

EXPANDED ABSTRACT

Limits on social clauses in public procurement from the perspective of antitrust law

The entities belonging to the public sector are involved as agents in the market, firstly, in procuring goods and services, and secondly, in initiating public procurement procedures.

Both actions are subject to the rules of competition, in particular, and in the field of public procurement it is the public entities that should encourage competition in their procedures by not incorporating unjustified restrictions and by helping to prevent and combat potential illegal actions between the bidding firms in the process. The guarantee of the principles of disclosure, competition, transparency, confidentiality, non-discrimination and safeguarding free competition are essential functions of public administrations, and nothing prevents other social principles from being incorporated into these procedures. In our analysis, we recommend avoiding those procedures in which there is no possibility of initiating a competitive process. With its pro-competitive proceedings, the National Antitrust Commission can also help, either by its own initiative or at the request of a party.

The Antitrust Commission, and the authorities that preceded it, have in recent years been developing numerous guides to support and safeguard these principles in the public procurement process.

If competition disappears, a decline in economic efficiency and a waste of public resources will occur, increasing the costs to be paid by public administrations.

The incorporation of stringent measures to safeguard competition in procurement procedures suggests that these instruments, economic and legal, and the transparency to which the use of Information and Communication Technologies will greatly contribute, will facilitate for public administrations the development and efficiency of public procurement.

Along with preventing these anti-competitive practices, the regulatory norms of the public sector contracts themselves will encourage the contracting authorities, the Advisory Board for Public Contracting of the State, and the bodies competent to rule on the special appeal that article 40 of the same law refers to, to be required to notify the Antitrust Commission of any fact they become aware of in the exercise of their functions, which may constitute a violation of the competition law, i.e. they must communicate "any sign of collective agreement, decision or recommendation, or concerted or consciously parallel practice among the bidders, whose object produces or may produce the effect of preventing, restricting or distorting competition in the procurement procedure."

In Spain, the Antitrust Commission has observed the need to strengthen transparency in public procurement and to achieve greater efficiency on the part of the public authorities, which will contribute to increased cooperation between the institutions involved. It is considered that greater disclosure and transparency in the procurement procedures will facilitate access for the bidders. If, in addition, the public authorities clearly specify the characteristics of the procedures, the general and specific clauses and the contractual peculiarities affecting the chosen procedure, eliminating those selection criteria that are ambiguous or overly discretionary, and if the procedures that do not meet sufficient guarantees of disclosure are excluded, then the rules of competition will have been met.

The public administration should be aware of its ability to achieve objectives with respect to procurement that go beyond the work, supplies or services, and they should incorporate social purposes, although the use of social clauses is not without problems in public procurement.

Public authorities should ensure that there is full equality concerning access to information, as well as access to any facts related to the correction of errors in the different steps of the procedure. They must provide all information regarding any changes that arise, such as additional provisions or changes in prices.

The incorporation of social clauses in public procurement aims to generate employment opportunities, which means implementing social public policies aimed at more disadvantaged sectors and, for that reason, public authorities must facilitate the use of social clauses in these procurement procedures; however, the limitations imposed by the law in force in the field of public procurement, on the one hand, and the requirements imposed by competition law, on the other hand, require an analysis of the limitations imposed by the legislature, so that all actions which are not expressly prohibited will be permitted. With the addition of social clauses into the procurement process, the implementation of the social public policies of the state, regional or local authorities will be achieved and thereby favour certain sectors at risk of social exclusion, or assist non-profit entities that incorporate this objective into their articles.

For this reason, one object of analysis will be the recognition of certain advantages to those companies that either have people on staff with disabilities or who are at risk of social exclusion, or in the case of non-profit companies; preference in the awarding of contracts will be analyzed, provided that the proposals are on equal terms, with the most economically advantageous, to the regulated insertion companies, or the preference in the award of the contract recognized in relation to services of a social or assistance nature, for those proposals submitted by non-profit entities, with legal personality, and provided that their activity is directly related to the subject of the contract, and also special attention will be given to the establishment of special conditions to promote equality between women and men in the labour market, and the setting of minimum reserve percentages of the right to participate in the procedures for the awarding of certain contracts or certain batches of them to be given to Special Employment Centers and insertion companies.

Thus, public administrations have the obligation to use public procurement rules, ensuring compliance with the principles of disclosure, competition, transparency, confidentiality, non-discrimination and protection of free competition, with nothing preventing other principles of a social nature from being incorporated into such proceedings. We therefore recommend avoiding those procedures in which there is no possibility of initiating a competitive process.

It is clear, therefore, that the determining factor in the awarding of the contract will not be the criterion of the lowest price, but rather the most advantageous economic proposal in which social and environmental criteria are included, as well as fair trade, gender equality and the inclusion of sectors at risk of social exclusion.

KEYWORDS: Public Procurement, Social Clauses, Antitrust, Public policies.