

**SOCIAL AND ENVIROMENTAL CRITERIONS IN  
PUBLIC PROCUREMENTS: A VISION FROM SPAIN.**

Oslo, 1 de October de 2004

Recently in Spain, the Ministry of Public Works has announced its intention of developing new norms to apply to the public procurements, to introduce **new terms and clauses** to avoid abnormally low tenders; to establish criterion to reward the companies whom have been reliable in other past contracts having carrying out in strict terms the objects of their agreement; to value aspects such as the fulfilment of the deadlines; the necessity of introducing modifications in the projects because of the execution of the works, quality of works, production, management, environmental process; and introduce the so-called “social and environmental criterions to award the contracts”, to value the different offers of the bidders so that those will be taken into account to award the contract the stable employment of the workers, the measure of healthy and safe used in the works done, the effort done in Innovation and Development and other aspects related with the past and history of the enterprises.

It is not a new matter that the conditions of the contracts, the announcement and during the process of contacting, have to respect scrupulously the legality, the legal frame, both European and Spanish laws.

In this way, the most named Directive in this last hours, 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, is not so clear as we wanted, but It provides in the **paragraph number 29 of its pre-amble**:

*“(29) ...Contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services...*

*...Contracting authorities should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover.”*

As we can see it's referred to the way of execution of the contract, not to a previous phase of valuing the bidders.

And in the **number 46** of its pre-amble:

*“(46) Contracts should be awarded on the basis of **objective criteria** which ensure compliance with the*

*principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender'.*"

Moreover, the one that is not so clear as desirable, the **article 53** provides:

*" Article 53*

*Contract award criteria*

*1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:*

*(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental*

*characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or*

(b) *The lowest price only.*”

This is one of the biggest deceptions of the directive, because it doesn't refer in this article expressly that the criterias have to be objective and only can evaluate the offer as it, and never analyse the way the enterprises are.

In my opinion, that is causes for the possibility that some countries can have, as the article 52 provides, **official lists** of approved economic operators and certification by bodies established under public or private law. In this point, I should say that Spain has a very operative way of public qualification that is obligatory to contract with the civil service, which analyse every aspect of the companies to value their capacity and solvency.

On the other hand, the Spanish law provides that the contract award criteria have to be **objective in all cases**, mentioning some as the price, the term of execution or delivery, the utilization cost, quality, cost-effectiveness, technical quality, maintenance, technical assistance, etc., and all of them as the article 53 of the directive provides.

The demand of objectivity is required by the **principles of equal treatment and non-discrimination** and especially by the requirement of acting in a **transparent** way. This seems that you can analyse the enterprise in a previous state, asking whatever you think that can be interesting or necessary to know how much capacity or solvency can offer to carry out the contract, but not when you begin to value the offers of the candidates. In that point you just can analyse the offer as it, clearly and not valuing the way the company is, its number of workers, machinery, experience in other works, etc.

It should be like a **literary contest**; you appreciate if all the candidates are eighteen years old, are from Norway, and only women, for example. Then you give a bar code to each one and that code will be their name from there to the end of the process. Once you have selected the winning work, you open an envelope to know the real lucky writer name. In this case you only value the offer not the person, the novel not the solvency, the book not the appearance.

Only if we use this way of working we can fulfil with the demand of equal treatment and effective and real competition, and apply the only two criterions to award: the most economically advantageous or the lowest price.

That's the outline of the process, divided in **two phases**:

- The first one to value the candidates.
- The second one to value their offers with an objective method.

The last team of the Ministry of Hacienda, when the Partido Popular of Jose Maria Aznar was on the government, set up a **Commission of Experts in Public Procurements** - formed by important lawyers, professors, civil servants from the Public Administration and employers organizations and where I had the honour to participate- that studied the situation of the national and international legislation, and specifically the new Directive in relation with the Spanish legislation and got thirty five conclusions; one of them couldn't say nothing more than there is necessary to separate the quality analysis - that will determinate the inclusion or exclusion in the process of the candidates by the grade of solvency – from the economic and technical study of the offers, and to avoid the use of award criterions that value aspects of the characteristics of the companies instead of their offer. And that is the way our legislation and practice in public contracts is working and respecting the principles of equal treatment and transparency.

In this way, it is necessary to delimit the criterions referred to the subject as it - that will assess how big is the enterprise, how much economic power has, how many workers or how the company works - from the objective criterions - that will value with independence from who

presents the offer, how is the technical solution proposed, how much it costs, how long is going to be, or the way of working in relation with the object of the contract, with its content.

That is why it is **not advisable to include** award criteria which value different things than the offers, for example how many workers has had in the past, the type of contracting way that the company usually uses, number of worker who has come from disadvantage collectives, the environmental system used in the way of working or other similar social criterions.

Whatever, the directive and our national legislation consider that it has to **be rejected the awards criterions that value the past of the companies** or the way of working in the past contracts, because in other way we were not respecting the previous phase of valuing the solvency quantifying some aspects of the candidates, and we should only exam once the personal and subject situation, and then admit or reject them from the process. Once it is done, we will only ask for offers and look for the cheapest or the most economic advantageous tender.

Therefore, what the public client can demand is the way of working for the future, not for the past; we could ask for some way of working, some methods, some specific technical solution in relation with the contract that we are offering but not with the past of the candidates, with the works already

done, with the way that they been using their capacity or means.

Otherwise, the directive 2004/18/ EC permits the use of social award criteria only when they were demand for the contract, for the object of the contract, and prohibiting specifically that using these criteria the administration could award the contract to whoever wants, doing a free selection, a discretionary and arbitrary selection.

In this point, I would like to show how it is the situation **in Spain**, in particular two judge process that are analysing two legal dispositions that includes social criteria, situation that “mutatis mutandis”, changing whatever you have to change, could apply to environmental criteria.

The first one is the **Order in council 213/1998, de 17 de December, that establish some question in Public Contracts to support the quality and stability employment.** In a few word this norm provides:

*“Article 2. Objective award criterions in relation with employment.*

*1. In the award criterions of the tenders as well as the objectives criteria like price, term, and other objectives that set out the State Law of public Contracts, it has to be included*

*necessary one or several objectives (?) criteria awards in relation with employment, attending to the specific characteristics of the object of each contract:*

- a) *The staff stability in relation with the number of workers with indefinite contracts during the last year before the presentation of the offer.*
- b) *Percent of workers with indefinite contracts in the moment of the presentation of the offer.*
- c) *Percent of worker who are going to be jointed to the direct execution of the contract.*
- d) *New hiring of workers linked to the execution of the contract.*

2. ...

3. *These criterions in relation with the employment will have to mark in all cases the twenty per cent of the total valuation.*

On the other hand, we have the Order in council 49/2003, which approve the regulation of the public contract for Madrid says in the same way that the contracts will have to be awarded by means of the objective award criteria said in

the precedent law in relation with quality and stability in the employment.

As we can see none of this award can be considered objectives and referred exclusively to the offers.

There is one infringement case in the European Commission - number 5040/1998 - about these norms which is still in study.

Finally I want to remember the words that were said yesterday by **Mr. Alexander Schaub**: “The new directive doesn’t introduce new possibilities of permitting social and environmental criterions; what the directive does is to throw messages to not understand incorrectly what she provides”.

Thank you.

Madrid, 2004-09-28