COURSE ON GREEN PUBLIC PROCUREMENT

DIDACTIC UNIT No. 1

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1. Public procurement. A general vision and the current legal system.

Thanks to the public procurement mechanism, public entities obtain the necessary provisions from the private sector to satisfy general interests in exchange for monetary compensation. In this way, **a collaboration between the public and private sectors** is created, in which the public sector obtains works, supplies or services, and the private sector receives economic payments as a trade-off for said provisions in favour of the first party.

Public procurement is grounded in the empirical evidence that, in a vast majority of cases**, from an economic point of view, it is more efficient** to entrust the private sector with the tasks necessary to fulfil public interests than direct implementation by Public Administrations using their own resources. For that reason, it is general practice that the construction of roads or buildings for public use, the supply of electric energy or office materials, or the public cleaning service or collection of urban solid waste are carried out by the private sector in exchange for monetary remuneration.

The contractual activity of entities that make up the Public Sector of the European Union is a matter regulated by **three community Directives:**

- **Directive 2014/23/EU**, 26 February, regarding the *allocation of concession contracts.*

- **Directive 2014/24/EU**, 26 February, regarding public procurement and through which Directive *2014/18/CE is repealed*.

- **Directive 2014/25/EU**, 26 February, regarding procurement by entities that operate in the water, energy, transport and postal service sectors and through which Directive *2004/17/CE is repealed.*

These three Directives regarding public procurement are known, together, as ***fourth generation*** **Directives***,* since it is the fourth "group" of regulations approved by the European Parliament on this matter.

The first two Directives have been incorporated into the Spanish legal system through **Law 9/2017, of 8 November, *on Public Sector Contracts*, through which the European Parliament and Council's Directives 2014/23/UE and 2014/24/UE are transposed into the Spanish legal system on 26 February 2014 (hereafter referred to as LPSC).**

The third of these *fourth generation* Directives, 2014/25/EU, of 26 February, on procurement by entities that operate in water, energy, transport and postal service sectors and through which Directive *2004/17/CE is repealed,* is still **awaiting incorporation** into the Spanish legal system.

In summary, the **key developments** contained in Law 9/2017, of 8 November, on Public Sector Contracts, are the following:

- **Expansion of the subjective area** of public procurement, including political parties, trade unions, business organisations, professional groups, and foundations and associations linked to either one of them.

- **Removal of two contractual modalities**: the *collaboration contract between the public and private sectors* and the *public services management contract* (regarding the latter, one of its modalities set forth in the consolidated text of the 2011 Law on Public Sector Contracts still remains, henceforth becoming an autonomous contractual type, along with work concessions).

- Expansion of the catalogue of contracts that **are not subject to harmonised regulation,** regardless of their amount.

- Allocation to the **Contentious-Administrative Jurisdiction of the control of the phases of preparation and adjudication** of all public contracts, whatever the adjudicating entity may be and its amount.

- **Innovations in relation to the special resource with regard to procurement:** the removal of the announcement prior to its filing, the possibility of resorting to contractual alterations, the tasks by own means and the agreements for rescuing concessions, decoupling of the quantities of the contracts subject to appeal from those subject to harmonised regulation, and the expansion of legitimacy to appeal the resource to trade unions and sectorial business organisations who represent the affected interests, among others.

- **Increased information** relating to contracts that must be published in the *contractor profile.*

- **Inclusion of strategic public procurement**, which, in addition to the acquisition of goods, works and services necessary to satisfy general interests, aims to achieve certain objectives beyond contractual activity, such as those relating to innovation, the environment or social and professional protection for citizens.

- Establishment of different **obligations** for procuring entities relating to **social and environmentally sustainable public procurement**.

- **Strengthening of the participation of small and medium size businesses (SMEs)** in public procurement, whose *star* measure is the general obligation to divide the purpose of the contracts into *batches.*

- **Adjusting the calculation method for estimating the value** of public contracts.

- **Reduction in the quantity of *minor* contracts.**

- Expansion of instances for using statements of compliance**.**

- **Removing the obligation to award the contract to the most *economically beneficial offer,*** substituting it for the obligation to do so in favour of that which presents a better ***price-quality*** or, exceptionally, to that with the best ***cost-efficiency****.*

- Introduction of the ***preliminary consultation*** method ***to the market.***

- **Removal of the process negotiated with no publicity due to the quantity.**

- Creation of an **open, simplified** procedure.

- Creation of the ***association's*** procedure for ***innovation***.

- Strengthening the system of **contractual amendments (*ius variandi).***

- **Deepening in electronic procurement.**

- Creation of the **Cooperation Committee for public procurement,** from the **Independent Regulation and Supervision of Procurement**, and the **National Evaluation Office**.

2. The concept of sustainable public procurement. "Green" or "ecological" public procurement.

Environmentally sustainable public procurement, also known as *green* or *ecological* public procurement or acquisition, can be defined as follows:

> **The process in which the public authorities attempt to acquire goods, services and work with a reduced environmental impact during their operational life, compared to other goods, services and work with the same primary function that would be acquired instead.**

Green public procurement forms part of a wider concept, ***sustainable*** **public procurement**, which can be defined as follows:

> **The integration of social, professional, ethical and environmental aspects in the processes and phases of public procurement, combining different conceptions of public procurement responsible**

for integrating its different characteristics, foundations and objectives.

Green or ecological public procurement is therefore part of what is known as sustainable public procurement. For this reason, **green public procurement is always sustainable, but sustainable public procurement is not always green**, as it may address other aspects of procurement such as social, professional or ethical aspects.

SUSTAINABLE PUBLIC PROCUREMENT: GREEN + SOCIAL + PROFESSIONAL + ETHICAL PROCUREMENT.

3. Benefits of environmentally sustainable public procurement and barriers for its implementation.

The **objective** of green public procurement is to channel the importance that, as consumers, different public powers have to achieve environmental sustainability goals.

In other words, to take advantage of the huge volume of procurements in the public sector (between 15 and 20% of the GDP in Europe) as an **incentive, so that the businesses direct their products and services towards environmental sustainability.** In this way, if Public Administrations begin to demand work, products or services which respect the environment, the private sector will be forced to do the same as to not remove themselves from this vital market.

The European Union has deemed that promotion may be more useful for the objectives of environmental sustainability than prohibition. Therefore, it is not about prohibiting behaviour, but rather **steering the private sector's offer of products and services** to encourage an industry that respects the environment.

In terms of the most important **advantages** associated with green public procurement, they are listed as follows:

- Although environmentally sustainable services generally offer a higher purchase price than their non-sustainable equivalents, **the cost for the contracting authority may be lower** if the service life of the provision is considered (*life cycle)*[1]*,* as it usually generates higher savings compared to non-sustainable work, products and services.

  EXAMPLE: a boiler for heating with a high energy efficiency level usually has a higher purchase price than their less efficient equivalent, but

[1] The life cycle will be studied in section 4.3 of didactic unit No. 2 of this course.

throughout its service life it will consume less fuel, and thus the overall cost will be lower.

- Green public procurement can **improve efficiency** in the use of public resources, obtaining better price-quality or cost-efficiency of contracted services.

  In order to select the best offer, the contracting body can take other factors into consideration in addition to the service cost; for example, the cost or profitability of the service, which may result in saving for public funds in the medium and long term.

- **Improved quality of life** by positively focusing on the environment in which citizens live.

  EXAMPLE: the contracting body may require that the contractor applies waste management systems or plans for the conservation of the surroundings affected by the service, which improves the quality of the environment in which citizens live. Likewise, they may acquire *organic* energy which is healthier than their non-organic equivalents.

- Increased **environmental conscience** of both citizens and public officials.

- By encouraging the development of environmentally sustainable products and services, which can also be offered to the general public, **positive synergies in the private sector** are created.

  EXAMPLE: products, work and services which respect the environment that the private sector works in order to be contracted by Public Administrations can be simultaneously offered to the market. In this way, the private sector may redeem the investment made in their investigation and development more easily.

- It allows a reduction of **negative externalities** associated with contracted services[2], including those relating to climate change.

  EXAMPLE: demanding that the work, products or services in which CO_2 emissions are limited during production or, in terms of the fabrication of certain components of the service (supply of bicycles manufactured using recycled aluminium) or the execution of the contract (transport of them, until the point of delivery, in environmentally friendly vehicles).

[2] Negative externalities are those costs or prejudices which, as a consequence of an economic activity, affect society or the environment and that are not reflected in the cost of the product that generates it. A paradigmatic example of negative externality is the contamination of the atmosphere caused by industrial processes

Various **barriers and obstacles** have also been identified, which make the use of environmental clauses in public procurement difficult. The most significant are listed below:

- **Purchase cost** of environmentally sustainable services: they are more expensive when it comes to purchasing compared to their non-sustainable equivalents, which could discourage contracting bodies from choosing them when there is a tight budget.

  EXAMPLE: The purchase price of a boiler with a high energy efficiency level usually has a higher purchase price than their less efficient equivalent.

- **Difficulties of precisely calculating** the economic costs and environmental impacts of the services contracted during their service life, including costs generated during the phase prior to the service's existence (extraction of primary materials, investigation, production, etc.) as well as those linked to their disposal, reuse or recycle.

  EXAMPLE: it is very difficult to accurately determine their environmental costs of products elaborated with primary materials originating from developing countries, or made in countries lacking transparency, such as China or Bangladesh, due to a lack of data or the lack of thoroughness of existing data.

- **Little awareness** of the benefits of works, products and services that respect the environment.

- **Lack of information** regarding the environmental characteristics that the different services being contracted must meet on the part of public buyers.

- **Lack of reliable information** on the environmental sustainability of certain environmental products and services available on the market.

  EXAMPLE: except for those products, work and services identified with *eco-labels,* it is difficult to understand their true environmental impact, despite the fact that they sometimes are automatically called "environmental."

- Lack of specific information on the members of contracting bodies: **lack of adequate specialisation.**

- **Inertia that makes it difficult** for the contracting bodies to change their patterns of behaviour: difficulty generating behavioural changes regarding public procurement involving the environmental sustainability of tendered services.

- **Lack of political will** on the part of public officials to decisively strengthen and adequately finance green public procurement.

- **Historical insufficiency of legal regulations** that adequately protect and channel green public purchase. Traditionally, there has been a "legal void" in the matter which has discouraged the use of environmental clauses on the part of the contracting bodies, which has been filled in recent years by community regulations and their development by legislators from the different Member States.

- **Deficiencies in the coordinated exchange of better practices and information** between public authorities (mainly regionally and locally).

- The **difficulty of reconciling the increase in the environmental standards of contracted services with the promotion of participation of SMEs** in public procurement procedures: the small size of these businesses makes the possibilities of offering environmentally innovative products and services more difficult, as well as adapting them to the requirements of the contracting bodies (limitations regarding flexibility, research, innovation, and variety of their offering).

  EXAMPLE: if the contracting bodies significantly raise the environmental standards of the services to be contracted (for example, requiring the supply of only the most efficient lights on the market), only businesses that are big enough will be able to participate in the bidding to invest in the research and development of the work, products or services required. Similarly, if the contracting bodies only purchase products marked with the European Ecolabel, only producers that have invested the resources and time to secure them will be able to participate.

- Difficulties associated with adequate **respect for the principles of equality, non-discrimination between private operators and competition** in those cases in which the heightened standard of environmental sustainability can only be reached by some businesses, or in cases in which only the products from a certain geographical origin meet the required technical specifications.

  EXAMPLE: as in the previous case, if the contracting body heightens the standard of environmental sustainability for services to be contracted to the latest technology on the market, only some private operators will be capable of participating in the bidding process, which will specifically

affect the equality, non-discrimination and competition principles in the procurement.

4. A background of environmentally sustainable public procurement. Jurisprudential and regulatory progress.

4.1. European Union documents on green public procurement.

European institutions' interest in the public procurement phenomenon as a tool to improve and conserve the environment **first began in the 1990s**, coinciding with the consolidation of the European Union's *Environmental Policy*.

From then on, the European Union began publishing a series of ***soft law* tools -** mainly **Communications and Green Papers**- in which they show their interest towards green public procurement and try to orientate and instruct the legal operators on this matter.

In all of these documents the European Union bids -hesitantly- for the so-called ***environmentalisation of public contracts***, that is, to allow contracting bodies to introduce environmental clauses in the **different phases of public** procurement. In other words, phases referring to:

a) Design of the contractual object.

b) Admission of bidders.

c) Selection of the offer/awarding of the contract.

d) Implementation of the contract.

One of the documents[3] which more decidedly backs the *environmentalisation* of public contracts was the **European Commission's Communication on 4 July 2001** "on the community legislation of public contracts and the possibilities of integrating environmental aspects in public procurement" (COM (2001) 274 final). This document has become the main reference on the subject, serving as a basis for subsequent jurisprudential pronouncements and European standards.

The legal basis for the integration of environmental factors in public procurement is found in **Article 11 of the Treaty on the Functioning of the European Union**, which requires the application across the board of environmental protection instruments to all European Union policies, including public procurement.

[3] The relation of the main community documents regarding green public procurement is available in the documental Annex of this course.

Previously, the European Directives on public procurement from 2004 -*third generation* Directives- had **already considered, for the first time, the possibility of integrating environmental aspects** in public procurement.

At this first stage, there were still general previsions regarding the possibility that contracting bodies **voluntarily** incorporate environmental clauses into their contractual documents[4].

However, **the acceptance of green public procurement by the jurisprudence of the European Union's Court of Justice has not been a simple, nor a straightforward process.**

4.2. The Europeanisation of ecological public procurement.

4.2.a) The evolution of the European Union's jurisprudence.

i) First judgements and Community documents.

The pioneering court decision on this subject - *leading* case - is the European Commission's Court of Justice judgement of 20 September 1988 (*Gebroeders Beentjes vs the Kingdom of the Netherlands,* subject 31/87).

The dispute heard in this judgement originated from the procurement process of a work contract in the framework of a land consolidation operation executed by the Ministry of Agriculture and Fisheries of the Netherlands, which was also responsible for procurement. The company Gebroeders Beentjes appealed the contracting body's decision to exclude their offer on the grounds that they lacked enough specific experience to carry out the service subject to contract, that their offer was deemed less acceptable than their competitors' and that they did not seem in capable of employing workers in *prolonged unemployment* (a special condition for the execution of the contract expressly considered in the bidding advert published in the Official Journal of the European Commission).

Even if the judgement does not allow the use of the most economically beneficial *qualitative* selection criteria, as well as the environmental or social characteristics of the service, it will indeed be the **first to admit the possibility that public contracts include special operational conditions, such as those relating to professional, social, ethical or environmental questions.**

The reason given by the Court of Justice to prohibit the environmental selection criteria in the offer was that they, **lacking economical content, were not adequate enough to identify the most economically beneficial offer.**

> "*With regard to the contract's award criteria, section 1 of Article 29* [from Directive 71/305/CEE, of 26 July, *on the coordination of the*

[4] The integration of these legislative previsions in the Spanish legal system is analysed in section 4.3 of this didactic unit.

> *procurement processes of public work contracts] anticipated that contracting authorities will focus either on the lowest price, or, in the case of contracting, it will be awarded to the most economically beneficial offer, in distinct criteria that may vary depending on the contract, for example: the price, the execution deadline, the usage cost, the profitability, the technical value. Even if the second alternative gives the contracting authorities the option of the allocation criteria of the contract that they intend to use, said election* ***may only revert to criteria aimed to identify the most economically beneficial offer"*** *(Sections 18 and 19).*

Similarly, in the aforementioned interpretive Communication of 15 October 2001 *on community public contracts legislation and the possibility of integrating social aspects in said contracts,* the European Commission **acknowledged that the environmental clauses did not have the capacity to elucidate the most economically beneficial offer,** on the grounds that all chosen allocation criteria must involve a ***direct*** **economic advantage** for the contracting body, and that it was not enough that each one of them could be measured in economic terms.

The European Communities Court of Justice judgement on 26 December 2000 (*Commission* vs *France (Nord-Pas-de-Calais), subject C-225/98)* would be **the first community court decision that** goes against the European Commission's opinion, allowing **contracting bodies to use *qualitative* allocation criteria** (that is, not economically assessable, as with the *quantitative* allocation criteria).

In this judgement, the alleged breach of Community regulations by the French Republic on public procurement on the occasion of various procedures for the procurement of works contracts relating to school buildings Convened by the Nord-Pas-de-Calais region and the *Département du Nor* (France). Specifically, the bidding procedures for the contracting of rehabilitation and maintenance work were tried over a period of ten years for fourteen secondary schools in the framework of an operation named "Institute Plans," as well a complementary bidding procedure regarding the development and implementation of a project of a high-quality environmental institution. Among the allocation criteria was an additional criterion referring to the fight against unemployment. As in the case of the *Beentjes* judgement in 1988, it was a social clause rather than an environmental clause, although the jurisprudence emanating from both decisions was equally applicable to the environmental sustainability of public contracts, since in both cases it refers to circumstances - non-economic/qualitative nature of the selection criteria of the best offer- concerning both social and environmental clauses.

As noted in this decision, in order for environmental criteria to be admissible, the **basic principles of Community law**, **the corresponding legislation**, and in particular, the principles of non-discrimination and freedom to provide services, **must always be respected**.

However, in this judgement **only qualitative award criteria are accepted as tie-breaking criteria,** that is, they only apply in the event of equality between offers.

ii) The Concordia Bus Finland judgement.

The judgement that definitively recognises the use of environmental criteria for the selection of the most economically beneficial offer is the European Communities Court of Justice judgement on 17 September 2002 (*Concordia Bus Finland* *Oy Ab vs Helsingin Kaupunki et al.*, subject C-513/99).

The lawsuit settled in this judgment addresses the company Concordia Bus Finland against the City of Helsinki (Finland) and the municipal public company HLK-Bussiliikenne for the allocation of a management contract for an urban bus line in the city. This contract was awarded to the municipal company HLK-Bussiliikenne and Concordia Bus Finland appealed this decision to Finnish courts, which brought a preliminary ruling before the European Union's Court of Justice.

In the contractual specifications that governed the procurement procedure, three criteria were included in order to determine the best offer: a) overall price of the bus line operation, b) quality of the vehicles (granting an additional score - up to 10 points - to vehicles which had nitrogen oxides emissions and a noise level lower than certain thresholds) and c) management by the employer in terms of quality and environment (composed of a set of qualitative criteria and an environmental management program accredited by certification).

Concordia Bus Finland argued that the assignation of the additional points for vehicles which had nitrogen oxide emissions and noise level lower than certain thresholds was discriminatory and unfair, consequently leaving only one bidder -the public company HLK-Bussiliikenne- capable of presenting an offer that met said requirements.

This decision constitutes a **fundamental milestone in this area**, since it definitively rejects the need for all allocation criteria chosen by contracting bodies to necessarily provide a *direct* economic advantage to the contracting body.

The Court of Justice recognises that **the community legal system does not require all allocation criteria to necessarily be of an economic nature**, since the *second-generation* directives of public procurement (1992) accepted a non-economic criterion: the aesthetic characteristics of the offer.

In this way, the Court of Justice highlights that *"in effect, it must not be excluded that factors which are not purely economic can affect the value of an offer for said contracting authority*" (section No. 55), **allowing for the possibility that qualitative rather than economic criteria such as environmental clauses, form part of the selection criteria for the most economically beneficial offer.**

For the new jurisprudential reasoning that begins with the *Concordia Bus Finland* judgement, it is one thing that the selected offer must generate economic benefits for the contracting authority -compared to the non-selected offers- and another thing that every one of the selection criteria must individually constitute economic

benefits for them, since **the benefits required by the community legislation refer to the overall offer considered, and not to all of the elements that compose it.**

Finally, with regard to the eventual discriminatory character of the allocation criteria that granted additional points for vehicles whose nitrogen oxygen emissions and noise were lower than certain limits (criteria b), the European Union's Court of Justice considers that **the fact that only a small number of businesses can meet these allocation criteria does not constitute, by itself, a violation of the principle of equal treatment.**

iii) The Wienstrom judgement.

The *Concordia Bus Finland* judgement was quickly followed by the European Communities Court of Justice judgement on 4 December 2003 (*ENV AG and Wienstrom GMBH vs Republik Österreich,* subject C-448/01), which confirms what was held up by the previous judgement, adding the need for the use of environmental clauses in public procurement to **respect the European Union's principles, and particularly the principle of proportionality,** which is essential when it comes to deciding, on the part of the contracting bodies, the level, or *standard,* of environmental sustainability required of the contracted services.

In this dispute, the EVN AG and Wienstrom GmbH companies faced the Republic of Austria on the occasion of a procurement procedure for an energy supply public contract for the Federal Administration of the Land of Carinthia (Austria)'s services for two years. The bidding included the celebration of a framework agreement, followed by a series of operational contracts. The contract's allocation criteria were the price of the electric energy supplied and other criteria of an eminently environmental nature, known as "the effect of services on the environment in compliance with the statement of specific administrative clauses," and referred to the energy generated from renewable energy sources. The first of these criteria attributed a weighting coefficient of 55%, and a second of 45%.

Similarly, the contractual statements contained an environmental condition of implementation: the energy supplier must commit to supplying, where technically possible, electric energy from renewable sources and in no case deliberately supply electricity obtained from nuclear fission. In the dispute regarding specific clauses it was specified that the contracting body was aware that, for technical reasons, no supplier was able to guarantee that the electricity supplies came entirely from renewable energy, but that having estimated the annual consumption of the federal services of Carintia's *Land* as 22,5 GW/h, the contract could be awarded to the bidders that were able to supply at least this amount of *green* electric energy. Lastly, all bidders were required to incorporate documentary accreditation to their offers, due to the fact that over the last two years and/or the next two years, the candidate produced or bought and/or would produce or buy at least 22,5 GW/h of electricity coming from renewable energy sources and supplied it and/or would supply it to final consumers.

The **requirements** set forth by the community jurisprudence for the inclusion of environmental criteria in public procurement are, in short, the following:

a) That the criteria used are **related to the purpose** of the contract.

b) That said criteria are **expressly stated** in the bidding advert, disputes regarding specific administrative clauses or in the descriptive document.

c) That the contracting authorities are not granted an ***unlimited*** **free choice.**

d) That the **European Union's main principles** are respected (equal treatment, non-discrimination, free circulation, transparency, proportionality, etc.).

The subsequent jurisprudence of the European Union's Court of Justice has **confirmed and developed this jurisprudential reasoning,** to this date (the main jurisprudential decisions on green public procurement can be found in the documentary Annex of this course).

4.2.b) The positivisation of green public procurement in European Union Law.

The jurisprudence of the European Union's Court of Justice was **incorporated into European legislation** on public procurement as of the *third generation* Directives, approved in 2004.

Specifically, Directive 2004/18/CE, of 31 March, on *the coordination of procurement procedures of public contracts for work, supply, and services.*

The **Directive 2004/18/CE openly allows, from this moment on, the voluntary inclusion of environmental clauses in all phases of public procurement:** structure of the contractual subject-matter, selection of candidates, evaluation of offers and execution of the contract.

However, the legislation on this matter is currently limited to a series of ***recommendations*** **or** ***possibilities*** that the **community legislator provides to national contracting authorities**, **but the inclusion of said environmental criteria is by no means compulsory** for contracting bodies.

Following this generation of Directives, the European legislature introduced **the obligation to use environmental criteria relating to specific services,** such as the acquisition of certain products, services or works with the specific characteristics of energy efficiency and limited impact on the natural environment.

These are **specific obligations for specific services. They therefore do not apply to general public procurement.** It applies to the following, for example:

- Directive 2009/33/CE of 23 April 2009, *on the promotion of transport vehicles for clean and energy efficient roads.*

- Legislation (CE) No. 106/2008, of 15 January 2008, *on a community programme for energy efficient labelling for office equipment (consolidated text).*

The current *fourth generation* Directives -2014/23/EU, of 26 February, on the allocation of concession contracts; 2014/24/EU, of 26 February, *on public procurement and through which Directive 2014/18/CE is repealed*; and 2014/25/EU, of 26 February, *on procurement by entities that operate in the water, energy, transport and post services sectors and through which Directive 2004/17/CE is repealed*- **take into account the provisions on this matter in prior legislation, developing and completing it, with their main innovation being the establishment of certain obligations for procuring entities with regard to public procurement.**

The **main contributions*** of this new generation of Directives on green public procurement are:

I. The obligation of contracting bodies to **verify the fulfilment of the Environmental law provisions** in all phases of public procurement.

II. The possibility for contracting bodies to **remove the cost of the service as priority criteria for allocating the contract, in favour of their environmental characteristics.**

III. The **flexibility of the obligatory link** between environmental clauses and the purpose of the contract.

IV. The regulation of **cost calculations of the *service life*** of the services.

V. The regulation of the requirements for the use of **ecological certificates or *ecolabels*** in public procurement.

*All of these additions will be analysed in didactic unit No. 2 of this course with the aim of incorporating them into the Spanish legal system.

4.3. Green public procurement in the Spanish legal system. Reception and evolution.

Law 13/1995, of 18 May, *on Public Administration Contracts,* and Royal Legislative Decree 2/2000, of 16 June, which approved its consolidated text, do not contain any allusion of the environmental matter.

However, it did **not prevent the inclusion of environmental clauses**, since its list of allocation criteria (that literally copied the provisions set forth in the *second-*

generation Directives) could not be considered as *fixed* or *closed* in any way. It was understood that the introduction of environmental aspects in public procurement was admissible, although the examples during this period were extremely scarce.

Based on this possibility, the **sectorial legislation** began to incorporate some environmental criteria into public procurement:

- Law 11/1997, of 24 de April, *on Packaging and Packaging Waste* (Third additional provision: "Public Administrations will adopt the necessary measures to favour the order of priorities indicated in the second paragraph of section 1 of Article 1 and will promote the use of reusable and recyclable materials in the procurement of public work and supplies. […]")

- Law 10/1998, of 21 April, *on Waste* (Article 26.2: "*Public Administrations will promote the use of reusable, recyclable and valuable material, as well as products made from recycled material that meet the required technical specifications, in the framework of public procurement of work and supplies"*). A provision continued by the current Law 22/2011, of 28 July, *on Contaminated Waste and Floors.*

- Law 48/1998, of 30 December, *on the procurement procedures in the water, energy, transport and telecommunications sectors through which Directives 93/38/CEE and 92/13/CEE are incorporated into the Spanish legal system* (Article 24.3: "*In the competition, the bidder who, as a whole, makes the most advantageous proposal will be awarded. This will be determined using various variable objective criteria according to the contract in question, such as delivery or execution time, cost of use, profitability, quality, aesthetic and functional characteristics, technical quality, environmental quality, after-sales service and technical assistance, commitment with regard to spare parts, security in the supply and cost, as well as the formula for its revision, if applicable. In this case, the contracting authority shall state, in the bidding documents or in the contract notice, all the allocation criteria they intend to apply.* [...]").

- Law 2/2011, of 4 March, *on Sustainable Economy* (Article 35 letters d): "To include in procurement processes, when the nature of the contract allows for it, and as long as they are compatible with the community law and indicate conditions for execution referring to the level of greenhouse gas emissions and maintenance or improvement of environmental values that may be affected by the execution of the contract in the bidding advert and dispute or in the contract. Similarly, in the allocation criteria of the contracts, when the subject allows it, and when the conditions are directly linked to the purpose, the savings and efficient use of water, energy and materials, the environmental cost of the service life, the ecological production procedures and methods, the generation and management of waste or the use of recycled and reused or ecological materials will be

valued," and e): "To optimise energy consumption in HQs and facilities carrying out energy service contracts that allow the reduction of energy consumption, retributing the contracting business' savings obtained from the energy bill.").

Ministerial orders explaining how to incorporate environmental criteria into the specifications of particular administrative clauses (for **example**, the Ministry of Environment's Order, of 14 October 1997, Official Spanish Gazette (BOE), No. 259, of 29 October 1997) were also approved in a timely manner by the General State Administration.

The **first legislation that openly allows the use of environmental clauses** by contracting bodies is **Law 30/2007, of 30 October, *on Public Sector Contracts.*** This legislation transposes the *third-generation* Directives to the legal system, mainly Directive 2004/18/CE. **Law 30/2007 introduced higher requirements and possibilities than those previously seen in European legislation, increasing the standard of environmental protection for now.**

Law 30/2007, consolidated by **Royal Decree Legislative 3/2001, of 14 November (TRLCSP)**, transposed the authorisation for contracting authorities to include environmental criteria in **important points** of public procurement to the legal system:

a) At the time of **defining the contractual** subject-matter, when it affects or could affect the environment, the Spanish legislator obligated contracting authorities to introduce, "*where possible*", environmental criteria, such as environmental sustainability and protection (Art. 117.1 TRLCSP). In this way, the contracting body **should justify why said clauses have not been included** when the contractual subject affects or could potentially affect the environment. The principle of equality and non-discrimination between bidders must always be respected.

b) At the time of the **admission of candidates**, Art. 60 TRLCSP introduced various **prohibitions** for contracting relating to the environment. With regard to the accreditation of its technical **solvency**, its justification was admitted by means of the indication of environmental management measures (Articles 76.1 d), 78.1 f), 79 and 81 TRLCSP).

c) The use of environmental criteria for the **determination of the most economically beneficial offer** was expressly allowed, provided that such criteria were directly linked to the purpose of the contract and was mentioned in the announcement, in the specifications of particular administrative clauses or in the descriptive document (Article 150.1 TRLCSP). In addition, and this constitutes **a true milestone on the matter**, the inclusion of allocation criteria of an environmental nature was expressly required when dealing with contracts "[...] whose execution could have a significant impact on the environment" (Art. 150.3 h) TRLCSP).

d) The possibility of establishing special **conditions for the execution of the environmental contract** (Article 118 TRLCSP), the setting of penalties in the event of non-compliance (Article 212.1 TRLCSP), its characterisation as essential conditions of the contract (Article 223 f) TRLCSP) and, collaterally, its consideration as a serious infraction that prevented the contractor from contracting with the Public Administrations again (Article 60.2 e) TRLCSP) was also accepted.

These essential implementation conditions were also subjected to a "**progress clause"**, through which the concessionaire of a public work had to keep it permanently in accordance with what, in each moment, and according to the progress of science, the environmental legislation expressed (Article 247.4 TRLCSP).

During this phase it was possible for the economic power to **modify the contract,** exercising their authority of *ius variandi*, although this possibility was not foreseen in the documentation, if it demonstrated an objective inadequacy in the project in relation to environmental circumstances, and provided that the situation would have become apparent after the procurement of the contract and it was *unforeseeable* (Article 107.1 b) TRLCSP).

As seen in the LCSP and following TRLCSP, the inclusion of environmental clauses **was always voluntary, except for the case referred to in Article 150.3 h) TRLCSP.** Therefore, during this period a voluntary general regulation exists on public procurement and obligation in some sectorial legislation, as have previously been listed.

Law 15/204, of 16 September, on *the rationalisation of the Public Sector and other measures of administrative reform,* belongs to this second group, that **requires Public Administrations to only acquire goods, services and buildings that have *high energy performance* -** according to the criteria established in its own Appendix- so long as it is coherent with profitability, economic viability, sustainability *in its widest sense* and technical suitability (Additional Thirteenth Provision).

However, this legislation **does not affect any work, product or service, but rather only the following**:

- Products covered by delegated acts in compliance with Directive 2010/30/EU, of 19 May, on the indication of energy consumption and other resources with respect to **energy related products**, through labelling and normalised information.

- Products covered by an adoptive method in compliance with Directive 2012/27/EU, of 25 October, on **energy efficiency.**

- **Office products** in compliance with the Agreement between the United States and the European Commission with regard to the coordination of energy labelling, **pneumatics**, and the acquisition and leasing of **buildings**.

As has been indicated, the legislation in force on matters of public procurement is **Law 9/2017, of 8 November, on Public Sector Contracts, through which European Parliament and Council Directives 2014/23/EU and 2014/24/EU, of 26 February 2014, were transposed into the Spanish legal system.** Analysis of the current legal system with regard to public procurement can be found in didactic unit No. 2 of this course.

5. Reference standards regarding to green public procurement.

5.1. European legislation.

- Directive 2014/23/EU, of the European Parliament and Council, of 26 February 2014, on the allocation of concession contracts.

- Directive 2014/24/EU, of the European Parliament and Council, of 26 February 2014, on public procurement and through which Directive 2004/18/CE is repealed.

- Directive 2014/25/EU, of the European Parliament and Council, of 26 February 2014, on procurement by entities that operate in the water, energy, transport and post services sector and through which Directive 2004/17/CE is repealed.

5.2. State legislation.

- Law 9/2017, of 8 November, on Public Sector Contracts, through which the European Parliament and Council's Directives 2014/23/EU and 2014/24/EU, of 26 February 2014, are transposed into the Spanish legal system.

  Legal precepts of reference on the matter: Arts. 1.3, 28.2, 35.1.c), 71.1.a) y b), 71.2.c), 88.1.d), 90.1.f), 90.2, 94, 99.1, 122.2, 124, 126.4, 127.2, 129, 145, 146.1, 148, 149.4, 184.3, 201, 202, 211.1.f) and 319.

- Order No. PRE 116/2008, of 21 January, for which an agreement with the Council of Ministers was published, through which the Plan for green public procurement of the State's General administration, public organisations and managing entities of Social Security is approved.

- Order no. MAM 211/2007, of 10 July, which regulates the environmental requirements and criteria to be introduced in disputes of specific administrative clauses that govern the contracts of the Environment Ministry and public organisations who depend on the latter.

5.3. Autonomous legislation.

- Agreement dated 18 October 2016, of the Government Council, through which the incorporation of social and environmental clauses in the Autonomous Region of Andalusia is encouraged.

- Guidelines for procurement not subject to harmonised regulation to apply in the Andalusian Management Company of Facilities and Youth Tourism *(Inturjoven),* adapted to the Royal Legislative Decree 3/2011, of 14 November, through which the consolidated text of the Law on Public Sector Contracts is approved, *Department of Equality and Social Politics*, not dated.

- Draft of the Law on environmental sustainability and protection, Principality of Asturias, 2016 (Article 16).

- Guidelines for the regulation of procurement procedures not subject to harmonised regulation by the Public Society of Management and Touristic Promotion, Principality of Asturias, 2017.

- Guidelines, of 18 October 2016, of the Government Council of Castilla-La Mancha, on the inclusion of social clauses, from a gender and environmental perspective, in the regional public procurement sector.

- Agreement 64/2016, of 13 October, of the Regional Government of Castilla-Leon, through which sustainable development measures are approved in the Autonomous Region of Castilla-Leon.

- Decree 89/2009, of 17 December, through which the appropriate body is determined and the procedure for application to the revised Community System of Ecological labelling is established in the Autonomous Region of Castilla-Leon.

- Decree-law 3/2016, of 31 May, on urgent measures for public procurement (Catalonia) (Art. 6).

- Law 16/2015, of 23 April, on environmental protection of the Autonomous Region of Extremadura (Additional fifth provision, inclusion of the environmental variable in public sector contracts)

- Counsellor's Resolution, of 25 February 2016, establishing the publication of the Agreement of the Regional Government of Extremadura's Council, of 23 February 2016, through which the Guidelines on the incorporation of social and environmental criteria and promotion of SME's and promotion of sustainability in public procurement of the Regional Government of Extremadura and entities that are involved in their public sector.

- Law 4/2009, of 14 May, on Integrated Environmental Protection (Article 124).

- Resolution 6/2008 of the Director of the Government-Secretariat and of Relations with Parliament, establishing the publication of the Agreement adopted by the Government Council "on the incorporation of social, environmental and other public politics criteria in the procurement by the Administration of the Autonomous Region and their public sector" (Basque Country).

6. Planning instruments and guidance documents relating to green public procurement.

Different Spanish Public Administrations have developed a series of planning instruments relating to ecological public procurement.

6.1. Environmental planning instruments that include green public procurement.

At the state level, some make reference to green public procurement **tangentially**, by handling other matters with a higher impact on the environment, among which the following can be listed, elaborated by the Ministry of Agriculture, Food and Environment.

- ***National Integrated Waste Plan 2008-2015*.**

- ***National Plan for Waste Prevention 2014-2020*.**

- ***Spanish strategy for Climate Change and Clean Energy "Horizonte 2007-2012-2020".***

6.2. Planning instruments relating to green public procurement.

There are also specific planning instruments for this matter, for both general and specific matters:

- ***Green Public Procurement Plan of the General State Administration, Public Organisations and Managing Entities of Social Security***

(published by Order PRE/116/2008, of 21 January; Spanish National Gazette (BOE) No. 27, of 31 January).

Two *General Reports on the state of green public procurement* have been published about this plan (the first in October 2011 and the second in June 2015). Similarly, for the development of this Plan, three *Codes of Good Practice: Procurement of building cleaning services and minor Works, and the use of paper and publications* have been published.

- ***Activation Plan of Energy Efficiency in General State Administration Buildings* (PAEE-AGE)** (approved by the Agreement of the Council of Ministers on 11 December 2009).

- ***Plan for the Promotion of the Procurement of Energy Services* (Plan 2000 ESE)** (approved by the Agreement of the Council of Ministers on 16 July 2010).

In terms of autonomous regions, there are also planning mechanisms for the administrative activity in the green public procurement sector, both specific and included in planning instruments of related matters. However, to this date they are very scarce:

- **The Basque Country's 2020 green public procurement and buying programme.**

- **Andalusia's "Horizonte 2017" environmental plan.**

6.3. Guidance documents on green public procurement.

With regard to guidance documents elaborated by Public Administrations for their contracting bodies, the following can be listed:

- **Guide for the inclusion of social and environmental clauses in procurement by the Regional Government of Andalusia** (Ministry of Finance and Public Administration, October 2016).

- **Guide for the technical solvency and environmental management of the Autonomous Government of Catalonia. Proposals for work and Service contracts** (2010).

- **Guide for the adoption of environmental criteria in contracts for the maintenance of building installations in the Autonomous Government of Catalonia** (no date)**.**

- **Green buying. Green public procurement and buying in the region of Aragon. 2º catalogue on criteria, products and suppliers** (2009).

- **Guide for sustainable public procurement and buying by the Government of the Canary Islands.** (no date)

- **Guide for socially responsible public procurement in the Public Sector of the Autonomous Region of Galicia** (no date).

- **Sustainable events in Castilla- Leon** (2010).

- **General guide of aspects relating to protecting the environment** (Community of Madrid, no date).

- **Code of good sustainable practice in local procurement** (Honourable Madrid Council, 2010)