

Modification of Public Contracts as Source of Corruption: The Spanish Case

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บทคัดย่อ

การดัดแปลงแก้ไขสัญญาภาครัฐภายหลังการลงนามในสัญญา ได้กลายเป็นแนวปฏิบัติปกติในระบบการจัดซื้อจัดจ้างปัจจุบัน แต่กฎระเบียบที่เกี่ยวกับการจัดซื้อจัดจ้างภาครัฐมักจะมีช่องว่าง โดยเฉพาะภายหลังจากการดำเนินการลงนามในสัญญาแล้ว การขาดความสนใจดังกล่าวอาจอธิบายการขาดแคลนผลงานวิชาการด้านกฎหมาย จนไม่กี่ปีที่ผ่านมา นักวิชาการเริ่มจะให้ความสนใจเกี่ยวกับขั้นตอนการบริหารสัญญามากขึ้น และเชื่อมโยงไปถึงการดัดแปลงแก้ไขสัญญาภาครัฐ

บทความนี้จะพยายามสร้างความเข้าใจเกี่ยวกับประเด็นว่า การดัดแปลงแก้ไขสัญญาภาครัฐอาจเป็นช่องทางการแลกเปลี่ยนต่างตอบแทนกันในเชิงทุจริต กรอบแนวคิดในเบื้องต้นชี้ให้เห็นว่าเหตุใดประเทศสเปนจึงเป็นกรณีตัวอย่างที่เหมาะสมสำหรับการศึกษาในเรื่องนี้ ให้คำนิยามกรอบแนวคิดเกี่ยวกับ "การดัดแปลงแก้ไขสัญญาภาครัฐ" และเหตุใดการแก้ไขสัญญาภาครัฐจึงนำไปสู่การคอร์รัปชัน อาทิ ความไม่โปร่งใส และการปราศจากแรงกดดันทางสังคมที่จะผลักดันให้งานมุ่งสู่ความสำเร็จ เป็นต้น หลังจากมีการวางกรอบทางทฤษฎีแล้ว จะยกประเทศสเปนมาเป็นกรณีศึกษา โดยการใช้กรณีศึกษาย่อยๆ หลายกรณี ซึ่งแสดงให้เห็นถึงปัญหาการทุจริตที่เกิดขึ้นในช่วงหลายปีที่ผ่านมา เนื่องจากการขาดการควบคุมและตรวจติดตามที่เหมาะสม สุดท้าย การศึกษานี้จะชี้ว่าอะไรคือมาตรการที่ฝ่ายนิติบัญญัติควรยอมรับเพื่อนำไปแก้ปัญหการทุจริตเหล่านี้

คำสำคัญ: การจัดซื้อจัดจ้างภาครัฐ การดัดแปลงแก้ไขสัญญา การทุจริต สเปน

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Abstract

Modification of public contracts after they have been awarded is a fairly common practice in current procurement systems. However, procurement regulations barely pay attention to it given that it is framed within the execution phase of the contract – which seems to deserve little or no attention. This lack of attention could explain the shortage of academic works in the legal field until a few years ago. Academics start now to pay attention to the execution phase and, thus, to the modification of public contracts.

The paper will try to shed light on how modification of public contracts may be a source of corrupt exchanges. First, a preliminary approach to the subject is carried out by pointing out why Spain is an appropriate candidate for this research and by defining the concept of “modification of a public contract” and the reasons why it is a field so prone to corruption, i.e. lack of transparency, public interest pressures to successfully finish the works, etc. Once the theoretical framework has been sketched out, then the Spanish case is addressed by means of several case studies. It is seen how several scandals appeared in the last years, triggered by the absence of proper controls and surveillance. Finally it is studied what are the measures adopted by the Legislator to deal with them.

Keywords: public procurement, contract modification, corruption, Spain

1. Introduction

a. Corruption in Spain

Spain, in a European context, could arguably be considered a corrupt country. The 2014 Transparency International’s Corruption Perception Index yields a CPI score of 60 and a country rank of 19 out of 28. Spain performance is similar to those countries with a more recent transition to democracy – only Italy and Greece,

among older democracies, do worse¹. Similar conclusions may be reached from the EU Special Eurobarometer on Corruption². The results show that 95% of Spanish people believe that corruption is widespread in the country – only better than Greece (99%) and Italy (97%), and at a similar level as Lithuania (95%), the Czech Republic (95%), Croatia (94%), Romania (93%), Slovenia (91%), Portugal and Slovakia

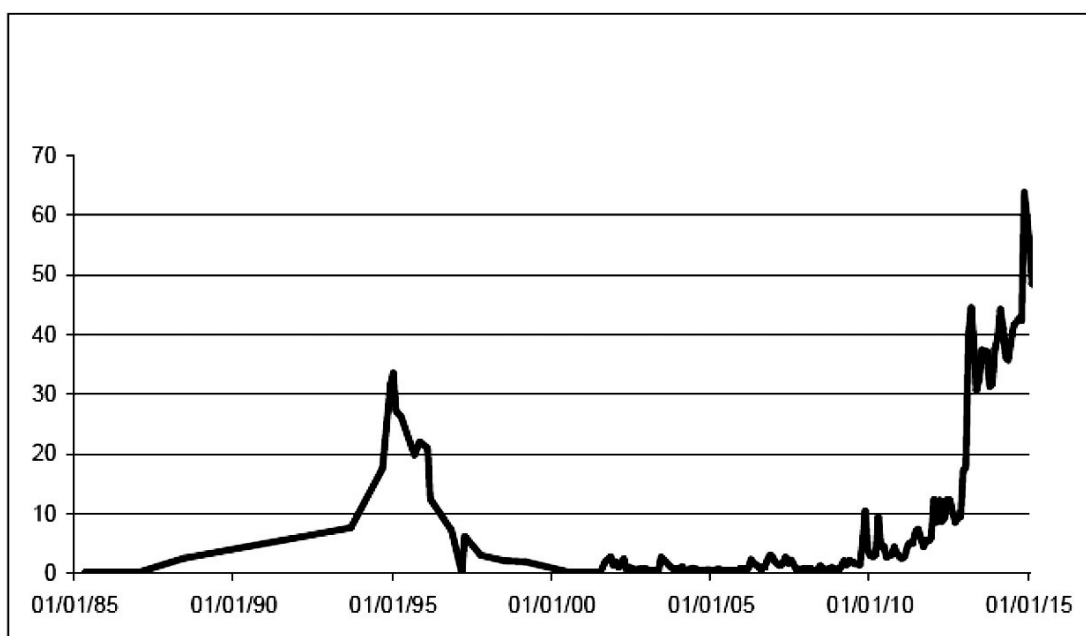
¹ *Transparency International, Corruption Perception Index 2014. The best one is Denmark (92). The worst are Slovenia, Greece, Italy and Romania (43).*

² *European Commission, Special Eurobarometer 397, February.*

(90%). The same study shows that only 1-3% of interviewed had a personal experience regarding corruption. This fact could support the idea that Spanish corruption is not extensive but intensive: a little group of corrupt people moving large amounts of money³.

Also the domestic CIS Index⁴ shows that “Corruption” is the second issue by order of importance for Spanish citizens and businesses, only after “Unemployment”⁵. The trend is as follows

Table 1: Perception of corruption as a public problem (1985-2015)



Source: Centro Investigaciones Sociológicas, Barometer April 2015

³ This opinion also raised in *Fundacin Alternativas, Informe sobre la democracia en Espaa 2009, Madrid, 2009, p. 27.*

⁴ CIS (Centro de Investigaciones Sociológicas) is the public institution in charge of elaborating index based on sociological research.

⁵ CIS, *Barometro April 2015.*

Table 1 identifies two periods in which corruption perceptions reached a peak in the last 30 years. It has to be highlighted that, despite the low perception, in the 1997-2007 period there were also corrupt exchanges (426 scandals within the period)⁶, mainly at a local level⁷. However, this inter regnum was not a situation similar to neither the first period (1990-1995)⁸ or the second (2009-2015). In each of these two periods, a large amount of corruption cases abruptly arise within shorts period of time, combining both petty corruption and grand corruption

(e.g financing political parties such as case Barcenas), and they exist in several institutions: the Royal Family, former Vice-Presidents, former Ministers, regional Presidents, Mayors and local authorities, political parties, unions, among others.

It has been estimated – there are no official figures⁹ - that in 2014 there were 1.900 people formally accused of corrupt exchanges¹⁰. Thus, it is easily understood why corruption seems to be widespread all over the country¹¹.

Researchers consider the following as the main causes of corruption in Spain¹².

⁶ A. Solé-Ollé; P. Sorribas-Navarro, “Does corruption erode trust in Government? Evidence from a recent surge of local scandals in Spain”, Working Paper IEB, vol. 2014/26, 2014.

⁷ E. Costas-Pérez; A. Solé-Ollé; P. Sorribas-Navarro, “Corruption Scandals, Press Reporting, and Accountability. Evidence from Spanish Mayors”, IEB Working Paper 2011/99, 2011.

⁸ On this first period see J. Pradera, *Corrupción y política. Los costes de la democracia*, Galaxia Gutenberg, Madrid, 2014.; P. Heywood, “Analysing Political Corruption in Western Europe: Spain and the UK in Comparative Perspective”, en Donatella Della Porta, Susan Rose-Ackerman (eds.) *Corrupt exchanges: empirical themes in the politics and political economy of corruption*, 1. Aufl., Nomos, Baden-Baden, 2002. . As a consequence of this corruption period, a Special Prosecution Office against Corruption and Organised Crime was established in 1995.

⁹ As it is said, “in Spain there is no accurate information or reliable statistics on the existing level of corruption in the public administrations (...) The Annual Reports of the Spanish General Prosecution Office (Fiscalia General del Estado), and of the Specialized Anti-Corruption Prosecution Office (Fiscalia Especial contra la Corrupcion y la Criminalidad Organizada) provide the most reliable figures and caserelated information on the Spanish investigations and prosecutions carried out in cases of corruption (including cases related to EU Funds)”. Price Waterhouse Coopers; Ecorys, *Identifying and Reducing Corruption in Public Procurement in the EU*, 2013, p. 286.

¹⁰ <http://www.europapress.es/nacional/noticia-radiografia-corrupcion-espana-mas-1900-imputadosmenos-170-condenados-mas-130-causas-20141102111941.html> (last visited January 2015).

¹¹ A reflection on perception versus reality in M. Villoria Mendieta; F. Jiménez, “La corrupción en España (2004-2010): datos, percepción y efectos”, *Revista española de investigaciones sociológicas*, vol. 138, 2012.

¹² Comprehensive reviews with in-depth analysis are periodically carried out by GRECO (anticorruption group of the Council of Europe). See www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp.

(1) The country only recently adopted a democracy with separation of powers (Constitution of 1975). Thus, “culture of democracy” has to be more developed. By means of example, separation of powers is not always well established¹³.

(2) In order to guarantee the stability of the system, political parties were considered as key institutions, e.g. an electoral system that favours nationwide main parties¹⁴.

(3) Both political and administrative decentralization multiplied the organisms empowered to take decisions, e.g. sub-central territorial levels and companies set up by public powers. This not always come with effective controls. For instance, at a local level, financial and legal controls

are carried out by officials who do not enjoy proper conditions in terms of independence¹⁵.

(4) Regulation is seen as a way of solving corruption problems disregarding other issues such as control effectiveness. For instance, public contracts and urban planning are highly regulated fields where corruption is said to be a serious problem¹⁶.

(5) Spain received large amounts of money from international investors from 1960 onwards, especially after the adhesion to the European Union and the subsequent adoption of the Euro as a common currency. This triggered large public investments, namely in infrastructures, e.g. High Speed Rail (AVE).

¹³ For instance, as the GRECO 4th Round of Evaluation Report stated: “More particularly, while the independence and impartiality of individual judges and prosecutors have been broadly undisputed to date, much controversy surrounds the issue of the structural independence of the governing bodies of the judiciary and the prosecutorial service - the primary concern being the appearance that partisan interests could penetrate judicial decision-making processes. This is particularly dangerous at a time when cases involving political corruption are on the rise.” ([http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4\(2013\)5_Spain_En.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2013)5_Spain_En.pdf)).

¹⁴ J. R. Montero; P. Riera, *El sistema electoral español: cuestiones de desproporcionalidad y de reforma*, Madrid, 2008.; C. Molinas, *¿Qué hacer con España?*, Destino, 2013. A chapter of the book, in English, can be read in “Theory of Spain’s political class” in *El País*, 12th September 2012, http://elpais.com/elpais/2012/09/12/inenglish/1347449744_053124.html (last visited January 2015).

¹⁵ See X. Lazo Vitoria, “El control sobre los entes locales tras la Ley de Racionalización y Sostenibilidad de la Administración Local. Rasgos fundamentales”, en *Anuario de Derecho Municipal 2013*, Marcial Pons, Madrid, 2014.

¹⁶ European Commission, *EU Anticorruption Report*, Brussels, 3.2.2014, COM(2014)38 final, Annex 9 “Spain”; in the field of urban planning see *Fundación Alternativas, Urbanismo y Democracia*, 2011.

(6) Spain can be considered an example of KURER's "corruption paradox"¹⁷: while corruption is considered a problem, corrupts politics are not generally punished. For instance, in 2011 local elections, 40 out of 69 allegedly corrupt mayors were elected¹⁸.

(7) The existence of a "spoils system" within the Public Administrations. There are many officials directly selected by elected politician¹⁹. Higher degrees of professionalization in the Administrative structure cannot be achieved with constant changes following political mandates.

(8) Regardless superficial reforms adopted, it cannot be seen enough political will to change the situation. For instance, the prosecutors specialised in public corruption do not have the proper means to fight corruption²⁰. Problems such as political party financing, conflict of interests or whistleblower protection are not solved yet.

The 2014 EU Anticorruption Report identified the following "issues at focus" related to corruption in Spain: financing of political parties, corruption at regional and local level, conflicts of interest and asset disclosure, urban development and public procurement²¹. The next section will focus on the impact of corruption on a particular phenomenon within a particular phase of public contracting: modification of a public contract once it has already been concluded and it is being implemented.

b. Modification of public contracts

It is widely acknowledged that within the public contracting process, contract implementation (execution phase) traditionally deserved little attention. Although corruption could be found throughout the procurement process²², public procurement systems are usually focused on the award process rather than on the preparatory

¹⁷ O. Kurer, "Why Do Voters Support Corrupt Politicians?", in A.K. Jain (ed.) *The Political Economy of Corruption*, Routledge, London, 2001.

¹⁸ *Fundación Alternativas, Informe sobre la Democracia en España, 2012.*

¹⁹ *Al respecto ver V. Lapuente Giné, "Por qué la corrupción no se castiga", Laboratorio de Alternativas 2011/2, 2011.*

²⁰ *2013 Public Prosecutor Memory pointed out that there were only 10 Tax agents; 7 public auditors; 11 National Police and 10 Civil Guards. See Memoria del Ministerio Fiscal del año 2013, disponible en www.fiscal.es (accedido en febrero 2015).*

²¹ *European Commission, EU Anticorruption Report, Brussels, 3.2.2014, COM (2014) 38 final, Annex 9 "Spain".*

²² *N. Dorn; M. Levi; S. White, "Do European procurement rules generate or prevent crime?", Journal of Financial Crime, vol. 15, 3, 2008.*

and the execution phases²³. This situation is observed in both common law countries and those in which public contracting is regulated by public law provisions, namely the ones who followed the French model, such as Spain.

It is a fairly common practice to amend the contract during its execution without any limit and only complying with some requirements. In addition, in some jurisdictions, certain budgetary and legal controls are imposed. For instance, in Spain, until recently, a modification with a value of 20% of the original contract had to be supervised by the Consejo de Estado – i.e Council of State, that is, the supreme advisory agency. However, traditionally, no real limits existed to modify the contract²⁴.

Only within recent years is this conception evolving in favour of a more rigid approach towards contract modification. The abuse of this practice is starting to be seen as an infringement (or a fraud) of the principles of transparency and fair competition. For instance, a contractor won the contract because it offered an extraordinary low price; however, this price was offered since the contractor knew that later on it would be able to amend the contract. Thus, the other candidates' offers could have been better at the end of the day, but were set aside because an unfeasible offer.

Recent studies reveal that contract modification is a global issue²⁵. For instance, Flyvbjerg *et al*²⁶ measured the “cost overruns”²⁷ of 258 infrastructure projects²⁸, from 1927

²³ P.-A. Trepte, *Regulating procurement: understanding the ends and means of public procurement regulation*, Oxford University Press, Oxford, 2004.

²⁴ L. Martín Rebollo, “La modificación de los contratos: régimen, regulación y consecuencias de una práctica generalizada que supone un riesgo al principio licitatorio y la idea de transparencia”, *Revista española de la función consultiva*, vol. 12, 2009.

²⁵ In addition to Flyvbjerg research see, among others, J. L. Guasch; J.-J. Laffont; S. Straub, *Renegotiation of concession contracts in Latin America*, The World Bank, 2003.

²⁶ B. Flyvbjerg; M. S. Holm; S. L. Buhl, “Underestimating Costs in Public Works Projects: Error or Lie?”, *Journal of the American Planning Association*, vol. 68, 3, 2002.; the work is extensively explained in other articles: B. Flyvbjerg; M. K. Skamris Holm; S. L. Buhl, “How common and how large are cost overruns in transport infrastructure projects?”, *Transport Reviews*, vol. 23, 1, 2003..

²⁷ Considering “Cost overrun” as the difference between the effective real cost and the original estimated one.

²⁸ The same research group has recently extended the scope of the research up to 806 projects in 37 countries (including now South Europe, Eastern Europe and Africa). The average variations range from 19.8% (roads) to 35.5% tunnels.

to 1998, in 20 countries of all around the world. The study yielded inter alia this interesting finding: there are cost overruns in 9 out of 10 projects, with an average increase of costs of 28%²⁹.

Focusing on the situation in Spain, the absence of official figures regarding contract modification shows the lack of transparency but it does not impede the identification of the problem by the doctrine³⁰.

The only empirical study in Spain was carried out by Ganuza

who studied 265 projects done during 1993 finding that 77% of projects had cost-overruns, mostly because of errors on the initial project (43%)³¹.

Even today, in 2014, amendments to public contracts represent a problem. Following the Eurobarometer on Businesses' attitudes towards corruption in the EU³², Spain presents the following figures, showing that contract modification is an extended problem all over the country³³:

²⁹ B. Flyvbjerg Y Otros, "Underestimating Costs in Public Works Projects", *cit.*, p. 282; It is also observed that underestimating costs is much more common than overestimating and that during the time covered by the study (70 years) there is no improvement observed in cost estimation.

³⁰ See L. Martín Rebollo, "Modificación de los contratos y consecuencias patrimoniales de las modificaciones irregulares (con especial referencia al contrato de obras)", en *Comentario a la Ley de Contratos de las Administraciones Públicas*, 2a, Civitas, Madrid, 2004.; J. Vázquez Matilla, "La Modificación de los contratos públicos, un obstáculo para la transparencia y eficiencia", *Revista de estudios locales. Cunal*, vol. 161, Número Extra, 2013.

³¹ J.-J. Ganuza Fernández, "Los sobrecostes en las obras públicas: un análisis económico del caso español", *Economía industrial*, 318, 1997.

³² Eurobarometer 374, *Businesses' attitudes towards corruption in the EU*, 2014.

³³ Again, it has to be said that these figures are based on "perceptions".

Table 2: Irregular practices on public procurement

Q: How widespread do you think the “Amendments of the contract terms after conclusion of the contract” are in public procurement procedures in (YOUR COUNTRY)?			
Country	Widespread (%)	Rare (%)	DK/NA (%)
EU27	44	32	23
Spain (ES)	69	12	19
Portugal (PT)	62	21	17
Slovensko (SK)	62	26	12
Greece (EL)	61	27	12
Cyprus (CY)	55	17	24
Czech Republic (CZ)	51	25	22
Croatia (HR)	51	17	32
Latvia (LV)	50	28	22
Ireland (IE)	46	37	17
Germany (DE)	44	44	10
Poland (PL)	43	42	14
Romania (RO)	43	28	22
Hungary (HY)	42	26	31
Netherlands (NL)	42	46	12
Slovenia (SI)	42	28	27
France (FR)	41	36	23
Malta (MT)	41	29	30
Austria (AT)	39	30	25
Italy (IT)	38	24	37
Bulgaria (BG)	36	26	35
Lithuania (LT)	32	29	36
Sweden (SE)	32	48	19
Estonia (EE)	31	29	40
United Kingdom (UK)	30	40	29
Luxembourg (LU)	27	60	13
Belgium (BE)	26	54	20
Denmark (DK)	23	32	42
Finland (FI)	18	74	7

Source: European Commission, Eurobarometer 374 on Businesses’ attitudes towards corruption in the EU, 2014

Once the reasons to choose contract modifications in Spain are clear, the paper will focus on why contract modification is an area so prone to corruption, providing with two real case studies from Spain.

2. Modification of public contracts as source of corruption

There are several reasons why modification of public contracts is an area so prone to corrupt exchanges. Most of these reasons are shared by every jurisdiction regardless its legal tradition.

First, as stated above, rules on public procurement are focused on the award of the contract. Only recently this has started to change. In this sense, for instance, the Court of Justice of the European Union (CJEU hereinafter)³⁴ and 2014 Directives³⁵ enshrined certain provisions to curb the abuse triggered by these modifications³⁶.

Secondly, once the contract is awarded the public interest that it represents makes extraordinarily difficult to annul the contract and re-award.

A variant of this point is related to political interferences that exist not only when the project is (under) estimated³⁷, but also to implement the contract regardless its costs-overruns.

Thirdly, there are several circumstances - e.g unforeseenability, urgency, public interest, mistakes - that allow a contract to be modified but are difficult to be measured³⁸. Thus, the degree of discretionary decisions does not help to avoid these practices.

Fourthly, there is no transparency regarding contract amendments. This impedes other contractors and candidates to act as watchdogs following the same pattern of protest-remedy established for the awarding phase³⁹.

³⁴ *Commission v France (C-337/98) (2000) E.C.R. I-8377; Commission v CAS Succhi di Frutta SpA (C-496/99 P) (2004) E.C.R. I-3801; Pressetext Nachrichtenagentur GmbH v Austria (C-454/06) (2008) E.C.R. I-4401.*

³⁵ *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.*

³⁶ *On contract modifications in the EU see S. Treumer, "Contract changes and the duty to retender under the new EU public procurement Directive", Public Procurement Law Review, vol. 23, 3, 2014.*

³⁷ *Wachs considers that planners lie when estimating contracts in order to get them approved M. Wachs, "When Planners Lie With Numbers", American Planning Association. Journal of the American Planning Association, vol. 55, 4, 1989.*

³⁸ *M. Wiehen; J. Olaya, "How to Reduce Corruption in Public Procurement - The Fundamentals", en Transparencia Internacional (ed.) Curbing Corruption in Public Procurement, Transparencia Internacional, 2006., p. 17.*

³⁹ *G. M. Racca; R. Cavallo Perin, "Material Amendments of Public Contracts during their Terms: From Violations of Competition to Symptoms of Corruption", European Procurement & Public Private Partnership Law Review, vol. 4, 2013.*

Fifthly, control mechanisms are not always in place and working as they should. It is necessary to get them to work.

Sixthly, a proper degree of accountability is hard to achieve. Particularly, individual accountability is hindered by the decisions taken within commissions instead of individually. By not punishing those responsible, both officials and contractors feel impunity.

a. Case study one: IMESA⁴⁰

In 2003, the municipal authority of Santa Cruz de Tenerife considered that it was necessary to refurbish a municipal building. Meanwhile, the municipal premises would be transferred to another building, a former school. Certain works in the former school were needed as to prepare it to its new activity.

Instead of awarding the new contract through a tendering competition, the public authority decided to directly award the works to IMESA, the company that was in charge of the maintenance of the former school. This amendment altered the nature of the initial contract – maintenance services. In addition, the decision was adopted without neither working project nor cost estimation.

The works began in 2005. In order to get paid, IMESA sent the first two invoices, but the local auditor (“Interventor municipal”) suspended those payments since it had not been an awarding process and the works could not be part of the maintenance contract – that is, the modification of the contract was completely unlawful. The very same day, the legal advisor prepared a report assuring that minor works could be done within the maintenance services contract and, in any case, the work already done had to be paid to avoid unjust enrichment. The mayor was as surprisingly diligent as the legal advisor and, based on the report of the latter, signed a Decree lifting the suspension of the auditor and authorizing the payments⁴¹.

This procedure was repeated during 2006, 2007, 2008 and 2009. In every occasion that the auditor suspended the payments, the mayor lifted the suspension and authorized them. In total, a sum of 7 million euros was paid to IMESA.

There was no proof that the mayor or its team received bribe. There was evidence of the fact that illegal decisions were adopted. Thus, the Spanish Supreme Court prohibited the mayor from taking part in politics for a period of 8 years – at the time of

⁴⁰ *IMESA (Industrias Metalurgicas Esgueva S.A. Pol. Ind. Allenduedero) case: Sentencia del Tribunal Supremo, num. 597/2014, de 30 de julio de 2014, Sala 2ª (rec. 20284/2012; Saavedra Ruiz).*

⁴¹ *A report signed by the legal advisor supporting the opposite view was found years later, in 2006, and it was the reason why the political opposition decided to file a complaint.*

the ruling he was not mayor of the municipality but national Senator⁴².

The case study is an extreme case that shows how contract modifications can be used to avoid the award procedures established by law (even by changing the nature of a maintenance contract).

This time the controls worked, but were easily overcome by the mayor. Perhaps it is an example of the impunity feeling of the mayor which driven him to ignore and set aside the decisions of the local auditor.

Moreover, it is an example of how difficult is to proof the corrupt exchange and to proof the participation of the contractor which had even to be paid the works done in order to avoid unjust enrichment of the municipality.

b. Case study two: Palma Arena⁴³

Palma Arena case is one of the most important cases of this wave of political corruption that ravages the country. In 2004 the regional Government of Balearic Islands was selected to organize the 2007 Track Cycling World Championship and,

for that purpose, a velodrome had to be built.

The first step was to set up a private company (“Consortio para la construcción del velódromo Palma Arena”) whose shareholders were a public foundation (Illesport), and both local authorities: Mallorca Island Council and City of Palma Council.

In 2006, the elaboration of the project is directly awarded to an architect for a price of 8.5 million euros. This contract includes the project management⁴⁴.

The construction took place in several phases and was done without either planning or cost estimations.

The first phase (stated as “1.A” in the project) was awarded to the consortium “Velódromo” (Dragados and Llabres Feliu) for a price of 1.6 million euros. It finally cost nearly 2 million euros.

The second phase (1.B) – parking – was awarded for 2.6 millions euros to the company Fomento de construcciones contratas (FCC) whose offer was 32% lower than the estimate price; a discount that could have been

⁴² The mayor faces two other criminal procedures regarding urban planning operations.

⁴³ The case is still under investigation so all the charges have to be understood as “allegedly committed” in order to guarantee the presumption of innocence. The information here is based on the decision by which the judge remanded him in custody (Sentencia del Juzgado de Instrucción num. 3, Palma de Mallorca, de 30 de marzo de 2010, (autos 2677/2008; Castro Aragón).

⁴⁴ This architecture company was also in charge of selling the advertising – a service for which it is not qualified and had to subcontract other company. The invoices for these services were largely above the market price. Sometimes even the concepts of the invoices did not exist. This publishing company is part of other open criminal proceedings related to the President of the regional government and its relatives, the ruling political party and other institutions. For instance, a renowned journalist was paid through this company in order to elaborate the political discourses and to write subliminal propaganda.

considered as an abnormally one. However, after the tender procedure and just before the sign of contract, the selected bidder demanded a 20% rise in the price plus a 10% when the contract is executed. It argued that its offer had an error. Unlawfully, the contract was signed accepting this modification.

The third phase (2.A) – foundations and structure-was published in the Official Journal of the European Union (OJUE hereinafter) and was awarded again to FCC, this time in consortium with Melchor Mascaró. The price of 8.5 million euros escalated to 19.5 million euros.

The fourth phase (2.B) – roof- was awarded again to the consortium FCC and Melchor Mascaró for a price of 5 million euros – in order to avoid from publishing it in the OJUE. It finally cost 14.5 million euros. Surprisingly, although the award was for the whole roof, the contract was finally signed only for the structure of the roof. Thus, the roof would be implemented by means of a contract modification.

The fifth phase (2.C) – equipments, inner design and façade - was awarded

again to the same consortium for a price of 31.9 million euros and it finally cost 41.1 million euros.

There are some interesting issues to be highlighted.

First of all, the importance of the political factor: as it is stated in the judicial decision, the project was a personal goal of the regional President who pushed the Administration into finishing the project “no matter what”.

Secondly, creating an entity was not an attempt to obtain flexibility but a way to avoid certain administrative controls⁴⁵. In the judicial decision it is stated that the Shareholder’s Meetings of this entity only took place in a fraudulent fashion and the minutes of this meetings were falsified. The investigation has shown that the entity was only a shell company that obeyed president’s orders.

Thirdly, a key factor is that in all these cases the project management company certified that the works were needed and had been done. These documents were sent to the contracting authority to be approved and paid. It shows the need for a proper project management selection and its accountability.

⁴⁵ This is a fairly common situation in Spain where it can be seen the so-called “huida del Derecho Administrativo” (The escape from Administrative Law): politicians create entities to carry out the Administration tasks using efficiency and flexibility as an excuse. This weakens all kind of controls. In the case study, For instance, the annual account of all the private companies set up by the Government could be presented as a whole (See article 33.2 and 93.2 Decreto Legislativo 1/2005, de 24 de junio, por el que se aprueba el texto refundido de la Ley de Finanzas de la Comunidad Autónoma de las Illes Balears).

Fourthly, the case is an example of the risks suffered when there is no project to work with. Low quality projects and improvisation are cheaper at first, but they leave the whole execution process up to contractor's discretion.

3. Solutions adopted

Recently some actions have been taken in order to minimize the impact of contract modification on both public funds and the procurement process⁴⁶.

First, in 2011 the public procurement legislation was amended by Law 2/2011 on Sustainable Economy (LES) which envisaged new provisions regarding contract modification - introduced following the CJEU jurisprudence⁴⁷. It has been said that this new regulation is the strictest in Spanish history – first regulations date back to first half of nineteenth century. It distinguishes between two cases: i) modifications foreseen in the contract,

published beforehand in the contract notice and, thus, open to transparency requirements; and ii) unforeseen amendments, which can only take place under certain circumstances, e.g. force majeure or project errors, and never altering the essential conditions of the contract, e.g. an essential change would be a 10% increase of price⁴⁸.

Secondly, in December 2013 Spain finally adopted its Transparency Law⁴⁹ that entered into force at the national level in December 2014 and will do it at regional and local level in December 2015. The law, albeit criticized for being a lost opportunity, could be a step forward towards a new concept of relationship Government-citizenship since Spain was one of the only European countries without Transparency legislation. Regarding contract modification, the law provides for compulsory publication of every single modification adopted (article 8.1.a)⁵⁰.

⁴⁶ There are other measures which are not directly related to contract modifications, such as the amendment of the party funding legislation, strengthen of the controls performed by the Court of Audit, or providing for a specific offence of illicit enrichment.

⁴⁷ *Commission v France (C-337/98) (2000) E.C.R. I-8377; Commission v CAS Succhi di Frutta SpA (C-496/99 P) (2004) E.C.R. I-3801; Presstext Nachrichtenagentur GmbH v Austria (C-454/06) (2008) E.C.R. I-4401.*

⁴⁸ See T. Medina Arnaz; M. A. Bernal Blay, "Recent reform of Spanish public procurement legislation in compliance with EU law: the issue of modifications to concluded contracts", *Public Procurement Law Review*, 6, 2011.

⁴⁹ Law 19/2013, 9th December, of Transparency, Access to Public Information and Good Government.

⁵⁰ See E. Guichot (ed.), *Transparencia, Acceso a la Información Pública y Buen Gobierno. Estudio de la Ley 19/2013, de 9 de diciembre, Madrid, 2014.*

Thirdly, the Bill on which the Government is working in order to transpose the 2014 Directives envisages a rapid review action against unlawful contract modifications. This action can be used by those with an interest in the contract. It is available for the contracts covered by EU Directives – not for the ones outside this scope⁵¹. This will allow other contractors to act as watchdogs of contract modifications⁵².

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⁵¹ Outside the scope of the Directives the review mechanisms are lengthy and most times useless other than to obtain damages.

⁵² Anteproyecto de Ley de Contratos del Sector Público, 2015 in <http://www.minhap.gob.es/Documentacion/Publico/NormativaDoctrina/Proyectos/Borrador%20Anteproyecto%20de%20Ley%20de%20Contratos%20del%20Sector%20P%C3%Ablico-%2017%20abril%202015.pdf> (last visited May 2015)