on procurement and its facultative nature*

In order to make it easy to understand, it will be useful to do a general presentation of the Spanish system and then descend into some of its details. The prescriptions of the “review” Directives were not properly introduced in the Spanish legal order until 2010. Initially, the legislator considered that it was unnecesary to incorporate the content of Directives 89/665/EEC and 92/13/EEC, and so he expressed it in the Explanatory Memorandum of the Law 13/1995 of 18 May, on the contracts of Public Administrations, where gave two reasons:

a) Firstly, “because the review material that constitutes its objective lies outside the contract legislation of the Public Administrations”.

b) Secondly, because [the Spanish] Legal Order, in common procedural rules in force, already complies with the content of Directive 89/665.

Nevertheless the Court of Justice considered those grounds did not justify the lack of transposition of Remedies Directives, and that accordingly, it was necessary a system *ad hoc* (Case C-444/06, Commission v. Spain).

The current Spanish remedies system in public procurement comes from the transposition of the requirements of Directive 2007/66 into Spanish public procurement law. This was first made by Law 30/2007 that already established an *ad hoc* remedies system. But this first attempt was clearly flawed, since the contracting authority which awarded the contract was the one empowered to oversee the special review procedure, hence the impartiality was not guaranteed. Ultimately, it was the Law 34/2010 that introduced important modifications in the regulation related to the special review procedure, presently maintained in Articles 40 to 49 of Royal Decree 3/2011, in approval of the Amended Text on the Law of Public Sector Contracts (hereinafter, TRLCSP), which is the Law in force.

The actual model is based on the following features:

a) For the contracts below EU thresholds.- There are only the ordinary remedies established in the general adminsitrative procedure Law.

b) For the contracts above EU thresholds.- When a breach of the public Procurement Law occurs, the aggrieved person has the opportunity to bring an action directly before the Judicial Courts, or -alternatively- to bring it before an “administrative tribunal”. The resource before an “administrative tribunal” is the one regulated in Articles 40 to 49 of TRLCSP which are the ones that have transposed the Directive 89/665/EEC and its amendments. If a party chooses to bring the action before the special review administrative body, its resolution can be always be appealed before the Judicial Courts, through the general system.

Thus, the special resource in the field of public procurement has facultative nature (Article 40.6 of TRLCSP). In practice, although the remedy before the administrative tribunals is not preclusive, the stakeholders usually use this alternative. The scope of application of the special resource on procurement is very limited. Essentially, it can be used (Article 40.1 of TRLCSP) to challenge certain pre-contractual activities relating to contracts that meet certain requirements. With some nuances it can be said that the action applies mainly to "contracts subject to harmonised regulation" concluded by entities having legal nature of "contracting authority".

Two Autonomous Communities, in exercise of its powers, have improved the state legislation and have expanded the scope of this special appeal regarding their contracts. This special appeal activity occurs in Aragon and Navarra. The legislation in Aragon establishes that the special appeal may be brought regarding works contracts whose estimated value is higher than EUR 1,000,000 and regarding contracts for supplies and services whose estimated value exceeds 100,000 euros. In Navarre the legislation has gone even further and does not require a minimum value of the contracts to raise the special resource.

From the above it follows that for contracts that do not meet the requirements of Article 40.1 of TRLCSP there is no special resource. The claims that the operators wish to lodge in relation to their preparation and award shall be governed by general law. While this duality of regimes leads to more than minor procedural problems, the most important aspect for the purpose of this study is that, the pre-contractual control of most of the contracts in Spain is out of special resource. It can be said that, in fact, the special resource applies only to the "icing on the cake" of all contracts are tendered.

The non-extension of the system to the majority of public sector contracts regardless of their amount is one of the biggest shortcomings of this system. Even the State Council in its Opinion 514/2006 understood that such a disparity of regimes was not sufficiently justified. In any case, this would not change even the Draft Law for public sector contracts prepared by the Spanish Government in April 2015 is approved, and in recent documents from different stakeholders have critizied this fact[[3]](#footnote-3). The extension of the scope of the specisl system of resources to the majority of public sector contracts would constitute a major breakthrough in the fight against corruption and collusion in this sector.

*2.2 Structural aspects of the system: the administrative tribunals specialised, impartial and independent*

The Spanish special system of reviews in the field of public procurement is based on the existence of different bodies that: are administrative nature; act independently; and are specialialized because they only deal with the review of award procurement procedures. This bodies are empowered to suspend the award procedure of a public contract and to adopt the remedies needed when it is alleged a breach of the procurement rules. The suspension and the remedies are kept during all the time the review procedure. Taking into account the Spanish territorial organization, the 34/2010 Law, set up a Central Administrative Tribunal for Contractual Appeals (hereinafter, TACRC) which has a collegial nature and was established to hear review procedures in relation to the contracts of the General Administration of the State.

Apart from that, the Law entitled the Autonomous Communities to create their own review bodies with similar attributes to hear applications in relation to their contracts. Some Autonomous Communities have created their administrative Tribunal for Contractual Appeals. The Autonomous Communities that have organized their own system are: Madrid, Aragón, Castile and Leon, Navarre, Andalusia, the Basque Country, Catalonia, Canary Island, Estremadura and Galicia. There are differences among the systems established by these Autonomous Communities. For instance, the administrative bodies in Vasque Country and Canarias do not have a collegial nature, and work with a single-member[[4]](#footnote-4). Castile, Leon and Estremadura have choesen not create a new administrative body, but have attributed the functions of “administrative tribunal” for contractual reviews, to their Advisory Councils, which are at an autonomous level, equivalent to the Council of State.

The State Law provides that the event an Autonomous Region does not create its own administrative Tribunal, the Central one would assume the authority to provide the remedies against the contracts awarded by this Region and the local authorities within the territory of that particular Region. Under this provision, some Autonomous Communities have chosen to empower the Central Administrative Tribunal to decide on the resources related to their contracts. To do that they have to subscribe a specific convention to that effect. This second solution has been preferred by the Autonomous Communities of Comunidad Valenciana, Cantabria, Castilla-La Mancha, La Rioja, Murcia, the Balearic Islands, and the autonomous cities of Ceuta and Melilla[[5]](#footnote-5). In this case, the Autonomous Communities pay a fee to the TACRC, as compensation for the costs involved in the review procedure.

Regarding the remedies against the contracts of the municipal authorities, the State Law establishes that the regulation of the Spanish Autonomous Communities governs the solution (because of the principle of territorial competence). In this regard, they have establisehd two different solutions.

a) The first one, in which the regional tribunal established to hear applications agaisnt contracts of each Autonomous Region also has the authority to hear applications in relation to contracts of local municipal authorities located in that Autonomous Region. This model is also followed in the Autonomous Communities that have empowered the Central Administrative Tribunal for Contractual Appeals to decide the resources against their contracts, in so far as in the convention suscribed, they also empower the Central Administrative Tribunal for Contractual Appeals to hear the applications in relation to the contracts of their municipal authorities.

b) In the second one, the regional Law permits the local entities to create their own independent bodies to settle resources. This happens in the Basque Country, and in Andalusia. In the Basque Country the local entities are allowed to create their own review bodies for municipalities of more than fifty-thousand (50.000) inhabitants. In contrast, in Andalusia, there exists no minimum population requirement. If a local entity chooses not to create its own administrtaive tribunal, the regional tribunal has subsidiary competence to decide on the reviews related to their contracts. The empowerment to the local authorities has been effective in these two Reagions. In the Basque Country, the three Provincial Councils (Provincial Council of Álava, Provincial Council of Guipúzcoa and Provincial Council of Bizcaia), have created their own administrative tribunal. In Andalusia, they have created their own administrative tribunals in different towns, such as Seville, Granada, Cordoba, Malaga, Huelva, Jaen, Linares, Puerto de Santa María, La Linea de la Concepcion, Alcala de Guadaira, Ubeda, Estepona, Torremolinos, and until recently also Marbella[[6]](#footnote-6), besides the Provincial Councils of Jaen, Huelva, Cadiz, Malaga and Granada.

This specific aspect, that is to say, the posibility for the local authorities to create their own review body, is one of the weaknesses of the Spainish system. Why? Because we can see in Andalusia that the feature of impartiality that must be present in the remedies system disapears, since the moment that the members of the local Tribunal are, in many cases, the ones who have awarded the contract as members of the awarding power, or have participated in the redaction of the contract documents.

Apart from the bodies previously mentioned, there are review bodies that form part of other institutions not considered part of the public Administration, such as the Spanish Parliament, and some Autonomous Communities Parliaments such as Catalonia and Aragón.

## *Legal nature of the administrative bodies. Their "broad" decision-making powers, Quasi-judicial bodies? Judgment of the Court of 6 October 2015 (Case C 203/14)*

While the bodies that resolve the special resources on procurement are administrtaive bodies, their unique position implies a special administrative nature. As administrative bodies, they are integrated into the structure of public administration through the secondment to one of its organs, but this does not affect the performance of their duties, which must be exercised with complete autonomy and independence. The functional autonomy and independence can be appreciated in the broad decision-making powers assigned to these bodies and in how the law protects their decisions.

It is useful to highlight the broad decision-making powers given to these administrative bodies:

**a)** They can adopt provisional measures in order to ensure the effectiveness of the final decision;

**b)** They can annul unlawful decisions taken during the award procedure, including the removal of discriminatory technical, economic or financial characteristics contained in the notice, indicative notice, tender documents, regulatory conditions of the contract or any other document relating to the tender or award. If necessary, they may agree roll back proceedings. That is, its function is solely to review the legality of the decision, and, for instance, they can not substitute their judgment for the technical judgment of the authority in applying the individual award criteria or determine to whom must be awarded a contract;

**c)** They may cancel the contracts if they are concluded without respecting the standstill period or where either of the causes of invalidity provided;

**d)** When requested by stakeholders, they may impose on the contracting entity an obligation to indemnify the person affected by the damages that may have caused the legal infringement that gave rise to the appeal;

**e)** They may decide to lift the precautionary measures that had been agreed to and, if appropriate, the release of the guarantee whose constitution would have been provided for the effectiveness of those measures;

**f)** They have the power to impose sanctions on a finding of recklessness or bad faith in filing the resource or requesting for precautionary measures. The penalties range from 1,000€ to 15,000€. The sanctions are set depending on any bad faith found and the damage caused to the contracting authority and other tenderers.

On the other hand, the Law “shields” the resolutions of the administrative bodies in order to safeguard their respect and obedience. Its resolutions are directly enforceable, with the possibility of achieving compliance by resorting to the use of enforcement. It underlines the fact that their decisions can only be challenged through the filing of an appeal before Judicial Courts. No administrative appeals may be filed against the decisions adopted by them, nor are they likely to be reviewed through an ex officio review, nor are they subject to oversight by the internal control bodies of the Administrations. The unassailability of the resolutions of these administrative tribunals through administrative channels is a way to defend their functional Independence.

All this is what allows us to recognize that these administrative bodies have a unique institutional position compared to the other ordinary administrative bodies. This singular institutional position that can be described as “quasi-judicial”. In fact, according to Judgment of the Court of 6 October 2015 (Case C 203/14), many of them can be considered a “court or tribunal” within the meaning of Article 267 TFEU. Indeed, in spite of the facultative nature of the Spanish review system, the ECJ has understood that, considering what is exactly a “court or tribunal” within the meaning of Article 267 TFEU, and according to this functional and broad interpretation, it must be concluded that the Spanish bodies can be considered as such, in so far as: a) the bodies are established by law, b) they are permanent, c) the procedure is inter partes, d) the bodies apply rules of Law and, e) the bodies are independent[[7]](#footnote-7).

The only aspect that does not directly comply is the compulsory nature of its jurisdiction. And this is precisely one of the weakness points of the system that should be corrected. In any case, considering the Judgment of the Court of 6 October 2015 (Case C 203/14) it seems apparent that the Court does not find this criterion as absolutely essential. The origin of this decision is located in a prejudicial-question submitted by the Catalan administrative tribunal of contractual remedies. This required the Court to consider whether the Catalan administrative tribunal of contractual remedies meets the criteria to do so according to Article 267 TFUE.

In this respect, with regard to the criteria concerning whether the body making the reference is established by law, whether it is permanent, whether its procedure is *inter partes* and whether it applies rules of law, the documents before the Court contain nothing which suggests that the Tribunal Català de Contractes del Sector Públic is not a ‘court or tribunal’ within the meaning of Article 267 TFEU. So far as the criterion of independence is concerned, it is apparent from the documents before the Court that the Tribunal Català de Contractes del Sector Públic acts as a third party in relation to the authority which adopted the decision challenged in the main proceedings. In that regard, it would appear that the Tribunal carries out its functions in a wholly independent manner, not occupying a hierarchical or subordinate position in relation to any other body and not taking orders or instructions from any source whatsoever; it is thus protected against external intervention or pressure liable to jeopardise the independent judgment of its members.

Nor is it disputed that the Tribunal Català de Contractes del Sector Públic complies, when performing its duties, with the requirement for objectivity and impartiality vis-à-vis the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. Furthermore, under Article 8(4) of Decree 221/2013 of the Generalitat de Catalunya, the members of the Tribunal are appointed on a permanent basis and cease to hold office only in the circumstances expressly set out in Law.

Greater complexity arises regarding the compulsory jurisdiction of the body, within the meaning of the Court’s case-law on Article 267 TFEU. The Court states that it is true that, under Article 40(6) of TRLCSP, the referring body’s jurisdiction is optional. Thus, a person bringing a proceeding in a public procurement case may choose between a special appeal to the referring body and an administrative-law action. Nevertheless, the court gives relevance to the practical reality of the functioning of these bodies. Firstly, the Court observes that once the recourse is lodged before this administrative bodies, the decisions taken by them are binding on the parties. Secondly, the Court accept the Spanish Government explanation given at the hearing that, in practice, tenderers in public procurement procedures do not generally avail themselves of the possibility of directly initiating an administrative-law action, without having first brought a special appeal of the kind in the main proceedings before the Tribunal Català de Contractes del Sector Públic. Essentially, the administrative courts are thus, as a general rule, involved at second instance, with the result that, in the Autonomous Community of Catalonia, primary responsibility for ensuring that EU public procurement law is observed lies with the referring body. Therefore, the Court considers that the Tribunal Català de Contractes del Sector Públic has the character of “Court” within the meaning of Article 267 TFEU. This conclusion can be extended generally to the Bodies of resources, at least with regard to the state and regional level.

## *The members of the bodies: specialization, impartiality and independence*

Three of the most important features and causes of the succsess of the system are found in the specialization, impartiality and independenceof the members of the bodies.

The Central Administrative Tribunal for Contractual Appeals [*Tribunal Administrativo Central de Recursos Contractuales*] is composed of a mínimum of three members, a President and two other members, appointed by the Council of Ministers on joint proposal by the Ministers of Finance and Justice for a period of six years, period after which they may not be reappointed. During their tenure, they can not be removed of their charge except for the limited grounds provided by the Law. Members of the TACRC must meet the following requirements: have developed their professional activity for more than fifteen years time, preferably in the field of administrative law directly related to the public procurement. The President must be a Graduate in Law. Although this requirement is not directly required for the rest of the members, all of them have studies in Law.

With respect to the members of the Tribunals of the Autonomous Communities, they are named following similar rules, but there are some differences, eg: they must be Graduated in Law and have professional experience in public Law mainly related to public procurement of a variable number of years of between five and fifteen, depending on the case; the period of their tenure can be also different; besides, in some cases once their tenure has expired they might be reelected again, etc.

In Castile and Leon and in Estremadura where the functions of “administrative tribunal” for contractual reviews have been attributed to their Advisory Councils, rules like these are not followed, because the President and members of the “administrative tribunal” are directly the President and members of the Advisory Councils. Once appointed, a member of the administrative tribunals can not be removed from his position, except for the causes expressly provided in the Act. As we shall see below, the members have consistently demonstrated a high professionalism and responsability in the execution of their functions, and act with extreme impartiality and independence, displaying their expertise and specialization.

## *Reviewable acts and decisions during the bidding procedure, term for instituting proceedings and capacity to bring the action in regard to the special procurement remedy*

According to Article 40.2 of TRLCSP, the bidding procedure, is subject to the special appeal for the following actions:

**a)** Calls for tenders, the specifications and contract documents setting out the conditions that must govern the procurement.

**b)** Procedural measures adopted in the award procedure, provided that they directly or indirectly decide on the award, determine the impossibility to continue the procedure or defense, or cause irreparable harm to legitimate rights or interests. Note that they will be considered prior acts that determine the impossibility of continuing the procedure acts of the Procurement for the exclusion of tenderers.

The decision about the exclusion of tenderers is considered a procedural measure that determines the impossibility of continuing the procedure.

**c)** Award decisions adopted by the contracting authorities.

If the action is brought against the Award decisions, the interposition of this resource will have a suspensive effect. If it is brought against any other decision or contractual documents, the review body, after analyzing the circumstances, may, where appropriate, adopt the precautionary measures necessary to ensure the effectiveness of its resolution.

The action is necessarily an appeal against a decision, and no other remedies of different nature, such as arbitration, can be used to resolve the disputes regarding to the precontractual acts. Article 44 of TRLCSP states that the appeal must be initiated by a written document to be submitted within fifteen working days from the day following the notification of the decision appealed. However, the Article includes special rules to calculate the term to appeal when the action is brought against certain acts or documents, for instance:

a) when the action is brought against the specifications and other contract documents, the computation of fifteen days begins from the day following the day in which they are received or made available to tenderers; or

b) when the action is brought against the contract notice, the fifteen days shall start from the day following the publication of the contract notice.

Meanwhile, Article 42 of the TRLCSP provides a broad concept of capacity to bring the action. It recognizes capacity to: *“any legal or natural person whose legitimate rights and interests may have been harmed or who may have been affected by the decisions subject to review”*. This broad definition, covers all the tenderers, but goes further. The review bodies have to “split hairs” when interpreting this Article, and have opened review procedures, not only to the tenderers, but also to legal or natural persons with no interest in obtaining the contracts under review, but that represent collective or supra-individual interests that in any way are related to the contract, or whose areas of activity coincide with those in the contract.

Therefore, a direct interest in obtaining the contract is not a condition or requirement to access to the review system. A high number of decisions of review bodies recognize the legitimacy of various groups to bring this action, such as councilors, municipal groups, organizations and political parties, trade unions, professional associations, etc., but this does not mean that it is recognized a “public action” in this field.

*2.6 General operating data about the spanish special appeal on public procurement*

A key element in making an overall assessment of the Spanish remedies system in public procurement should be based on an analysis of the main results obtained since its inception. In this respect, we assume the data offered by the larger and better comparative study on the subject to date, elaborated in 2015 by the Research Center on Administrative Justice (Centro de Investigación sobre Justicia Administrativa: CIJA) of the Autonomous University of Madrid, titled Report on the Administrative Justice. Taxes, public contracts and patrimonial responsibility. The analysis of this Report has been carried out based on the information taken from the Annual reports prepared by the administrative bodies for remedies[[8]](#footnote-8). Among the ends that can be valued, we will focus on those we consider most relevant to the purpose of forming an opinion on this special resource.

### 2.6.1. *Constant increase in the number of resources that stand*

From 2011 (when the review bodies start functioning) to date (December 2015), they have resolved more than 6.000 resources

The analysis of the annual reports of activity between 2011-2014, which are the years for which there are records available, shows that the trend is towards a progressive increase in the total number of resources that stand every year. This is due to various reasons. Mainly, the confidence that this resource, gradually, has generated in the potential recurrents. The speed with which the administrative bodies decide the resources, the quality of decisions and the independence with which operate their functions have served as an incentive for increasing the total number of appeals. Furthermore, the broad interpretation made by the administrative bodies with regard to who is entitled to bring the action before them also may have influenced the increasing number of issues. Without neglecting that, ultimately, the slight recovery of the economic crisis influences the increase in the total number of public contracts awarded and thus in amount of contracts in connection with which it may lodge an appeal.

In the case of the Central Administrative Tribunal of Contractual Appeals (hereinafter TACRC) the exponential increase in the cases before it, is explained by the signing of agreements with the Autonomous Communities who renounce to create their own administrative body of resources and derive to the TACRC the resolution of the appeals that affect their contracts.

2.6.2. *The resolutions content: A high "success rate" in favour of the appellants*

From the Annual Records available, it can be concluded that taking into account the total number of appeals, just over one third ended with a resolution of inadmissibility, another third with the rejection of the claims made by apellants and the last third with total or partial estimate of the claims.

Rejection of the resource by processual reasons: In the first year of operation of these bodies there was a higher percentage of rejection of the resources by processual reasons (e.g., bringing an action out of time, etc.). This could be due to the lack of maturity in the interpretation of the formal requirements to appeal. This situation is changing. In any case, from 2011 to 2014 the percentage of rejections by this reason has fluctuated, depending on the year and the administrative body, between 6% and 45%, so the average is around 20%.

Rejections of the claims of the appellants: the percentage varies depending on the year and the administrative body between 24 and 50%.

The withdrawal of the recourses: the percentage of cases in which the withdrawal of the recourses occurs is between 1 and 5%, depending on the year and the administrative body.

The estimates: the percentage of cases in which the claims of the recurrents are totally or partially accepted varies considerably depending on the administrative body of resources and the year considered, moving in a range between 19 and 43% of all recourses.

An interesting perspective is offered by the analysis of the "rate of success on appeal"[[9]](#footnote-9). It is an expression that refers to the percentage of total and partial estimates but taking into account only the recourses in which there is a ruling on the merits, so it excludes cases of rejection by processual reasons and cases of withdrawal of the recourse. If we discriminate resolutions on the basis of this "success rate" we observe that the percentage of cases in which occurs a full or partial estimates of the recourses is even higher and in some cases exceed 50%. This is the case in relation to the Catalan administrative body of recources, on which the success rate stood at 56% in 2012, 54.38% in 2013; or the TACRC in which the success rate in 2013 was of 53.06%.

2.6.3. *Average time of resolution of the appeal: When speed is the keynote*

The effectiveness of the resources is closely linked to the fast resolution of issues. Article 1 of the original version of Directive 89/665/EEC, already associated the effectiveness of the mechanism to the promptness in the resolution of appeals. One of the strengths of the Spanish system is the swiftness with which, to date, the administrative bodies are solving the resources. Although the presentation of data on this issue is not homogeneous in the different Annual reports of the review bodies, it can be concluded that the recourses are resolved within one calendar month.

This sharply contrasts with the long duration of the processes in the administrative courts where the average duration of proceedings between 2003 and 2013, was above 500 days, only a year dropped to 422.03 days. Regarding in particular public procurement processes, between 2003-2013 the average duration before the Juzgados de lo Contencioso Administrativo was 387.16 days, and the average duration before the Tribunales Superiores de Justicia was of 440.4 days in 2013.

The increase in the number of resources lodged has not led, at least not for now, to the collapse of the system. Certainly there are small variations in terms of the duration of proceedings between the different administrative bodies. It is also true that some of them are taking longer than before to resolve the recourses, but for now these differences are not sufficiently important to muddy the fact and the general feeling that the resources are resolved very quickly. The specialization of professionals who are entrusted with the study of these resources contributes significantly to the prompt conclusion of the proceedings.

### 2.6.4. *Low percentage of decisions of the administrative bodies are appealed before Judicial Courts*

According to the Memories of activity of the administrative bodies, the percentage of their decisions between 2011 and 2014 that were challenged before administrative courts varies in a range between 3 and 13%. It can be concluded that the degree of acceptance by the parties is high. Although the information available is not conclusive, it is significant that a very low percentage of decisions taken by administrative bodies are annulled when they are appealed before Judicial Courts.

2.6.5. *Low percentage of the decisions taken by the administrative tribunals that are appealed before Judicial Courts are estimated*

The information available is not conclusive, but it is significant that a majority of resolutions taken by the administrative tribunals that have been challenged before Judicial courts have been ratified by them. If we look at the data contained in the Report of TACRC relative to 2014, it can be noted that with respect to 55 Judgments related to the resolutions appealed before Courts (Administrative Courts), in 40 cases confirmed the decision of TACRC and only in 15 cases their decisions were totally or partially revoked.

## *Recapitulating: the strengths and weaknesses of the Spanish System of remedies*

## 2.7.1. *The strengths*

In general, the Spanish system of review procedures in the field of procurement deserves a favourable appraisal. At present, the evidence establishes that the existing system of review procedures has been very effective. There are different reasons that support this positive assessment.

The level of litigation existing in the precontractual phase prior to 2010 was nearly nonexistent. The creation of the special review has acted as a “wake up” call for tenderers and other interested parties, as shown by the statistical data relating to the activity of review bodies. As the figures show, the stakeholders have increasingly chosen to use it.

These specialized administrative bodies are genuniely establishing their *auctoritas*. They work like genuine independent bodies. It is true that they are formally and budgetary dependent on the Administration, but functionally these administrative tribunals are acting with total independence. This independence can be seen by considering the large number of estimated resources, which is much higher comparing with the estimated reviews in the ordinary admnistrative resources. The success rate is quite high, nearly 43% (excluding not admitted resources). The stakeholders trust the system.

Some bodies have even annulled very important contracts like the water supply of some big cities in Spain (eg: Barcelona or Zagaroza), and despite pressures the body could have received, it acted with clear independence while demonstrating full respect for procurement law. Even, the Press published some news stories which showed surprise because a kind of body like this had adopted a decision against the Administration, that is, the Press was surprised by the real independence and firmness with which the body was acting. The parties normally accept the decision offered through the administrative tribunal, and turn down the option of a second judicial instance. The fast resolution of resources is evident.

Another great advantage of the Spanish special review procedure in the field of public procurement is that it is “free” for the appellant. We all know that costs of procedure and legal expenses can significantly impact the effectiveness of remedies. When such costs are high, it discourages litigation. Conversely, when costs and/or expenses are low, competitors are more likely to challenge unfavorable decisions[[10]](#footnote-10). In short, the Spanish special review procedure in the field of public procurement is “free” for the appellant. Only in Catalonia are fees charged, and this has received criticism[[11]](#footnote-11). Indeed, in Catalonia, Law 2/2014 of 27 January, on tax, administrative, financial measures and public sector of Catalonia has created a fee to appeal before the Catalan review body (Article 37). The fee amount, climbed in response to the estimated contract value ranges from a minimum of 787,50€ to a maximum of 5250€, if the estimated contract value is over ten million[[12]](#footnote-12). If the fee is not payed at the time the action is filed, the appeal is declared not admissible.

The implementation of the new system has shown a positive change. Existing bodies respect each other. One body takes into account the decisions of the others. This is clearly seen in the resolutions, which often cite each other. Presidents and members of the bodies are in regular contact and there is a good relationship between them. They organize regular meetings every year to clarify doctrine, and uniform criteria and adopt performance guidelines. It could be even asserted that the proper functioning of the system is due in large part to the persons named as members of the bodies. The members are nonpolitical and are very committed to the proper functioning of public procurement system. In fact, in view of the good results, this informal coordination will become mandatory if the draft for a Law for public sector contracts prepared by the Spanish Government in April 2015 is approved. Its 24th Additional Provision, is refered to the *“Coordination between the administrative bodies for the special review in the field of public procurement”*.

On the other hand, the rulings of these administrative tribunals are very well considered and have a relevant influence in the daily practice of contracting authorities. In many cases contracting authorities have adpated their templates and contractual documents to the decisions of the remedies bodies. E.g., contracting authorities draft better specifications for the contracts, and establish improved award criteria. The tribunals are doing a good job in creating a “body of knowledge” or “doctrine” in the field of public procurement. Further, tribunal decisions are rarely appealed to the Administrative Courts. To be honest, one could argue that the lack of appeals is due at least in part, because the procedure before Courts is expensive, but in many cases this is clearly not the main reason.

2.7.2. Weakness: The special remedies system is for contracts above the Directives thresholds

As a general rule, the administrative system of remedies only applies to the contracts that reach the Directives thresholds. Only in two Autonomous Communities (Navarra and Aragón), is the legal framework of protection broader, and their Laws have extended the scope of the special review procedure to contracts under Directives thresholds. In Navarre this system applies to all contracts irrespective of their amount/price. The aragonese Law has lowered somewhat the amount and the legislation states that the special remedies system may be used in connetion with works contracts which estimated value is higher than 1.000.000 euros and with contracts for supplies and services whose estimated value exceeds 100.000 euros. In any case, this is not sufficient.

Aside from these two exceptions, as a general rule to the contracts under the Directives thresholds the ordinary regime of administrative reviews which is settled in Law for common administrative procedure is applied, and in Law of procedure before contentious-administrative Courts. The problem is that the regime of “ordinary” reviews, does not observe the specific guarantees imposed by the Remedies Directive, e.g., there is no standstill period nor independent body for the review, etc. This situation can represent difficulties with respect to some of the core principles of public procurement.

This solution was criticized long ago by the Spanish State Council[[13]](#footnote-13). Unfortunately, the critique of which we echo would not be impacted by the draft for a Law for public sector contracts prepared by the Spanish Government in April 2015.

2.7.3. *The facultative nature of the remedies system*

### 3. The facultative nature of the remedies system

The facultative nature of the special review procedure in the field of procurement implies the de facto, opening of two review routes (the special administrative one and the judicial).

When an entitled person believes that a breach in the award procedure of a contract above Directive threshold has occurred, the person can choose between going to the Adminsitrative Court, or to the judicial one. (It must be noted that if a person follows the administrative path, the person can always challenge/dispute/contest the decision of the administrative Court before the judicial courts).

This double possibility is not exent from practical difficulties, considering the procedural differences between both alternatives. The most clear one is the time-limit for bringing an action: in the case of the special review in the field of public procurement, 15 working days, calculated in a different way depending on the act that is contested; and, in the case of the contentious-administrative review procedure, two months from the day following the publication of the provision contested or from the day following to the notification or publication of the act that ends the administrative proceedings[[14]](#footnote-14).

The compulsory nature of the special review would offer greater adventages: legal certainty, greater swiftness in reviweing, and a more effective legal protection to the appellants, guaranteeing that eventual infringements may be remedied prior to the award of a contract. The special review is more interesting to achieve a real “restoring system” than a “compensatory system”.

In the draft for a Law for public sector contracts approved by the Spanish Government in April 2015, this feature about the voluntary character of the special review is amended. If the text of the draft is approved, the special administrative review in the field of public procurement would change to a mandatory character. The Artícle 44.6 of the Draft states that: *“The previous lodging of the special administrative review in public procurement is an essential requirement to can lodge an appeal before the administrative judicial Courts”*.

2.7.4. *Weakness: The legal scope of the special review does not cover the performance phase of the contract (e.g. does not cover the modifications of the provisions of a public contract during its term)*

In the State Law actions that take place after the conclusión of contracts are excluded from oversight through the special review procedure. Once again, the Laws of Navarre and Aragon do allow the use of this system to control the modifications in the performance phase of the contracts, but this is not the general rule in the State Law.And it is known that the ECJ has made it clear that a illegal modification of a public contract is equivalent to a “new award” contract, and therefore should be the subject of the reviews established in accordance to the Remedies Directives.

In any case, in so far as the substantive Directives on public procurement already refer explicitly to certain issues related to the performance phase of the contracts, this aspect in the Spanish regulation has to change[[15]](#footnote-15). Indeed, the draft for a Law for public sector contracts approved by the Spanish Government in April 2015 includes the illegal modifications of contracts in the scope of the special review, Article 44.2.d) of the draft.

2.7.5. *Weakness: The proliferation of bodies responsible for the review procedures specially at local level*

The existence of a central review body, some regional bodies, and some others at a local level, established under the regulations of certain Autonomous Communities (Andalusia and the Basque Country), is an aspect that can affect and reduce the efficiency of the system. It would be sufficient with the existence of state review body and regional ones. This solution would be in line with the territorial organization of the Spanish State and would avoid the problems that can create the local review bodies. The main problem with the local review bodies is that at this level it is difficult to guarantee the independence and specialization of the members of the review bodies. E.g.: In some cases the members of the review body could have participated, first, in the elaboration of the contractual documents. Moreover, the existence of such a large number of review bodies could easly jeopardize the existence of a doctrinal unity with the risks that divergent or contradictory interpretations on the same topic generate in the legal certainty.

In April 2015 the Spanish Government approved a draft for a Law for public sector contracts in which, inter alia, are transposed Directives 2014/24/EU and 2014/23/EU. This draft was not sent to the Parliament. In any case, it is likely that this draft will be the text that the new Government -after the 20th December elections- takes primarily into account to comply with the transposition term of the above mentioned Directives.

# 3.- Protection to the actuations and contracts outside the special review remedy

As it was explained, currently the special administrative resource -through which the Directive 89/665 was transposed in Spain- can be only applied to the preparation and award of "contracts subject to harmonised regulation". Only the legislation in the Autonomous Communities of Aragon and Navarre admit this special resource against the modifications in the execution phase of the contracts. In any case, the Draft for a Law for public sector contracts prepared by the Spanish Government in April 2015 includes the modifications in the scope of the special administrative resource.

Apart from this, the system to control public contracts outside the scope of the special resource is quite complex. The reason: the applicable system depends on three factors:

a) The legal nature of the contracting entity;

b) The legal nature of the contract. In Spain there is the category of the “administrative contracts” which are celebrated by public authorities to meet a goal of general interest. But it happens that public authorities can not only celebrate “administrative contracts” but may also celebrate private contracts.

c) The controlled phase: precontractual phase, execution phase, or termination phase of the contract

The combination of the above circumstances generates a plurality of different ways to verify the control of the contracts. In short, the possibilities are:

a) To control any aspect of an administrative contract (related to the preparation, award, execution or termination phase) an ordinary administrative remedy or/and a remedy before administrative Courts must be lodged.

b) If it wants to control any aspect of a private contract concluded by a public administration in the preparation or the award phase, it must lodge an ordinary administrative resource and/or a resource before the administrative Courts, while if it wants to control any aspect of the executionr or termination phase it must directly lodge a resource before the civil Courts.

c) Civil Courts are also competent to challenge any phase of any contract awarded by public entities other than public administrations.

# 4.- Financial control for public contracts

The supervisory role of the Court of Auditors implies a public sector evaluation carried out by an independent statutory body. The Court of Auditors is an external control body. It performs different types of audits to verify, mainly, the legality of the contractual activity of the public sector.

In Spain, the supervisory body par excellence is the Tribunal de Cuentas (hereinafter, Court of Auditors), which is subject to regulatory block established by the Constitution (Article 136), the Organic Law 2/1982, of May 12, of the Court of Auditors, and Law 7/1988, of April 5, on the operation of the Court of Auditors.

In addition, the Autonomous Communities can have equivalent bodies to the Court of Auditors at a regional level. Article 29 of TRLCSP determines that a certified copy of the conclusion of the contracts above certain amounts, accompanied by a brief resume of the administrative file, must be submitted to the Court of Auditors -or to the external oversight body of the Autonomous Community- within three months after the conclusion of contracts above certain amounts. The contracts amounts are: 600,000 euro, for public works, public works concessions, public service management and partnership between the public sector and the private sector; 450,000 euros in the case of supplies, and 150,000 euros, in service and in the special administrative contracts.

The modifications, extensions or variations of time, changes in price and the final amount, nullity and normal or abnormal termination of the aforementioned agreements must be communicated to the Court of Auditors -or to the external oversight body of the Autonomous Communities-.

Regardless, the Court of Auditors -or the corresponding external oversight bodies of the Autonomous Communities- is entitled to reclaim the data or documents that are deemed relevant in relation to contracts of any nature and amount. This information must be submitted by the contracting authorities of each territorial level. With this information the Court of Auditors prepares annual audit reports which are valuable instruments to detect deficits of management, procedural deficiencies and, where appropriate, to raise to the judicial Courts the possible existence of financial irregularities, criminal acts or other types of misconduct in the performance of agents and public managers.

# 5.- Arbitration

According to Article 50 of TRLCSP organizations and public sector entities that do not have the character of public administrations may submit to arbitration -under the provisions of Law 60/2003 of December 23, on Arbitration-, the resolution of disputes that may arise that affects compliance and termination of contracts that they conclude.

6. - POSSIBLE ACTIONS BEFORE THE AUTHORITY IN CHARGE OF COMPETITION IN PUBLIC CONTRACTS[[16]](#footnote-16)

The first-hand reply of the Spanish Public Procurement model against bid rigging is quoted in the Additional Provision num. 23rd of the TRLCSP. In spite of being placed within the core law on public contracts, such provision outsources the conflict, by calling all the public entities concerned by the tender for supplying the national or regional Competition agencies with any evidence -even circumstantial- of bid rigging that they found within the procedure[[17]](#footnote-17).

Although contracting bodies may be assimilated to a *sui generis* regulator, the outsourcing laid down by the Additional Provision num. 23rd deprives them of a significant portion of their regulatory powers: those formed by the function of guaranteeing ‘antitrust competition’ before and alongside the contract life (tender, award and implementation). The outcome is twofold. The TRLCSP does set out some methods to shield competition among bidders during the procedure (*competition for the market*). But even though it was notorious that the candidates bargained and came to an agreement on the contract award before the procedure began, the Legislative Decree did not set its own rules for ensuring that, in that case, the bidders must abide by the antitrust rules (*competition in the market*).

Hence, the TRLCSP puts the contracting bodies out of action in cases where bid rigging results in the contract awarding decision being plagued with antitrust errors. Such paradox is almost inevitable although they are absolutely aware of the Antitrust law breach. As an example, the Decision *Transporte Ayuntamiento de Las Palmas* adopted by the CNC (Spanish Competition Authority)[[18]](#footnote-18):

The city council of Las Palmas started a procedure to award a contract to provide the transportation local service for sporting and educational activities. Once the offers were known, a bidder complained that other three rivals’ proposals were exactly the same in terms of price per ticket, in more than nine hundred cases. Successive contracting process reports acknowledged the strong evidence of collusion. Nevertheless, the procedure went on until the contract was awarded to the best-rated candidate; precisely one whose bids were in question. Few days after the decision, the contracting authority decided *ex officio* to report the case to the Comisión Nacional de la Competencia. Two years later, the Comisión Nacional de la Competencia imposed a sanction for collusive agreement to the person who had been awarded the contract. The contract was in full performance phase.

As the example shows, both logic and reality demonstrate the futility of a Spanish-like model in facing collusion within public procurement. Deprived of its own solutions, the ultimate answer offered by the TRLCSP is the Additional Provision 23rd reference clause. Since antitrust agencies have been modelled to act after the breach has taken place, it is not an exaggeration to say that Spanish public procurement runs the risk of becoming fully cartelised sooner rather than later.

1. M. A. BERNAL BLAY; “The Spanish Remedies System in Public Procurement: Strengths and Opportunities for Improvement”, *EPPPL* 2.2013, pp. 121 et 123; J. PONCE SOLÉ; “El Órgano administrativo de Recursos Contractuales de Cataluña: un nuevo avance en la garantía del derecho a una buena administración”, *Revista Documentación Administrativa*, n° 288/2010, p. 206. [↑](#footnote-ref-1)
2. D. PACHNOU, *The effectiveness of bidder remedies for enforcing the EC public procurement rules:* *a case study of the public works sector in the United Kingdom and Greece*, PhD Thesis, University of Nottingham, 2003. [↑](#footnote-ref-2)
3. By all, see J. M. GIMENO FELIU, *Observatorio de Contratación Pública. Informe especial. Sistema de control de la contratación pública en España. (Cinco años de funcionamiento del recurso especial en los contratos públicos. La doctrina fijada por los órganos de recursos contractuales. Enseñanzas y propuestas de mejora)*, December 2015, specially pp. 144 to 148. Available: <http://www.obcp.es/index.php/mod.documentos/mem.descargar/fichero.documentos_INFORME_ESPECIAL_OBPC__RECURSO_ESPECIAL_Y_DOCTRINA_2015_0f8f25d8%232E%23pdf/chk.13f88f1fcc7d3864e48c973df4e880f7> [↑](#footnote-ref-3)
4. Initially, the same solution was established in Catalonia and Andalusia, but the workload and other practical drawbacks were taked into account to modify their regulation, and now they have a collegial body. [↑](#footnote-ref-4)
5. At first was also the option choosen by Galicia and Estremadura, but after a period, they decided to create their own administrtaive tribunal. [↑](#footnote-ref-5)
6. The administrative body for special resouces in the field of procurement was abolished in Marbella by resolution of the Full Council adopted in July 30, 2015. [↑](#footnote-ref-6)
7. The ECJ held in the Dorsch Consult case (C-54/96) that in order to be considered as a body of judicial character, the following multiple cumulative criteria must be met: the body must be established by law, it must be a standing body, its decisions must be binding, the proceedings before this body must be binding on the parties, the body must apply the rules of law, it must be independent. [↑](#footnote-ref-7)
8. The Annual reports are available in the web pages of each administrative resources body. [↑](#footnote-ref-8)
9. Concept proposed by M. A. BERNAL BLAY, “El sistema de tutela de la buena Administración contractual: balance de su implantación y propuestas para un mejor aprovechamiento”, *Revista Española de Derecho Administrativo*, núm. 160, 2013, pp. 189-216. [↑](#footnote-ref-9)
10. R. CARANTA, “The Comparatist’s Lens on Remedies in Public Procurement”, *Working Papers Series European and Comparative Law Issues*, Instituto Universitario di Studi Europei, 2011-1/2-ECLI, p.10. [↑](#footnote-ref-10)
11. M. A. BERNAL BLAY, “No a las tasas en el ámbito del recurso especial en materia de contratación pública”, <http://www.obcp.es/index.php/mod.opiniones/mem.detalle/id.145/relcategoria.208/relmenu.3/chk.1acd61ad0fb4b78b50684ddd5dcab369> (05/03/2014). [↑](#footnote-ref-11)
12. Amounts updated by Law 2/2015 of 11 March, on Budgets of the Generalitat de Catalunya for 2015. [↑](#footnote-ref-12)
13. *Cfr.* The Opinion of the Spanish Council of State 514/2006, where it was understood that such a disparity of regimes, was not sufficiently justified. Opinion available in: <http://www.boe.es/buscar/doc.php?id=CE-D-2006-514> [↑](#footnote-ref-13)
14. *Cfr.* M. A. BERNAL BLAY, “Aspectos orgánicos del recurso especial en materia de contratación pública en las comunidades autónomas”, *Cuadernos de Derecho Local* (QDL), núm. 26, 2011, pp. 9-10. [↑](#footnote-ref-14)
15. *Cfr.* Chapter IV of Directive 2014/24/CE and of Title III of Directive 2014/23/CE. [↑](#footnote-ref-15)
16. A. MIÑO LÓPEZ, P. VALCÁRCEL FERNÁNDEZ, “Contracting authorities inability to fight bid rigging in public procurement: reasons and remedies”, in *Integrity and efficiency in sustainable public contracts. Balancing Corruption Concerns in Public Procurement Internationally* (Dir. Gabriella Racca and Chris Yukins, book on for the series directed by Prof. J.-B. AUBY, Bruylant, 2014, p. 199-214. [↑](#footnote-ref-16)
17. Literally, Adittional Provision num. 23rd of the TRLCSP says (translation by the author): “*Contracting authorities, the State Consultancy Commission on Public Procurement and all the bodies able to decide the special appeal set out in Article 40, are bound to report the Comisión Nacional de la Competencia all deeds they know while managing the contracting procedure, that may represent a breach of Antitrust law. In particular, they are bound to report any evidence of agreements, decisions of and concerted practices between the candidates which have as their object or effect the prevention, restriction or distortion of competition within the common market within the contracting procedure*”. [↑](#footnote-ref-17)
18. Comisión Nacional de la Competencia (CNC), *Transporte Ayuntamiento de las Palmas*, 25 October 2012. [↑](#footnote-ref-18)