



G-2019-02 GUIDE TO PUBLIC PROCUREMENT AND COMPETITION

PHASE 1: PLANNING PUBLIC PROCUREMENT

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I. INTRODUCTION

Public procurement is of considerable importance in Spain and, in general, in the group of neighbouring countries; according to various estimates, it accounts for 10% to 20% of the country's GDP and 14% of the GDP of the EU¹. It also plays a very important role in the development of other public policies due to its carry-over effect, since it serves to promote innovation, provide quality public services, promote social integration, increase corporate productivity and improve the well-being of citizens in terms of prices or quality.

Given the high significance of public procurement in quantitative and qualitative terms, it is of utmost importance that the regulatory and decision-making framework of public procurement promote effective competition among operators, and thus maximise the efficient use of public resources. In addition, promoting competition always reduces the risk of collusion between companies and hinders the likelihood of corruption.

The above considerations are especially important in the current economic context caused by the Covid-19 pandemic. As the European Commission recently highlighted: "*The social opportunity cost of inefficient public expenditure will be a burden to be shared by business and citizens. Improved governance, professional and efficient use of public procurement tools will be more necessary now than ever*".²

Various national³ and international⁴ analyses show that public procurement in Spain has ample room for improvement in terms of competition and, therefore,

¹ According to the OECD, it accounted for 9.6% of GDP and 23.4% of total spending by Spanish government agencies in 2017 (OECD (2019) "*Government at a glance 2019*"). In the past, the CNMC has estimated the share of public procurement at 18.5% of GDP (CNMC (2015) "[Documento de Análisis de la contratación pública en España: oportunidades de mejora desde el punto de vista de la competencia](#)" [Analysis of public procurement in Spain: Opportunities for improvement from the point of view of competition]. The [Observatory of Public Procurement](#) estimates it at 20% of GDP. Internationally, it accounts for over 14% of the EU's GDP, according to the [EC public procurement scoreboard](#).

² Communication from the European Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of Regions and the European Investment Bank: "European Semester in 2020: Country-specific recommendations". 20 May 2020.

³ In the Study "[Radiografía de los procedimientos de contratación pública en España](#)" [Overview of public procurement procedures in Spain] (CNMC, 2019). See also the report from the Independent Office for the Regulation and Supervision of Public Procurement (OIReScon) "[Informe de Supervisión de la Contratación Pública de España](#)" [Monitoring Report on Public Procurement in Spain] (2019).

efficiency. The lack of adequate planning and programming of public procurement has been highlighted as one of its main shortcomings⁵.

The CNMC views public procurement as a strategic sector to promote the rapid and inclusive economic recovery, and to advance in the achievement of sustainable development goals, including digitisation and the ecological transition. In addition to prosecuting public procurement practices that restrict competition, the CNMC has been focusing its efforts on helping to improve the regulatory framework and policies of public procurement⁶.

Foremost among the tools for its improvement is the [Guide to Public Procurement and Competition](#), prepared by the National Competition Commission (now CNMC) in 2011. Said Guide provides standards to improve both the design of public tenders and to identify possible situations of collusion among bidders.⁷

In its 2020 Action Plan, the CNMC undertook to partially update the aforementioned [Guide to Public Procurement and Competition](#) (action 8.14). This updating process will be carried out in phases, starting with **planning** as the first stage that should be part of any normal procurement process, and which is of special importance to guarantee the principle of free competition in any public procurement system.

The remaining phases will then be addressed: **preparation** (based on a market analysis, the procurement alternatives must be assessed: resort to the market

⁴ The European Commission lists Spain as one of the EU countries with the worst comparative performance in terms of public procurement ([Single Market Scoreboard - Public Procurement, 2020 data](#)).

⁵ See "[Informe de Supervisión de la Contratación Pública de España](#)" [Monitoring Report on Public Procurement in Spain] OIReScon (2019).

⁶ The CNMC has a specific section on its website on [Competition Advocacy and Public Procurement](#) listing all of its activities in terms of promoting competition in this area. Also, in an effort to fight against fraud in tenders, these [recommendations](#) have been published.

⁷ Of note is the document "[Making Public Procurement Work in and for Europe](#)" prepared by the European Commission, COM (2017) 572 final, which underscores the role of competition authorities to support contracting authorities in their tasks, including planning: "Collusion is a recurring feature in some public procurement markets. It may add up to 20% to the price otherwise paid in competitive markets. Competition authorities have been entrusted with investigation and enforcement powers to punish collusive practices but only when collusion is suspected to have already occurred. The Commission will therefore develop tools and initiatives addressing this issue and raising awareness to minimise the risks of collusive behaviours on procurement markets. This will include actions to improve the market knowledge of contracting authorities, support to contracting authorities careful planning and design of procurement processes and better cooperation and exchange of information between public procurement and competition authorities. The Commission will also prepare guidelines on the application of the new EU procurement directives on exclusion grounds on collusion".

or use internal resources); **tender** (design of the key elements of the specifications: type of procedure; lots; solvency and award criteria, etc.); **award** (process that ensures that the most economically advantageous bid is chosen: handling of abnormally low bids, using formulas that stimulate competition, adequate weighting of the economic variables, etc.); **execution** (analysis of modified terms, complementary services, special execution and subcontracting conditions, etc.). Finally, carry out an adequate **ex post evaluation**, identifying, where appropriate, aspects that could be improved.

This initiative has been prepared on the basis of a [public consultation on improving public procurement planning](#), and a [debate session](#), both held at the end of 2019. As a basis for both, the CNMC's Competition Advocacy Department prepared the preliminary working document "[Planning as a tool to promote competition and efficiency in public procurement](#)". The consultation was open from 20 November to 21 December, 2019, and a total of 66 contributions were received. In general terms, the responses received confirmed the existence of deficiencies and shortcomings when planning purchases, motivated in part by the lack of specialisation, time and resources in the public sector. In general, the responses though it positive that guidance is offered on how to carry out adequate procurement planning, given its implications for the proper management of public funds⁸.

This document offers general guidelines for properly planning public purchases in order to improve their efficiency and competitiveness. It is structured into four sections: after this introduction, Section II explains the usefulness of planning to promote competition and efficiency, Section III analyses the planning phases and, finally, Section IV offers the main recommendations to implement it.

II. PLANNING AS A TOOL TO PROMOTE COMPETITION AND EFFICIENCY

"Planning is a conscious determination of actions intended to achieve objectives" (Harold Koontz, Professor of Business Management, University of California)

"Planning means designing a desired future and identifying ways to achieve it" (George Steiner, professor, philosopher, critic and theorist of literature, Universities of Cambridge and Oxford)

⁸ The form with the questions asked in the public consultation and the answers received can be viewed at the following link: <https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/mejora-regulatoria/consultas-publicas/planificacion-de-la-contratacion-publica>. The summary of the Conference is available at the following link: <https://blog.cnmc.es/2019/12/16/que-está-fallando-en-la-contratacion-pública/>.

Planning implies anticipating. It means analysing needs and potential alternatives in order to properly define strategies. In the field of public procurement, this is considered a key phase to the success of the procurement, since it minimises errors resulting from a lack of foresight. It is also one of the most defining factors in the existence of a truly competitive tender.

It is an essential activity for all organisations, public and private, but, to the extent that the former are always financed with limited public resources, and are subject to the constitutional commitment to efficient management⁹, its proper implementation becomes essential. Similarly, planning and management by objectives and tracking and evaluating the results of public policies are general principles that should guide the actions of all government agencies¹⁰.

The laws on public procurement have not been particularly sensitive to the relevance of planning, as this activity is traditionally omitted from the regulatory framework¹¹.

Although the EU's directives on public procurement do not contain any reference to its planning, a small step in this direction was taken in Law 9/2017 of 8 November, on Public Sector Contracts (LCSP in Spanish). This law requires public sector entities to schedule their purchases annually, although only in the case of contracts subject to harmonised regulation¹².

⁹ See Article 31 of the 1978 Constitution and, more specifically, Article 1 of the Law on Public Sector Contracts, which formulates the principle of efficiency in managing funds earmarked for public procurement, and highlights as key elements: the requirement to define the need to be satisfied beforehand, the safeguarding of free competition and the selection of the most economically advantageous offer.

¹⁰ Article 3 of Law 40/2015 of 1 October, on the Legal Regime of the Public Sector. Similarly, Art. 6 of Law 9/2013 of 9 December, on transparency, public information and good governance, specifies: *Government agencies shall publish those annual and multi-year plans and programmes in which specific objectives are set, as well as the activities, means and timeline planned to achieve them. Their degree of compliance and results must be subject to periodic evaluation and publication, together with the measurement and evaluation indicators, in the manner determined by each competent agency.* Elsewhere, Law 39/2015 of 1 October, on the Common Administrative Procedures of Government Agencies, specifically embodies this principle in the form of ex ante regulatory planning and an ex post assessment through the Annual Regulatory Plan (Article 132).

¹¹ Article 73 of the General Regulation of the Law of Government Contracts (Royal Decree 1098/2001 of 12 October) briefly outlines the preparatory actions of the contracts: the procurement tenders will be initiated by the contracting body that determines the procurement need that is the subject of the contract, either because it appears in previously approved or authorised plans, or because it is deemed to be singularly necessary. A substantiated report of the unit issuing the tender will be attached, stating the need, characteristics and calculated amount of the services involved in the contract.

¹² This is probably due to the fact that this issue is related to the publication of prior information notices that are regulated in EU Directives. Article 28.4 of the LCSP states that: *“Public sector entities shall schedule the public contracting activity, which they shall carry out*

However, the lack of specificity on the content of the annual purchasing schedule and on the process involved, as well as the consequence of omitting from its scope a significant volume of procurement cases (all contracts not subject to harmonised regulation), entail negative elements that will reduce its effectiveness. The responses to the public consultation conducted by the CNMC corroborate the general impression of the scant practical significance that this provision of the LCSP has had¹³.

The competition problems involving public procurement become evident when the operators are formally called upon to submit bids to the tender (shortage of bidders, low competition in prices, variety or quality, and more). But the causes that have resulted in these situations, their ultimate roots, may stem from a much earlier process, a fundamentally internal process directly related to an adequate knowledge of their needs and expectations, a process we know as planning.

Proper planning has advantages for public entities, while a lack thereof entails a cost that they should at least be aware of. These are presented below:

The following can be identified as advantages of strategically planning¹⁴ and managing public procurement¹⁵ :

in a budget year or in multi-year periods. They shall announce their contracting plan in advance by means of the prior information notice provided for in Article 134 that includes at least those contracts that will be subject to harmonised regulation". In turn, Article 116.1 LCSP states that: "Government agencies may only enter into contracts after the corresponding case is processed, which shall be initiated by the Contracting Authority, justifying the need for the contract under the terms provided in Article 28 of this Law".

¹³ The respondents generally agree that contracting authorities do not usually plan contracting activities (1.6 out of 5), despite the high consensus regarding its usefulness to control spending, avoid deviations and make better decisions (4.9 out of 5).

¹⁴ See the [Recommendation of 20 October 2020](#) of the Valencian Anti-Fraud Agency (AVAF), which notes that *"the importance of planning in organisations pivots around four issues: i) it avoids waste (understood as spending public money with no need or justification); ii) it makes it possible to organise and manage public resources in the best possible way based on real medium-term needs; iii) it provides non-cosmetic accountability, disclosing to the public any plans that are in the works and the extent to which they are implemented; iv) it allows conscientious measures to be taken within the framework of the strategic vision and institutional intelligence in all contexts"*.

¹⁵ See the European Commission Practical Guide: Publish annual procurement plans (file 12), OECD (SIGMA) Module C (Preparation of procurement. (2.3.2 and 3) Advantages of the procurement planning process and consequences of not undertaking procurement planning). Of note in Spain is the Ministry of Defence, which has developed a [Model of Excellence for Managing Procurement in the Public Sector](#), based on the requirements of the UNE 15896: 201 standard (approved by [Instruction 42/2019](#) of the Secretary of State for Defence), which includes a specific section on operational purchasing planning (Axis 6) that covers: the compilation and prioritisation of purchasing needs, the resources and means available in the

- ☑ **The identification, categorisation and prioritisation of needs.** Planning makes it possible to identify future needs, prioritise them based on different factors (for example, their urgency, economic amount, recurring nature, risks identified, strategic nature) and adjust them to the available resources.
- ☑ **The satisfaction of needs through an open and competitive procurement system.** Planning makes it possible to identify the procedures for awarding the most appropriate procurement contracts in a given case. Adequate anticipation avoids resorting excessively to procedures with little or no effective competition, such as, for example, minor contracts, procedures without prior publication or in-house relationships¹⁶.
- ☑ **The improved transparency of public actions, thus facilitating operator access to the market¹⁷.** Publishing procurement forecasts offers valuable information to the private sector on the needs of public sector entities that must be satisfied in a certain time frame, which allows companies to prepare and plan their production capacities and their specific proposals. It also facilitates market access to companies, especially SMEs, that are less able to respond in certain circumstances¹⁸. However, this predictability could result in increased

organisation, the preparation of the contract calendar for the following period, and the evaluation of the previous period's procurement plan.

¹⁶ The participants in the public consultation agree that the proper planning of contractual activity prevents recurring and permanent needs from being tendered through procedures that limit competition and disclosure (4.5 out of 5).

¹⁷ OIReScon, in its study mentioned earlier, "[Monitoring Report on Public Procurement in Spain](#)" (2019), alludes to the call in the LCSP to disclose the programming and planning of public purchases, and points out the difficulty of locating this information given the current configuration of the Public Sector Contract Platform (PLACSP), as well as of the regional information platforms and services. This makes it necessary to go to the specific profile or specific web page to consult the schedules of the individual contracting bodies. Hence, it concludes that "*As a result, we advise having a specific space in the contractor's profile to publish, search for and monitor its schedule, thus providing information to economic operators and other contracting bodies from the perspective of good practices in the matter*". This report provides as an example of a good practice the Contracting Platform of the Principality of Asturias, which has a specific section in the contractor's profile on contracting plans, classified chronologically and by contracting entity.

¹⁸ One good practice that merits mention is the dissemination of the public contents of the annual purchase plans of the Ministry of Defence, which are published not only on the Ministry's website, but on the Transparency Portal, the Public Sector Contracting Platform and through press releases, in order to make potential bidders aware of its tenders.

anti-competitive behaviour that should be monitored and minimised (for example, by selecting the public information that is disclosed)¹⁹.

- ☑ **Adopting a truly strategic approach that allows achieving efficiency objectives together with other public-interest goals (environmental, social).** Procurement planning is one of the pillars for the proper implementation of strategic management in public purchases²⁰. These other objectives cannot be integrated without a preliminary evaluation of the situations that pose a greater risk/potential for compliance/non-compliance and impact on the achievement of said objectives, in such a way that effective competition is always ensured in tenders.²¹

The fact that public entities develop planning instruments for their strategic purchases will lead them to specialise in certain areas of procurement. This specialisation should be leveraged by other entities, that may have fewer resources, to aid their understanding of the different market dynamics. This should all be fostered through different collaboration mechanisms that could be put in place.

- ☑ **Improved economic-financial and budgetary management, creating incentives that reward efficiency.** Planning should yield a better-defined economic quantification of the needs to be satisfied by public entities. This improved definition should lead to better budget implementation. This would enhance accountability by making it possible to analyse deviations from the plan and making better decisions in the future. In addition, the economic efficiency obtained with the bids provided for in the plan should be encouraged through increased budgetary resources in future years.
- ☑ **Prevention of corruption phenomena.** Although the prevention of corruption is not an explicit objective of competition policy, there is no denying that transparency and competition hinder the likelihood of

¹⁹ Although, in general, the contributions received during the public consultation indicate a low perception that expanding the transparency of procurement schedules may increase the risk of collusion in bidding processes (2.3 out of 5).

²⁰ See this [presentation](#) by P. Magina (OECD), in which he underlines how important planning is to transitioning towards truly strategic procurement (Conference on planning as an essential tool to promote competition and efficiency in public procurement, organised by the CNMC on 3 December 2019).

²¹ Of note is the work carried out by the Ministry of Defence to transform towards strategic management and its vocation for excellence in procurement. This Ministry is a pioneer in procurement planning within Spain's central government (since 2013).

corruption. Needs planning makes it difficult to use uncompetitive procurement procedures, and thus helps to prevent corruption²².

In contrast, the inconveniences²³ derived from the absence or inadequate planning refer to:

⊗ **The proliferation of procedures that limit competition**, causing damage to the business sector and to the existing competitive dynamics²⁴. A lack of planning leads to the use of non-competitive bidding procedures to address needs (such as, for example, minor contracts or in-house providing)²⁵.

²² See Valencian Antifraud Agency (AVAF): "[La planificación: herramienta clave para prevenir los riesgos de corrupción en las organizaciones](#)" [Planning: a key tool to prevent the risk of corruption in organisations] (2020). As the AVAF itself noted: "*We noticed that one of the main risks of corruption is related precisely to the lack of planning in the execution of public policies, and specifically in public procurement, since it does not allow ordering and prioritising the achievement of general interests; instead, it unfortunately allows processes to be undertaken that frequently do not involve contracting, replaced by formulas such as unjust enrichment, and leading, as well, to situations in our public institutions involving a conflict of interest or a lack of oversight of economic activity*".

²³ In its Monitoring Report (p. 336), OIReScon notes that there are general deficiencies in planning contractual activities, such as the preparation of each tender dossier: *With regard to the contract preparation phase, we identified a lack of scheduling of both the contractual activity of the contracting authority (as was also indicated by the IGAE and the IGSS in their report), or at least, a lack of proper disclosure, and the absence of planning of the contracting tender itself (including those corresponding to streamlined and centralised contracting systems), that is, the choice of tendering procedure, the division into lots, the solvency determination, and the drafting and definition of the award criteria. These aspects are all equally indicated by the Court of Auditors (at the national, regional and local level), in view of the reports analysed*". See also the [presentation](#) by European Commission representative, Alvydas Stančikas, (Conference on planning as an essential tool to promote competition and efficiency in public procurement, organised by the CNMC on 3 December 2019).

²⁴ See, for example, the analysis conducted by the Anti-Fraud Office of Catalonia in various working documents, in which they analyse the risks to the integrity of public procurement, and pay particular attention to "*Planning deficits, which create multiple opportunities throughout the entire process, but especially in three areas of risk within the preparation of contracts: that of promoting unnecessary, oversized, impossible or damaging contracts; that of preparing contracts that unduly limit competition or free competition; and that of awarding directly to an operator outside the contracting procedure*". (Working document 04 "*El análisis de los riesgos. Factores y efectos de los riesgos y mapas para facilitar el análisis*" [Risk analysis. Risk factors and effects and maps to facilitate analysis], p.13). Along similar lines, the [AVAF](#) adds as a consequence of the lack of planning, the misuse of tools such as agreements, or resorting to in-house resources for services intended for contracts.

²⁵ See, for example, the [Report](#) of the General Auditor of the National Government (IGAE) containing the main findings on the monitoring of public procurement as per Article 332.11 of the LCSP (2019), in which it notes the high number of minor contracts entered into by Spain's National Government that were *signed to cover needs known in advance (permanent or recurrent), and that therefore should have been planned so they could have*

- ⊗ **A rushed deadline for preparing bids, which may be one of the causes behind the low number of bidders²⁶.** Spain has very poor indicators compared to other EU Member States in this regard: according to the EC, in 27% of the Spanish tenders published in the OJEU, only one operator presented a bid²⁷. These figures were even worse when the CNMC analysed the tenders published in national sources from 2012 to 2016, with a third of them having a single bidder, and 65% of them having three or fewer bidders²⁸.
- ⊗ **Procurement that is inefficient (low quality or high cost), potentially oversized and of questionable viability.** The CNMC has analysed the impact, in terms of economic efficiency, of the lack of competitive bids²⁹: on average, the Government pays 9.9% less in contracts in which it uses the open procedure. In relation to the number of participants, having an additional company involved in the process results in an average reduction in the price paid by the Government of 2.1%. There is also the heightened risk of improperly resorting to amendments to address

been awarded using more adequate processes that are open to disclosure and competition and that could have resulted in the more effective and efficient management of public resources. Hence, as with contracts negotiated with no disclosure, it recommends engaging in true and proper planning of the contractual activity.

²⁶ Article 136 of the LCSP establishes a general rule regarding the deadlines for submitting proposals. It entails setting said deadlines by taking into account the time that might reasonably be adequate given the complexity of the contract while abiding by the legally specified minimums at all times. Of note is the analysis carried out by OIReSCON in its Monitoring Report (2019) (pp. 138 et seq.) on the deadlines for submitting bids, the lack of planning and the effects on the levels of competition: “11% of the bid announcements published in the sample analysed do not comply with the minimums laid out in the regulation. This, together with those that do not reasonably adjust the deadline to the complexity of the contract and its economic impact, account for approximately 55% of the sample analysed. This is in violation of the rule in Art. 136 LCSP on setting deadlines in keeping with the size of the contract”. For this reason, it recommends: *the need for adequate planning, especially in large investment projects, that allows establishing bidding periods that (always in the opinion of the contracting authority) are sufficiently adapted to the purpose of the contract, as established in Art. 136.1 LCSP, in order to maximise competition.*

²⁷ The European Commission indicators on public procurement ([Single Market Scoreboard - Public procurement, 2020 data](#)) rank Spain at the bottom of the Member States.

²⁸ "Radiografía [de los procedimientos de contratación pública en España](#)" [Overview of public procurement procedures in Spain] (CNMC, 2019).

²⁹ "Radiografía [de los procedimientos de contratación pública en España](#)" [Overview of public procurement procedures in Spain] (CNMC, 2019).

unforeseen economic or technical conditions, or to rely on unnecessary extensions that could have been avoided with advance planning³⁰.

III. CONTENT AND PHASES OF PLANNING

Proper planning would include the following phases: first, identify the needs of the entity, categorise and prioritise them according to the entity's objectives and strategy; second, schedule the different procurement actions (purchasing plan); and third, evaluate and monitor the plan.

1) Identifying, categorising and prioritising needs

In keeping with the IGAE's recommendations³¹, this should be based on: *preparing an adequate annual plan of needs that makes it possible to correctly plan the tenders and schedule the corresponding procurement cases so they satisfy the necessity, opportunity and efficiency criteria of contracting.*

However, in the absence of a legal provision³² in this regard, what is understood by "needs"? Mindful of the difficulty of detailing this conceptually, some guidance can be provided from a negative point of view.

³⁰ In this regard, the findings of the Court of Auditors (to which the OIReScon refers in the Supervision Report) are worth noting: *Regarding irregularities related to amendments, the reports (of the Court of Auditors) reveal deficiencies that could have been avoided with proper preparation and planning, and that caused delays in the planned execution deadlines. These amendments, therefore, are not made to address new needs or technical causes that could not be anticipated during the planning stage, and are often due to deficiencies in the initial projects.* In similar terms, the [IGAE report](#) containing the main findings on the monitoring of public procurement as per Article 332.11 of the LCSP (2019) concludes that the deficient forecast of needs has caused there to be, in many cases, significant deviations between the amount of the contract award and that associated with the final obligations recognised, as well as numerous differences between the initially approved credits and the amount of the recognised obligations. In some cases, obligations are recognised after the opportune amendment of the credit without the credits even being anticipated in the first place. Due to its relationship with aspects of corruption, see also the analysis of the Valencian Anti-Fraud Agency (AVAF) in its [Recommendation of 20 October 2020](#) entitled "*La planificación: herramienta clave para prevenir los riesgos de corrupción en las organizaciones*" [Planning: a key tool to prevent the risk of corruption in organisations].

³¹ See the IGAE [report](#) containing the main findings on the monitoring of public procurement as per Article 332.11 of the LCSP (2019), where it adds: "*Accordingly, it would be advisable to pay special attention to those of a periodic and recurrent nature in order to identify the most suitable award procedures, not only from the legal point of view, but also that of the principles of public procurement that relate to freedom of access to tenders, disclosure and transparency of the procedures. Thus, the use of minor contracts and negotiated procedures to satisfy recurring and periodic needs must be limited*".

³² See Article 28.1 of the LCSP, which adds that: *To this end, the nature and extent of the needs that are intended to be covered by the projected contract, as well as the suitability of its purpose and content to satisfy said needs (...) must be precisely determined and recorded in the preparatory documentation before the procedure that results in the award is initiated.*

Needs are not specific products or services, nor are they unique solutions³³, but rather aspects or functionalities directly related to the functions of the public entity. These functionalities must be directly associated to its internal (for example, cleaning of public buildings) or external (for example, information to taxpayers on fiscal matters) operations.

The unit within each public entity that is responsible for gathering this information in each operating unit must know and, for a given time frame, estimate:

- what needs should be covered
- why are they needed
- in what amount they are needed³⁴
- when are they needed³⁵
- their approximate cost
- what potential alternatives exist, as well as their viability and cost³⁶.

Once the needs are identified³⁷, they must be **categorised and prioritised based on the entity's objectives and strategies**. This makes it possible to classify needs from different perspectives: new³⁸ or existing, occasional or recurring, routine (non-critical) or strategic, low or high risk.

In the words of the AVAF: *"This would not be a mere formality during the process since issuing a contract when there is no need entails "wasting" public money (whether building an airport with no constant air traffic, or several public swimming pools in neighbouring towns)". Hence the essentiality that there be a plan of what needs to be contracted, together with follow-up and control, in order to avoid wasting public money and adequately manage spending based on the necessary resources.*

³³ As established in [Article 99.1 LCSP](#): *"The purpose of public sector contracts must be specified. It may be defined based on the specific needs or functionalities that are intended to be satisfied, without limiting the purpose of the contract to a single solution"*.

³⁴ If, for example, writing material is needed, the consumption of this material per employee or time period can be gauged to arrive at a close approximation of the overall amount.

³⁵ One possibility that may be reasonable is to differentiate between a more medium/long-term time frame (strategic planning) and another that is more limited to the short-term, to the current year (operational planning).

³⁶ For example, if it is more efficient to hire individuals to provide this service, or if it is better to outsource the labour.

³⁷ Note that the sufficiency or insufficiency of the internal means available to handle all of the needs identified will have to be evaluated beforehand.

³⁸ For example, in the wake of the health crisis caused by the COVID-19 epidemic, new needs have arisen that must be met by public sector entities, such as the acquisition of

This could be used to define purchasing categories³⁹, understood as sets of needs (goods or services) that exhibit common characteristics, taking into account both their purpose and the market of potential suppliers affected, which would make it easier to manage these categories, analyse them individually and implement strategies specific to each.

When classifying and prioritising needs, the internal factors of the organisation must be taken into account (for example, study of the demand, the budget that is allocated or the impact on the operation of the organisation), as well as external factors (study of the characteristics of the affected market, ease of replacing vendors or risk to the vendor).

Having analysed the external and internal factors, each purchasing category could be characterised using the [Kraljic matrix](#), which is a strategic planning tool frequently used in procurement management⁴⁰.

This methodology classifies the inputs or purchasing categories based on their impact on the organisation and the complexity of the supplier market (for example, if alternative solutions are available in the market, how concentrated the market is, if there is some supply risk), and subsequently designs a procurement strategy⁴¹. The main advantage of this classification is that it allows applying standard strategies for the procurement based on each purchasing category⁴².

personal protective equipment, not only for health personnel, but for the entire population, or VPN licences for teleworking.

³⁹ The categorisation of purchases is a general practice among private entities in the field of strategic procurement management.

⁴⁰ See “*Purchasing must become supply management*” by Peter Kraljic (Harvard Business Review, 1983), which marked a turning point in conceiving the procurement planning activity as a strategic aspect of companies.

⁴¹ The types of inputs are:

- *Leveraged*: those to which the organisation allocates a high budget and where the market has several suppliers, meaning there is no risk to the supply, making it easy to change vendors (for example, office supplies).
- *Strategic*: they have a high impact on the organisation and the market is limited, making it difficult to change vendors and thus placing the supply at high risk.
- *Routine or non-critical*: they have little budgetary impact and pose little risk for the supply since there is an ample market of suppliers (for example, electricity or fuel supply).
- *Bottleneck or critical*: they have little impact on the organisation, but they entail a high risk to the supply since the market is limited by the existence of few potential suppliers, or only one that dominates the market (for example, the repair of original parts).

⁴² In this line, the typical strategy for *leveraged* inputs should be to select, from the group

The analysis described will result in a final statement of existing needs based on the above criteria and prioritised according to the objectives and strategies set by each entity⁴³.

2) Scheduling procurement activities: procurement plans

In keeping with the objectives set by the organisation's strategic lines, the next step is **scheduling**: establishing a **procurement plan** in such a way that the contractual activity is defined for a specific period so that the needs are covered at the right time.

This requires having a realistic estimate of the timeframes involved in the procurement procedures⁴⁴. Guidelines should be provided for those needs that cannot be scheduled exactly.

The purchasing plan should contain, at least, the following elements⁴⁵:

of available providers, those that offer the best service at the lowest price through procedures that promote competition and participation, taking advantage of the organisation's bargaining power. Specifically, the strategy can be aimed at saving costs and obtaining better prices, or more quality at the same price, which is why the use of electronic auctions and framework agreements is recommended; *strategic* inputs, being a critical category for the organisation due to the difficulty of finding alternative suppliers, should be the object of further study and preparation to avoid serious impacts on the results; for *routine* inputs, given the variety of bidders and how easy it is to change vendors, the strategy should be oriented towards standardising products and reducing management and supply times through simplified and agile, but equally competitive, procedures; the strategy for *bottleneck* inputs - due to their low impact on the organisation but the scarcity of vendors, with the risk of being left with no supply and with no power over suppliers - should focus on ensuring the supply by looking for alternative suppliers, or even substitute products.

⁴³ There are inputs, such as those related to new technologies and ICT, that are considered strategic due to the vendor lock-in effect, or to dependence on the supplier or to key aspects such as interoperability, standards, data management models, and others (See the 2013 [Communication of the European Commission](#) on public procurement in the field of ICT). Because of this, some governments have adopted initiatives to strategically plan this type of purchase. In Germany, a specialised central entity (Zentralstelle für IT-Beschaffung) has been created to design public procurement strategies for ICT that is tasked with planning these purchases and providing advice to contracting authorities.

⁴⁴ New technologies should be used such that contract management can rely on computer resources that alert managers of contractual incidents sufficiently far in advance to correct any problems. In this regard, the tool developed by the Ministry of Defence (www.calendariocontratacionpublica.es) stands out as an example of a good practice that is useful for any public body that is interested in planning and scheduling its contracting activity, since it calculates the deadlines for processing the different types of procurement tenders. Said tool provides the most likely estimate of the processing time, along with a range for the timelines corresponding to the optimistic and pessimistic estimates.

⁴⁵ OIReScon recommends (see 2019 Monitoring Report, p. 370) taking into account the following aspects, both when scheduling the contractual activity and when preparing the procurement tender: i) The definition of the purpose of the contract and adequate justification of the general-interest need to be satisfied; ii) The choice of the most appropriate contracting

- Contracting authority.
- Need it seeks to address or purpose of the contract (CPV) ⁴⁶.
- Estimated duration.
- Procurement method that best addresses the need in terms of cost-benefit⁴⁷.
- Budget (approximate maximum amount).
- Indication of whether the contract is subject to harmonised regulation.
- Timeline of the different stages of the chosen procurement method.

To provide transparency to future procurement actions, **procurement plans must be published** in the contractor's profile, contracting platforms and transparency portals. This should not be limited to contracts subject to harmonised regulation, but should be extended to all procurement proposals associated with the public entity. It should offer valuable information to potential bidders to promote their involvement in the various processes⁴⁸.

procedure; iii) The division into lots; iv) The economic cost structure of the contract and the method for calculating the estimated value; v) The estimated duration of the bidding procedure and the expected entry into force.

⁴⁶ Once the need is identified, it may even be possible to anticipate the division of the future contract into lots. In this sense, the OIREscon recommendation (2019 Monitoring Report) is of interest: *“Procurement planning or scheduling should be enhanced to include an evaluation of the factor of dividing the contract into lots based on the most appropriate criteria for more effectively and efficiently rendering the service, such that, from the outset, the contracting authority analyses the possibility of dividing it into lots depending on the purpose of the contract, or on the provision of the service in various territories. The result would be an improved adjustment to the market and, ultimately, greater competition, by adjusting the needs of the contracting authorities to the reality of the economic operators”*.

⁴⁷ For example, the procurement procedure (and its specific type) or other methods, such as assignments to internal resources or agreements with other public entities.

⁴⁸ A good example is the Ministry of Defence's Annual Procurement Plan, which is publicly disclosed in order to promote competition and transparency in contracting processes. The Ministry acknowledges that the annual scheduling of its purchases involves more than 400 bodies of the Department, which includes 6,972 contracts to be carried out by the different bodies that make up the Ministry, estimated to be worth 2,556.62 million euros. Regarding the content, [an Excel file](#) is published detailing the proposed contracts to be awarded that involve those services that may be subject to harmonised regulation (SARA), which are expected to be contracted using the Centralised National Procurement System; those that are based on a framework agreement; those that are expected to be awarded by any of the following procedures: open, restricted and negotiated with disclosure; and those belonging to the Research and Development (R&D) sector, which will be awarded by the negotiated procedure with no disclosure. The following information is provided for each of the proposals: a) assigned Contracting Authority; b) CPV (Common Procurement Vocabulary) code; c) Purpose of the proposal; d) Award procedure chosen; e) Indication of whether the contract is

However, we must not lose sight of the fact that the predictability of public procurement increases the risk of collusion between companies, thus producing an undesirable effect that must be corrected by the contracting entity with *ex ante* (data aggregation) and *ex post* (monitoring, complaints to competition authorities) preventive measures.

In this regard, it may be reasonable to even consider different levels of disclosure: on the one hand, the planning/scheduling documents that would be publicly accessible and whose content would be limited but sufficiently descriptive for bidders (contracting body, type of supply, duration, estimated maximum amount, etc.); on the other hand, restricted documents for internal use by the organisation that contain instructions and guidelines to ensure consistent and coordinated planning.

In any case, these transparency measures may also be supplemented or, based on the above risks, replaced by others, such as better designed and utilised preliminary market consultations⁴⁹, or the establishment of longer deadlines for preparing bids in an effort to facilitate the participation of operators with fewer financial and technical resources.

3) Monitoring and control indicators

Correct planning cannot be limited to the *ex ante* phase, but must instead be supplemented with checks during the execution process and after its completion⁵⁰.

The OECD⁵¹ recommends improving performance by evaluating the effectiveness of the public procurement system, both of individual processes and of the system as a whole, whenever feasible and appropriate. Specifically,

subject to harmonised regulation (SARA); f) NUTS code; g) Approximate estimated value of the procurement proposal.

⁴⁹ Preliminary market consultations are regulated in Article 115 of the LCSP. The CNMC has noted the advantages of doing these consultations and has stressed the importance of designing them properly to avoid *the risk of regulatory capture*, reducing and potentially even violating the principles of equal access to tenders, non-discrimination and non-distortion of competition (among others, see its report IPN/CNMC/010/15 APL public sector contracts (III.2.7.1 Preliminary market inquiries).

⁵⁰ Although focused on the field of anti-corruption, the AVAF's reflections fit perfectly into this idea: "*Ultimately, for planning to provide the desired benefits and result in the considerable minimisation of corruption, it is not enough to prepare and approve the plans; instead, it is necessary to verify their actual execution by implementing mechanisms to monitor, evaluate and control their compliance that allow for the timely correction of any potential failures or deviations identified*".

⁵¹ Recommendation of the Council on Government Procurement (OECD, 2015). See also the *Methodology for Assessing Procurement Systems (MAPS OECD 2018)*.

it proposes developing indicators to quantify the performance, effectiveness and cost savings of the public procurement system for comparative purposes and to support the strategic formulation of public procurement policies.

In strict planning terms, these **monitoring and control tasks** would involve two areas:

- **Management indicators.** To provide quantitative and qualitative information on the organisation's performance, identify any deviation from the established lines of operation, and take timely corrective measures.
- **Compliance indicators.** To verify the achievement of the programmed objectives. Feedback systems should be set up to serve as a basis for future planning processes⁵².

If deviations are identified, they should be duly justified and steps taken to, if planning was used, determine the fundamental reasons for the planning error, and if it was not used, ascertain why the decision was made to proceed with the tender.

Finally, and without prejudice to the fact that, given their valuable managerial experience, personnel from any of the public entities involved in managing public procurement cases may participate in the planning activity, it seems appropriate to note the recommendation, also in this regard, to promote as far as possible the **professionalisation** of purchasing managers, consistent with EU recommendations⁵³. This would mean having multidisciplinary teams that have the legal, economic and technical knowledge needed to deal with increasingly complex markets, and prevent information asymmetries between companies and the government regarding the conditions of the market affected by the contract, from resulting in situations that are negative for the general interest.

IV. RECOMMENDATIONS TO PUBLIC CONTRACTING AUTHORITIES

In light of the foregoing, the following recommendations are made:

⁵² Of note in this regard is the recommendation that the IGAE includes in its Report containing the main findings on the monitoring of public procurement as per Article 332.11 of the LCSP (2019): *Establish a procedure within the annual procurement planning process to analyse how well the needs contained in the contracts concluded in the previous year were addressed.*

⁵³ The professionalisation measures are directly related to the tasks of strategic planning and project and risk management and their evaluation [*RECOMMENDATION \(EU\) 2017/1805 of 3 October 2017 on the professionalisation of public procurement. Building an architecture for the professionalisation of public procurement.*](#)

1. Implement a true **public procurement planning culture**, which must permeate all technical-regulatory and organisational levels. In both areas, we are in an early stage, but this should not impede firm decision-making in this regard by the contracting entities, even before these changes occur.
2. Approach **planning in an integrated and strategic way** that takes into account the activity of the organisation. No two plans are the same: each entity must know the essential values that characterise it in order to accommodate its procurement system to the public service mission that has been entrusted to it.
3. Consider the different **types of planning** as they relate to the time frame, differentiating between planning that is more strategic (medium-long term) and one that is more operational (for the current year). Both must be readapted if events or circumstances occur that result in abrupt changes to the affected public entities or markets.
4. Establish an **internal process for collecting information** to ascertain the needs that must be satisfied by the organisation's various internal units in order to have a specialised unit prioritise them according to the strategic actions or values of the organisation itself, allowing them to be monitored and controlled by way of different management and compliance indicators. This will be essential for deciding which ones will be the subject of tenders and which ones will be covered using internal resources.
5. Establish an **external process for providing information** to improve the predictability of public purchases (dissemination of procurements plans, not settling for complying with the obligation imposed by Article 28 of the LCSP). This creates legitimacy and trust in public management, but above all it enhances the participation of the private sector, and especially SMEs, in tenders.
6. Introduce **measures that keep** this predictability from bringing about an increase in **anti-competitive behaviour**. Preventive measures that promote data aggregation or that reinforce the oversight of potential anticompetitive behaviours can be supplemented with measures such as prolonging the deadlines for submitting bids.
7. Encourage **collaboration between contracting public sector entities** by enabling express mechanisms to exchange experiences and best practices, so that the knowledge of a specialised entity in certain markets can be used by others with less experience in the matter. Do not let the

asymmetry of information between companies and the government lead to the imposition of demands or requirements that are not necessary or proportional to the intended general-interest objectives.

