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## **Public procurement for social responsibility and inclusion of persons with disabilities<sup>1</sup>**

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## **Summary**

1. Transversality of disability policies
2. Disability in the regulatory framework of public contracts
3. Strategic and socially responsible public procurement
4. Integration of persons with disabilities and reservation of public contracts for sheltered employment centers

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<sup>1</sup> Traducción autorizada por el autor Ph D. José Antonio Moreno Molina, quien publicó el documento originalmente en español bajo el título: Compras públicas socialmente responsables e inclusión de las personas con discapacidad.

## **Transversality of disability policies**

The consideration of disability in the legislation on public contracts is a manifestation of the connection between public procurement and social policies.<sup>2</sup>

The United Nations Convention on the Rights of Persons with Disabilities<sup>3</sup> includes among the general obligations of the signatory States the requirement to take into account "in all policies and programs, the protection and promotion of the human rights of persons with disabilities" (Article 4.1.c).

This is the first legally binding text that recognizes disability as a matter of human rights.<sup>4</sup> It has thus represented a qualitative leap in social policies in this field, by setting as the main objective the need to ensure that persons with disabilities enjoy human rights on an equal basis with others.

In the World Report on Disability<sup>5</sup>, it is recommended that the policies and strategies adopted have a broad inclusive profile of areas and people and that they consider the need to include persons with disabilities in all poverty eradication programs, education improvement, and inclusion measures.

The Treaty on the Functioning of the European Union (TFEU) stipulates that the Union, in the definition and implementation of its policies and actions, shall strive to combat all discrimination based on disability (Article 10) and may take appropriate actions to combat discrimination based on disability (Article 19).

The European Disability Strategy, the Strategy on the Rights of Persons with Disabilities 2021-2030<sup>6</sup>, aims to improve the lives of persons with disabilities in Europe and worldwide. The

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<sup>2</sup> This can be seen regarding the connection between procurement and public policies ROMERO MOLINA, C.A. AND GÓMEZ MONTERROZA, L.A., "The principle of balance: an environmental approach to the primary and secondary policy objectives of public procurement," *Veredas do Direito*, v.17, n.39 (2020), pp. 297-308 (<http://dx.doi.org/10.18623/rvd.v17i39.1792>).

<sup>3</sup> The Convention on the Rights of Persons with Disabilities of December 13, 2006, was adopted by the United Nations through Resolution 61/106, in accordance with Article 42.

<sup>4</sup> DE ASIS, R., BARRANCO, M.C., CUENCA, P., and PALACIOS, A., "Some general reflections on the impact of the International Convention on the Rights of Persons with Disabilities on Spanish Law," in AAVV (editor CUENCA GÓMEZ, P.), *Studies on the impact of the International Convention on the rights of persons with disabilities on the Spanish legal system*, Dykinson, Madrid, 2010, p. 13.

<sup>5</sup> World Health Organization and World Bank, *World Report on Disability*, Geneva, 2011, pp. 18 and onwards.

<sup>6</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions "A Union of Equality: Strategy on the Rights of Persons with Disabilities for 2021-2030," COM (2021) 101 final.

Strategy builds upon the outcomes of the previous European Disability Strategy 2010-2020<sup>7</sup> and aims to progress towards a situation where, regardless of their gender, race or ethnic origin, religion or beliefs, age, or sexual orientation, all persons with disabilities can assert their human rights, enjoy equal opportunities and participation in society and the economy, have the ability to choose where, how, and with whom they live, have the freedom to move within the Union regardless of their support needs, and do not experience discrimination.

This new reinforced Strategy, considering the risks of multiple disadvantages faced by women, children, older persons, refugees with disabilities, and individuals with socio-economic difficulties, promotes an intersectional perspective in line with the 2030 Agenda for Sustainable<sup>8</sup> Development and the United Nations Sustainable Development Goals.

### **Disability in the regulatory framework of public contracts**

Before the European Union Directives on public procurement included any measures in this regard, the interpretative Communication from the Commission on "Community legislation on public contracts and the possibilities of integrating social aspects into such contracts,"<sup>9</sup> as well as the Commission Communication "Public Contracts in the European Union," adopted by the Commission on March 11, 1998<sup>10</sup>, advocated for the possibility of integrating social aspects into public contracts, which was also recognized by the case law of the Court of Justice of the European Union (CJEU) since the Beentjes judgment (of September 21, 1988, in case 31/87).

In Spain, the eighth additional provision of the Royal Legislative Decree 2/2000 of June 16, which approved the consolidated text of the Public Procurement Law, allowed contracting with companies that employed people with disabilities, as well as with non-profit entities. In this regard, it stated:

"1. Contracting authorities may indicate in the tender documents the preference for awarding contracts to proposals submitted by public or private companies that, at the time of proving their technical solvency, have a

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<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, "European Disability Strategy 2010-2020: A Renewed Commitment for an Inclusive Europe," SEC (2010) 1323 and 1324, p. 11.

<sup>8</sup> United Nations Resolution "Transforming our world: the 2030 Agenda for Sustainable Development" adopted by the General Assembly on September 25, 2015 (A/70/L.1).

<sup>9</sup> Documento COM (2001) 566 final.

<sup>10</sup> Documento COM (98) 143.

workforce of disabled workers of not less than 2 percent, provided that these proposals are equal in their terms to the most advantageous ones from the perspective of the objective criteria underlying the award.

2. The same preference may be established in the award of contracts relating to social or welfare services for proposals submitted by non-profit entities with legal personality, provided that their purpose or activity is directly related to the object of the contract, as stated in their respective statutes or founding rules and they are registered in the corresponding official registry. In this case, the contracting authority may require these entities to submit a breakdown of the offered price based on their costs."

Directive 2004/18/EC did not include this provision, although the Public Sector Contracts Law of 2007 maintained it in its Sixth Additional Provision (fourth additional provision of the 2011 TRLCSP) with the same discretionary nature and with the percentage of disabled workers in the workforce stated as "greater than 2%"<sup>11</sup>. This discretionary nature is also reflected in Article 147 of the LCSP 2017, which states in its first paragraph the authority of contracting authorities to establish specific award criteria in the tender documents for tie-breaker purposes in cases where, after the application of the award criteria, a tie occurs between two or more bids.

The current Spanish Law 9/2017 on Public Sector Contracts (LCSP 2017) includes, as a cause for prohibition of contracting with public sector entities, the failure to meet the requirement that at least 2 percent of the employees of companies with 50 or more workers are workers with disabilities. This was already anticipated by the amendment to the TRLCSP by Law 40/2015 of October 1, on the Legal Regime of the Public Sector, so it does not actually represent a novelty. Another specific cause is having been definitively sanctioned for serious offenses related to professional integration and equal opportunities and non-discrimination of people with disabilities.

The eighteenth additional provision of the LCSP 2017 establishes, on a transversal basis, that in the field of public procurement, the determination of admissible means of communication, the design of instrumental elements, and the implementation of procedural steps must be carried out taking into account criteria of universal accessibility and universal design or design for all

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<sup>11</sup> The discretionary nature of the tiebreaker criterion became mandatory in some Spanish regional legislation, such as the Foral Law 6/2006 of June 9th, on Public Contracts in Navarra, Article 51.

people, as defined in the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion, approved by Royal Legislative Decree 1/2013 of November 29.

The provision thus includes what was already stipulated in the twenty-first additional provision of the LCSP 2007, which did refer to the previous legislation in the field by referring to the definitions of Law 51/2003, of December 2nd, on Equal Opportunities, Non-Discrimination, and Universal Accessibility for Persons with Disabilities.<sup>12</sup>

According to letter k) of Royal Legislative Decree 1/2013, universal accessibility is the condition that environments, processes, goods, products, and services, as well as objects, tools, instruments, and devices, must meet in order to be understandable, usable, and practicable by all individuals in conditions of safety and comfort and in the most autonomous and natural way possible. It presupposes the strategy of "universal design or design for all people" and is understood without prejudice to the reasonable accommodations that may need to be adopted.

In turn, universal design or design for all people is the activity through which environments, processes, goods, products, services, objects, instruments, programs, devices, or tools are conceived or designed from the outset, whenever possible, in such a way that they can be used by all individuals, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design or design for all people" shall not exclude assistive products for particular groups of persons with disabilities when they need them (letter k) of Royal Legislative Decree 1/2013).

To facilitate accessibility, it will be essential to make reasonable adjustments, understood as the necessary and appropriate modifications and adaptations of the physical, social, and attitudinal environment to the specific needs of persons with disabilities, which do not impose a disproportionate or undue burden when they are required in a particular case, effectively and practically, to ensure that persons with disabilities can enjoy or exercise all rights on an equal basis with others.

## **Strategic and socially responsible public procurement**

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<sup>12</sup> "ESCRIHUELA MORALES, J., Public Sector Procurement. Special Reference to Supply and Service Contracts, La Ley, Madrid, 2007, section 2.5.c)"

The currently applicable Spanish Law 9/2017, of November 8, on Public Sector Contracts (hereinafter referred to as LCSP 2017), has incorporated into the national legal system Directive 2014/24/EU of the European Parliament and of the Council of February 26, 2014, on public procurement, and Directive 2014/23/EU of the European Parliament and of the Council of February 26, 2014, on the award of concession contracts.

The preamble of LCSP 2017 emphasizes from the beginning its dependence on European Union<sup>13</sup> law and draws attention to the fact that we are currently facing "a legislative framework marked by the so-called 'Europe 2020 Strategy,' in which public procurement plays a key role." Indeed, the new European Union law advocates for a strategic use of public procurement<sup>14</sup>. The adoption of the fourth-generation directives in this field<sup>15</sup>, whose main objective is to simplify,

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<sup>13</sup> The consideration of social aspects in public procurement has relevant precedents in European law, among which the following should be highlighted: the European Commission's Communication on "Community law on public contracts and the possibilities for integrating social aspects into such contracts" (COM 2001, 566); the measures introduced by Directive 2004/18/EC of the European Parliament and of the Council of March 31, 2004, on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts; the European Commission's Guide on "Social Procurement: A Guide to Considering Social Aspects in Public Procurement" (SEC 2010, 1258 final); and the "Green Paper on the Modernization of EU Public Procurement Policy: Towards a More Efficient European Public Procurement Market" (COM 2011, 15), which served as a precursor to Directives 2014/23 and 24.

In Spain, the Public Sector Contracts Law (LCSP) of 2007 and the Public Sector Contracts Consolidation Act (TRLCSPP) of 2011 represented a significant advancement. Prior to that, on June 23, 2009, the Congress of Deputies unanimously approved a Non-Legislative Proposal requesting the promotion of socially responsible management by Public Administrations through actions that encourage the incorporation of social clauses in public tenders and contracts. At the regional level, several noteworthy initiatives were undertaken, such as the Decree of the Community of Madrid 213/1998, which established measures in administrative contracting to support employment stability and quality. For example, Agreements 59/2012 and 44/2016 of the Junta of Castilla y León approved binding guidelines for the contracting bodies of the General and Institutional Administration of the Community of Castilla y León regarding the incorporation of social aspects in procurement, and the Law 3/2016 of the Basque Country aimed to include certain social clauses in public procurement.

For further reference, you can consult the following sources: GIMENO FELIÚ, J.M., "Novedades en la nueva Normativa Comunitaria sobre contratación pública" (Novelties in the new Community Regulations on public procurement), *Revista de estudios locales*, No. 161 (2013); GALLEGO CÓRCOLES, I., "¿Pueden incluirse cláusulas sociales en la contratación pública (I)?" (Can social clauses be included in public procurement (I)?), *Contratación Administrativa Práctica*, No. 114 (2011); MEDINA ARNÁIZ, T., "Social Considerations in Spanish Public Procurement Law", *Public Procurement Law Review*, vol. 20 (2011); BERNAL BLAY, M. A., "Hacia una contratación pública socialmente responsable: Las oportunidades de la Ley 30/2007, de 30 de octubre, de Contratos del Sector Público" (Towards socially responsible public procurement: Opportunities offered by Law 30/2007, of October 30, on Public Sector Contracts), *Revista Aragonesa de Administración Pública*, special issue on Public Sector Contracts Law (2008); and RAMOS PÉREZ-OLIVARES A., *La regulación de las cláusulas sociales en los contratos del sector público tras el RD Legislativo 2/2011 (Regulation of social clauses in public sector contracts after Legislative Royal Decree 2/2011)*, La Ley, Madrid, 2012.

<sup>14</sup> GIMENO FELIÚ, J.M., *The new European legislative package on public procurement: from bureaucracy to strategy (public contract as a tool for institutional leadership of public authorities)*, Aranzadi, Cizur Menor, 2014, pages 39 et seq.

<sup>15</sup> See GIMENO FELIÚ, J.M., "The new directives - fourth generation - on public procurement. Towards an efficient strategy in public procurement," *Revista Española de Derecho Administrativo*, no. 159 (2013), pages 39-106; and MORENO MOLINA, J.A., "The fourth generation of European Union directives on public contracts," in AAVV (ed.

modernize, and improve the efficiency of rules and procedural requirements for public procurement in the European Union<sup>16</sup>, seeks to promote the achievement of other public policies through procurement.<sup>17</sup> They propose that public buyers make better use of public contracts, which are a key element of EU national economies<sup>18</sup>, in support of common social objectives such as environmental protection, increased energy and resource efficiency, the fight against climate change, the promotion of innovation<sup>19</sup>, employment and social integration, and the provision of high-quality social services under the best possible conditions.<sup>20</sup>

Directive 2014/24/EU on public procurement itself, after highlighting how it "is a key instrument for achieving smart, sustainable, and inclusive growth," states in Consideration 3.3 that when applying the law, "account should be taken of the United Nations Convention on the Rights of Persons with Disabilities, in particular regarding the choice of means of communication, technical specifications, award criteria, and conditions of contract performance."

In this regard, it is worth noting the Commission Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions of October 3, 2017, "Making Public Procurement Work in and for Europe," which identifies a series of priority areas for transforming public procurement, including ensuring a greater acceptance of strategic public procurement. Additionally, the Commission Recommendation of October 3, 2017, on "Professionalization of Public Procurement: Building an

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GIMENO FELIÚ, J.M., coord. BERNAL BLAY, M.A.), Observatorio de Contratos Públicos 2012, Aranzadi, Cizur Menor (Navarra), 2013, pages 115-163.

<sup>16</sup> MORENO MOLINA, J.A.; PUERTA SEGUIDO, F.; PUNZÓN MORALEDA, J. and RAMOS PÉREZ OLIVARES, A.: Keys to the application of Directive 2014/24/EU on public procurement, Wolters Kluwer-El Consultor de los Ayuntamientos, Madrid, 2016, pages 197 et seq.

<sup>17</sup> GIMENO FELIÚ, J.M., "Strategic public procurement," in Strategic public procurement (coord. PERNAS GARCÍA, J.), Aranzadi, Cizur Menor, 2013, pp. 45-80.

<sup>18</sup> Public authorities spend approximately one-fifth of the EU's GDP each year on the acquisition of works, supplies, and services (Special Report of the European Court of Auditors No. 17/2016, "EU institutions can do more to facilitate access to their public procurement," Luxembourg, 2016 - report submitted in accordance with Article 287(4), second paragraph, of the TFEU).

You can also refer to the European Commission: "Thematic factsheets of the European semester. Public procurement".

<sup>19</sup> VALCÁRCEL FERNÁNDEZ, P., "Promoting Public Procurement for Innovation (PPI) through different forms of joint procurement: analysis of cases," Joint procurement and aggregate demand in public sector procurement: a legal and economic analysis, Aranzadi, Cizur Menor, 2016, pages 349 et seq. And "Decisive impetus in the consolidation of responsible public procurement. Green contracts: from possibility to obligation," Environmental Legal News, no. 1 (2011), pages 16-24.

<sup>20</sup> See ALONSO GARCÍA, C., "Considering the environmental variable in public procurement in the new European Directive 2014/24/EU," European Union Law Journal, no. 26 (2015), pages 5 et seq., and PERNÁS GARCÍA, J., Green Public Procurement, La Ley, Madrid, 2011, and "The strategic use of public procurement to support environmental policies," in Environmental Policy Observatory 2012, Civitas, Cizur Menor, 2012, pages 299-323.

Architecture for the Professionalization of Public Procurement," emphasizes that public procurement faces new challenges as it is expected to increasingly:

"demonstrate the best value for money in public investments in increasingly tight budgetary environments; seize opportunities from digitalization and evolving markets; make a strategic contribution to cross-policy objectives and social values such as innovation, social inclusion, and economic and environmental sustainability; maximize accessibility and demonstrate responsibility to minimize inefficiencies, waste, irregularities, fraud, and corruption, as well as to create responsible supply chains." (p. 3)

LCSP 2017 incorporates this strategic vision of public contracts<sup>21</sup> and goes beyond the traditional bureaucratic approach in this area<sup>22</sup>. Its social and environmental aspirations exceed the mandatory legal scope of European standards, as can be inferred from essential Article 1.3 or subsection 6 of Article 145 of LCSP 2017.

The Recommendation of the State Advisory Board on Administrative Procurement to contracting authorities regarding various aspects related to the entry into force of the Public Sector Contracts Act 2017, dated February 28, 2018, states that the new Law represents a "milestone of great importance for Spanish public procurement (...) It is a fundamental regulation in the economic sphere of our country, as this sector is also a driving force for the economy" (p. 3).

As highlighted by the European Court of Auditors, public procurement policy is nowadays a fundamental tool for the development of the single market, the achievement of smart, sustainable, and inclusive growth, and the efficient and effective use of public funds<sup>23</sup>.

Through socially responsible public procurement or socially strategic public procurement, public authorities can promote "employment opportunities, decent work, social inclusion,

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<sup>21</sup> See GIMENO FELIU, J.M., "The interpretative value of EU directives on public procurement and 'pretorian' law. Transposition options in Spain in the reform proposal," in AAVV (dir. GIMENO FELIÚ, J.M., coord. BERNAL BLAY, M.A.), Observatory of Public Contracts 2014, Aranzadi, Cizur Menor (Navarra), 2015, p. 19.

<sup>22</sup> GIMENO FELIÚ, J.M., Special Report. Public Procurement Control System in Spain, Public Procurement Observatory, 2015, pp. 3 et seq.:

[http://www.obcp.es/index.php/mod.documentos/mem.descargar/fichero.documentos\\_SPECIAL\\_REPORT\\_OBPC\\_PUBLIC PROCUREMENT\\_CONTROL\\_SYSTEM\\_IN\\_SPAIN\\_2015\\_0f8f25d8%232E%23pdf/chk.13f88f1fcc7d3864e48c973df4e880f7](http://www.obcp.es/index.php/mod.documentos/mem.descargar/fichero.documentos_SPECIAL_REPORT_OBPC_PUBLIC PROCUREMENT_CONTROL_SYSTEM_IN_SPAIN_2015_0f8f25d8%232E%23pdf/chk.13f88f1fcc7d3864e48c973df4e880f7), accessed February 3, 2017.

<sup>23</sup> Special Report from the European Court of Auditors No. 17/2016, "EU institutions can do more to facilitate access to their public procurement," Luxembourg, p. 10.



accessibility, design for all, fair trade, compliance with workers' labor and social rights, broader application of social norms, as well as more demanding voluntary commitments in the field of corporate social responsibility. These actions allow for influence in the market and incentivize companies to develop socially responsible management, both directly through the specific goods and services that are acquired, and indirectly through the example set by public administrations. All of this contributes to advancing society progressively along the path of sustainable and inclusive development" (Section 3 of the preamble to Royal Decree 94/2018, of March 2, establishing the Interministerial Commission for the incorporation of social criteria in public procurement).

The European Commission's guide on social aspects in public procurement defines socially responsible public procurement (SRPP) as aiming to address the impact that goods, services, and works acquired by the public sector have on society. It recognizes that public buyers are not only interested in buying at the lowest possible price or obtaining the best value for money, but also want to ensure that procurement generates social benefits and avoids the emergence of adverse social effects during contract execution or mitigates them<sup>24</sup>.

### **Integration of persons with disabilities and reservation of public contracts for sheltered workshops**

The reservation of contracts or lots thereof represents an exception to the general principles of public procurement, such as equal access to tenders and free competition (Article 1 of the LCSP 2017), which limits participation in procurement. The law itself only allows reservation "for entities mentioned in the fourth additional provision" (second paragraph of Article 132(1) of the LCSP 2017). As highlighted by MENDOZA JIMÉNEZ, reserved contracts provide an opportunity to reinforce social policy strategies through public procurement without any additional cost to public administrations and promote labor market inclusion<sup>25</sup>.

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<sup>24</sup> European Commission: "Social Procurement - A Guide to Considering Social Aspects in Public Procurement", 2nd edition, section 1.1. (DOUE 2021/C 237/01, June 18, 2021, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC\\_2021\\_237\\_R\\_0001&amp;](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2021_237_R_0001&amp;), accessed on July 16, 2021).

<sup>25</sup> MENDOZA JIMÉNEZ, J., "Los contratos reservados, política social a coste 0" (<https://www.jaimepintos.com/los-contratos-reservados-politica-social-a-coste-cero/>, accessed on September 15, 2020) and "Guía Rápida sobre los contratos reservados. ¿Qué son? ¿Cómo se aplican?" (<https://www.crisisycontratacionpublica.org/wp-content/uploads/2017/10/Guia-de-contratos-reservadosJMendoza.pdf>, consultada el 15 de julio de 2021).

In this regard, Resolution 129/2019 of the Administrative Body for Contractual Appeals of the Basque Country states that the purpose of the fourth additional provision of the LCSP 2017 is to promote "employment and occupation as means of integrating disabled or disadvantaged persons into society (see Consideration 36 of Directive 2014/24/EU), and this objective would be distorted if, in fact, part or all of the provision and, consequently, the economic volume and employment generated by the contract were to benefit economic operators other than the beneficiaries of the reservation who could not have been awarded the contract, as is the case with the appellant."

The regulation in the fourth additional provision of the LCSP 2017 regarding contracts reserved for special employment centers or the possibility of reserving their execution within protected employment programs has undergone significant modifications.

The reservation of contracts for special employment centers was introduced as a novelty in Article 19 of Directive 2004/18 and included in the seventh additional provision of the LCSP 2007<sup>26</sup>, with an optional character.

The current Directive 2014/24/EU maintained the market reservation to promote the integration of persons with disabilities and extended it to economic operators whose main objective is the social and professional integration of disadvantaged individuals. This new regulation was incorporated into our legislation through Law 31/2015, of September 9, which amends the regulations on self-employment and promotes self-employment, allowing for the reservation of participation also for insertion companies, introducing the option to reserve not only contracts but also lots within contracts, and transitioning from possibility to obligation.

The considerandum 36 of Directive 2014/24 on public procurement highlights that employment and occupation contribute to social integration and are key elements in ensuring equal opportunities for the benefit of all. In this context,

"sheltered workshops can play an important role. The same can be said of other social enterprises whose primary objective is to support the social and professional integration or reintegration of disabled or disadvantaged persons, such as the unemployed, members of disadvantaged communities, or other groups that are socially marginalized in some way. However, under normal

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<sup>26</sup> The aforementioned regulation provided for the possibility of reserving contracts for these special employment centers when at least 70 percent of the affected workers were persons with disabilities "who, due to the nature or severity of their impairments, are unable to carry out a professional activity under normal conditions."

competitive conditions, these workshops or enterprises may face difficulties in obtaining contracts. It is therefore appropriate to provide that Member States may reserve for these types of workshops or enterprises the right to participate in public procurement procedures or in the awarding of certain lots or to reserve their execution within the framework of sheltered employment programs."

Article 20 of the aforementioned Directive 2014/24 provides for the possibility for Member States to reserve the right to participate in procurement procedures "both for sheltered workshops and for economic operators whose objective is the social and professional integration of disabled or disadvantaged persons, or for execution within the framework of sheltered employment programs, provided that at least 30% of the employees of the workshops, economic operators, or programs are disabled or disadvantaged workers."

In transposing this European legislation, the LCSP 2017 understands this reservation of contracts within the social dimension that public procurement must have, which it enshrines throughout its provisions and especially in Article 1.3. The Spanish law's explanatory statement highlights that "with regard to social issues, contracts reserved for special employment centers or the possibility of reserving their execution within the framework of sheltered employment programs continue to be regulated; this reservation extends to insertion companies, and all the entities mentioned are required to have the percentage of disabled workers specified in their respective regulations."

The Consultative Board on Administrative Procurement of the Canary Islands states in its Report 4/2020 that: "current contract legislation explicitly and unequivocally recognizes the possibility of using public procurement to achieve social objectives and to make this public procurement a true political tool that fully realizes its potential impact on generating employment for the most disadvantaged groups in our society. In this context, reserved contracts are a tool, increasingly widespread but still underutilized, for the public sector to strengthen its role as a guarantor of the welfare state through public procurement, a function that fits perfectly with the requirement of Article 1.3 of the LCSP for more socially oriented procurement that promotes SMEs and the Social Economy."

The LCSP 2017 specifies the reservation of contracts to special employment centers of social initiative<sup>27</sup> and extends it to insertion companies<sup>28</sup>, requiring all mentioned entities to have the percentage of disabled workers specified in their respective regulations.

The status of a special employment center or insertion company is not a solvency requirement but a legal condition of suitability, in the sense of enabling title referred to in Article 65 of the LCSP 2017, as indicated by the Report of the Consultative Board on Administrative Procurement of Aragón 16/2011, of June 8<sup>29</sup>, and the resolution of the TACRC 860/2018, of October 1.

In the same vein, resolution 129/2109 of the Administrative Body for Contractual Resources of the Basque Country states that although the LCSP 2017 "does not contain an explicit prohibition on subcontracting reserved contracts with non-beneficiary companies of the reservation, from the second paragraph of Article 65.1 of the LCSP, it can be deduced that the status of a special employment center or insertion company is, in this case, a requirement of suitability. The LCSP provides examples of how such requirements (solvency, classification, not being in a contracting prohibition, etc.) are also required of subcontractors (see Article 215.2 b of the LCSP). Likewise, ultimately, it should be noted that the classic prohibition of fraudulent intent contemplated in Article 6.4 of the Civil Code is applicable."<sup>30</sup>

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<sup>27</sup> The definition of these special employment centers is included in article 43.4 of the consolidated text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion, approved by Royal Legislative Decree 1/2013, of November 29th. According to said article, special employment centers are those whose main purpose is to carry out productive work, regularly participating in market operations, and whose objective is to provide paid employment and the necessary support for the labor integration of people with disabilities. These centers must have a workforce composed of at least 70% of workers with disabilities.

<sup>28</sup> Insertion companies must be registered and authorized in accordance with State Law 44/2007, of December 13th, which regulates the regime of insertion companies, or the corresponding regional legislation. At least 30% to 50% of the workforce in insertion companies must consist of individuals in situations of social exclusion or at risk of social exclusion.

<sup>29</sup> The cited report also highlights the exceptional nature of the social reservation of contracts, "based on the collective interest or public purpose it satisfies, the sole and exclusive reason that legitimizes and supports it, and as such, it must be interpreted restrictively, as stated in our report 16/2010, of December 1st" (Section III).

<sup>30</sup> The aforementioned resolution 129/2019 of the Administrative Body for Contractual Appeals of the Basque Country notes that in the contracting file subject to the appeal, there was no explicit justification for the decision to reserve the contract, as required by Article 116.4(a) of the LCSP 2017. In its opinion, this provision "should be understood not only to refer to the reasons for selecting one of the procedures provided for in Article 131 of the LCSP, but also to procedural issues that, like the one analyzed, are relevant to limit access to the contract to a certain type of economic operators. However, the lack of motivation is a purely formal irregularity, as it does not prevent the act from achieving its purpose nor does it cause any defenselessness, given that the 4th Additional Provision of the LCSP does not contain any discretionary element whose existence needs to be verified to legitimize the option of reservation (in particular, no judgment of proportionality of the measure is required) and it barely contains regulated elements in the same sense, beyond the proper delimitation of the beneficiary economic operators and the reference

The LCSP 2017 establishes in its additional provision 4 that through an agreement of the Council of Ministers or the competent body in the field of the Autonomous Communities and Local Entities, minimum percentages of reservation of the right to participate in the awarding procedures of certain contracts or certain lots of contracts to Special Employment Centers of social initiative and insertion companies, which comply with the requirements established in the regulations to be considered as such, or a minimum percentage of reservation of the execution of these contracts within the framework of sheltered employment programs, provided that the percentage of disabled workers or those in situations of social exclusion in Special Employment Centers, insertion companies, or programs is the one stipulated in their reference regulations and, in any case, at least 30 percent.

In the Triennial Report of the Consultative Board on Public Procurement in Spain for 2018, 2019, and 2020, presented in April 2021 to fulfill the information obligations imposed by the 2014 Public Procurement Directives, it is highlighted that the contracting with reservation has increased by 129.0%, reaching 6,949 contracts, of which 3,220 correspond to harmonized contracting, representing 46.3%. This has resulted in a growth of 168.5% between 2018 and 2019 and 110.0% between 2019 and 2020 (page 14 of the mentioned report).

On the other hand, the Annual Report on Supervision of Public Procurement in Spain for 2020 (IAS 2020) by the Independent Office for Regulation and Supervision of Public Contracting (OIREscon), approved on December 17, 2020, provides a detailed analysis of reserved contracts under the 4th Additional Provision of the LCSP 2017, based on the two categorizations made by PLACSP (contracts reserved for Special Employment Centers or protected workshops, and contracts reserved for protected employment programs). The report concludes<sup>31</sup>:

"With regard to contracts reserved for 'Special Employment Centers or protected workshops' (categorization established by PLACSP), the search results under this criterion indicate that the number of contracts published in this category under the 4th Additional Provision of the LCSP amounts to 121 contracts awarded between January 1, 2019, and December 31 of the same year,

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to the regulation in the announcement of the provision, both of which are not subject to debate (see Article 48.2 of Law 39/2015 on the common administrative procedure)."

<sup>31</sup> The IAS (Annual Report on Supervision of Public Procurement) by OIREscon can be accessed on the website <https://www.hacienda.gob.es/es-ES/RSC/Paginas/RSC.aspx> (revised on February 1, 2021), and its comprehensive analysis of reserved contracts is presented on pages 210 and onwards.

encompassing all types of contracts and procedures. Out of the 121 contracts, 77 are related to service contracts, 19 to supplies, 22 to works, and 3 to 'other.' On the other hand, the search results for contracts reserved for 'protected employment programs' show that the number of procurement procedures published as processed under the 4th Additional Provision of the LCSP amounts to 58, covering all types of contracts and procedures, awarded between January 1, 2019, and December 31 of the same year. Out of the 58 procedures, 21 relate to service contracts, 15 to supplies, 20 to works, and 2 to 'other.'

However, it has been observed that several procurement procedures, specifically 46, are published in both categories, 'Special Employment Centers or protected workshops' and 'protected employment programs,' meaning that there are contracts that appear in both searches. This fact could lead to duplicate contracts in the analysis to be carried out. Therefore, those files that have been processed under the 4th Additional Provision of the LCSP and have been 'tagged' in one or both categories of PLACSP have been taken into account.

In conclusion, eliminating duplications, the total number of contracts awarded between January 1 and December 31, 2019, published in PLASCP as reserved for 'Special Employment Centers or protected workshops' and/or reserved for 'protected employment programs' amounts to 104 contracts from autonomous communities with platforms integrated into PLACSP and the state public sector. Out of the 104 files published as reserved under this section, only 60 have been published as processed under the 4th Additional Provision by the state and autonomous public sector and their instrumental entities. However, after supervising them through the analysis of the PCAP governing their procurement, it has been found that only 45 of these procedures have actually been processed under the 4th Additional Provision. In other words, only 75% of the contracts published as reserved are actually reserved."

The OIReScon recommends that the percentage of reservation in the autonomous communities and local entities should be similar to the one required at the state level (7%-10%) in relation to the regional or local budget, and it should be done in dialogue with the sheltered

employment centers (CEE) sector in their territorial scope, taking into account their production capacity and business volume. It proposes the approval of agreements by both the Council of Ministers and the competent bodies of the communities and/or autonomous cities that have not yet approved them.

The resolution of the TACRC 707/2019 considers that "in the bidding procedure analyzed here, however, there has been a complete omission of these formal requirements. It is evident that the tender announcement does not make any reference to the application of any of the additional provisions that allow for the reservation of the contract. Additionally, there is no solid explanation in the entire procurement file that substantiates the restriction of the bidding to non-profit entities registered in the corresponding registry. The Standard Special Administrative Clauses remain silent on this issue, and in Annex I, there are only three references to the restriction to this type of entities: the one contained in the specifically contested clause that regulates the content of one of the envelopes, and two additional references regarding solvency and required guarantees. None of these three references substantiates, based on contract legislation, the restriction on free competition."

In the resolution of the Administrative Tribunal of Public Procurement of the Autonomous Community of Galicia 67/2018, dated September 3, 2018, the special appeal on procurement against the specifications of the service contract for maintenance and cleaning of used cooking oil containers in the public road of the City of A Coruña is dismissed, considering the conditions of this tender that limited it only to sheltered employment centers and social integration enterprises to be legally sound.

In this regard, the Galician Tribunal argues that the decision taken by the City Council to reserve this contract for such social economy entities is in line with the direction advocated by European and national legislators. Concluding that without the agreements referred to in the fourth additional provision of the LCSP 2017, these contract reservations cannot be made would lead to an interpretation contrary to the intention of the legislature<sup>32</sup>.

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<sup>32</sup> Remember at this point the resolution of the Administrative Court of Public Procurement of the Autonomous Community of Galicia 67/2018, which states that the LCSP 2017 is concerned with ensuring a minimum, that is, that there are tenders with this reservation, so making them, even if there is no agreement to establish this minimum, can only contribute to the fulfillment of this provision, without prejudice to the desirability of such agreements, also adapted to this new regulatory framework.

Order PCI/566/2019, of May 21, publishes the Agreement of the Council of Ministers of April 12, 2019, approving the Plan for the promotion of socially responsible public procurement within the framework of the LCSP 2017, which refers to the reservation percentages provided for in the LCSP 2017 in the absence of a Council of Ministers Agreement establishing them. This Plan, whose purpose is to effectively and coordinately promote the implementation of the measures for socially responsible strategic public procurement established in the LCSP 2017, also promotes the creation of a working group to carry out the necessary preparatory tasks for the approval of the Council of Ministers' Agreement referred to in the fourth additional provision of the LCSP 2017.

The fourth additional provision of the LCSP 2017 also establishes that when the reservation is applied, the requirement for a definitive guarantee shall not apply, except in cases where the contracting authority, for exceptional reasons, considers it necessary and justifies it in the procurement file<sup>33</sup>.

It is worth noting the Plan for the Promotion of Socially Responsible Public Procurement, approved by the Council of Ministers on April 12, 2019, through which the Administration will encourage its suppliers to have people with disabilities in their workforce. The objective is to promote the use of public procurement for the promotion of employment opportunities, decent work, and social inclusion.

The Court of Justice of the European Union (CJEU) has expressly ruled on the regulation in Additional Provision 4 and Final Provision 14 of the LCSP 2017 regarding the reservation of public contracts for sheltered employment centers (CEE) and their requirement, in addition to being social initiative sheltered employment centers (and not business initiative), to receive direct or indirect support and participation from more than 50% non-profit entities and, on the other hand, to reinvest their profits entirely in their own establishment or in another center of the same nature.

The judgment of the Court of Justice of the European Union (Fifth Chamber) of October 6, 2021, Case C-598/19 (ECLI:EU:C:2021:810), declares in its ruling that "Article 20(1) of Directive 2014/24/EU of the European Parliament and of the Council of February 26, 2014, on public procurement and repealing Directive 2004/18/EC, must be interpreted as not precluding a Member State from imposing additional requirements to those set out in that provision, thus excluding from

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<sup>33</sup> Article 36.8 of the Foral Law 2/2018 on public contracts provides in a broader way that "no guarantees, whether provisional or final, shall be required in reserved contracts, unless their necessity is exceptionally justified in the file."



the procedures for the award of reserved public contracts certain economic operators that meet the requirements established in that provision, provided that the Member State respects the principles of equal treatment and proportionality."

The European Court thus resolves the preliminary ruling raised by the Higher Court of Justice of the Basque Country in the context of a dispute between the National Confederation of Sheltered Employment Centers (CONACEE) and the Provincial Council of Gipuzkoa, regarding a resolution of the Council of Government of this Provincial Council of May 15, 2018, approving instructions addressed to the contracting bodies of that institution regarding certain reserved contracts.

The Administrative Body for Contractual Resources of the Basque Autonomous Community had already ruled on this issue in its resolution 100/2018, which was appealed before the Higher Court of Justice of the Basque Country, which raised the preliminary ruling that originated the CJEU judgment of October 6, 2021<sup>34</sup>, as well as the TACRC (resolution 860/2018), the Administrative Tribunal of Contractual Resources of Castilla y León (resolution 108/2018), and the Catalan Tribunal of Public Sector Contracts (resolution 266/2018)<sup>35</sup>.

All of them consider the requirements for beneficiaries of reserved contracts set out in the LCSP to be legally compliant.

In a special appeal filed by the National Confederation of Sheltered Employment Centers itself, requesting the annulment of the specifications for a contract called by a City Council for a school cafeteria service reserved for social initiative sheltered employment centers and insertion companies, resolution TACRC no. 914/2018, of October 11, 2018, states that the status of a social initiative sheltered employment center or an insertion company is a legal condition of aptitude and not a solvency requirement, without implying a violation of the principles of equality, non-discrimination, and freedom of competition, as we are dealing with "reserved contracts." The fact that a specific category of social operators is specified to access the contract, which enjoys reserved

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<sup>34</sup> You can see SANMARTÍN MORA, M.A., "Can the reservation of contracts be exclusively limited to Special Employment Centers of social initiative, and only to them, or should it include insertion companies?", [www.obcp.es](http://www.obcp.es), consulted on October 15, 2021.

<sup>35</sup> FONDEVILA ANTOLÍN, J., "The market reservation for insertion companies and special employment centers (Additional Provisions 4 and 48 of the LCSP)", in AAVV, *Inclusion of social and environmental clauses in public procurement specifications. Professional Practical Guide* (ed. PARDO LÓPEZ, M. and SÁNCHEZ GARCÍA, A.), Aranzadi, Cizur Menor, 2019, p. 86.

status, does not prevent the TACRC from applying free competition among them, leaving the tender open to any company that meets the conditions, just like in any ordinary tender.

The judgment of the CJEU of October 6, 2021, interprets Article 20(1) of Directive 2014/24 in the sense that the requirements listed therein are not exhaustive, and that Member States have the power to impose additional requirements that the entities referred to in this provision must meet in order to participate in reserved public procurement procedures. However, the Court clarifies that Member States, when exercising this power, must respect the fundamental rules of the TFEU, in particular those relating to the free movement of goods, freedom of establishment, and freedom to provide services, as well as the principles derived therefrom, such as equal treatment and proportionality (see, in this regard, the judgment of October 3, 2019, *Irgita*, C-285/18, EU:C:2019:829, paragraph 48 and case law cited), which are also reflected in Article 18 of Directive 2014/24.

The CJEU points out that it is for the TSJ of the Basque Country to examine the conformity of the content of Additional Provision 4 and Final Provision 14 of the LCSP with these general principles.

However, the CJEU itself provides some interesting reflections on this matter.

Firstly, applying the principle of equal treatment (which requires that comparable situations must not be treated differently and that different situations must not be treated identically unless such treatment is objectively justified<sup>36</sup>), the CJEU considers that it must be determined whether special employment centers of social initiative are in the same situation as special employment centers of entrepreneurial initiative with regard to the objective pursued by Article 20(1) of Directive 2014/24.

For the purpose of this determination, the Court takes into account that the LCSP indicates that both social and entrepreneurial special employment centers have the aim of ensuring paid employment for disabled persons and are considered a means to include as many of these persons as possible in the regular employment system. Furthermore, a special employment center includes at least 70% disabled persons in its staff.

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<sup>36</sup> See the judgment of December 17, 2020, *Centraal Israëlitisch Consistorie van België and others*, C-336/19, EU:C:2020:1031, paragraph 85 and the case law cited.

In the field of EU law on public procurement, the principle of equal treatment means, in particular, that bidders must be in a position of equal competition when preparing their tenders and aims to promote fair and effective competition among the companies participating in a public procurement (judgment of the CJEU of July 11, 2019, *Telecom Italia*, C-697/17, EU:C:2019:599, paragraphs 32 and 33).

The CJEU deduces from this that CEEs of entrepreneurial initiative, like social initiative special employment centers, are in a situation where they could not participate in public procurement procedures under normal competitive conditions.

However, "the referring court must also verify whether, as the Spanish government indicated, social initiative special employment centers, due to their specific characteristics, are able to more effectively implement the social integration objective pursued by Article 20(1) of Directive 2014/24. This could objectively justify a difference in treatment compared to entrepreneurial initiative special employment centers. In this regard, the Spanish government points out that social initiative special employment centers maximize social, rather than economic, value because, firstly, they lack a profit motive and reinvest all their profits in achieving their social purposes; secondly, they adopt democratic and participatory principles in their governance; and thirdly, in this way, they achieve a greater social impact through their activities, providing better quality employment and greater opportunities for the social and occupational integration and reintegration of disabled or disadvantaged individuals."

Secondly, according to the principle of proportionality, the rules established by Member States or contracting authorities in the implementation of Directive 2014/24, such as rules aimed at specifying the conditions for the application of Article 20(1) of that Directive, should not go beyond what is necessary to achieve the objectives pursued by the Directive itself<sup>37</sup>.

For the CJEU, the requirement regarding support and participation, direct or indirect, by more than 50% of non-profit entities, as well as the obligation to reinvest all profits in social initiative special employment centers, appear to be suitable for ensuring that such special employment centers have the primary objective of integrating disabled or disadvantaged individuals, as required by Article 20(1) of Directive 2014/24.

The CJEU also considers that from the analysis of the LCSP presented by the Spanish government in response to the written questions from the court, "it does not appear that economic operators established under the law of other Member States are excluded from the right to participate in the reserved public procurement procedures provided for by that Spanish legislation, provided that those operators meet the requirements expressly provided for in this legislation for

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<sup>37</sup> You can refer to the judgment of the CJEU dated January 30, 2020, in the case Tim (C-395/18, EU:C:2020:58), in paragraph 45.

social initiative special employment centers. However, it is for the referring court to carry out the necessary checks in this regard."