

“DECISIVE BOOST IN THE CONSOLIDATION OF A RESPONSIBLE PUBLIC PROCUREMENT. GREEN CONTRACTS: FROM ABILITY TO OBLIGATION”

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I. PUBLIC PROCUREMENT AS A WAY OF ENCOURAGEMENT OR PROMOTION OF ENVIRONMENTAL SUSTAINABILITY

The concern about environmental protection is a target that has made its way into different policies and actions promoted by the EU. Community regulations enacted in order to gradually harmonize public procurement procedures have also followed this tendency. In any case, taking into account that the individuals included in EU law scope are the main consumers in the great internal market, the integration of environmental criteria into public procurement procedures will constitute one of the best ways to implement the environmental principle of prevention.

Hence the introduction of respectful criteria for environment in the preparation and implementation phases of public contracts would be a considerable progress in the improvement of the widely considered “green policies”. As an example, calculations carried out in the framework of the Project of Research, known as Relief and co-founded by the European Commission, are significant. The aim of this Project is to assess scientifically the potential environmental advantages that the use of environmental criteria in the EU¹ public procurement would entail. The conclusions reached today are consistent in recommending EU public authorities to:

a) require the electricity supplied to be green, we could avoid the production of the equivalent of 60 million tonnes of CO₂, which corresponds

¹ *1;Buying green! Handbook on environmental public procurement* is an indicative document of the European Commission services, 2005, page 5.

to 18% of the undertakings to reduce greenhouse gases to which the EU has committed on the basis of the Kyoto Protocol.

b) require the utilization of more energy-efficient computers, what would benefit the market to move in that direction. Thus, 830,000 tons of CO₂ savings would be obtained.

c) choose environmentally-efficient toilets and taps in their buildings, this would result in a reduction in water consumption of around 200 million tonnes (equal to 0.6% of the total consumption by families within the EU).

And this does not take into consideration the fact that if approximately one fifth of the public procurement contracts within the European Union were to be concluded according to green principles, there would certainly be a sort of follow-on effect on the entire contracting system of the EU. Surely, it would find an incentive in order to accommodate the benefits that offers to the contracting authorities to these requirements, even to the extent of becoming a main budget for its survival in the market.

In short, the huge influence that public procurement represents as an instrument to improve certain public policies, including the environmental one, must be taking into account.

This work aims to put forward the evolution in EU law in order to bet for the boost of “responsible”, “green” or “sustainable” public procurement. The study also tries to stress the huge step that has meant the enactment of Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009, on the promotion of clean and energy-efficient road transport vehicles. This Directive has been recently incorporated into Spanish Act by Act 2/2011 of 4 March, on Sustainable Economy (Ley 2/2011, de 4 de marzo, de Economía Sostenible).

II. EVOLUTIONARY LANDMARKS IN THE INCLUSION OF ENVIRONMENTAL CRITERIA IN THE EU LAW ON PUBLIC PROCUREMENT

The way in which EU Law has handled environmental matters within the framework of public contracts has undergone through different phases. Thus the environmental awareness has become increasingly clear. It is possible to distinguish four great phases:

a) *First phase: first EC Directives on procurement and deprived of environmental references*

The first period covered from the early 1970s- when the first EC regulations on public procurement were enacted- to the late 1990s. At that time, the EC legislation on public was totally deprived of any reference to environment. This legislation included Directive 71/304/EEC of the Council of 26 July 1971, and Directive 71/305/EEC of the Council of 26 July 1971.

Both Directives included rules confined to clearly outline the provision aimed to guaranteeing the coordination between national public procurement procedures for the granting of public work contracts. This coordination was expected to contribute to the effective and simultaneous achievement of the freedom of establishment and of the freedom to provide services in the framework of public procurement contracts.

b) *Second phase: from late 90s to 2004. The Commission starts to embody its aspiration of encouraging a responsible public procurement*

In order to understand the importance of this evolution, the passing of both the Single European Act in 1986 and the Maastricht Treaty in 1992 were essential for legal endorsement of environment at Community level. Since then, the environment has started to shape an autonomous place among the Community targets, provided with an explicit legal ground. Furthermore, sustainable development has become an indispensable purpose within the European Union. In the light of this evolution, the relation between public procurement and environment has shyly started to stand out thanks to the gradual activity of the European Commission, supported by the ECJ's case law.

Therefore, although Directives on procurement were replaced with new texts, these new texts do not include any references to environmental clauses on public contracts². However, in those years different documents of the Commission were published and meant a change of direction. Among them, it should be highlighted the Communication from the European Commission: *A sustainable Europe for a better world. A European Union Strategy for sustainable development*, COM (2001)264 final or the Green Paper on integrated product policy COM (2001) 68 final. The latter case mentioned that: “*The Commission*

² The new documents were Directive 92/50/EEC of the European Council of 18 June 1992; Directive 93/36/EC of the Council of 14 June 1993; Directive 93/37/EC of the Council of 14 June 1993, as well as change introduced in both previous Directives by Directive 97/52/EC.

will also look at the feasibility of promoting green purchasing by introducing an obligation to carry out, before purchasing, an assessment of the environmental impact of the different alternatives available that meet the needs of the contracting authorities. In this way, decisions will be taken with full awareness of the environmental consequences.” Accordingly, it pointed out that: “Systematic awareness raising initiatives of public procurement authorities are needed. In this regard, the Commission will adopt an Interpretative Communication on Public Procurement and Environment that addresses the question to what extent it would be possible to require the use of a specific production process or to take into consideration all costs incurred during the whole life cycle of a product. A handbook and/or a communication on Green Public Procurement with examples on how to draw up green calls for tenders in conformity with EU law is also under consideration.”³

The Commission Interpretative Communication on EU law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM (2001) 274 final was particularly important since it was clearly the starting point to a more precise definition of an environmentally-friendly public procurement regulation. This became specific in Directive 2004/18.

Likewise, the legal doctrine of the ECJ followed Commission guideline. This fact was illustrated in some of its judgments, as for example in *Concordia Bus Finland v Helsingin kaupunki, HKL-Bussiliikenne*, C-513/99 on 17 September 2002; *Commission v Federal Republic of Germany*, on 10 April 2003, ruling two joined cases, *Commission v Federal Republic of Germany*, C-20/01 and C- 28/01; or *EVN and Wienstrom GMBH v Republic of Austria*, C-448/01 on 4 December 2003, doctrine of case law that had already been laid in the Judgment on 10 April 2003 ruling two joined cases, *Commission v Federal Republic of Germany*, C-20/01 and C-28/01. In summary, all these judgments interpreted the articles of Directives on public procurement then in force. Awarding to this doctrine, it was understood that environmental reasons could be included as a criterion to determine the most economically advantageous tender when awarding a public procurement.

c) *The “invitation” under Directive 2004/18 of the European Parliament and of the Council of 31 March 2004*

The third phase in the integration progress of environmental protection within the public procurement starts when an explicit legal reference is included by then in the form of “permission” or, if it is preferred, of

³ In the same way, other documents were elaborated, as for example, the Communication from the Commission to the Council and the European Parliament on Integrated Product Policy. Building on Environmental Life-Cycle Thinking COM(2003)302 final

“invitation” so that the contracting authorities “be able to color in green public contracts through the prioritization of the tenders presenting a major level of respect for nature. This phase starts as a result of the indications emerged and consolidated in the previous phase in Directive 18/2004 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

This Directive currently in force refers to environmental aspects on several occasions. Apart from the references that are initially included in this Directive’s Recitals, the binding provisions often mention this matter. To be precise, the most relevant Articles are 23 (*Technical specifications*); 26 (*Conditions for performance of contracts*); 27 (*Obligations relating to taxes, environmental protection, employment protection provisions and working conditions*); 48 (*Technical and/or professional ability*); and 50 (“*Environmental management standards*”).

Of course, all these references have been integrated in national legislations of the Member States. In Spain, the transposition was carried out through Spanish Act on Public Sector Contracts (Ley de Contratos del Sector Público).

For systematic purposes, we could say that afore-mentioned provisions authorize- “invite”- to the contracting authorities to delimit certain rights and obligations that will emerge from the contract on environmental grounds or to demand certain requirements of this nature to tenderers, or to use environmental considerations as a criterion to identify the most economically advantageous tender. In other words, in accordance with these provisions, environment can be present:

a) At the time of the drafting of bid specifications which will have a direct impact on the implementation phase of the contract. For example, with regard to work contracts, contracting entities may specifically request designers of a building with low energy consumption to use solar cells for heat generation; in case of supply contracts, contracting authorities may require the purchase of recycled paper and toner, etc.

b) In the selection phase as a suitable requirement for tenderers in order to work with public sector. For example, as a requirement to assess the technical capacity of candidates it may be required that instruments, or technical equipment to execute the contract are eco-compatible, or to hold environmental certifications.

c) In the award phase as a criterion of appraisal of the tenders submitted in order to identify the most economically advantageous one. Nowadays, the performance of the tender documents has or may have a significant impact on the environment. As criteria to be considered, such documents can provide measurable environmental conditions such as a less significant environmental impact, energy efficiency, life cycle cost, less waste generation or the use of recycled or reused or environmentally-friendly materials. The basic premise capable to be respected is that the criteria have to be directly linked to the object of the contract, not to the qualities of the contractor.

Nevertheless, as indicated above, so far, the introduction of environmental aspects in public procurement contracts has basically been limited to “*possibilities, invitations and recommendations*” to Public Administrations. Although it is undeniable that, in general, these administrations have been willingly accepted and have been making use of this prerogative⁴, it is also true that the consolidation of more effective results would depend on making compulsory the integration in the conclusion of public contracts in these green criteria. It is clear that, one thing is to recommend one Administration to “color in green” public contracts, and quite another to make this an obligation to the extent of declaring unlawful any contract concluded in breach of this obligation.

Now then, a new step in this direction has recently led to the enactment of Directive 2009/33, transposed into Spanish legislation through Act 2/2011 of 4 March, on Sustainable Economy, as described below. This Directive will inaugurate the fourth phase we have referred above.

III. FROM THE RECOMMENDATION TO THE OBLIGATION OF “COLOR IN GREEN” A CERTAIN PART OF PUBLIC PROCUREMENT: A HUGE STEP SPONSORED BY DIRECTIVE 2009/33/EC OF THE EUROPEAN PARLIAMENT AND OF COUNCIL, TRANSPOSED BY SPANISH ACT 2/2011 OF 4

⁴As regards to Spain, the policies development and implementation of responsible public procurement has experienced an interesting advance, at least regarding to statements. See the multiple examples of these practices that can be found at national, regional and local level. For example, at national level we can highlight the Order PRE/166/2008 of 21 of January on the publication of the Agreement of the Council of Ministers approving the Plan on Green Public Procurement of the General Government Administration and its Public Administrations and Managing Bodies of the Social Security.

MARCH ON SUSTAINABLE ECONOMY, ON THE PROMOTION OF CLEAN AND ENERGY-EFFICIENT ROAD TRANSPORT VEHICLES

One of the most important social costs of road transport is the high polluting potential compared with other means of transport.

The European Union, aware of this problem, is adopting measures in order to mitigate this circumstance. For that purpose, one of the key targets of EU transport policy is to coordinate the economic growth of transport with sufficient solutions to lessen the substantial environmental damages associated to transport. However, this target has not been achieved yet.

It is in this context that Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 is introduced. This Directive was enacted for the clear and stated purpose of stimulating the market for clean and energy-efficient road transport vehicles and, especially –since this would have a substantial environmental impact- having an influence on the market for a standardized production of vehicles such as passenger cars, buses, coaches and trucks on a large scale, through public procurement. Ultimately, another aim is to ensure a nearly stable level of demand for clean vehicles sufficiently enough to encourage manufactures and industry to invest in the development and manufacture of environmentally sustainable vehicles.

It is well known that clean and energy-efficient vehicles are initially priced higher than conventional ones. That's why; due to the high volume of public procurement, the generation of the above-mentioned stable market is considered to come from public procurement carried out to provide services of public transport. It is considered that this orientation will have a significant impact on the clean vehicle market if it is managed by implementing harmonized criteria at Community level.

For this reason, this Directive orders or requires contracting authorities, contracting entities as well as certain operators to take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO₂ and of certain pollutants, when signing contracts for the purchase of road transport vehicles. We would like to remark the aim of this strategy of promoting and stimulating the market for clean and energy-efficient road transport vehicles and improving the contribution of transport sector to the environment, climate and energy policies of the Community.

The scope of Article 3 includes the following entities:

a) contracting authorities or contracting entities in so far as they are required to apply the procurement procedures set out in Directives 2004/17/EC and 2004/18/EC;

b) operators in the execution of public service obligations under a public service contract within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road [17] when the threshold defined by Member States does not exceed the threshold values set out in Directives 2004/17/EC and 2004/18/EC.

In other words, this Directive covers road transport vehicles purchased by contracting authorities or contracting entities, regardless they are public or private. Furthermore, this Directive includes the purchase of road transport vehicles used for performing public transport services under a public service contract, leaving to Member States the freedom to exclude minor purchases with a view to avoiding an unnecessary administrative burden.

The vehicles purchase contracts concluded by the above-mentioned subjects signed in very special circumstances, including vehicles designed and constructed for military use, civil defense, fire services and forces responsible for maintaining public order, fall outside the scope of this Directive⁵.

The last target is to achieve that all contracting authorities, in particular the Administrations, set an example by purchasing environmentally-friendly cars no matter its technology (hybrids, electrics, etc.). This fact can also contribute to its generalization and helping people to see this type of cars as normal and encouraging at the same time manufactures of these vehicles.

It is not excessive to say that the enactment of this Directive marks the beginning of a new phase. Nowadays, the Community legislator is no longer satisfied with the exhortation or introduction of the possibility of using environmental criteria when signing contracts, especially by public sector, but goes a further step and requires compliance with certain environmental parameters. Article 1 of this Directive leaves no room for doubt with regard to purchasing road transport vehicles requiring contracting authorities, contracting entities as well as certain operators to take into account lifetime energy and environmental impacts.

⁵The mentioned circumstances are set out in Article 2, section 3, of Directive 2007/46/EC of the European Parliament and of the Council of 5 September establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles.

Indeed, with the coming into force of this Directive, particularly public sector will have to purchase environmentally-friendly, clean and low-energy vehicles. If they fail to comply with this obligation, the contract award will be illegal.

In accordance with Article 5 of this Directive, Member States shall ensure that, as per 4 December 2010⁶, all contracting authorities, contracting entities and operators referred to in Article 3, –through award criteria- take into account the operational lifetime energy and environmental impacts of any road transport vehicle purchased⁷.

Particularly, Member States should inform national, regional or local contracting authorities and contracting entities and operators which provide public passenger transport services of the provisions relating to the purchase of clean and energy-efficient road transport vehicles.

There is no doubt that the application of these obligations will have a remarkable impact on providing public road transport services because this Directive includes the purchase of road transport vehicles used for performing public transport services under a public service contract, leaving to Member States the freedom to exclude minor purchases with a view to avoiding any unnecessary administrative burden.

With regard to Spain, this Directive has been transposed into Spanish legislation through Act 2/2011 of 4 March, on Sustainable Economy. Articles 99 to 106 of its Title III on “*Environmental Sustainability*” are specifically aimed to boosting “*sustainable mobility*.” After highlighting in the first provisions of the section the principles and targets pursued in order to stimulate the “sustainable mobility”, Articles 105 and 106 mention specifically the promotion of clean road transport by the contracting authorities. These articles refer also to how contracting authorities must verify the purchase of clean and energy-efficient road transport vehicles.

In particular, it is highlighted that the obligation of purchasing clean and energy-efficient road transport vehicles will apply to the purchase of road

⁶ About the Directives and the effects of its adequate or inadequate transposition on time, see the works of BELLIDO BARRIONUEVO, M.; *La directiva comunitaria*, Dykinson, Madrid, 2003 and “La Eficacia Interpretativa de la Directiva Comunitaria durante el Período de Transposición: el efecto Anticipación de la Directiva en Conexión con el Efecto Bloqueo” Cuadernos de Derecho Público, 2005, pages 159-174.

⁷ Article 6 of this Directive defines the methodology for the calculation of operational lifetime costs.

transport vehicles of categories M₁, M₂, M₃, N₁, N₂ and N₃, as are defined under Directive 2007/46/EC of the European Parliament and of the Council of 5 September establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles.

In Article 2, Directive 2009/33/EC establishes the possibility of excluding from this obligation the purchase of certain vehicles. The Spanish legislator makes use of this faculty determining that such obligation does not apply to the purchases of the following types of vehicles: a) vehicles designed and constructed for use principally on construction sites or in quarries, port or airport facilities; b) vehicles designed and constructed for military use, civil defense, fire services and forces responsible for maintaining public order; and c) mobile machinery.

Similarly, Article 106 lists the energy and environmental impacts that must be taken into account when signing contracts: energy consumption, emissions of CO₂ and emissions of NO_x, NMHC and of particles.

Finally, when specifying how these requirements must be presented, the Spanish Act sets out two alternatives:

a) Establishing technical specifications for energy and environmental performance in the documentation related to the purchase of road transport vehicles for each of the above-mentioned impacts or any other additional environmental impact; or

b) Including energy and environmental impacts in the decision to purchase. Thus, these impacts will be taken into account as award criteria when conducting public procurement procedures.

In conclusion, we strongly believe that such mandatory rules must be warmly welcomed. Actually, these rules represent an advance in the decrease of pollutants.