



COURSE ON GREEN PUBLIC PROCUREMENT

DIDACTIC UNIT No. 2

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1. The “greening” of public procurement: environmental law on public contracts and environmental clauses.

The first point to bear in mind when analysing the legal framework on green public procurement is that **not all of the provisions of the LCSP in this matter have the same nature and purpose.**

The provisions of the LCSP regarding the environmental sustainability of public contracts may be classified in **two categories**:

- a) Those that form a part of what is known as the **“environmental contracting regime”**: these provisions require contracting authorities to ensure that **the environmental regulations are respected** throughout the entire procurement procedure and subsequently during the implementation of the contract.

Its purpose is not, therefore, to raise the standards of environmental protection with respect to what is established in the legal system, but to **ensure that it is complied with**. For this reason, the contracting authorities will now carry out the roles that **have traditionally been assigned to environmental bodies**.

Examples of provisions of the LCSP that cover the environmental regulations of public procurement contracts are to be found in Articles 71 and 72 (prohibitions on contracting), 149.4 (abnormally low bids) and 201 (environmental, social or labour obligations).

- b) What are known as “**environmental clauses**”: those provisions of the LCSP that go beyond the mere compliance with environmental legal obligations, pursuing an **increase in environmental protection standards with respect to what has been established by the legal system**.

Its purpose is thus, the **procurement of services with higher levels of environmental protection than those required by the legal system**. To this end, contracting authorities are authorised to include these environmental clauses in all stages of public procurement.

Examples of provisions of the LCSP that authorise the inclusion of environmental clauses are articles 88.1.d) (technical capability in works contracts), 126 (rules for the establishment of technical requirements), 145 (requirements and types of criteria for awarding the contract) and 202 (special conditions for the implementation of the contract of a social, ethical, environmental or other nature).

EXAMPLE: the contracting authority decides that for a tyre supply contract it will be required that the tyres be of the highest category from the point of view of energy efficiency (category A) and noise pollution (1 *loudspeaker wave*), according to the European Tyres Label; although the sale of tyres is allowed in the European market with environmental values much lower than these (up to category G of energy efficiency and 3 *loudspeaker waves* in noise pollution)

Apart from this, in the LCSP there are provisions **referring to both specific stages** of public procurement and **across the board to all** stages of procurement. Sections 3 to 6 of this didactic unit analyse the first of these, while Section 7 looks at the latter.

2. The general obligation to include environmental criteria in public procurement. The mandatory or voluntary nature of the greening of public contracts.

Article 1.3 of the LCSP establishes that **social and environmental criteria are to be included across the board in all public procurement**, whenever they are related to the purpose of the contract.

The Spanish legislature **justifies** the inclusion of environmental clauses in public procurement because it considers that they provide better value for money in the contractual service, as well as greater and better **efficiency** in the use of public funds.

However, this requirement must always be **reconciled** with the objective of facilitating access for small and medium-sized enterprises, as well as social economy enterprises, to public procurement.

The LCSP requires, therefore, that contracting authorities include environmental clauses in all contracts entered into with the private sector, with the requirements that will be analysed in this didactic unit.

However, Article 28.2 of the LCSP provides that public sector entities must ensure efficiency and maintenance of the terms agreed upon in the execution of public procurement processes, foster the streamlining of procedures, **value the incorporation of social, environmental and innovation considerations** as positive aspects in public procurement procedures and promote the participation of small and medium-sized enterprises and the access to information free of charge, in the terms set forth in this Law.

The content of both provisions –1.3 and 28.2 LCSP– is admittedly **contradictory** regarding the mandatory or voluntary basis of the inclusion of environmental considerations in public procurement. The following question is therefore raised:

Is the inclusion of environmental clauses in public procurement contracting voluntary or mandatory for contracting authorities?

As it will be evident in this didactic unit, **there is no single or general answer** to this question. To answer it there is no alternative but to **analyse each of the provisions** that regulate this issue to ascertain, in each case, whether the contracting authority faces an obligation or a mere possibility of voluntary use.

3. Greening public contracts at the contract drafting stage.

During the contract drafting stage, the contracting authority must **decide which service is the most appropriate to fulfil the relevant public purpose**. It must, among other things, decide which type of contract (works, supply, service or concession) is most suitable for these purposes and design the service so that it fulfils the intended aims, that is, configure the purpose of the contract.

When designing the contractual subject matter, the contracting authority may include environmental clauses in the sense of **requiring features to the provision that raise their level of environmental compatibility with respect to what is required by the legal system**. The works, services or supplies contracted will thus have a higher level of environmental compliance than they would have if the contracting authority limited itself to procuring works, services and supplies that comply strictly with the environmental requirements demanded by the legal system.

If the option of greening the contract is selected, **only those bids that meet the levels of environmental protection required by the contracting authority may be submitted.** This is an absolute requirement. In other words, it is either met or not by the bids submitted, and that there can be no intermediate situations; one cannot award more or fewer points according to the degree of environmental protection, as occurs, for example, with the bid selection criteria.

EXAMPLE: the contracting authority decides to award a contract for the supply of paper for photocopying and accepts only those bids whereby no chlorine is used to whiten the paper. Although the Spanish legal system allows the use of chlorine for bleaching paper pulp - not liquid chlorine but rather gaseous chlorine dioxide - the contracting authority decides to increase the standard of environmental protection in this respect and procure exclusively paper that has been whitened without the use of chlorine. Only firms that submit bids to supply paper whitened without using chlorine will be admitted to the bidding procedure.

3.1. Provisions of the Spanish Public Procurement Contracting Law (LCSP, initials in Spanish) at the contract drafting stage.

- ❖ **Art. 28.2 (Necessity and suitability of the contract and efficiency in the procurement).**
- ❖ **Art. 35.1.c) (Content of the contract).**
- ❖ **Art. 99.1 (Purpose of the contract).**
- ❖ **Art. 124 (Particular technical specifications dossiers).**
- ❖ **Art. 125 (Definition of certain technical specifications).**
- ❖ **Art. 126 (Rules for the establishment of technical specifications).**
- ❖ **Art. 127 (Labels).**
- ❖ **Art. 128 (Reports of evidence, certification and other means of evidence).**

3.2. The environmentally sustainable design of the contractual subject matter. The inclusion of environmental criteria in the technical specifications of the contract.

Article 99.1 of the LCSP, which regulates the purpose of the contract, permits that it be **defined on the basis of the specific needs or functionalities that it is intended to fulfil**, without restricting it to a single solution. In particular, the purpose of the contract **must be defined in this manner** when the contracting authority takes the view that technological, social or **environmental** innovations may be incorporated that may improve the efficiency and sustainability of the assets, works and services procured.

Therefore, this provision does not require that the purpose of the contract be designed taking environmental considerations into account - as do, for example, Articles 126.4 and 35.1 of the LCSP - but, if the contracting authority opts to include innovations of an environmental nature, the said object must be defined with a view to the specific needs or functionalities that it is intended to fulfil (that is, **not the service itself, but the public purpose that it is intended to serve** by means of said contract).

Conversely, Article 35.1c) of the LCSP, with regard to the minimum content of the contract, establishes that the documents in which contracts are formally entered into by public sector bodies, unless they are already set out in the procurement dossiers, they must include the following points:

- The definition of the purpose and type of contract, **taking into account in the definition of the purpose** social, **environmental** and innovative considerations.

This provision does establish the **requirement that the purpose of any public contract must be designed taking into account environmental considerations**. The contracting authorities are bound, therefore, to take into account the environmental impacts of the services they contract. For this reason, they must demand works, supplies and services with a **minimum degree of environmental sustainability**.

The **technical requirements or specifications** can be defined as those qualities that characterise a particular works project, service or supply.

Article 125 of the LCSP defines the concept of technical requirement or specification in view of the type or types of contract in question:

- a) In **works contracts**, all of the technical requirements contained mainly in the procurement dossiers are considered as such, in which the characteristics required of a material, product or supply are defined, and these make it possible to characterise them so that they are consistent with the use that the awarding body assigns to them.

The following are also regarded as technical requirements/specifications in works contracts:

- Quality assurance procedures.

- The social, labour, **environmental and climate impact** of said materials, products or activities that are carried out during the implementation or use thereof.
 - The design for all of needs (including universal accessibility and universal design or design for all persons).
 - The terminology, symbols, tests and testing methods, packing, marking and labelling.
 - The instructions for use and the **processes and methods of production at any stage of the life-cycle of the works.**
 - The rules covering the project design and the calculation of the works.
 - The conditions in respect of the testing, control and acceptance of the works.
 - The construction methods and techniques and all of the other conditions of a technical nature that the awarding body may impose, by general or specific regulations, in respect of completed works and the materials and elements that comprise them.
- b) In **supply or services contracts**, that specification that appears in a document in which the characteristics required of a product or service are defined, such as:
- The quality levels and **the environmental and climate performance levels.**
 - The design for all of needs (including universal accessibility and universal design or design for all persons) and the evaluation of conformity.
 - The **performance**, the use of the product, its safety and its dimensions.
 - The requirements applicable to the product in relation to the sales name, terminology, symbols, tests and test methods, packaging, marking and labelling, instructions for use, **processes and production methods at any stage of the life cycle** of the supply or service, as well as the conformity assessment procedures.

The fundamental provision regarding the use of environmental criteria when designing the purpose of the contract is Article 126.4 of the LCSP, which states that:

- **Whenever** the purpose of the contract **affects or may affect the environment, the technical requirements must be defined by applying sustainability and environmental protection criteria**, in accordance with the definitions and principles regulated in Articles 3 and 4, respectively, of the Law 16/2002, of 1 July, on the Integrated Prevention and Control of Pollution*.

*This standard has been replaced by Legislative Royal Decree 1/2016, of 16 December, which enacts the consolidated text of the Integrated Prevention and Control of Pollution Act.

According to this provision, **whenever the environment is affected, the contracting authority must define the technical specifications of the contract by applying sustainability and environmental protection criteria.**

The difficulty lies in the wide margin of assessment established by this provision, as it is difficult to imagine an activity that has no effect, however small, either actual or potential, on the environment.

As this is a legal obligation, the contracting authority **must provide adequate justification for not including environmental considerations** in the technical specifications or requirements of the service to be procured **on the understanding that there is no impact on the environment.**

EXAMPLE: a services contract for the simultaneous interpreting of guests to public institution is very unlikely to produce impacts on the environment, so the contracting authority will be able in such cases to justify not including environmental considerations in the design of the service to be procured.

Moreover, determining the **standard or level of environmental protection that is to be required of** each contract is problematic. Taking into account that different services affect or may affect the environment in a diverse way and intensity, the choice of the contracting authority must be **proportional** to said de facto budget, as is underlined when analysing the principles of sustainable public procurement and, in particular, the principle of proportionality (heading 6.2 of this didactic unit).

EXAMPLE: The level of environmental demands in the clauses included in a service contract for the maintenance of a building cannot be the same as in a works contract for road building.

The technical requirements may refer **to two aspects of the contractual subject matter** (Art. 126.2 LCSP):

- a) **Specific process or method of production or provision** of the works, supplies or services;

EXAMPLE: manufacturing tyres without using silicon or replacing isoprene compound with biolsoprene.

- b) **The specific process of another stage of its *life cycle*** –Art. 148 LCSP–, even when such factors are not part of the *material substance* of the services*, provided they are related to the purpose of the contract and are proportional to their value and objectives.

EXAMPLE: tyres in whose composition rubber is used that is sourced from sustainably managed forests or from forestry operations in which the natural environment of the host communities is respected and that are recycled when their use comes to an end.

* This question will be analysed in Section 6.1 of this didactic unit.

The technical requirements or specifications must be stated in one of the **four ways** permitted by the LCSP (Art. 126.5):

- a) **In terms of performance or functional demands, including environmental characteristics**, provided the parameters are precise enough to allow bidders to determine the purpose of the contract and to allow the contracting authority to award it.

Example: energy or fuel consumption, what is known as the comfort temperature - with respect to the ambient temperature or sanitation water - the quantity of waste that is generated, etc.

- b) **With reference**, according to the following order of priority, to:

- **Technical specifications contained in national regulations that incorporate EU regulations.**

EXAMPLE: technical specifications contained in the internal regulations that apply of the Regulation (EC) No. 1222/2009, of 25 November, 2009, *on the labelling of tyres with respect to fuel efficiency and other essential parameters*

- **EU technical evaluations, of common technical specifications, of international standards, of other systems of technical references drawn up by European standardisation bodies.**

EXAMPLE: the *European Technical Evaluations* (ETE) with regard to products for construction (regulated by (EU) Regulation no. 305/2011, of 9 March 2011, *laying down*

harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC; or the Common Technical Specification for the scope of ICTs (regulated in the (EU) Regulation 1025/2012, of 25 October, on European Standardisation).

- **In the absence of all of the above, of national standards, of national documents of suitability or of national technical specifications** that apply to the project design, calculation and performance of works and of the use of supplies: accompanying each reference with the annotation “or equivalent”.

EXAMPLE: The *Technical Suitability Document* (DIT, initials in Spanish) for construction materials issued by the IETcc. [the Eduardo Torroja Institute of Construction Sciences].

- c) In terms of performance or functional requirements according to what has been stated in paragraph a), making reference to the specifications stated in paragraph b), **as a means of assumption of conformity with these requirements of performance or functional requirements;**
- d) Making reference to technical specifications mentioned in paragraph b) for certain characteristics, and by reference to the performance or functional requirements mentioned in paragraph a) for other characteristics. This is a **hybrid system** that combines the modalities set out in paragraphs a) and b).

Establishing any kind of technical requirement or specification requires that the principles of **equal opportunity and non-discrimination** must always be respected, so that bidders are always given access to the procurement procedure in equal conditions and no unjustified obstacles are created to the opening of public procurement to competition (Art. 126.1 of the LCSP).

To comply with these principles, the LCSP establishes **three rules** in that regard:

- a) Technical requirements **may not refer to the following aspects** in order to favour or rule out certain firms or certain products (Art. 126.6 LCSP):
 - Particular manufacturing or source.

Example: a specific country or region, such as the case of Spanish motor vehicles, Italian meat or French tyres.

- A specific procedure that characterises the products or services offered by a particular firm.

Example: a construction system patented by a particular firm, such as the systems *BSCP* or *F2TE3*.

- Brands, patents or types.

Example: a particular software –*Microsoft Office*– or a particular brand of cleaning products –*Persán*–.

- Particular origin or production.

Example: a particular designation of origin for food products; e.g. cheese or wine, or for decorative elements or construction materials, e.g. Macael marble (Almería).

Such references shall only be accepted if they are justified by the purpose of the contract, in which case they may be authorised **on an exceptional basis** when it proves impossible to make a reference that is sufficiently *precise and intelligible* to the same.

In any case, it must be accompanied by the expression “**or equivalent**”, so that there can be no doubt that **other features will be accepted with characteristics that are similar to those required**.

- b) When technical requirements or specifications are formulated in terms of performance or functional requirements, bids may not be rejected that are compliant with the instruments of Article 126.5b) of the LCSP if the bidder **proves by any appropriate means that such instruments meet the requirements of performance or functional requirements established by the contracting authority** (Art. 126.7 of the LCSP).
- c) When the contracting authorities formulate the technical requirements or specifications by reference to the instruments of Article 126.5.b) LCSP, they may not reject bids submitted provided the bidder **demonstrates by any appropriate means that the solutions it proposes comply in an equivalent form with the requirements set in the relevant technical requirements or specifications (“equivalence test”)** (Art. 126.8).

The technical requirements or specifications of the services to be procured **shall be contained in the particular technical requirements dossiers**, which are contractual documents regulated by Article 124 of the LCSP.

4. Greening the acceptance stage of candidates: prohibitions on contracting and “environmental” solvency.

In this stage of public procurement, the contracting authority evaluates what is known as the “professional morality” [i.e. track record] of the candidates, that is, their **previous conduct** both in relation to the respect for the legal system and in relation to previous contractual relationships with the Public Administration.

In addition, in this stage, the contracting authority assesses the capabilities of the candidates to comply with the obligations set out in the contract in the event that it is awarded to them. This is what is called the contractor's “solvency”, which may have to do with different aspects related to the implementation of the contract (economic, financial, technical and professional).

In the stage of acceptance of candidates, the greening of public procurement takes the form of **two mechanisms**:

- a) The establishment of **prohibitions on contracting** for certain candidates as a result of previous non-compliance with the environmental legal regime, both in terms of official penalties and in terms of criminal offences.
- b) The possibility of requiring the candidates to **prove their solvency** and capability to perform the contract from an environmental point of view.

By making use of this possibility, the contracting authority may decide whether it only accepts candidates that meet certain environmental requirements (in which case it will establish social solvency [sic] criteria) or if it will simply assess this circumstance positively (in which case it will assess them at a later stage of the public procurement process: as bid selection criteria).

EXAMPLE: the contracting authority may decide that only those candidates who can prove that all the electric power they supply comes from renewable sources may participate in the bidding procedure, in which case this requirement should be established as a “solvency” requirement. The contracting authority may also positively assess this circumstance when determining the best bid, in which case this requirement must be established at a time after the admission of candidates, as a bid selection criterion.

As in the previous stage, **only those bidders that comply with the requirements of acceptance established by the contracting authority may participated in the tender**, and no candidates may do so that only partly comply, as these are equally **absolute** requirements, that are either complied with or not; there are no shades of grey whatsoever.

4.1. Provisions of the LSCP related to the candidate admission stage.

- ❖ **Art. 71 (Prohibitions on contracting).**
- ❖ **Art. 72 (Decision that a contractor is disqualified. Competence and procedure).**
- ❖ **Art. 73 (Effects of the declaration of prohibition on contracting).**
- ❖ **Art. 88.1.d) (Technical capability in works contracts).**
- ❖ **Art. 90.1.f) (Technical or professional capability in service contracts).**
- ❖ **Art. 94 (Evidence of compliance with the environmental management rules).**
- ❖ **Art. 122.2 (Dossiers containing the particular administrative clauses).**

4.2. Environmental prohibitions on contracting.

One of the pioneering mechanisms used by the drafters of EU and Spanish law to include environmental considerations in public procurement has been the disqualification of those contractors what have breached the law in this matter.

The current Article 71.1 of the LCSP states that **no persons that are in any of the following circumstances may enter into contracts with the public sector:**

a) Having been convicted in a final judgement of terrorism offences, of the setting up or membership of a criminal organisation or group, illicit association, illegal financing of political parties, human trafficking, corruption in business, influence peddling, bribery, fraud, criminal offences against the Public Finances and the Social Security system, offences **against** the rights of workers, misuse of authority, misappropriation of funds, business activities from which public servants are barred, money-laundering, criminal offences with regard to land use zoning and urban development, the protection of historical heritage and **the environment**, or having been sentenced to special disqualification to practise a profession, office, industry or commercial activity.

EXAMPLE: having been convicted of offences against natural resources and the environment, or of offences related to the protection of flora, fauna and domestic animals (Articles 325 to 340 of the Spanish Criminal Code).

b) Having been penalised by a final judgement for a serious infringement in a professional matter that compromises its integrity, in respect of market discipline, false competition, labour hiring practices and equal opportunities and non-discrimination against persons with disabilities or foreign nationals, in accordance with the law currently in force, or **for a very serious infringement in respect of the environment in accordance with the provisions of regulations currently in force**, or for a very serious infringement in respect of labour or social matters, in accordance with the provisions of the consolidated text of the Act on Infringements and Penalties in the Social Sphere, enacted by Legislative Royal Decree 5/2000, of 4 August, as well as for the serious infringement set forth in Article 22.2 of the aforesaid text.

EXAMPLE: for instance, for having been penalised for one or more of the infringements specified in Article 31.2 of Legislative Royal Decree 1/2016, of 16 December, *enacting the consolidated text of the Act on the Integrated Prevention and Control of Pollution*; or for any of the infringements set out in Article 58.1.a) of the Decree 6/2012, of 17 January, *enacting the Regulations on the Protection from Noise Pollution in Andalusia*.

Secondly, Article 71.2.c) LCSP disqualifies firms from public sector contracts that have **failed to comply with the clauses that are essential** in the contract, including the **special conditions of performance established in accordance with the terms set forth in Article 202**, when said non-compliance has been defined in the specification and requirements dossiers or in the contract as a **serious breach, involving wilful misconduct, fault or negligence by the firm, and whenever it has given rise to the imposing of penalties and/or compensation for damages**.

The said Article 202 of the LCSP governs the special conditions of implementation of the contract, which are covered in Section 5 of this didactic unit.

Furthermore, the prohibitions on contracting do not just affect those companies that are in the referenced circumstances, but are also transferred to those others that, due to the persons that manage or govern them or to other circumstances, may be presumed to be **a continuation or derive from the former, due to restructuring, merger or succession** (Art. 71.3 LCSP).

A new feature, Article 72.5 of the LCSP, allows those persons affected by grounds for disqualification to **provide proof of the payment or undertaking to pay** fines and compensation ordered by a court judgement or an administrative resolution from which the disqualification from contracting derives, as well as

implementing the **technical, organisational and personnel means as appropriate to prevent the commission of future administrative infringements**, among which is the option to request coverage by the clemency scheme in the matter of distortion of competition ¹.

4.3. The contractor's environmental solvency.

With respect to the **proof of the “environmental” solvency of the bidders**, the provision that approves the inclusion of environmental criteria in this stage of public procurement is Article 122.2 of the LCSP, with regard to particular administrative clauses dossiers.

The said provision – which likewise authorises the inclusion of environmental criteria at bid selection stages and in the implementation of the contract – provides that **the social, labour-related and environmental considerations as well as solvency [and capability], awarding criteria and/or such special conditions of performance that may be established, shall be included in the dossiers of the particular administrative clauses.**

The environmental criteria in relation to the bidders' technical capability [“solvency”] are materialised in the requirement that they **demonstrate the capacity to implement certain environmental management measures** during the performance stage of the contract.

EXAMPLES: in a supply contract, that for delivery non-polluting vehicles must be used. In any contract, that the waste associated with the performance thereof be managed appropriately, including the selective disposal that will facilitate the subsequent reuse or recycling thereof.

Articles 88.1.d) and 90.1.f) of the LCSP make such a provision for works and services contracts, respectively. In these contracts, the technical - or professional - capability of the firm must be proven by one or more of the means set out in the LCSP, at the discretion of the contracting authority and, in particular:

- **In appropriate cases, indication of the environmental management measures that the firm will be able to implement in carrying out the contract.**

It is not entirely clear what the LCSP means by the expression “in the appropriate cases”: it may mean those cases in which the contracting authority imposes a special condition on the implementation of the contract of such a nature (Art. 202 LCSP), or to those cases in which the service to be provided

¹ Regulated in the Law 15/2007, of 3 July, on the Defence of Competition. The “clemency” scheme permits companies involved in collusive practices to elude or reduce the amount of the fines they have to pay if they report the existence of said practices to the authorities, that is, when they report the other parties involved in said practice (for example, a cartel).

affects or may affect the environment (Art. 126.4 LCSP). From the wording of the Act **it is not possible to construe a more precise interpretation of the obligation imposed by Articles 88.1.d) and 90.1.f) of the LCSP.**

In relation to a services contract, Article 90.2 of the LCSP states that it is necessary to stipulate in the announcement of the tender or in the invitation to tender, as well as in the procurement dossiers the means accepted to prove technical capability ["solvency"] of the bidders for the contract with an express statement, among other matters, of the certificates of environmental management required. In this case, **the measures of environmental management set forth in Article 90.1.f) LCSP must be accredited through a certificate or label.** This instrument is studied under heading 6.4 of this didactic unit.

Finally, Article 94 LCSP lays down **a specific rule for contracts that are subject to harmonised regulation** – regardless of the type of contract involved. In these cases, if the contracting authorities should decide to demand, as a means of accrediting technical or professional capability, the submission of the aforementioned certificates of environmental management, these must refer solely to one or more of the following systems:

a) EU Eco-Management and Audit Scheme (EMAS), regulated by the Regulation (EC) 1221/2009, of 25 November.

b) An environmental management system recognised in accordance with the provisions of Article 45 of the afore-mentioned Regulation (EC) 1221/2009.

c) Environmental management standards based on European or international standards drawn up by accredited bodies.

EXAMPLE: The environmental management system based on the standard ISO-14001, designed by the International Organisation for Standardisation (ISO), and applied in Spain by the *Asociación Española de Normalización y Certificación* [Spanish Association for Standardisation and Certification] (AENOR)

d) **Equivalent** certificates issued by bodies established in any member State of the European Union or whose equivalence has been suitably proven by the bidder.

5. The greening of the award stage of the contract: environmental criteria for the awarding of contracts.

The greening of the contract awarding stage consists in positively valuing those characteristics of the bids that will contribute to protecting the environment. Thus, **the contract awarding criteria may include scoring that relates to the environmental aspects** in order to determine the best bid.

EXAMPLE: the contracting authority may award points to environmental aspects of bids such as their energy performance, the level of pollution generated during their production or performance, or the type and volume of wastes it generates and the possibility of recycling, reusing and disposing of it, among others.

Unlike what occurs in the contract preparation stages (design of the contractual object) and the admission of candidates (disqualifications from contracting and solvency conditions), **in this stage, bidders may participate that do not meet the environmental conditions evaluated as awarding criteria, although they will not score any points for these aspects.** Even so, they may end up winning the contract if they succeed in submitting the highest-scoring bid on the basis of the other bid selection criteria, such as the price, the aesthetic and functional qualities or the social/labour-related benefits.

5.1. Provisions of the LCSP with regard to the bid selection stage.

- ❖ **Art. 145 (Requirements and types of criteria for awarding the contract).**
- ❖ **Art. 146 (Application of the awarding criteria).**
- ❖ **Art. 147 (Criteria in the event of a tie).**
- ❖ **Art. 148 (Definition and calculation of the life-cycle).**
- ❖ **Art. 149 (Abnormally low bids).**
- ❖ **Art. 184.3 (Competitions for projects).**

- ❖ **Art. 122 (Dossiers containing the particular administrative clauses).**
- ❖ **Art. 127 (Labels).**
- ❖ **Art. 128 (Reports of evidence, certification and other means of evidence).**

5.2. The inclusion of environmental considerations as criteria for the awarding of the contract.

As pointed out in the previous section, Article 122.2 of the LCSP not only authorises the use of environmental considerations as solvency and capability criteria, but also as awarding criteria and as conditions for the implementation of the contract.

The LCSP dispenses with the former obligation to award the contract to what was termed the “economically most advantageous bid”, and in its place introduces a **general rule for awarding contracts and an exception** thereto (Art. 145.1):

1. As a **general rule**, the awarding of contracts must be done using a series of awarding criteria based on the best **“quality-price ratio”** [value for money].
2. **In exceptional cases**, the contracting authority may award the contract on the basis of criteria based on an approach that focuses on **cost-efficiency**.

This cost-effectiveness may be based on either the **price** or the **cost** of the service, and in the latter case the life-cycle cost may be factored in, which is regulated in Article 148 of the LCSP.

The **life cycle**, which can be defined as the set of all consecutive or interrelated stages related to a specific service, including research and development to be carried out, production, sales marketing and its conditions, transportation, use and maintenance, throughout the existence of a product, a project or the provision of a service, from the sourcing of raw materials or the generation of resources to disposal, dismantling and recycling, is analysed at length under heading 4.3 of this didactic unit.

In any case, as it is an exceptional option, the contracting authority will have to **justify in the contract dossier** the selection of the system to award the contract based on cost-effectiveness and not on value-for-money of the

service (although the LCSP does not contain any element that enables such a preference to be justified, so that the argumentation must be constructed *ex profeso* by the contracting authority).

5.2.a) Awarding criteria to determine the best value for money.

If the contracting authority opts to use the general rule based on the best value-for-money of the service, this can be determined on the basis of economic criteria - *quantitative* but also *qualitative* (Art. 145.2 of the LCSP). The LCSP **expressly includes environmental criteria among the qualitative contract awarding criteria**, provided they are related to the purpose of the contract.

This possibility authorises contracting authorities to score bids submitted for tendered projects taking environmental circumstances into account. Unlike what occurs with the technical specifications or requirements of the services to be procured, which must be complied with by all bids submitted by the bidders, in this stage of public procurement **it is possible that the bidders may present bids that do comply with the environmental characteristics evaluated in the contractual documentation**, but they will have to compete with the rest of the bids without the score awarded for such circumstances.

EXAMPLE: If the contracting authority demands the supply of food products from organic agriculture - as part of the purpose of the contract - no bid can be accepted that does not undertake to supply foods of this kind. However, if at the time of evaluating the bids submitted by the bidders, an additional score is awarded for supplying *eco-friendly* food - a selection criterion for the bid - it will be possible for bidders to submit bids that do not provide for the supply of this type of food, although logically they will not score points for this aspect. These bidders may even be awarded the contract if the total score obtained by their bid is higher than the rest, and the decision not to supply eco-friendly food will not prevent their bid from being selected as the best.

The LCSP provides an **open-ended list** of environmental characteristics of the service that may be used by contracting authorities to select the bid that offers the best value for money:

- Reduction of the **level of greenhouse gas emissions**.

EXAMPLE: Supply of electric or hybrid vehicles.

- Use of **energy-saving and energy-efficiency measures**.

EXAMPLE: The irrigation of gardens with recycled water, the use of silent machinery or the employment of construction materials with a high degree of thermal insulation.

- Use of energy from **renewable sources**.

EXAMPLE: The use of photovoltaic solar energy integrated in buildings (*Building Integrated Photovoltaics*, BIPV).

- **Maintenance or improvement of natural resources** that may be affected by the performance of the contract.

EXAMPLE: recovery and improvement plans of the natural surroundings affected by haulage, such as a road, railway line or a port, or the masses of water affected by a hydro infrastructure, such as a reservoir.

This **list is for the purpose of illustration and is not exhaustive**, since the LCSP uses the expression “among others”, so contracting authorities may use other environmental characteristics as awarding criteria for the contract, provided they are related to its contractual subject matter (Art. 145.2 paragraph 2 of the LCSP).

5.2.b) Awarding criteria to determine the best cost-efficiency.

If the contracting authority opts, with the requirements pointed out, to award the contract on the basis of criteria that are based on an approach that looks for the best cost-effectiveness, this may be, as we have said, the **price** but also its **cost**, calculated on the basis of **the life-cycle cost**. As will be seen in the following sections, in the life cycle, circumstances of an environmental nature may be taken into account, such as energy consumption, the level of pollution or the costs of collection and recycling associated with the end of the useful life of the service (Art. 148 of the LCSP).

5.3. Rules for selecting the contract awarding criteria.

The LCSP establishes a series of rules for the selection of the awarding criteria for contracts:

- a) Firstly, if the contracting authority opts to use a single criterion to award the contract, this need not necessarily be the price, as was the case in the previous regulation.

There is now a requirement that **the sole criterion must be related to the costs**, which may be the **price**, but may also be a criterion based on the **return on investment**, like the cost of the life-cycle calculated in accordance with Article 148 of the LCSP (Art. 146.1 of the LCSP).

b) Secondly, **any qualitative criterion must be accompanied by a cost-related criterion**, which may be the **price**, but may also be an approach based on the **return on investment** of the service, or the life cycle cost calculated according to Article 148 of the LCSP (Art. 145.2 *in fine* LCSP).

c) Thirdly, the LCSP imposes the obligation that, **in certain circumstances, the contracting authority must select more than one awarding criterion.**

The intention of the drafter is that in such circumstances **it is not only the price or some other criterion of a strictly economic nature that is evaluated.**

Specifically, Article 145.3h of the LCSP requires contracting authorities use more than one selection criterion of the best bid in contracts **whose performance may have a significant impact on the environment**, in the awarding of which **they will evaluate empirical environmental conditions**, such as:

- The least **environmental impact**
- The **saving and efficient use** of water, energy and materials.
- The environmental cost of the **life-cycle**.
- *Environmentally friendly* **procedures and methods of production.**
- **The production and management of waste.**
- The use of **recycled or re-used** materials, or **environmentally friendly materials.**

As in the previous case, it is an **open-ended list** of contract awarding criteria, as the legislator uses the expression “such as”, so the contracting authority can use other similar criteria.

Note that this provision refers to a *significant* impact on the environment and not a simple potential or real affect, as Article 126.4 of the LCSP mentions in relation to the contracts whose technical requirements must be defined by applying criteria of sustainability and environmental protection. In this case **the impact on the environment must not only exist**, but in order that it be mandatory for the contracting authority to include the environmental awarding criteria, it is **necessary that said impact have a certain significance for the environment.**

EXAMPLE: the public building security service has a certain environmental impact, for example, if motor vehicles are used to perform this service, but it is hard to see how this impact could be considered *significant*, whereas this is the case in the supply of energy to these same buildings or their

construction or renovation. In the first case the price or any other criterion of an economic nature could be selected as an awarding criterion. In the other two cases, *measurable environmental conditions* will also have to be evaluated, as will their environmental impact and the production and management of waste.

D) Finally, the LCSP contains one other **exception to the voluntary basis** in the use of environmental awarding criteria in relation to **project competitions**. Article 184.3 of the LCSP requires that in project competitions the evaluation of proposals must refer to their *quality*, as well as their technical, functional. Architectonic, cultural and **environmental** values.

The new regulation of the awarding criteria of contracts contained in the LCSP is **innovative**, as it is the first one that **allows the price of contracts to be set aside as the prevailing criterion**.

As has been explained, it is possible to award the contract without taking into account the lower price, as whether one opts for an approach based on the best *value for money* or if one opts for an approach based on *cost-effectiveness*, **it is possible to award the contract without taking into account the price of the bids, but instead considering solely their environmental or social sustainability:**

a) Firstly, and as has been explained when analysing this issue in the new regulation contained in the LCSP, the best value for money can be evaluated based on qualitative criteria and the social characteristics of the contract, and **although these criteria must always be accompanied by a criterion related to the costs, it does not necessarily have to be the price**. It suffices that it is an approach based on the return on investment, or on the life-cycle cost, in which environmental issues may apply.

EXAMPLE: Cost-saving and energy efficiency measures can be used as evaluation criterion no. 1 (qualitative criterion) and the management of the waste produced by the service can be used as evaluation criterion no.2 (criterion related to costs → return → an element that can be evaluated from the life-cycle of the service).

b) Secondly, **the best value for money approach also permits one to disregard the prices of the bids and opt for their cost**, which means that the cost of the life-cycle of the service comes into play once again.

As pointed out above, the determination of the best value for money can be determined on the basis of the **price** charged for the service, but also on the basis of its **cost**, calculated on the basis of **the life-cycle cost**.

EXAMPLE: It is possible that, in a services contract for the painting of public buildings and facilities, the awarding criterion may be its price, but also other

issues related to its life-cycle cost, such as the costs related to the end state of the service (disposal and recycling of waste related to the service, that is, with the supply of paint).

c) Finally, the LCSP has eliminated the afore-mentioned rule that formerly required that in the event that the contracting authority established a sole awarding criterion this would be the lowest price. **Now the single awarding criterion will have to be related to the costs of the contract**, which may be the price, or, once again, a criterion based on return, such as the life cycle cost.

5.4. Calculating the cost of the life-cycle of the services.

As has been stated in the previous section, the life cycle may be **defined** as all those circumstances that affect a specific service, from before its existence - the extraction of raw materials or research - until after its disappearance - recycling, reuse or disposal.

Article 148.1 of the LCSP defines it in these terms. For the purposes of this Act “life cycle” of a product, work or service will include **all of the consecutive or inter-related stages that occur during the existence of a work, product or service**, and, in any case:

- Research and development.
- Manufacturing/production.
- Sales and marketing.
- Transportation.
- Use and maintenance.
- Sourcing of raw materials and generation of resources.
- Disposal, decommissioning and/or end of use.

The calculation of the life-cycle cost has acquired a **capital importance** in Spanish public procurement as Article 148.4 of the LCSP imposes an obligation on contracting authorities to calculate the costs of the service, **preferably on the basis of the life-cycle cost**.

This means that the contracting authorities will have to **provide an appropriate justification of its decision not to use any method of calculation of the life-cycle cost** of the service when they evaluate the costs of the various bids.

Furthermore, this obligation applies equally, whether the contracting authority opts to award the contracts on the basis of the best value for money or on the basis of the best cost-effectiveness (Arts. 145.1 and 2 LCSP).

To **calculate the life-cycle cost**, the contracting authority may take into account **some or all of the costs listed** in Article 148.2 of the LCSP:

1.- Costs borne by the contracting authority or by other users:

- Acquisition costs (basically, the price).
- Costs of use (such as energy consumption or of other resources).
- Maintenance costs (related to the technical support for the product or the costs of repairing buildings or infrastructures).
- End of life costs (such as the costs of collecting the waste generated by the service and their disposal or recycling).

2. Costs charged to *environmental externalities* related to the service during its life cycle, which may include the **cost of greenhouse gas emissions and other pollution emissions, as well as other costs of the mitigation of *climate change***.

EXAMPLE: the costs derived from the contamination generated in water resources when extracting the raw materials necessary for its production (for example, when extracting the metals with which an infrastructure is built), or from the deforestation linked to the production of a certain supply (for example, in relation to a food whose composition contains palm oil).

In order that these costs may be computed in the calculation of the life-cycle cost it is indispensable that its **monetary value can be determined and verified**.

As we have stated, the contracting authority is authorised to **design and/or implement the method to calculate the life-cycle costs** that it sees fit, but this method must meet a series of **conditions** (Art. 148.3 LCSP):

- a) It must be based on criteria that are **objectively verifiable and non-discriminatory** (in this regard, if it has not been established for recurring or continuous implementation but rather for a specific procurement procedure, the method of calculation may not unduly favour or harm the interests of particular firms).

b) It must be accessible **to all interested parties**.

c) It must be possible to provide the information **with a reasonable effort on the part of the firms**,

Contracting authorities are under the obligation to **include in the procurement dossier all of the data that the bidders have to supply to calculate the life-cycle cost as well as the specific calculation method selected**.

However, there will be occasions when the contracting authority **will not be able to freely design or select** the method of calculation of the life-cycle costs. As Article 148.2 *in fine* LCSP points out, in cases in which **an EU standard compels a common method be used to calculate life-cycle costs, it will be the only one that can be used** by the contracting authority.

With regard to this common method of calculation, EU Directive 2014/24/EU, of 26 February 2014, on public procurement repealing 2004/18/EC, **calls upon community authorities to draw up such methods at the community level** (Recitals nos. 96 and 129). However, to date no initiative has been enacted in the European Union in this regard.

5.5. The possibility of using environmental criteria as tie-breakers.

Article 147 of the LCSP allows contracting authorities to establish specific awarding criteria in the particular administrative conditions dossiers to break a tie if, after applying the awarding criteria, there is a tie between two or more bids.

The question that is posed with regard to the greening of the contract selection criteria is: ***is it possible to use environmental criteria in the event of a tie?***

Paragraph 2 of Article 147.1 LCSP states that **criteria to break a tie “shall refer” to a set of circumstances, all of which shall be of a social nature:**

- The percentage of disabled workers on the payroll.
- Bids submitted by employment enterprise for the socially disadvantaged.
- Bids submitted by non-profit entities.
- Bids submitted by fair trade organisations.
- Bids that include measures of a social and employment-related nature that benefit equal opportunities between women and men.

By using the expression “shall refer to”, it appears that the legislator wants to close the door so that the contracting authority cannot select other tie-breaking criteria other than those expressly stipulated (all of which are of a social nature), hence **it does not appear to be possible to use environmental criteria in public procurement to break a tie** [i.e. between bidders].

Furthermore, if the contracting authority does not select any of the tie-breaking criteria above, a **mandatory list of tie-breaker criteria is laid down to be used on a supplementary basis, all of which are likewise of a social nature.**

However, the Resolution dated 18 October 2016, of the Council of Ministers, *which encourages the inclusion of social and environmental clauses in the contracts of the Autonomous Region of Andalusia, states in point eight that “[w]hen several proposals are the most advantageous once the criteria that serve as the basis for the awarding the contract have been applied, **criteria to break the tie shall be applied that shall take into account social and environmental considerations, which shall be indicated in the specifications**”.*

5.6. Environmental precaution when abnormally low bids are submitted: mandatory rejection of bids that violate domestic and international environmental obligations.

In the above regulation, excessively low bids as compared with the figure set by the contracting authority may be rejected, but the reason for such a circumstance is not covered.

The new feature introduced by the LCSP is that now, when a contracting authority determines that a bid is not viable because it has been drawn up in terms that make it abnormally low, **it must reject it if it establishes that this situation is due to a breach of the obligations in respect of national or international regulations**, and no justification in this regard by the bidder is acceptable (Art. 149.4 LCSP).

EXAMPLE: An abnormally low bid is presented in a contract for the supply of office furniture and the contracting authority ascertains that the wood used by the supplier does not comply with Regulation (EU) No. 995/2010 of 20 October 2010, *whereby the obligations of the agents who sell wood and products made of or from wood are established.*

6. Greening the implementation stage of the contract.

The greening of the performance stage of the contract consists of the establishment, by the contracting authority, of **conditions of compliance with the content of the contract that result in the benefit of the protection of the environment.**

EXAMPLE: in a power supply contract, that the power comes entirely from renewable sources, or, in a works contract, that the contractor must implement a plan for the removal and recovery of construction waste.

The establishment of special conditions of an environmental nature for the implementation of the contract **does not entail any limit on the admissibility of candidates**, since the enforceability of these commitments will occur once the contract is awarded, during its performance stage. But **once in the performance stage, these conditions are mandatory** for the contractor, which will be bound to comply with them (having implicitly accepted such conditions of execution because they necessarily appear in the procurement dossiers).

In addition, the contracting authority **can forward these requirements to the candidate admission stage, in the form of solvency and capability requirements, in which case they already function as a limit on the admissibility of candidates**, since **only those who participate in the procurement procedure can participate**. candidates that show in advance - in the candidate admission stage - their capacity to comply with the required conditions of implementation.

The contracting authority **can therefore choose** between requiring environmental clauses during the candidate admission stage - as solvency criteria - or in the contract performance stage. In the first case it acquires special importance, since **it closes the door of the bidding procedure** to all those candidates that do not comply with the required environmental requirements.

EXAMPLE: the supply of electricity entirely from renewable sources may be required as a special condition for performance of the contract or as a solvency requirement for the candidates. In the second case, the candidates must prove in advance their capacity to comply with this contractual performance condition when requesting to participate in the tender procedure (for example, by providing a certificate of Guarantee of Origin (GdOs) granted by the National Commission of Markets and Competition).².

The second greening mechanism introduced by the LCSP in the performance stage of the contract is the **obligation for the contracting authority to take the necessary measures so that the contractor complies with the applicable environmental obligations**, regardless of the legal system in question: international, EU or domestic. In order to meet this obligation, the contracting authority is **expressly empowered to check** that both candidates and contractors comply with the aforementioned environmental obligations.

² In relation to this possibility, see the Resolutions of the Administrative Tribunal of Public Procurement of the Community of Madrid no. 256/2017, dated 19 September, and 110/2018, dated 18 April.

6.1. Provisions of the LCSP with regard to the implementation stage of the contract.

- ❖ **Art. 201 (Obligations in environmental, social or labour matters)**
- ❖ **Art. 202 (Special conditions for the implementation of the contract of a social, ethical, environmental or other nature)**

6.2. Environmental, social and labour obligations.

Article 201 LCSP obliges the contracting authorities to **take the *pertinent measures* to guarantee that during the performance of contracts the contractors comply with the applicable legal obligations in environmental matters** established in the domestic, European or international legal system³.

Any breach thereof obliges the contracting authority to impose **penalties** on the contractor (as regulated in Article 192 LCSP).

This is established without prejudice to the power of the contracting authorities to **take all necessary measures** to verify, during the bidding process, that the bidders comply with the aforementioned obligations.

6.3. Special conditions of an environmental nature for the implementation of the contract.

Secondly, Article 202 LCSP authorises contracting authorities to **establish what are termed *special conditions for the performance of the contract***, provided that they meet the following requirements:

- a) That they are stated in the tender announcement and in the contractual documentation.
- b) That they are related to the purpose of the contract.
- c) That they are not directly or indirectly discriminatory.

³ Set out in Annex V LCSP.

d) That they are compatible with EU law.

Contracting authorities **have the obligation to establish** in all contracts that they award **at least one special implementation condition of an innovative, environmental or social nature**.

- **Therefore, there is no obligation for the contracting authority to require a special condition of implementation of an environmental nature in any case**, since it may choose one of an innovative or social nature to the detriment of the latter.

The LCSP provides an **open-ended list** of environmental considerations that may be required by contracting authorities as special conditions for performing the contract (Article 202.2 LCSP). In this regard, environmental considerations may be established, *among others*:

- The reduction of **greenhouse gas emissions**, (contributing to comply with the objective established in Article 88 of the Law 2/2011, of 4 March, on the Sustainable Economy).

EXAMPLE: in a contract for comprehensive maintenance services of buildings and public facilities, the obligation that when replacing luminaires LED technology must be used, or the requirement to perform an audit to diagnose and improve the energy efficiency of heating equipment or of insulation elements.

- The maintenance or improvement of **environmental assets** that may be affected by the implementation of the contract.

EXAMPLE: requirement to implement conservation plans and improvement of the natural environment that may be affected during the performance of the contract, for example, in the construction of large hydro or transport infrastructures.

- **Sustainable water management.**

EXAMPLE: in a garden service contract, the obligation to use reused or non-potable water for irrigation.

- Encouraging the use of **renewable energies**.

EXAMPLE: an obligation that the energy supplied during the performance of the contract come from renewable energy sources.

- The promoting of the **recycling of products** and the use of **reusable containers**.

EXAMPLE: in a collective food service contract -catering- to schools or colleges, the obligation for the contractor to conduct a selective collection of waste and to train students in this matter. Also, the requirement to use reusable instead of single use packaging (to transport and/or serve food).

- Encouraging the delivery of **products in bulk** and **environmentally friendly production**.

EXAMPLE: in the previous case, the requirement to offer, whenever possible, bulk products versus those packaged singly (for example, juices served in a glass versus individual tetrabricks); or the obligation to use food from organic farming or livestock.

The reaction of the contracting authority to **non-compliance with the special conditions of implementation of the contract**: the contracting authorities **must always be included in the procurement dossiers** and may take the following forms:

- a. **Penalties**
- b. Make them **essential** contractual obligations for the purposes of article 211.f) LCSP (causes of contract termination).
- c. When the above possibility is used, the breach of these conditions may be considered in the specifications as a **serious breach** for the purposes of art. 71.2.c) LCSP (prohibition on contracting) **in the terms established by regulations** (Article 202.3 LCSP).

The contractor is obliged to comply with the special performance conditions and, correlatively, the contracting authority can demand compliance like any other contractual obligation (Article 189 LCSP), although this can also **strengthen its compliance** with the fixing of penalties, setting out *essential* contractual obligations or, in the terms that are established by regulation, consider its breach as a serious breach for the purposes of the prohibition on contracting.

Finally, the special implementation conditions required in the contract specifications will also be required of all **subcontractors** involved in the performance of the contract (Article 202.4 LCSP).

7. Cross-disciplinary aspects of the various stages of public procurement contracting.

In this section we study the environmental precautions contained in the LCSP that do not refer to a specific stage of public procurement, but affect all of them equally.

7.1. Relevant principles.

❖ **Art. 74.2 (Solvency requirement).**

- ❖ **Art. 126.2 (Rules for the defining of technical specifications).**
- ❖ **Art. 127.2.a) (Labels).**
- ❖ **Art. 128 (Reports on proof, certification and other forms of proof).**
- ❖ **Art. 129 (Information regarding obligations in respect of tax, environmental protection, employment and working conditions and the hiring of a specific percentage of persons with disabilities).**
- ❖ **Art. 132 (Principles of equality, transparency and free competition).**
- ❖ **Art. 145.5 y 145.6 (Requirements and types of criteria for awarding the contract).**
- ❖ **Art. 146.1 (Application of the awarding criteria).**
- ❖ **Art. 147 (Labels).**
- ❖ **Art. 202 (Special conditions of contractual implementation of a social, ethical, environmental or other kind).**

7.2. Link between environmental protection clauses and the purpose of the contract.

The need for qualitative clauses, such as environmental criteria, to be linked to the purpose of the contract has been stressed by the European Commission since its Interpretative Communication of 15 October 2001 *on Community legislation on public contracts and the possibilities of integrating social aspects in those contracts (COM (2001) 566 final)*.

In **European jurisprudence** the first decisions that point out this connection are the judgements of the Court of Justice of the European Communities of 17 September, 2002 - Concordia Bus Finland - and of 4 December, 2003 - EVN AG Wienstrom GmbH vs. Republik Österreich -.

The link between environmental criteria and contractual subject matter is required by the LCSP in all stages of public procurement:

- Admission of bidders (Art. 74.2).
- Establishing the technical specifications (Art. 126.2).
- Labels (Art. 127.2.a).
- Awarding criteria (Art. 145.5).
- Tie-break criteria (Article 147).
- Special conditions for the implementation of the contract (Article 202).

However, it is necessary to note that the degree or intensity of the relationship required between the environmental clauses and the contractual subject matter has undergone an **evolution** in recent times:

- **BEFORE:** the aforementioned Communication of the European Commission and the original jurisprudence on the subject required a **direct link** between the environmental clauses and the purpose of the contract,
- **NOW:** from the judgement of the Court of Justice of the European Union of 10 May, 2012 (*European Commission vs. Kingdom of the Netherlands*, known as "Max Havelaar") **it is no longer necessary for environmental characteristics to refer to characteristics intrinsic to the product, that is, to elements incorporated materially to them (altering its nature with respect to equivalent products or services)**. Since this judgement it has been accepted that the environmental clauses refer to factors that do not affect their material substance.

EXAMPLE: in a vehicle supply contract, the requirement that these be electric is a clause that clearly affects the characteristics of the contract object (since an electric vehicle is materially different from a combustion vehicle). The environmental characteristic required affects its material substance, since its nature changes with respect to analogous products that do not include the required environmental characteristic (that is, in relation to combustion vehicles).

On the other hand, if the contracting authority requires, for example, the supply of electricity from non-polluting sources, or paper for reprography from sustainable forests, this clause does not affect the intrinsic characteristics/material substance of the provision (because both energy and paper are identical to their unsustainable equivalents). In this case, as noted, the

existence of a link with the purpose of the contract is also accepted, since, although the environmental clause does not alter its material substance, it refers to the benefit purpose of the contract (electric power or paper supplied).

Following this interpretation, article 145.6 LCSP indicates in this respect that:

- An awarding criterion will be considered to be linked to the purpose of the contract when **it refers to or integrates the benefits that must be performed under that contract**, in any of its aspects and at **any stage of its life cycle**, including the factors that are involved in the following processes:

- a) In the **specific process of production, provision or sale and marketing** of, where appropriate, works, supplies or services, with special reference to the forms of production, provision or environmentally and socially sustainable and fair trade.

EXAMPLE: environmental clauses related to the bleaching of paper without the use of chlorine, the demand for food from organic farming, the prohibition of contaminating materials in products, protection of the natural environment during the performance of works, environmental management of the implementation of supply contracts, environmental measures related to waste management, etc.

- b) In the specific process of **another stage of its life cycle**, even when these factors are not part of its *material substance*.

EXAMPLE: Requirement that environmental standards are respected at the time of extraction of the raw materials used in the manufacture of the contracted product, such as the metals with which the bicycles supplied to the contracting authority are built.

As in the cases stated, these bicycles are materially identical to those built with metal from mining activities that do not respect the environment. Although the environmental clause does not affect the *material substance* of the service, it is considered acceptable because it refers to or integrates the services that must be performed under said agreement (thus respecting the requirement of connection with the purpose of the contract).

Although Article 145.6 LCSP refers specifically to the link between award criteria and contractual object, **such criteria are applicable to any stage of the contract.**

As noted, the link between environmental clauses and the purpose of the contract has been relaxed **does not mean that it can disappear**: the link with the purpose of the contract does not require that the provision must necessarily change its material nature - *material substance* - but it does mean that those elements to which the environmental clauses apply **really affect the performance of the services contracted at any stage of their life cycle** (extraction of raw materials, research and development, manufacturing, transport, marketing, use, maintenance, recycling, disposal, etc.).

It is not possible, therefore, for the contracting authority to require environmental commitments from bidders relating to other activities or products that are not part of the contracted service.

EXAMPLE: Environmental criteria are required of products manufactured by the contractor that are not part of the supply contract (for example, in relation to other models of vehicles not supplied to the procurement), or on activities that are not part of the contractual subject matter (for example, in relation to works performed or services provided by the contractor in the private sector).

Precisely this need that the environmental clauses are related to the performance - in a broad sense - of the contracted benefit would be the reason why Directive 2014/24 / EU, of 26 February, 2014, on public procurement and whereby Directive 2004/18 / EC is repealed, **does not accept** the existence of such a link when the clauses refer not to the specific benefits but to **the general policy of corporate responsibility of a company**, because "it cannot be considered a factor that characterizes the specific process of production or provision of the works, supplies and services acquired ", and, consequently," the procurement bodies cannot be authorized to require bidders to have established a certain policy of social or environmental responsibility of the company "(Recital No. 97, second paragraph).

7.3. Principles of proportionality, transparency, equal treatment and non-discrimination.

The use of environmental clauses in public procurement is subject to several principles: **equal treatment, non-discrimination, transparency and proportionality.**

The positivisation of these principles is set out, in general, in Article 132, Sections 1 and 2 LCSP, which states that:

- Contracting authorities will give bidders and candidates **equal and non-discriminatory treatment** and will align their actions with the principles of **transparency and proportionality.**

- **Under no circumstances may the participation be limited by the legal form or the profit motive in the procurement**, except in the contracts reserved for entities included in the Fourth Additional Provision (Special Employment Centres of social initiative and regulated enterprises for the promotion of socially excluded persons).
- The procurement shall not be conceived with the intention of avoiding the requirements of publicity or those related to the relevant awarding procedure, **nor artificially restricting competition, either unduly favouring or harming certain firms.**

Some reference has already been made to the principle of equal treatment and conversely, non-discrimination, applied to the use of environmental clauses in public procurement (Article 126.1 LCSP, regarding the establishment of technical requirements).

Other examples can be found in articles 145.5 LCSP (criteria for awarding the contract) and 147.1.e) LCSP (criteria for tie-breaking between bids).

The **principle of transparency** is required in certain issues related to the use of environmental clauses in public procurement, such as labels (Article 127.2.c) LCSP) and the criteria for awarding the contract (Article 145.5 LCSP).

The **principle of proportionality** applied to the use of environmental clauses in public procurement is required in relation to the solvency and capability criteria of bidders (Article 74.2 LCSP) and the criteria for awarding contracts (Article 145.5 LCSP).

There is no pre-established limit or maximum threshold relative to the level of environmental sustainability required for the contracted services, but as the European Commission reiterates, "it must adapt its approach to the specific requirements of the contract, including its value and the level of environmental risk involved. "(Buying Green! / Green Acquisitions, Handbook on Green Public Procurement, 3rd ed., 2016, p. 39).

In this way, **environmental sustainability requirements demanded in public contracts must be proportional to their value, but fundamentally, to their capacity -potential or real- to affect the environment**, so that standards of environmental protection cannot be demanded. elevated to those benefits with little environmental transcendence, and vice versa. In this way, at the moment of deciding the level of environmental requirement of the benefits to be contracted by the contracting authorities the principle of proportionality must be taken into account without exception.

EXAMPLE: the level of environmental requirement of the clauses included in a contract cannot be the same in a service contract for dependants as in a construction contract for the construction of a road.

7.4. Environmental obligations of disclosure.

Article 129 LCSP empowers the contracting authority to state in the specifications the body or bodies from which the bidders can obtain the **pertinent information in relation to the obligations** related to a series of matters, among which is the protection of the environment.

When this occurs, the contracting authority must request the bidders participating in the award procedure **to state that they have taken into account such obligations when preparing their bids.**

In any case, this does not prevent the application of the provisions of Article 149.4 LCSP on verification of offers that include abnormal or disproportionate figures.

7.5. Labels.

Certificates or *labels* are regulated in article 127 LCSP, which defines them as:

"[...] any document, certificate or accreditation that **confirms** that the works, products, services, processes or procedures in question **meet certain requirements.**"

The LCSP expressly admits the use of environmental labels - *ecolabels* - as evidence in the admission of bidders (arts.

89.1.f) or 90.2 LCSP), definition of the technical requirements, award criteria and conditions of performance of the contract (Article 127.2 LCSP).

But not just any label is admissible as a means of proving that the works, services or supplies meet the required characteristics. In order for a contracting authority to be able to demand a label at any of the aforementioned moments, it is necessary that it complies with a series of **requirements**:

a) That the requirements for obtaining the label refer only to **criteria linked to the purpose of the contract** and are appropriate to define the characteristics of the works, supplies or services that constitute said object.

When a label complies with letters b), c), d) and e) but establishes requirements not related to the purpose of the contract, the contracting authorities may not require the label as such but, in substitution thereof, may define the requirements techniques by reference to the specifications detailed in that label or, where appropriate, to parts of it that are linked to the purpose of the contract and are appropriate to define the characteristics of said purpose.

b) That the requirements for obtaining the label are based on criteria that **can be objectively verified and are non-discriminatory**.

c) That the labels be adopted in accordance with **an open and transparent procedure** in which all the parties concerned, such as government agencies, consumers, social partners, manufacturers, distributors and non-governmental organizations, can participate.

d) That the labels are **accessible** to all interested parties.

e) That the requirements for obtaining the label have been **set by a third party** over which the firm cannot exercise a decisive influence.

f) That references to labels **do not restrict innovation**.

However, and this is very important, the indication of a specific label in the technical specifications **never exempts the contracting authority from its obligation to clearly detail in the specifications the characteristics and requirements that it wishes to impose** and whose compliance the specific label required is intended to prove (Article 127.5 LCSP) *

EXAMPLE: the contracting authority may require a specific label (for example, the FSC label, which certifies that the wood used in the contracted service comes from sustainably managed forests), but it must also detail in the procurement dossiers the specifications and requirements required to obtain such a label, so that **the candidate can know and demonstrate that their offer meets these requirements, even if it does not have the required label**.

* This is one of the most important requirements of which, in relation to labels, imposed the ruling of the Court of Justice of the European Union of May 10, 2012 (*European Commission vs. Kingdom of the Netherlands, known as "Max Havelaar"*), fundamental in this matter.

It is also possible that the contract authorities may only require a **partial** label. In this case, when the contracting authority does not require in the specifications

that the works, supplies or services comply with all the requirements required to obtain a label, they must indicate which of these requirements is being referred to (Article 127.4 LCSP).

Contracting authorities must accept all those **labels equivalent** to those specifically required (Article 127.3 LCSP).

Equivalent labels are those that verify that the works, supplies or services meet requirements that are similar to those that are required to obtain the label originally required by the contracting authority.

In addition, the contracting authority **is obliged to accept other means of proof** that demonstrate that the services provided by the future contractor meet the requirements of the specific label required (the so-called "**equivalence test**"). The burden of the equivalence test falls, in any case, on the candidate or bidder (Article 127.6 LCSP).

Article 128 LCSP establishes some accepted **means of proof** to prove the equivalence of labels:

a) The Contracting authorities may require that the economic operators provide a **test report or a certificate issued by a conformity assessment body as a means** of proving compliance with the technical requirements, award criteria or conditions of implementation of the contract.

If the contracting authority opts for the second option - certificates issued by an assessment body of conformity - it must also accept the certificates equivalent to the one specifically demanded.

Conformity assessment bodies conduct activities of calibration, testing, calibration and inspection. Its accreditation is regulated by Regulation (CE) 765/2008 of 9 July, 2008, *setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93*.

EXAMPLE: in Spain, both the Spanish Association for Standardization and Certification (AENOR) and the National Accreditation Entity (ENAC) accredit the different conformity assessment bodies in different areas.

b) In addition to the means of evidence referred to in the previous point and on a supplementary basis, the Contracting authorities must accept other means of proof, such as the ***manufacturer's technical reports***.

These will be acceptable if the bidder does not have access to the certificates or reports of required tests, nor the possibility of obtaining them within the required deadlines, and provided that such lack of access is not due to causes attributable to the bidder and that it is sufficient to prove that its bid meets the technical requirements, award criteria or conditions of contract implementation.