



Is it possible to challenge social clauses in public contracts?

Resolution No. 600/2016 of the Central Administrative Court of Contractual Appeals (TACRC) of 22 July 2016

Recently, different administrations have taken measures to promote the inclusion of social aspects ("social clauses") amongst the criteria for awarding public contracts and the trend in favour of their acceptance has grown. However, it must be noted that not all social clauses are valid.

By means of this Resolution, the TACRC rejected a social clause that granted 5 points to any offer which included training to professionals, patients and the general public on specific disorders. The TACRC established that the aforementioned clause was not directly linked to the purpose of the contract, given that the purpose was "plainly and simply" to successively deliver analytical equipment.

Based on this resolution, we believe it is important to briefly review the legislation and case law on this topic.

Since 2007, the Public Sector Contracts Law in Spain has stipulated that in order to evaluate offers, social clauses may be included if they are linked to the needs of the underprivileged population which benefits from the performance of the contract. Directive 2014/24/EU took one step further and in its Article 67 it expressly considered the possibility of including social aspects (generally) amongst the criteria for awarding a public contract.

In light of these new parameters, their inclusion in the specifications of public contracts has been more accepted by the Courts. However, having analysed more recent resolutions and

judgments, we would like to draw attention to the requirements that the social clauses in specifications of public contracts must meet:

- They must be directly related to the purpose of the contract or to its implementation conditions.
- They must not be discriminatory or distort competition, and their importance related to the rest of the awarding criteria must be taken into account.
- They cannot unduly interfere in the corporate policy of companies. Measures which restrict the freedom of enterprise must be proportionate and indispensable.
- They must be included as special contractual implementation conditions or as awarding criteria to evaluate offers. Therefore, they cannot represent mandatory requirements or requisites for participating in the tender process.
- Objective parameters must be included to establish when the social obligation is considered fulfilled and an effective control must be established by the Public Authority during the contract implementation phase.