

EXPANDED ABSTRACT

Socially responsible public procurement: the need to reconsider the power of public procurement for achieving social objectives

In 2014, the European Union approved a set of secondary legislation — known as the fourth generation of procurement directives — which involves the transition towards strategic procurement and attempts to go deeper into the possibilities of "socially responsible procurement". In a nutshell, it talks about the massive quantity of public funds for procurement (In Spain it is around 20% of the GDP) and fulfilling the ambitious objectives of the Europe 2020 Strategy. This strategy establishes three main priorities: a) intelligent growth through more efficient investments in education, investigation and innovation; b) sustainable growth driving a low carbon economy and fighting against global warming; and c) inclusive growth, highlighting job creation and poverty reduction.

In relation to this strategy, the European Commission has issued "50 proposals for improving our work, business and exchanges with one another" and "Twelve levers to boost growth and strengthen confidence". One of these twelve priorities is a revised and modernised regulatory framework for public contracts to achieve, among other aims, environmentally sustainable, socially responsible and innovative procurement.

However, the procurement potential has encountered some difficulties with certain elements of the procurement requirements and especially with the interpretation of the contractual principles. These are central, but most are skewed towards the purely economic aspect of procurement. As a result, social and environmental aspects are placed at different levels, but properly linked to the main subject matter of each contract. In this view, "the most advantageous economic proposal" barely serves the general interests attached to the contract and creates a clash between the main subject matter and the main goal of the general interest.

These difficulties are reflected in the high number of consultations and conflicts resolved in the courts: the social clauses have a place in several areas of the contract but in practice, all of them present almost insoluble problems in their "link to the subject matter of the contract" and as regards the procurement principles (free competition, equality and non-discrimination). This is what happens when their inclusion has been demanded as a criterion for adjudication of the contract and even, to a lesser extent, as a special condition for execution. At this moment, the present study has found many resolutions of consultative agencies in matters of procurement as well as court rulings that show the difficulties: in a word, the "ubiquity" of social clauses has become a problem of "location".

The Public Administrations that are more sensitive towards incorporating social elements in their contractual activity have ended up testing different legal formulas, through imaginative definitions of the contract, for instance, or, the riskiest, passing legislation they require their procurement staff to stand by. All the possibilities devised pose legal validity problems, as shown in several judicial proceedings.

Our proposal calls for taking advantage of the moment of regulatory reform obliged by the 2014 Directives to advance the role of procurement in achieving objectives of general interest and social character. Moreover, we consider that both the Europe 2020 strategy and the Directives require that changes be projected in the following areas:

1. From a negative point of view (i.e. determining consequences for everyone who violates social (or other) postulates), the warranty of the State, in the execution of public contracts, is required to ensure that economic operators comply with their legal obligations in environmental, social or labour matters.
2. The active or positive level is more complex because we do not see many differences between current and previous directives. The recitals of Directive 2014/24 / EU show a wish to advance the inclusion of social criteria, but there are problems in their mandatory use and their generalization to all public contracting activity. In Spain the draft bill incorporates some interesting innovations: the list of tiebreakers include insertion companies, non-profit entities, companies that incorporate measures favouring the extension of gender equality. They have also introduced new options in the special conditions of implementation of a social nature and are firmly committed to supporting small and medium enterprises. In any case, the most important obstacle is the requirement of linkage to the subject matter of the contract, although there is a certain flexibility in the new rules to the extent that it seems not to be required to be "direct". We believe that the solution to the problem is to accept that social clauses and public contracts serve different purposes, in a natural process, and are not called unfaithfully to interbreed. That is why, in line with some doctrines, we advocate proposals that have already been made for a comprehensive vision that understands that recruiting is not an objective in itself, but an instrument at the service of public needs of a very different character. The principle of efficiency requires linking the use of public funds (obviously also intended procurement) to the satisfaction of the general interest, a generic goal which materializes in multiple purposes (social, ecological, innovation and research, ...).

From the foregoing we put forward some concrete proposals: a) clear identification of the area where social clauses should be included in the contract; b) removing the rigidity of the direct link with the subject matter of the contract and interpreting this linkage in a broader and more flexible way; c) requiring the objectives to include evaluation of the impact on recruitment. The latter proposal is also linked to the impact analysis, an essential ingredient of the so-called smart regulation which is also part of the Europe 2020 Strategy.

KEY WORDS: Governmental Accounting, Local Authorities, Setting of Accounting Standards Process in the Public Sector, Accounting Reform.