

# **THE UNDELAYABLE LEGAL REFORM OF PUBLIC PROCUREMENT RULES IN THE MANAGEMENT MODELS FOR THE URBAN TRANSPORT PUBLIC SERVICE IN THE AUTONOMOUS COMMUNITY OF CASTILLA Y LEÓN**

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## **ABSTRACT**

The purpose of this paper is, on the one hand, to analyze the management models that Law 7/1985, of April 2, 1985, regulating the Local Regime Bases, offers to the Provincial Capital Cities of the Autonomous Community of Castilla y León in Spain, a Member State of the European Union, for the provision of public urban transport services. And on the other hand, in line with and in relation to the previous premise, to study how it influences and determines, depending on the form of management of the public service of urban transport chosen by each town council, which articles of Law 9/2017, of November 8, on Public Sector Contracts, should be applied.

From the study of these issues, it will be concluded that the level of application of the contractual legislation will not be the same, it will be disruptive and unequal, which requires a necessary legislative modification that equates the application of the contractual regulations, regardless of the model of management of the urban transport public service that the Municipalities decide to adopt.

## **1. INTRODUCTION**

The aim of this research is to analyze the service management models of urban public transport in the provincial capital cities of the autonomous community of Castilla y León in Spain and their relationship with public procurement. We will corroborate that the system for contracting the urban public transport service within these municipalities is different and discriminatory. This treatment shows the violation of the principle of equality in the application of the rule (Carmona, 1994).

## **2. MODALITIES OF PUBLIC MANAGEMENT OF LOCAL ENTITIES**

Spanish local legislation distinguishes two modes of management for local public services (Guayo, 2004): direct management and indirect management.

### **2.1 Modes of direct management of public services**

The forms of direct management of a public service can adopt the following models: Provision of a public service by a local entity, in which the municipality, with its own resources, provides the service; provision of a public service by a local autonomous agency, in which an entity with legal personality (Quintana, 1992), dependent on the municipality, provides the public service; Public service's provision by a local Public Business Entity, according to which it is a separate and distinct entity from the municipality to which the service provider depends and is financed mainly by market income; and public service provision by a local Mercantile Society, according to which it is a private legal entity that provides the service and its assets must be public, either completely owned by a municipality, participated by it or owned by other public entities (Melania, 2011).

A recent legislative amendment established direct management as a preference over indirect management (Fernández, 2016). If the municipality opts for indirect management, it must be approved by the Plenary of the Local Government (Huergo, 2019).

### **2.2 Modes of indirect management of public services**

The choice of municipalities for the forms of management is a prerogative of their local autonomy, constitutionally guaranteed (Fernandez-Miranda, 2008). When the municipality decides on the indirect management of a public service, the choice of the private or commercial entity that will provide it will follow the procedures of Law 9/2017, of November 8, on Public Sector Contracts.

The previous public procurement legislation included four types of public service management contracts or indirect management modes: the concession, the interested management (Nieves, 1958), the concert (Domínguez, 2011) and the provision of public services through a mixed economy company (Iglesias, 2010). The current public procurement regulations no longer include public service management contracts (López, 2017). However, it has maintained the administrative concession, although under the name of service contract in favor of citizenry, a notion that is highly criticized because it rethinks the classic concepts of public service contract and service contract (Fortes, 2019).

### **3. THE FORMS OF MANAGEMENT OF THE COLLECTIVE URBAN TRANSPORT PUBLIC SERVICE IN THE CITY COUNCILS OF CASTILLA Y LEÓN**

In this section we will analyze the forms of public service provision of urban collective transport in the nine provincial capitals of the autonomous community of Castilla y León in Spain, which are: Ávila, Burgos, León, Palencia, Salamanca, Segovia, Soria, Valladolid and Zamora. It is a compulsory public service in accordance with local legislation. The population in Ávila is of 57,744 inhabitants, in Burgos of 175,821, in León of 124,303, in Palencia of 78,412, in Salamanca of 144,228, in Segovia of 51,674, in Soria of 39,398, in Valladolid of 298,412, in Zamora of 61,406.

#### **3.1 Municipalities that provide urban public transport services under a service concession scheme**

The municipalities that provide public urban transport services under a service concession are: Ávila, Palencia, Salamanca, Segovia, Soria and Zamora. All these municipalities opt for a form of indirect management. The municipalities selected this form of management because they only have to wait a the successful bidder to comply with the obligations of the service concession contract.

#### **3.2 Municipalities which provide urban public transport services under direct management by the City Council itself**

The Municipalities that provide the urban collective transport service under direct management by the City Council itself are Burgos and León. Both municipalities opted for this model to be implemented directly by the Local Council itself. These municipalities understood that the management of the service should be held by their City Councils, with their own means and with the aim of protecting the public interest at stake.

#### **3.3 Municipalities that provide the urban collective transport service as a public company with entirely public capital**

The only municipality that provides the urban public transport service as a public company is Valladolid, through a municipal company. One of the reasons for using this method of management was to reduce the application of public procurement rules.

### **4. PUBLIC PROCUREMENT REGULATIONS FOR URBAN COLLECTIVE TRANSPORT**

The normative systems of public procurement that the state legal system includes (Moreno & Pintos, 2015) are going to be developed below.

#### **4.1 Public procurement laws that affect, directly and indirectly, the management of urban collective public transport**

The entrance of the Kingdom of Spain into the European Economic Community in 1986 meant that it was obliged to submit to its regulations, its institutions and the judicial resolutions of the courts that make up the Community. It also affected the matter of public procuring (Allain, 2006). The Community Directives on public procurement (Verdeaux, 2003), which have followed one another throughout the life of the European Union, amount to ten. One of them is Directive 2014/24/EU of the European Parliament and the Council, dated February 26, 2014, which has been transposed into the Spanish legal framework by Law 9/2017, dated November 8, on Public Sector Contracts.

A second rule that regulates public procurement is the one relating to special economic sectors. The European law currently in force in this area is Directive 2014/25/EU of the European Parliament and the Council, dated February 26, 2014. This rule has been transposed into Spanish law by means of Book I of Royal Decree-Law 3/2020, of February 4, on urgent measures.

And the third European law on public procurement is the one on concession contracts, known as Directive 2014/23/EU of the European Parliament and the Council of February 26, 2014, on the award of concession contracts (Graells, 2015), which has also been transposed in Spain through Law 9/2017, of November 8, on Public Sector Contracts.

#### **4.2 Subjective scope of public sector contracts, in general**

Article 3 of Law 9/2017, dated November 8, on Public Sector Contracts, lists three types or classes of public entities for the purposes of public procurement: Public Sector entities from a broad or generic point of view (it refers to the entire Spanish public sector), Procurement Authorities (this concept has been drawn up by the state legislator to cover the notion of a public company in the European Union) and Public Administrations (the Spanish public entities, bodies or agencies that fall into this group are the territorial or similar administrations, including the local Autonomous Bodies).

#### **4.3 Subjective area in the special sectors of water, energy, transport and postal services**

The subjective scope of Book I of Royal Decree-Law 3/2020, of 4 February, on urgent measures, is made up of three concepts which, according to its article 5.2, are Contracting Entity, Adjudicating Power and Public Company.

The public entities to which the contracting procedures provided for in the law on the special sectors of water, energy, transport and postal services are applied, are different from and more flexible than those established in the public sector contracting legislation that are considered to be Public Administrations.

#### **4.4 Subjective scope of the contracts for the concession of works and the concession of services**

The subjective scope of contracts for the concession of works and the concession of services (Bovis, 2005) is the same as that set forth in Law 9/2017, of November 8, on Public Sector Contracts, distinguishing, for the purposes of contracting, between Public Administration, the Awarding Authority and the Public Sector.

### **5. THE PUBLIC CONTRACTING REGIME WILL DEPEND ON THE PUBLIC SERVICE MANAGEMENT MODE CHOSEN BY EACH CASTILLA Y LEÓN CITY COUNCIL**

From all the above, we can highlight the disparity in the mechanisms for public contracting in the Spanish legal system. The public procurement system will depend on the public sector entity that contracts, and in urban public transport, the model chosen by each municipality of Castilla y León. The list of the entire public procurement system of the state legal system that we have set forth, together with the management methods of the existing urban collective public transport services in the municipality, leads to the following perspective.

The City Councils of Ávila, Palencia, Salamanca, Segovia, Soria and Zamora, which manage urban public transport through service concessions, make the management model subject to the provisions for an administrative contract in Law 9/2017, of November 8, on Public Sector Contracts.

The City Councils of Burgos and León, as they are public administrations, will follow the procedures set forth in Law 9/2017, of November 8, on Public Sector Contracts for any type of work, service or supply required by the public collective transport service. There will be as many administrative contracts tendered as requirements to be satisfied by the service.

Finally, in the City Council of Valladolid, the urban public transport service is managed by a municipal public company. It has the legal nature of a Bidding Power and, therefore, it will have to be in accordance with the Law 9/2017, of November 8, of Contracts of the Public Sector for the Bidding Powers. It will have a much lower level of application of contractual rules than the ones the above-mentioned City Councils are subject to. In this case, moreover, when the object of the contract consists of the activities of making available or operating networks that provide a service to the public in the field of bus transport (Bermejo, 2008), they will be governed by the provisions of Book I of Royal Decree-Law 3/2020, of February 4, on urgent measures.

From what has been explained, we can affirm that there is a disparity of rules and procedures of public contracting in the provision of the service of collective urban transport. Their application will depend on the type of direct or indirect management - public or private

(Hansson, 2010) - chosen by each one of the nine provincial capital cities of Castilla y León, leading to dysfunctional public procurement regulations (Santamaria, 2016).

## 6. CONCLUSIONS

Firstly, the legal regime of Local Entities includes the possibility that Town Councils may, in the exercise of their constitutionally and legally granted local and organizational autonomy, opt for different modes of management of public services in general and of the public urban transport service in particular.

Secondly, the municipalities which are provincial capital cities in the autonomous community of Castilla y León in the Kingdom of Spain have different models for managing public transport services: indirect management (the municipalities of Ávila, Palencia, Salamanca, Segovia, Soria and Zamora), direct management by the Council itself (the municipalities of Burgos and León) and direct management by means of a local commercial company with entirely public capital (the municipality of Valladolid).

Thirdly, the legislation on public procurement in the European (Community Directives) and Spanish (Spanish public procurement laws) legal systems is detailed and not homogeneous: its application will depend on the purpose of the contract, the area in which it conducts its activity and the public sector entity it contracts.

Fourthly, the public procurement rules applicable to the management of the public service of urban public transport are as varied as the forms of organization of the urban public transport's public service that each capital city of Castilla y León follows.

Fifthly, the disparity between the contractual and public service regulations to be applied, which depend on many factors, leads to a regulatory dysfunction that should be modified so that no one is left out of the same public contracting procedures, which guarantee the efficient management of public resources managed through the public urban collective transport service.

Sixthly, the solution we propose would be a legislative modification in which it would be clear that, regardless of the method of management of the public service of collective urban transport chosen by each municipality - when the satisfaction of a need, expressed in a work, a service or a supply, is foreseen - the same rule would be applied, in all its virtuality. This will generate a great deal of legal security for those applying the Law and for the contracting bodies of all the public sector entities affected.

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