STANDING OF UNIONS AND COMPETENT COURT ON SOCIAL CLAUSES IN PROCUREMENT PROCEEDINGS

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Fecha de recepción: 22/06/2018
Fecha de aceptación: 13/07/2018

SUMMARY: 1. SOCIAL CLAUSES IN PROCUREMENT REGULATION. 2. CASE LAW ON SOCIAL CLAUSES IN PROCUREMENT. 3. ENTITLEMENT OF UNIONS IN PROCUREMENT DISPUTES. 3.1. Genesis of the case law about entitlement of unions in trials about individual rights. 3.2. Legitimate interest as necessary prerequisite of the entitlement. Ascertainment of the presence of the constituent features of the legitimate interest. 3.3. Union standing on social clauses contained in procurement. 3.4. Limits related to the object of the proceeding. 4. COMPETENT JURISDICTION. 4.1. Competent jurisdiction in procurement. 4.2. Main proceedings and questions referred for a preliminary ruling. 4.3. The so–called civil preliminary question. 4.4. Administrative and labour preliminary questions. 4.5. Administrative preliminary questions before labour court. 4.6. Collective conflict procedure. 5. CONCLUSION

ABSTRACT: Improvement of labour conditions is more balanced when it is reached through reform of Employment Law. The protection of workers interests is placed in labour courts, labour inspectorate and union. The state of readiness of procurement bodies to protect the workers interest is doubtful. The members of administrative bodies have not received training on such special branch of law. Labour courts, labour inspectorate and unions have specific regulation which provides the necessary tools to reach their goals. It

should be agreed that the inspectorate state of readiness to protect the workers interests is much higher than the abilities of the procurement bodies. It is beyond discussion that labour inspectorate is more prepared to establish unified criteria to avoid contradictory and discriminating action.

RESUMEN: La mejora de las condiciones laborales está más equilibrada cuando se logra a través de la reforma de la legislación social. La protección de los intereses de los trabajadores está depositada en los tribunales del orden social, la Inspección de trabajo y los sindicatos. Es bastante dudoso el grado de preparación de los órganos administrativos de contratación para proteger los intereses de los trabajadores. Los miembros de los órganos administrativos no han recibido formación en Derecho del Trabajo y Seguridad Social. Los tribunales del orden social, la inspección de trabajo y los sindicatos tienten una regulación legal que les facilita las herramientas necesarias para alcanzar sus fines y objetivos. Se puede considerar un hecho notorio que la Inspección de se encuentra en una posición mucho más efectiva que los órganos administrativos para garantizar los interés de los trabajadores. Está mas alla de toda discussion que la Inspección de Trabajo está más preparada para establecer criterios unificados que eviten decisiones contradictorias y situaciones discriminatorias.

KEY WORDS: Procurement, social clauses, appeal, competent jurisdiction, standing of union.

PALABRAS CLAVE: Contratación administrativa, cláusulas sociales, impugnación, jurisdicción competente, legitimación del sindicato.

1. SOCIAL CLAUSES IN PROCUREMENT REGULATION

About regulatory matters, one finds the social clauses in article 145 LSCP 2017 which includes the demanded requirements and the kind of award criteria. The award of contracts is solved by a set of criteria which are based on the best relationship quality–prize. Supporting evidence collected by the procedure should be appraised. Based on such evidence, contracts can be awarded following criteria which are based whether on cost and efficiency, whether prize and cost, as well assessment of life time. The best relationship can be based whether on economic or qualitative criteria. Qualitative criteria establish by procurement bodies based on qualitative data can include environmental or social perspectives, which be attached to the object of the contract.

Social features will be related, among others, to the following goals: promotion of social integration of disabled persons, exposed collectives included among personal assigned to the contract. Also the scope includes people at risk of social exclusion, outsourcing with Special Employment Center or Integration companies, plans for gender equity related with the contract, equality among women and man, promotion of hiring female workers, reconciling personal and working life, improvement of labour conditions and wages, employment stability, hiring a bigger work task, training in health and security, ethical criteria and corporative responsibility, being provided with goods from equity commerce along the execution of the contract.

Article 147 LSCP 2017 includes tiebreaker criteria with a deep social founding. First of all the contracting bodies are able to set specific award criteria in the contract specifications when there is a tie according to general award criteria. These tiebreakers are linked to the object of the contract and will include: a) petitions of companies which hire a higher number of disabled worker than the number fixed by regulation at the end of the deadline for offers; b) Petitions of Integration companies ruled by Law 44/2007, December 13th, which have all the legal requirements; c) by award of contracts with social o caring programs features, the proposals submitted by non–profit organizations which pursue goals directly related to the contract, when it is has been stablished by the foundation of the organization and the organization is officially registered; d) offers submitted by fair commerce entities in order to be awarded with procurements that allow fair commerce; e) proposals submitted by companies which by the proposal submission deadline, contain

social and employment measures that promote equality of opportunities among men and woman. The documents containing evidence of tiebreakers will be provided by tenderers when the tie is caused, it is not necessary to submit the evidence prior to the tie.

In the absence of any provision in the procurement specifications, the tie among offers will be broken according to the following social criteria. The social criteria will be appraised referred to the time of the offers submission deadline. a) higher percentage of disabled worker or employees risking social exclusion in each company; in this case the tie will be broken favoring higher indefinite workers or the higher amount of hired employees. b) lesser percentage of temporary or time fixed labour contracts; c) higher percentage of hired women; d) randomly if the former criteria could not break the tie.

In case of unusual low offers, article 149 LSCP 2017 stablishes that procurement bodies will reject the abnormal low offers when it is proven that the lowliness comes from not complying with contractors, environmental, social or labor rules whether they are national or international, including sectorial collective agreements which are in force.

This provision should be connected with article 201 LSCP, whose title is "Environmental, social or employment duties". The referred article 201 stablishes that procurement bodies will take action guaranteeing that the procurement execution by the contractors are consistent with environmental, social or labour duties from European Union Law, state law, collective agreements or provisions of international law regarding environmental, social or labour matters which are mandatory for the state, especially those contained in Appendix V.

The Appendix V cited above contains the following international regulations regarding social and labour matters:

ILO 87th Convention about union freedom and protection of the right to organize; ILO 98th Convention about the right to organize and collective bargain; ILO 29th Convention about eradicating forced labour; ILO 138th about minimum age; ILO 111th Convention against discrimination (employment and occupation); ILO 100th about equal pay; ILO 182th Convention about the worst forms of child labour.

One can easily notice a big reinforcement of collective bargain by integrating ILO Convention about union freedom and protection of the right to organize and ILO Convention about the right to organize and collective bargain.

That should be understood without prejudice of the procurement bodies to take action to check that while the bidding procedure, the applicants and bidders comply with social and labour duties.

Breach of social or employment duties and, specially, non–compliance or delays in paying salaries or application of lower salaries conditions than those established by collective bargain are punished. In case of serious misconduct and willful behavior, the penalties contained in article 192 LSCP will be imposed.

The above mentioned article 192 LSCP 2017 regulates partial non–compliance or defective compliance. It stablishes that procurement and the descriptive document can also make provision of penalties the defective execution or non–compliance of obligations or specific conditions procurement execution.

These penalties should be proportionate to the seriousness of the infringement and the amount of the penalties should not be higher than 10 percent of the procurement price, excluding VAT. The complete amount can neither be higher than 50 percent of the contract price. When the contractor partly fails to execute the services agreed in the procurement for reasons attributable to the contractor, then the public administration will appraise the specific circumstances and it can either terminate the procurement or impose penalties foreseen for such cases by the special specifications or by the descriptive document. The conditions of institutional agreements could establish provisions regarding the penalties contained in article 192 LSCP.

2. CASE LAW ON SOCIAL CLAUSES IN PROCUREMENT

The STS 3ª 1301/2016, de 2 junio (rec. 852/2015) Ruling is related to social clauses in Procurement Law and its relationship with collective bargain. In this procedure is discussed a Regional Act from Guipúzcoa which approved a new rule about public procurement. According to this rule, specific administrative clauses included in public procurement necessarily should comply with the Collective Agreement of construction and public works from Guipuzcoa, which was published in the Official Gazette from Guipuzcoa. At the same time the Regional Act approved another rule about specific administrative clauses which referred to public work contracts. It was established that such specific administrative clauses should contain a special provision. The scope of this provision was to stop extreme low offers. The tools to achieve that goal were the award criteria. It was understood that an offer was extremely low when the offer was lower by more than 10% of the arithmetic mean from the prices of all the accepted offers. It was meant to be an objective appraisal criterion. This objective criterion meant that abnormal appraisal would cause the decrease of labour wages affecting the Collective agreement. In last place, the Regional Act decreed that contractors are compelled to hire at least 30% of the worker trough indefinite labour contracts. This provision was meant to secure employment stability[1].

1 LARRAZABAL ASTIGARRA, E., "Las cláusulas sociales en la contratación pública y la posibilidad de ejercer un salario mínimo en la ejecución de los contratos", Lan Harremak¸31, 2014, pp. 135–156.

The referred STS 3ª 1301/2016, de 2 junio (rec. 852/2015) Ruling understands that the provision which forces public procurement is dependent from the fulfillment of employment law, regulation and collectives agreements. In this group of acts one can find the provisions related to company level collective agreements and the withdraw of the force and effectiveness of the collective agreements. In such case, the requirement of fulfillment of labour acts including the imposed effectiveness of the current collective bargain for construction and public work goes too far. This problem must be decided in relationship with the new labour regulation. It is not a covert derogation of employment (neither an attempt to do so), because the referred collective agreement is not corrupted. The collective agreement has not been changed. Its content remains the same. Even it could be defended that the collective agreement has become more operative, effective and transparent. The question must be solved concluding that the Regional Act does not usurp the **role of employment regulations**. At the same time, the specific administrative clauses will not prevent the effectiveness of article 84.2 ET. It cannot be argued that the collective agreement is the prerequisite of effectiveness of free competition law. Finally it should be remarked that the deeper meaning of possible regulatory movements of employment law in relationship with the effectiveness of the collective agreements are dependent of the employment law itself. It means that everything depends of the ET and their relationship with collective agreements and labour case law. Labour case law must follow the lead of law and international treaties. According to this reasoning, the refuted Regional Act is under the protection of Convention Number 94 ILO about working conditions in public administration. This ILO Convention establishes that public administration contracts must guarantee for the workers, wages, working time and other working conditions. The content of the guarantee is that public workers should not receive worst working conditions than the work of the same character in private industry whether it comes from collective bargain, arbitral resolution or state law. The STS 3ª 26 noviembre 2015 (rec. 3405/2014) Ruling reaches a different reasoning in a procedure, where it was under discussion the legitimacy of an Instruction of the Government Counsel of the Regional Chamber from Bizkaia. The Instruction regulated Criteria of guaranteeing working conditions and social measures in relationship with the activity in procurement contracting. This Instruction goal was to force procurement contracting bodies after the employment reform of year 2012. The Instruction argued that labour reform would worsen employment conditions, concretely the wages would decrease, labour conflicts would arouse, the reform would also cause a decrease of large consumption. All these facts would affect labour contracts, in which intervened exposed collectives which should receive a special protection. After picturing the later referred situations, the Instruction remarks its goal of preventing the cases which meant losing former working conditions. The scope was to protect and preserve former

working conditions. That meant the will of neutralizing the labour reform. It is also argued that these measures are taken under the provisions of the Public Procurament Law. Anyway, it is clear enough that the provisions of procurement law were not designed to affect labour reforms. The hidden will of the Instruction is discovered. This hidden will is to neutralize the power of the State to regulate employment reform. The Instruction contains the criteria which would be applied to contractors who decide to decrease working conditions. It must be said the worsening of the working conditions is related to the loss of effectiveness of collective agreement caused by not complying with the new legal deadlines. In this context one can easily conclude that the goal of the Instruction is labour and sociale rather that a procurement contracting scope. Another reason to declare the illegitimacy of the Instruction is the lack of jurisdiction of Regional Council Chamber in employment matters.

Based on the same reasoning the STS 3ª 1154/2016, de 23 mayo (rec. 1383/2015) Ruling which solved the legitimacy of a Regional Act, approved by General Assembly of Alava. The Regional Act requires social clauses to be included in the public work contracts along the Region. It imposed complying with all legal, regulatory and collective agreements. Specifically, the Collective agreement for construction of Alava is named. The Regional Act promotes the making of a Committee with jurisdiction to watch over all the parties about complying with the working conditions. This Committee could even impose sanctions. The content and goals of the Regional Act cannot be defended based on the self–organizing powers of the public administration. After reading the Regional Act one immediately detects the influence over the development of the public contracts. And more important the effects over the contractors who can be sanctioned for not complying with employment laws, even security and health laws. It is clear that the effectiveness of the Regional Act goes way beyond administrative self–organization.

3. ENTITLEMENT OF UNIONS IN PROCUREMENT DISPUTES

3.1 Genesis of the case law about entitlement of unions in trials about individual rights

The case law of the Constitutional Court which entitles the standing of the union in individual disputes has a double origin. On one side, the origin lies on the union taking action in collective conflicts special procedure. On the other side, the root is the rebuttal of administrative agreements which affect the interest of the workers.

At the time, when the case law about entitlement of unions for standing began, the standing to take legal action through the **special procedure of collective conflict** was granted only for the representatives of the workers (article 18.1.a/ Royal Decree 17/1977, March the 9th, about labour relationships). The restrictive interpretation adopted by ordinary courts caused the intervention of the Constitutional Court[2].

The interpretation by ordinary courts about the standing of the union in the rebuttal of administrative decisions, when these decisions affected the workers, was a very restrictive interpretation. This situation moved again the unions to seek the Constitutional Court protection.

The Constitutional Court built its case law based on its own prior rulings, independently of the belonging of the rulings to the matter of union standing. This understanding has allowed to create a harmonized case law about the access of union to judiciary process. This was general case law. After that case law there is the specific case law about union entitlement in individual labour disputes.

The first ruling about the union standing in judiciary trials solved a collective conflict about appraisal of overtime payment. In that case, the union belonged to health care field. The Constitutional Court developed an innovative understanding about the kinds of entitlement. The function of the union exceeds the classic layout of power of attorney and empowerment in Private Law[3].

The Constitutional Court understands that the classic concept of the power of representation is acting on behalf of a third person. In the traditional concept, the representation is based on the will of the represented person or the will of the law. The Constitutional Court understanding includes a third kind of representation which names "institutional representation". This institutional representation has on one side an explicit stipulation by voluntary adherence of the concerned party. On the other side the institutional representation is implied when the legal system empowers an entity to defend and manage the rights and interests of groups of persons[4].

3.2 Legitimate interest as necessary prerequisite of the entitlement. Ascertainment of the presence of the constituent features of the legitimate interest.

The layout set by articles 7 and 28 of the Constitution leads to understand that in the scope of intervention of the unions, they have the ability to represent the workers interests. It must be remarked that the condition of union is not enough to produce the regular

2 The first ruling about the union standing is Judgment STC 70/1982, November the 29th.
3 STC 70/1982.
4 GARCÍA–PERROTE ESCARTÍN, I., Manual de Derecho del Trabajo, Tirant Lo Blanch, 6ª Edición, 2016, p. 833.

procedural juridical relationship. To that end the acting union must be directly related to the dispute. The link with the dispute results of the implementation degree in the conflict. The constitutional function attributed to the unions does not turn them in to abstract guardians of the legal system[5].

The concept of implementation should not be mistaken for the concept of representativeness. The former is the key to appraise the standing for collective bargain with general effects or for institutional representation. Therefore when a union has enough representativeness in an area, then it has also sufficient implementation. The opposite is not true, implementation does not guarantee representativeness. The implementation may also be related to the concrete scope of a concrete union according to the articles of association or the level of affiliation. Implementation constitutes the tool to appraise the presence of the link or nexus between the union and the conflict[6].

The continued review of the idea of link or connection between the union and the object of the procedure brings in new features which shape the concepts mentioned above. Union procedural standing can be located in the conception of professional or economic interest. This interest is identified by the achievement of an advantage or the demise of something harming. The interest has not necessarily a patrimonial condition[7].

The interest must be qualified and specific. These conditions are fulfilled when an advantage becomes enforceable in favor of the union affiliates and other workers, if the complaint is finally granted by the court ruling[8]. Prior intervention or involvement of the union at the negotiation table contributes to the understanding of presence of procedural union entitlement[9].

The intensity of comprehensive projection or the contained generality also contribute to ascertain of union standing[10]. Alleged discrimination may be enforced the intensity[11]. Generality becomes stronger when the advantage or utility impacts the whole personnel instead of concrete persons[12].

5 The STC 210/1994 Ruling judged a case about the legal action taken by a union about the registration of a group of workers in the General Regime of the Social Security. These workers were registered in the Agriculture Special Regime.

6 STC 37/1983 Ruling about entitlement to take action through special procedure of collective conflict.

7 STC 101/1986 Ruling about a complain filed before the administrative court for rebutting an administrative agreement of personnel provision at a university.

8 STC 7/2001 Ruling.

9 STC 101/1996 Ruling which analyzed a disputed agreement which was adopted by the university Governing body subsequently to some meetings of the negotiating table where the union was engaged. The Governing body agreement disregarded some of the prior decisions of the negotiating table. Therefore is challenged before court by the union.

10 STC 24/2001 Ruling.

11 STC 24/2001 Ruling judged the union standing for rebutting before administrative court the application conditions for a merit based and open competition for recruiting firefighters. The challenging union denounced breach of gender rights because the fitness test was the same for men and women.

12 STC 84/2001 Ruling.

3.3 Union standing on social clauses contained in procurement

It is remarkable that LSCP 2017 establishes in article 44 a "Special remedy for procurement matters". Against the rulings detailed by article 44, the parties can appeal through the special administrative appeal. In such cases is not possible to appeal by ordinary means. The object of this special appeal is the acts and rulings contained in 2nd paragraph of the article 44 LSCP 2017, when such acts and decisions are linked to the procurement settled by public administration or other entities which have the status of awarding bodies:

a) Procurement of work whose appraised value is higher than three million euros. Also supply and service contracts with a higher appraised value than a hundred thousand euros; b) Institutional agreements and dynamic acquisition systems whose object is any of the contracts mentioned in the former letter. Also contracts based on the prior classification of contracts and c) Work or services granting agreement whose appraised value is higher than three million euros.

Special administrative contracts can be appealed when because of their features; it is not possible to appraise their bid value. Also special administrative contracts can be appealed when their appraised value is higher than the value fixed for service contracts. Also the subsidized contracts of the article 23 LSCP can be object of the special appeal. The assignments can be object of the special appeal when due to their features cannot be appraised or when their extensions last more or the same time provided for service contracts. The following proceedings can be appealed:

a) Procurement notice, specifications and documents linked to the contract which establish the procurement conditions; b) Procedure acts approved through the awarding process, when these acts have a direct or indirect decisive influence on the award; also when either the procedure acts prevent the completion the process, either cause legal powerlessness or irreparable damages to rights or legitimate interests. The prior mentioned circumstances necessarily exist related to agreements of the procurement bodies which admit or prevent the acceptance of candidates or bidders; also the acceptance of abnormal low offers consequence of article 149 LSCP 2017; c) award agreements; d) changes which are based on non–compliance of the content of articles 204 and 205 LSCP 2017 and also based on the understanding that modification should have been subjected to renew awarding; e) Formalization of assignments through the administration own means, when these assignments breach legal requirements; f) Procurement bailout agreements.

Procedure faults which affect acts that are not mentioned on the above paragraph can be underlined by the parties to the procurement body. Those faults can be highlighted when the parties appeal the award agreement. The emergency award procedure results cannot be appealed through special procurement remedies.

When procurement appeal is not allowed, the parties can follow the regular appeal of Law 38/2015, October the 1st of Common Administrative Procedure. The judiciary appeals of LJCA can also be used by the parties. When the award has been agreed by subjects which are not public administration, then Law 38/2015, October the 1st of Common Administrative Procedure must be applied. In such cases the appeal will be channeled through the head or chairman of the department or body in charge of supervising those non administrative awarding subjects. When the procurement body is linked to several public administrations, the jurisdiction belongs to the body which has the highest degree of supervision power. Procurement appeal is optional and free of charge.

Article 48 of LSCP 2017 is named "Entitlement for procurement appeal". Any natural or legal person can follow procurement appeal when their rights or legit interest, whether individual or collective, have directly or indirectly suffered. The cause of undermining those rights must be the agreements subject of procurement appeal.

It should be remarked that trade unions are able to file procurement appeal. It happens when the decision–making of procurement agreements execution has been breached by the employer. These agreements are related to social or labour rights of workers linked to the procurement services. The association of employers will also be entitled to procurement appeal.

Article 196 LSCP 2017 regulates compensation of damages caused to third parties. Article 196 stablishes the duty for contactor to compensate all damages inflicted to third parties when the damages are caused by procurement execution. It is not clear whether this regulation means an enhancement of liabilities foreseen by ET.

When damages are caused directly by directions or instructions coming from public administration, then the public administration is liable within legal limits. The public administration is also liable for the damages inflicted to third parties when these damages have been caused by defects of the project of work procurement or defects of the supply procurement.

Third parties can request the procurement body to produce a report about which contractors are liable. The request deadline is one year. It is necessary to hear the contractor previously of producing the report. When third parties raise this kind of requirement, then it is granted a stay of execution for legal actions deadline.

3.4 Limits related to the object of the proceeding

There is a dividing line drawn between matters which by their nature belong to the civil jurisdiction and matters which exceed this scope. As a matter of principle the civil jurisdiction is selected by objective criteria to claims of civil kind. ("Matters which belong [to civil jurisdiction]" article 9.2 LOPJ). It means to embrace all claims based on private law: it covers not only strictly civil claims.

4. COMPETENT JURISDICTION

4.1 Competent jurisdiction in procurement

When the union brings legal action in defense of collective or indidual rights, it must be decided which jurisdiction is competent. The article 27 LSCP 2017 is named "Competent jurisdiction". This article 27 grants jurisdiction to Administrative Courts regarding the following matters:

a) Matters linked to preparation, award, effects, modifications and termination of procurement; b) Questions aroused about preparation and awarding of private contracts of public administrations. Also belong to administrative courts matters contained in first and second subparagraphs of letter a/ of first paragraph of article 25 LSCP 2017 subject of harmonized legislation. The administrative court is competent about rebuttal based on articles 204 and 205 LSCP 2017 against modifications lacking award renewal; c) Matters linked to preparation, award, effects, modifications in contracts signed by non–administrative bodies when the rebuttal is based on articles 204 and 205 LSCP 2017 against modifications lacking award renewal; d) matters related to preparation and awarding of contracts signed by public sector entities which lack the condition of awarding power; e) appeals regulated by article 44 LSCP 2017; f) questions related to preparation, award, and modifications of subsidized contracts which are regulated by article 23 LSCP 2017.

The Civil Courts will be competent to solve the following matters:

a) Disputes between parties when these conflicts are linked to the effects and termination of private contracts signed by awarding power entities, whether these entities are public administration or they lack such condition; b) Matters related to effects and termination of contracts signed by public sector entities which lack the condition of awarding body; c) Questions linked to private founding of public works contract and grant of services, excluding exercise of administrative jurisdiction by the awarding administration, in this case administrative court will be competent about the mentioned exercise of administrative jurisdiction.

4.2 Main proceedings and questions referred for a preliminary ruling

The preliminary rulings are questions linked to the merits of the case. The competent court to judge preliminary rulings is a court which belongs to a different jurisdiction.

Recent case law understands that preliminary rulings features are related to the procedure object. There is a link with the *res in iuditio deducta*. On the opposite side there is no relationship with the procedure itself. Therefore the preliminary ruling is not integrated in

the merits of the case, but that does not mean an accessory condition. Its accessory condition is accidental. A question can be object of preliminary ruling in some procedures, while in other procedures could it constitutes the main object of an autonomous procedure.

Preliminary rulings are competence of courts which belong to different jurisdictions. This is their key feature. There lies the difference with incidental questions. However there is a civil preliminary ruling which is regulated by article 43 LECiv. When the civil question arises in a civil procedure will usually have the status of an incidental question and it will be addressed by the court who is judging that procedure. Nevertheless when the incidental question is already being judged in a different pending civil proceeding (before the same or different civil court), there are two possible solutions: 1) Joining of proceedings following proceeding accumulation rules; or stay of proceedings until the end of the proceeding whose object is the preliminary civil question.

Preliminary question have always caused serious problems of practice implementation. The legal regulation are the article 10.1 and 10.2 LOPJ and articles 40 to 43 LECiv. The practice implementation has been solved by distinguishing different kinds of such questions.

4.3 The so–called civil preliminary question

In civil proceedings should not arouse a truly civil preliminary question. When to judge a civil question, another civil question must be previously judged, it should not pose any problem. The civil court is competent, therefore the absence of complexity. In this case, the nature of the matter is an incidental question. It will be always solved through article 387 LECiv and following. Nevertheless, article 43 LECiv regulates the civil preliminary question, when such a question does not actually exits.

Article 43 LECiv regulates three different cases: 1º) When in a civil proceeding comes up a civil matter which is logic prerequisite of the ruling. There is no other civil court judging this civil question. The court judging the civil proceeding will also solve the preliminary civil question. 2º) When to judge a civil question is necessary to solve another civil matter pending before another or the same civil court, then the court has the possibility to merge the pending proceedings through articles 74 LECiv and following; 3º) When procedures merging is not possible, the court at request of one or both parties can decree a stay until the end of the where the preliminary question is being judged.

4.4 Administrative and labour preliminary questions

The administrative question mentioned here is not the procedure before public administration but the proceeding before administrative courts. The general rule is that civil court

will decide labour or judiciary administrative questions as a logic prerequisite to judge the civil main matter. The decision will only have preliminary effects (article 10.1 LOPJ and 42.1 LECiv).

Preliminary effects mean that the ruling is not *res iudicata*. Therefore the question can arise afterword and it can be judged before a labour or administrative court as main question. The mentioned effects are regulated in article 42.2 LECiv.

There is another possibility. The civil procedure can be adjourned until the preliminary matter is solved as a main matter by administrative or labour court. Before passing judgement by civil court the court clerk can decree the stay of civil proceeding at the request of one party, the request of both parties and when there is a specific provision which allows the adjournment. The stay will last until the administrative or labour court judge the question. The ruling by administrative or labour court is *res iudicata* for civil court (article 42.3 LECiv).

4.5 Administrative preliminary questions before labour court

The labour court lacks jurisdiction to judge the validity of procurement administrative acts. Awarding decisions, tiebreaking agreement, and rejection of abnormally low offers and monitoring while procurement execution belong to administrative courts.

Social or labour duties from European Union Law, state law, collective agreements or provisions of international law regarding social or labour matters belong to labour courts.

The interpretation problem arises when the content of mentioned procurement administrative acts (awarding decisions, tiebreaking agreement, rejection of abnormally low offers and monitoring while procurement execution) is Social or labour duties from European Union Law, state law, collective agreements or provisions of international law regarding social or labour matters.

This causes an awkward situation. The procurement body can understand that the contractor is not fulfilling labour duties. If it is a compliance matter, then there will be no difficulties. But if the matter regards interpretation instead of simple compliance, then it becomes a complex question. Namely the contractor could disagree on the applicable collective agreement. There could be disagreement on wages appraisal or working time. The administrative court is not trained on such matters. The mentioned questions belong entirely to Employment Law.

Article 4 of 29/1998, July 13, on administrative s jurisdiction Act regulates preliminary questions. The competence of administrative courts will include the judgement of preliminary questions which do not belong to administrative jurisdiction, when the preliminary question is directly related to an administrative lawsuit. The competence about prelimi-

nary questions does not include criminal or constitutional matters and provisions made by international treaties.

Since there is no unitary jurisdiction to judge all claims filed against public administration, one must go to the competent court. The competent jurisdiction is decided based on the grounds of the claim.

Article 4 tries to break the break the barriers of the diversity of jurisdictions by assigning jurisdiction to administrative courts to judge matters "which do not belong to administrative courts" when these matters "are related to administrative proceeding and they are significant to the matter object of ruling". This idea was generalized by article 10 LOPJ[13].

Administrative court exceptionally extends the area of its jurisdiction to preliminary questions when they are directly linked to administrative judiciary claims. In such cases the ruling has no effect outside of administrative court ruling. The steps to follow do not include the stay of administrative claims until the competent court rules. The administrative court rules with limited effects. The ruling on the preliminary question will not be binding for the competent court.

The general rule establishes that as long as there is no binding law which defers the ruling to a specific court, then the administrative court will judge with the limited effects mentioned above. Article 4 LRJCA sets some exception to this common regime of preliminary questions: constitutional questions, criminal questions and those questions provided by international treaties. The preliminary question is featured by having their solution in a different law branch. Another feature is that the ruling on the preliminary question will condition the main matter.

Beside preliminary questions, there are incidental questions. The incidental questions arise an objective procedural crisis. In this crisis appears a secondary or incidental question. The incidental question will be judged in whether in the main procedure or in a special procedure. The later is the so–called incidental proceeding.

4.6 Collective conflict procedure

The 36/2011, October 10, has established the possibility of stay of individual lawsuits pending before administrative courts, when there is a pending procedure of collective conflict. The article 160.5 LRJS regulates this suspension. The article 160.5 LRJS establishes that the definitive ruling on collective conflict will be *res iudicata* regarding individual pending or future proceedings followed whether before labour courts as well before administrative

13 GONZÁLEZ PÉREZ, JESÚS, Comentarios a la Ley de la Jurisdicción Contencioso–administrativa (Ley 29/1998, de 13 julio), Thomson Reuters, 6ª Edición, p. 180.

courts. This outcome will take place when the object is the same or directly related. The individual proceedings will be adjourned until there is a ruling in collective conflict. The adjournment decision can be adopted even while an appeal is pending.

Labour courts lack competence to judge the validity of procurement acts. It does not mean that the parties are not going to file lawsuits before labour courts. It can also happen that the workers have filed claims about labour conditions of an employer which is a procurement contractor. These claims pose another problem. The public administration is not entitled in these proceedings since the conflict regards only the worker and the employer.

It is also possible that the union or the workers representatives file collective conflict lawsuit. The labour conditions mentioned by LCSP will usually affect a group of workers.

5. CONCLUSION

The prior LCSP 2007 was neutral on social or labour questions. To the contrary the current LSCP has plenty of social clauses. The LCSP follows the present trending. Today the social clauses in procurement are highly regarded. Nevertheless some troubling questions are aroused by the enforcement of these clauses through procurement legal regulation. There is a law–making question: is it a good path to improve employment conditions? This debate exceeds the purpose and object of the present paper.

On the practical side, it can be argued that improvement of labour conditions is more balanced when it is reached through reform of Employment Law. The protection of workers interests is placed in labour courts, labour inspectorate and union. The state of readiness of procurement bodies to protect the workers interest is doubtful. The members of administrative bodies have not received training on such special branch of law. Labour courts, labour inspectorate and unions have specific regulation which provides the necessary tools to reach their goals.

The closest organization to the procurement bodies is the labour inspectorate. The mentioned capacities empower the inspectorate to monitor the compliance of employment duties, demand accountability and advising. The labour inspectorate is regulated by 23/2015, July the 21th; Act of organization of the system of labour and social security inspectorate, 192/2018 Royal Decree of regulatory statutes of labour inspectorate; 138/2000, February the 4th, Royal Decree, and Ministerial Decree 12 February 1998. The Inspectorate has its own legal entity. It has the necessary powers to enhance its scopes. The mentioned capacities empower the inspectorate to monitor the compliance of employment duties, demand

accountability and advising. The inspectorate will plan and program monitoring action. Organizing, operative and technical mandatory criteria will be stablished.

The inspectorate will monitor and command services on complying with law, statutory regulation and collective agreements will include the following areas: 1) Union relationships; 2) health and security; 3) subscription to social security and exacting contributions; 4) social security subsidies and pension funds; 5) employment, migratory movements, recruitment agencies and temporary work companies

The inspectorate will take action through the following measures: 1) warning notice when there are no direct damage to workers interest; 2) initiation of sanction procedures by inspection report; 3) initiation of contribution procedures by liquidation reports; 4) initiation of subscription procedure for mandatory association to social security; 5) proposal of stay or termination of subsidies when there is non–compliance of awarding regulation; 6) proposal of surcharge in cases of liability for non–compliance of health and security regulation; 7) proposal of surcharge or decrease of contributions for non–compliance of health and security regulation; 8) command to cease immediately working activities; 9) notice to competent bodies of non–compliance on grants and subsidies for work training; 10) filing of lawsuits before labour courts.

It should be agreed that the inspectorate state of readiness to protect the workers interests is much higher than the abilities of the procurement bodies. It is beyond discussion that labour inspectorate is more prepared to establish unified criteria to avoid contradictory and discriminating action.

Given that procurement bodies are empowered to decide on labour matters, it is beyond doubt that disagreement of contractors will take place. Since the decisions of the procurement bodies are adopted through administrative acts, the rebuttal of the procurement decisions due to disagreement of the contractors will be judged by administrative courts. The lack of preparation of administrative courts to judge these labour related matters is based on the same principle that the lack of readiness of procurement bodies. Administrative matter is considered a specialized field in branches of law. Labour matters are also a specialized area in Spanish law. The degree of specialization is so high that each group of matters is judged by a special jurisdiction instead of by regular courts.

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