The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Spain: Construction (2nd edition)

This country-specific Q&A provides an overview to construction laws and regulations that may occur in Spain.

This Q&A is part of the global guide to Construction. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/construction-2nd-edition/

Country Author: Andersen Tax & Legal

The Legal 500

Mr. Jose Vicente Morote, Public Law and Urban Planning Director

jvicente.morote@andersentaxlegal.es

The Legal 500

1. ## Is your jurisdiction a common law or civil law jurisdiction?

Our jurisdiction, as an abstract general system, is a civil law jurisdiction.

The construction process of buildings in Spain is regulated by the state regulation, Law 38/1999, of November 5th, of Building Regulation, hereinafter LOE, published in the Official State Gazette of November event of conflicts between the agents involved in the building (6th, 1999.

In the developer, constructor, technical technicians -planners and construction and execution managers -) or between them and the consumer, the the Courts of Law of the civil order will be acquainted with such conflicts.

For the execution of infrastructures in Spain such as roads, railways, power lines, etc., the sectoral regulations of the regulatory State of each of them must be complied with.

2. What are the key statutory obligations relevant to construction and engineering projects?

The necessary project for the construction, extension, modification, reform or rehabilitation of buildings must comply with the applicable technical regulations, which is mainly constituted by the Technical Building Code, approved by Royal Decree 314/2006, of March 12th.

For the construction of a building of any kind, be it administrative, health, religious, residential, teaching or cultural, the project can only be executed by an Architect.

For the construction of an aeronautical building; agricultural; used for production of energy; the production of hydraulic energy; mining; telecommunications (referred to telecommunications engineering); land, sea, river and air transport; forestal; industrial; naval; the engineering of sanitation and hygiene, and accessory to the engineering works and its exploitation, the project can be carried out by an engineer, technical engineer or architect, according to the current legal regulations for each profession, according to their respective specialties and specific competences.

If the purpose of the project is to build an infrastructure such as a road, a railway line, a power line, etc., the technical framework established by the State for each of these infrastructures must be met.

3. Are there any specific requirements that parties should be aware of in relation to: (a) health and safety; (b) environmental issues; (c) planning; (d) employment; and (e) anti-corruption and bribery.

In terms of health and safety, the current legislation on the prevention of occupational risks must be applied, mainly integrated by Law 31/1995, of November 8th, on the prevention of occupational risks, and all its regulatory development - in particular, Royal Decree 1627/1997, of September 5th , approving the minimum health and safety regulations for construction works.

In environmental matters, the current legislation on environmental assessment must be applied, integrated by Law 21/2013, of December 9th, on environmental assessment. In its annexes are defined the works subject to ordinary environmental evaluation - Annex I - simplified environmental evaluation - Annex II - and strategic environmental study - Annex IV -. Each Autonomous Community has developed its own regulations that specify and extend the state regulations.

In terms of planning, with respect to buildings, the regulations require a basic project - sufficient to obtain a building permit - and an execution project - necessary for obtaining a first occupation license.

Regarding an infrastructure, it is necessary to comply with the regulatory sector norm of each infrastructure, which defines the content of the projects and professional competence for its drafting.

Regarding employment, the labor legislation of the State is applicable, integrated by Royal Legislative Decree 2/2015, of October 23rd, which approves the Consolidated Text of the Workers' Statute Law.

In terms of anti-corruption and bribery, the Penal Code is applicable, approved by Organic Law 1/2015, of March 30th. Also applicable is Law 10/2010, of April 28th, on the prevention of money laundering and financing of terrorism, which obliges the authorities to inform of any action suspected of laundering capital of criminal origin.

4. What permits, licences and/or other documents do parties need before starting work, during work and after completion? Are there any penalties for non-compliance?

Before executing a building it is required to obtain a building license, granted by the City Council, which requires the presentation of a basic project. Such project is analyzed by the City Council and verifies that it complies with the urban planning of the municipality.

With the presentation of the works license application, the municipal tax on Constructions, Installations and Works is paid to the City Council, whose rate is set by each Municipality -not exceeding - 4 %, of the real and effective cost of the construction.

Once the residential construction work is completed, in order to occupy it, it is necessary to obtain the first occupancy license, in which the City Council verifies that the building complies with what is authorized in the license.

In the event that a building without a license is executed, the City Council proceeds to the opening of two files: on one hand a sanctioning file in order to impose a sanction, and on the other hand urbanization town planning legalization, with which the owner of the construction is required to request the license.

5. Is tort law or a law of extra-contractual obligations recognised

in your jurisdiction?

In Spain, extra contractual liability is recognized in the Civil Code, approved by the Royal Order of July 29, 1889.

6. Who are the typical parties involved in a construction and engineering project?

The typical parties involved in a construction and engineering project are the developer, the planner and the builder.

The developer is defined in Article 9.1 of the LOE, as "any person, physical or legal, public or private, who, individually or collectively, decides, promotes, programs and finances, with own or other resources, the building works for himself or for subsequent transfer, delivery or assignment to third parties under any title".

The planner is defined in article 10 of the LOE, as "the agent who, on behalf of the developer and subject to the corresponding technical and urban regulations, drafts the project".
The builder is defined in article 11 of the LOE, as "the agent that assumes, contractually before the promoter, the commitment to execute with human and material means, own or external, the works or part of them subject to the project and to the contract."

7. What are the most popular methods of procurement?

In Spain it is very common to buy the house off plan, before it has been built. But for this, it is essential that the building project has obtained a building permit and the horizontal division be recorded in the Land Registry. The other form of acquisition is once the house is already built.

Usually, the end user of the building or consumer signs a contract for the sale of a home with the developer of the work. The latter has previously contracted (i) with the planner the development of the project (ii)with the construction company the execution of the work, (iii) with an architect the construction management, as well as (iv) with a technical architect the executive direction of the work.

The construction management directs the development of the work in its technical, aesthetic, urban and environmental aspects; while the execution management is limited to directing the material execution of the work, the qualitative and quantitative control of the construction, as well as the quality of the construction.

8. What are the most popular standard forms of contract? Do parties commonly amend these standard forms?

There are standard contracts:

- Sale contract of the home or premises, entered into between the consumer and the developer.
- Construction contract, entered into between the developer and the construction company.
- Of project contract, entered into between the developer and the designer.
- Work management contract, entered into between the developer and an architect - usually the same person who drafts the project.
- Management of execution of work contract, entered into between the developer and a technical architect.

9. Are there any restrictions or legislative regimes affecting procurement?

No, there are not. The freedom of choice will prevail.

In any case, building agents have a status made up of rights and obligations that are defined in the Law on Building Regulation in force.

10. Do parties typically engage consultants? What forms are used?

The promoter can hire a "project manager", that is, a consultant who assists both in the project phase and in the construction phase. This figure is not regulated in the Law of Building Regulation, not being an agent of the building.

The form of contracting is a civil contract for the leasing of services, between the promoter of the work and the consulting firm.

11. Is subcontracting permitted?

In the construction of buildings, it is possible to subcontract bids always within the limits established in the construction contract signed between the developer and the builder.

In the construction of infrastructures, given their public nature, they are subject to Law 9/2017, of November 8th, on Public Sector Contracts, whose articles 214 and 215 regulate the transfer of the contract as well as subcontracting. In order to subcontract, it must be stipulated in the specifications which governed the award of the work.

12. How are projects typically financed?

The financing of the construction of buildings is mainly made through bank credit with mortgage guarantee. It is a line of credit in which, as the work is being built and certified, the bank will unlock the money granted.

The financing of public infrastructures will be controlled by the budget of the Public Administration (State, Autonomous Community or City Council).

13. What kind of security is available for employers, e.g. performance bonds, advance payment bonds, parent company guarantees? How long are these typically held for?

In Spain, developers of buildings are usually not financed by the issuance of bonds or obligations.

14. Is there any specific legislation relating to payment in the industry?

Law 3/2004, of December 29thestablishes measures to combat late payment in commercial transactions, which transposes Directive 2000/35 / EC, of the European Parliament and of the Council, of June 29th 2009 is applicable. It establishes a payment period of 35 calendar days after the date of receipt of the goods or provision of services in case no date or payment period has been set in the contract, as well as the automatic accrual of interest of monetary delay due to the mere failure to pay on time.

In the contracts in which the Public Administration is a party, they are subject to Law 9/2017, of November 8th, on Contracts of the Public Sector, regulating in Article 198 the payment of the price by the Administration.

15. Are pay-when-paid clauses (i.e clauses permitting payment to be made by a contractor only when it has been paid by the employer) permitted? Are they commonly used?

In a situation in which the contractor cannot comply with the payments due to the subcontractors, it is possible that they can demand payment from the promoter, exercising the direct action of article 1,597 of the Civil Code.

In any case, for said payment to be due and to have a liberating effect on the main contractor, it is necessary, on one hand, that the claimed debt is a due and payable debt, not previously paid by the main contractor, and on the other hand that the developer is, in turn, a debtor of the main contractor by virtue of the same work to which the subcontractor's claim refers to.

The payment made to the subcontractor without any of these requirements would not have a liberating effect on the developer against the main contractor. Therefore, the promoter must acquire certainty about the expired and enforceable nature of the payment of the debt which is claimed.

The ideal situation would be to be able to have express agreement of the main contractor on the expired and enforceable nature of the debt at the time of the claim. However, in most cases, it is not possible to obtain such certainty about the maturity and due nature of the debt and, in such cases, it would be prudent not to make any payment - neither to the main contractor nor to the subcontractor - and to consign the amounts in favor of the person who could later prove that he has a real right to collect them. Such consignment would have liberating effects for the promoter (articles 1.176 and following of the Civil Code) and would avoid incurring in default.

16. Do your contracts contain retention provisions and, if so, how do they operate?

They are usually included in construction contracts, as they are a guarantee of the promoter of a work to cover contingencies such as construction defects.

The retention of work is regulated by the Law of Building Regulation, which provides in Article 17 1. b) second paragraph, an annual guarantee that covers possible defects of construction or other

contingencies, stating: "The builder will also be responsible for the material damages for defects or defects of execution which affect elements of completion or completion of the works within a period of one year".

The promoter company retains a percentage (generally, 5%) in each invoice that the promoter company is issuing, so that if at the end of the work, the developer finds defects or defects in construction, he can discount the repair costs of the amounts he has been withholding.

In case there are no defects, the promoter company is obliged to return the withholdings within a maximum period of one year after the work has been delivered.

17. Do contracts commonly contain liquidated delay damages provisions and are these upheld by the courts?

Building construction contracts usually include stipulations which impose compensation for delay in execution and are usually confirmed by the Courts of Justice.

Contracts for the execution of public infrastructures also include stipulations, which impose an indemnity to be paid by the contractor in case of breach of deadlines and are usually confirmed by the Courts of Justice. Specifically, they are contemplated in Article 194 of the Law on Public Sector Contracts.

18. Are the parties able to exclude or limit liability?

In building construction contracts, it is possible that in the scope of freedom of will, the parties may exclude or limit liability.

In contracts for the execution of public infrastructures, this is not possible, as they are subject to Law 9/2017, of November 8th, on Public Sector Contracts.

19. Are there any restrictions on termination? Can parties terminate for convenience? Force majeure?

In contracts for the construction of buildings, the agreed termination of the contract is possible, as well as force majeure.

In the contracts for the execution of public infrastructures, it is possible to terminate the contract by agreement (Article 211.c) of the Public Sector Contracts Law) and due to force majeure (Article 239 of the Law on Contracts of the Public Sector).

20. What rights are commonly granted to third parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?

Banks as providers of funds, usually establish together with the money loan a mortgage guarantee that falls on the land and the building, so that in case the developer stops paying the loan, the may execute the aforementioned guarantee, that is to say, they may take to public auction the land and the building, after filing a judicial action of foreclosure.

Regarding the buyers, they can register their property in the Property Registry. Two things can happen, that are subrogated in the loan and mortgage guarantee subscribed by the promoter with the bank, in which case, the charge will appear in the property registry, or that it acquires without charges, in which case, should it come down to a foreclosure by part of the bank, this does not affect them if the load does not appear in his home.

Regarding tenants in buildings to be demolished for subsequent construction, they are granted a right of relocation and return, as long as it constitutes their habitual residence (Article 19.2 of Legislative Decree 7/2015, of October 30th, which approves the Consolidated Text of the Land and Urban Rehabilitation Law (Official Gazette of the State No. 261 of October 31, 2015).

21. Do contracts typically contain strict provisions governing notification of claims for additional time and money which act as conditions precedent to bringing claims? Does your jurisdiction recognise such notices as conditions precedent?

Yes, provided that this is established in the contract as a prior condition to subsequently file a legal claim.

22. What insurances are the parties required to hold? And how long for?

It is regulated in Article 17.1 of the Law of Building Regulation, which states:

"*1. Without prejudice to their contractual responsibilities, the natural or legal persons involved in the construction process will be liable to the owners and the third party acquirers of the buildings or part of them, in the event that they are subject to division, of the following material damages caused in the building within the indicated periods, counted from the date of reception of the work, without reservations or from the rectification of these:*

a) For ten years, of the material damage caused to the building by defects or defects that affect the foundation, the supports, the beams, the slabs, the load-bearing walls or other structural elements, and which directly compromise the mechanical resistance and the stability of the building.

b) During three years, of the material damages caused in the building by defects or defects of the constructive elements or of the installations that cause the breach of the habitability requirements of paragraph 1, letter c), of article 3 ".

It is mandatory for the developer and construction company to sign the ten-year liability insurance that covers for a period of 10 years the vices or defects that affect the foundations or structure of the building.

For this, this insurance must be contracted before the works begin and the insurance company requires the intervention of a technical control body (O.C.T.) for the control during the execution of the works, without whose validation the insurance is not granted.

Normally, the following insurance policies are contracted during the construction process:

A) On behalf of the PROMOTER:

Ten-year damage insurance

- Obligatory by Law.
- It is contracted before starting construction.
- It has a coverage of 10 years from the completion of construction, with the insured being the purchasers of the homes.
- Non-renewable policy, one part being paid upon contracting the Insurance and the rest upon completion of the work.

Accident insurance

- Obligatory by Law.
- The coverages will be those indicated each year in the Collective Agreement of construction.

- It has to cover all the people registered in the TC2 of the Promoting Company.
- It is a renewable annual policy.

Insurance of consolidation of quantities

- Obligatory by Law.
- Cover the amounts advanced by the purchasers of the homes if the promotion is not carried out or the end of the promotion is delayed beyond what is indicated in their contracts.
- It is a single payment policy, not renewable.

Liability insurance

- Not required.
- It covers the responsibility of the Promoter vis-à-vis third parties, including its own workers, as well as the joint and several liability with other intervenors who may be convicted.
- It is a renewable policy of annual character.

B) On the part of the BUILDER:

Construction risk insurance

- Not required.
- It covers the damages produced in the own work during the execution of the same (fire, flood, etc.)
- Single payment policy, non-renewable. The coverage period is the same as the duration of the work.

Accident insurance

- Obligatory by Law.
- The coverages will be those indicated by the Collective Agreement of construction every year.
- It must cover all the people registered in TC2 of the Construction Company.
- It is a renewable annual policy.

Liability insurance

- Not required.
- It covers the responsibility of the Constructor against third parties, including its own workers, as well as the joint and several liabilities that could be condemned.
- It is a renewable policy of annual character.

C) In relation to the SUBCONTRACTOR COMPANIES:

Accident insurance

- Obligatory by Law.
- The coverages will be those indicated in the Collective Agreement of construction every year.
- It must cover all the people registered in the TC2 of the Company or Autonomous.
- It is a renewable annual policy.

Liability insurance

- Not required.
- It covers the responsibility of the Contractor in front of third parties and in front of the main contractor, as well as the joint and several liabilities to which he could be convicted.
- It is a renewable policy of annual character.

The developer must demand the builder, and the builder the subcontractors, the insurance policy and the last proof of payment of the premium.

23. How are construction and engineering disputes typically resolved in your jurisdiction (e.g. arbitration, litigation, adjudication)? What alternatives are available?

In the contract for the construction of a building (without the intervention of the Administration and not subject to the Public Sector Contracts Law), all the options are open, although it is normal for it to be settled in a judicial way, following the filing of a claim. Arbitration is not usually established in work contracts.

In contracts for the execution of public infrastructures (with the intervention of the Administration and subject to the Public Sector Contracts Law), arbitration is possible, but the Public Administration is rarely submitted to arbitration. The usual proceeding is that the differences and conflicts are resolved in the Courts of Justice.

24. How supportive are the local courts of arbitration (domestic and international)? How long does it typically take to enforce an award?

It does not usually go to the arbitration route for the resolution of disputes between the developer and the builder of the building. In the event that this has been agreed, they would be subject to Law 6/2003, of December 23th, on Arbitration (Official Gazette of the State No. 309, of December 26, 2003).

Arbitration, unlike judicial proceedings before the Courts and Tribunals, are much quicker and less formal. Undoubtedly, it should go to arbitrators experts in the matter, should it be indicated in the arbitration agreement, which ends with a resolution or award that has an executive character before the Courts of Justice, which can be used in the case of that is breached by the party bound to compliance.

25. Are there any limitation periods for commencing disputes in your jurisdiction?

In the contract for the construction of buildings, the action to claim compliance with a duty derived from the contract prescribes after 5 years (Article 1964.2 of the Civil Code). That is, the action must be exercised within 5 years from when the fulfillment of the obligation could be demanded.

In the contract for the construction of a public infrastructure, the limitation period of 4 years from the day on which the right could be exercised is applicable (Article 15 of Law 47/2003, of November 26, General Budget).

26. How common are multi-party disputes? How is liability apportioned between multiple defendants? Does your jurisdiction recognise net contribution clauses (which limit the

liability of a defaulting party to a “fair and reasonable” proportion of the innocent party’s losses), and are these commonly used?

The normal proceedure is that when a claim is filed by a community of owners for defects or defects in the building, the developer, the construction company, construction management and construction execution management are jointly sued.

It will be at the trial where the type of constructive defect and its imputation to the guilty building agent should be clarified. If the defect is a project, it will be on the architect who designed the project. If the defect is the execution of the work, it will be on the construction company and the architect, the construction manager or the technical architect.

Regarding the possibility of limiting the responsibility of a building agent, the Law of Building Regulation does not contemplate it.

27. What are the biggest challenges and opportunities facing the construction sector in your jurisdiction?

The overcoming of the economic crisis and the current dynamism of the Spanish economy, especially the restructuring of the balance sheets of Spanish banks, once again flowing real estate credit, together with the existence of demand for housing, will undoubtedly imply an increase of the credit activity and promotion of buildings, mainly residential.

On the other hand, on the side of public infrastructures, there is always a demand from public opinion for the continuity in the construction of roads and high-speed rail network.

28. What types of project are currently attracting the most investment in your jurisdiction (e.g. infrastructure, power, commercial property, offshore)?

Without a doubt, the promotion of residential buildings.

29. How do you envisage technology affecting the construction and engineering industry in your jurisdiction over the next five years?

There is a high demand of public opinion for the improvement in the energy efficiency of buildings, incorporating new requirements in this regard in the Technical Building Code. In fact, since the entry into force of Royal Decree 235/2013, of April 5, which approves the basic procedure for the certification of energy efficiency of buildings (Official Gazette of the State No. 89, of April 13 of 2013), requires that in order to sell or rent a property, it is necessary to make and provide the buyer and / or user with a certification of their energy characteristics that allows them to assess and compare their benefits, in order to promote the promotion of the energy efficiency.