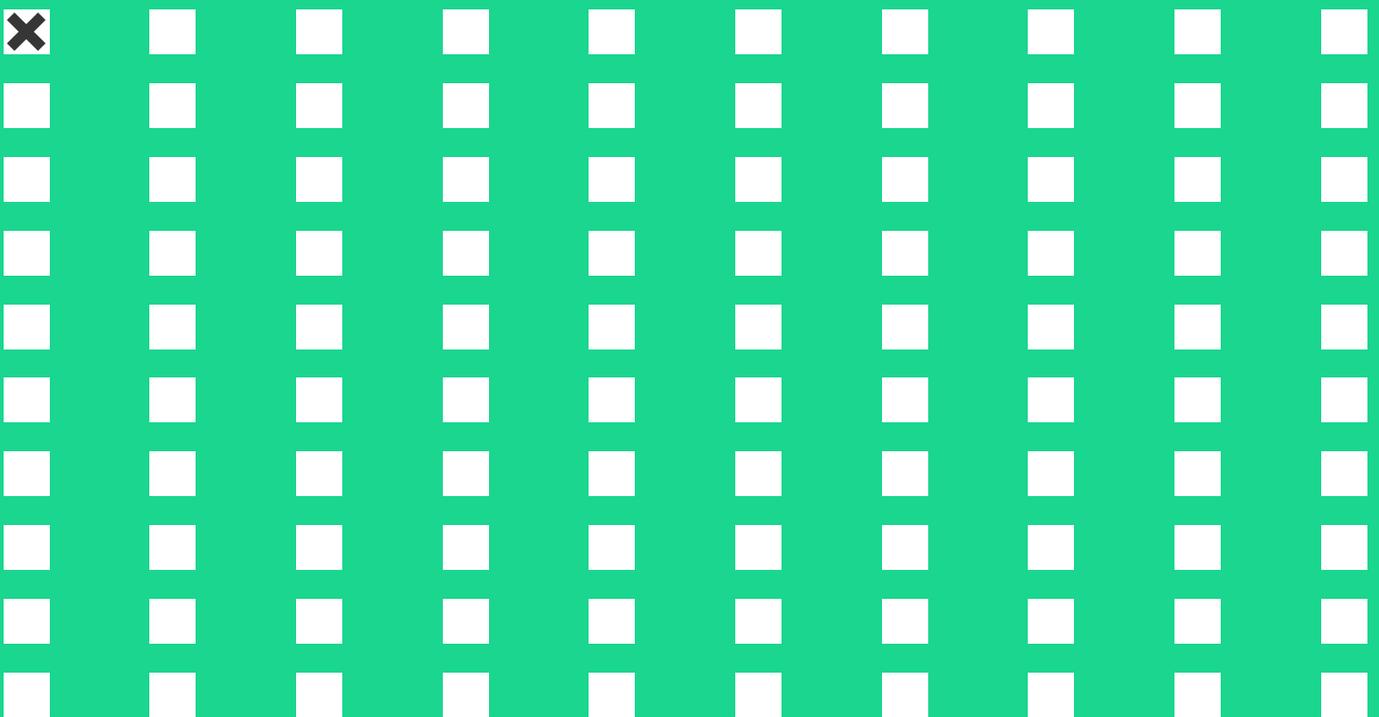


# Guide for the protection and promotion of human rights in public procurement



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**Authors:** Joaquín Tornos, Agustí Fernández de Losada, Anna Calvete, Juan Ambrós. Lathes Lawyers



**Project coordinators:** Alys Samson Estapé, alys@novact.org, Marta Pérez Fargas, comunicacio@sci-cat.org, Davide Tonon, davidetonon@nexescat.org

**Project assistants:** Felip Daza Sierra (Novact), Alba Guasch Casadevall (SCI), Elena Hosta Cuy (Nexes), Sandra Tous Rodríguez (Nexes)

**With the support of** the Observatory for Human Rights and Business in the Middle East and North Africa: Blanca Camps-Febrer (coordinator), Felipe Daza Sierra, Miguel Castro, Lucrecia Baquero Ramos



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# **Guide for the protection and promotion of human rights in public procurement**

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# Foreword

By Claire Methven O'Brien

**Strategic Adviser, Human Rights and Development, Danish Institute for Human Rights**

Governments are huge consumers of manufactured products and services, ranging from the construction of infrastructures and urban development projects; the acquisition of complex items such as weapon systems; the establishment of essential public services in the health and social services sectors; the purchase of health products such as pharmaceuticals, fittings, uniforms and high-tech equipment, and acquisition of general articles such as stationery and food products.

Throughout the world, public procurement amounts to more than 1 trillion euros annually, representing 12% of GDP on average in OECD countries. Government purchases are a significant part of the total global economy. Governments have great potential for influence through procurement, trading conditions and corporate behaviour in different industrial sectors. Public procurement can promote human rights, particularly those of workers, through specific conditions in tender processes to influence immediate suppliers and also other business enterprises that participate in the process.

Thus, public procurement has great potential to promote respect for human rights, both locally and through transnational supply chains. So far, however, little attention has been paid to this role. In addition, through purchase relationships, public procurers have been involved in serious human rights abuses, such as human trafficking and modern slavery, in sectors such as agriculture, fishing and cleaning. Not long ago, among the people who died in the Rana Plaza disaster and fires at a factory in Bangladesh were women working for companies supplying textiles to governments. Child labour is still very common in supply chains of various items such as cobblestones, cocoa and rubber gloves for governments.

The 2011 Framework and the United Nations Guiding Principles on Business and Human Rights calls on states to address the impacts on human rights deriving from their conduct as economic agents, including in the field of public procurement. In addition, Agenda 2030 for Sustainable Development identifies public procurement as a key component in the drive towards sustainable production and consumption and a more inclusive economy. So far, however, there has been no detailed orientation for public procurers, providing the necessary guidance on how to integrate human rights into the tender process in a meaningful way, together with compliance with other legal regulations and political objectives.

This Guide should be an invaluable support for public procurers in meeting objectives for effective and efficient procurement, while helping the state fulfil its fundamental role in the protection and fulfilment of human rights.



# Introduction

Public procurement, defined by the European Union as the process through which public administrations buy works, goods and services from business enterprises using public money, has become a vital tool for the promotion of corporate social responsibility in our country. Given the importance of public procurement in general economic activity (amounting to 18.5% of total GDP in Spain), it is a key factor in promoting transformation towards a more sustainable, social world where all human rights are guaranteed.

For some time now, public administrations in Catalonia have included social, working and environmental requirements in contract specifications, such as compliance with workers' rights, non-discrimination in the workplace, use of more environmentally sustainable products and participation of small and medium-sized enterprises (SME) in the tender procedure.

Inclusion of human rights considerations in public procurement procedures has not been common so far. This is probably because the law on public procurement has not explicitly demanded it. Furthermore, requirements for enterprise compliance with human rights are as yet little regulated, and guidelines in this regard are often framed within soft law and, therefore, are recommendations and proposals for action, without a binding effect on business enterprises. This Guide should serve to advise public administrations, especially local Catalan bodies, and associate or dependent public entities, on how to include the protection of human rights in their public procurement procedures with suppliers, further to clauses already expressly identified in current law, to promote a more just, sustainable, social world of solidarity, in which human rights violations are not treated with impunity. Therefore, this Guide is addressed to Catalan local authorities, public administrations and municipal enterprises with majority public participation. It could also be used as a reference text for local entities all over Spain.

As mentioned above, there is no specific legislation, either at national or at international level, which allows procurers to demand respect for human rights by participants and successful tenderers in procurement processes. Evidently, any requirement of this type should be related to the object of the contract. At the national level, the amendments tabled to the Spanish Law on Public Sector Contracts (LCSP 2017) offered a ray of hope, and were adopted, to some extent, in the final version.

Additionally, although states are not directly responsible for human rights violations committed by private agents, they may be breaching their international obligations if they do not take the necessary measures to prevent, investigate, punish and remedy abuses committed by such private agents. This reflection should encourage competent authorities, through the approval of new legislation on public procurement, to fulfil their duty in the field of respect, protection and fulfilment of human rights.

# 1. The need for the Guide for the protection and promotion of human rights in public procurement

The legal and institutional framework of respect, protection and promotion of human rights is complex and changing. There are different levels of decision making (international, European, national and local), and also different institutions and organisations, the relationship between which is not always easy to determine.

“Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.” Office of the High Commissioner for Human Rights (OHCHR)

The degree of guarantee of human rights in Spain is high on a global scale, as far as actions that take place within Spain are concerned. However, greater efforts should be demanded, for example, in response to the (quasi-binding) recommendations made by United Nations committees, and emerging initiatives such as the introduction of human rights clauses in public procurement should be encouraged.

Public procurement has a strategic role as a driver of social, economic and environmental policies and in support of human rights. Public procurement can promote more sustainable and respectful practices with regard to human rights on the part of tenderers, while giving public administrations a protective, supervisory role for these fundamental rights recognised in legal texts of the highest order.

This section, titled “The need for the Guide for the protection and promotion of human rights in public procurement”, aims to set out the regulatory and institutional human rights framework around the world, in Europe and in Spain, and also the current regulatory framework and strategic role of Spanish public procurement. This section establishes that the purpose of the Guide, contained in the following section, is fully justified and has a sound legal basis.

# 1.1 Regulatory and institutional framework for the protection, respect and promotion of human rights: international, European and national regulations

## 1.1.1 Protection, respect and promotion of human rights is a duty of states and other agents; also of business enterprises

Since the creation of the United Nations Organisation in San Francisco (United States) in 1945, international human rights law has been in constant evolution, as determined by the historical, political and ideological constraints at each moment in time.

And if at the outset this branch of law exclusively regulated the relations between sovereign states, these have seen how their sovereignty has been limited and new international non-state players have been incorporated into international relations, and their role in the international sphere is constantly increasing. We refer in particular to international organisations (not only the United Nations but also regional organisations such as the Council of Europe and the European Union, and their counterparts in America, Africa, the Arab world and Asia, the Organisation for Economic Cooperation and Development [OECD], etc.), and to citizens, either individually or through non-governmental organisations (NGO) and civil society (CSO). Also, the private sector, where trade unions have a leading role as organisations of institutional relevance and general interest, is acquiring an increasingly important role as a global player, though its international legal status is still limited. Their actions could have an enormous impact, both positive and negative, on the defence and promotion of human rights internationally.

The widening range of agents with powers and capacity for influence in the international arena has been accompanied by an ideological change in the conception of human rights, which is embodied in the doctrine of horizontal effectiveness of human rights (*drittwirkung*), by virtue of which human rights cease to be merely a guarantee for citizens in the face of the actions of states (understood as public administrations at any territorial level), also determining legal relationships between individuals (whether business enterprises, unions, citizens individually or collectively, universities and research centres, NGO, etc.).

In other words, private individuals, in their relations with each other, also have an obligation to respect human rights. Thus, the international agreements of the International Labour Organisation, the European Social Charter and other international agreements with a high level of guarantee and legal efficacy, also clearly affect the actions of business enterprises. And while there are few legal obligations directly imposed by international law on non-state agents, it is the states themselves, through their domestic law, who have this power (or this duty of protection and guarantee, as established by the ruling of the European Court of Human Rights, 23 September 2010), for example, and as will be seen later, through public procurement processes.

Internationally, most of the directives aimed at the private sector have been channelled through non-binding *soft law* instruments, without monitoring the actions of this sector or leading to

reparations due to legal breaches. However, these principles, new initiatives such as the Global Compact on Corporate Social Responsibility (or the Global Compact), various ILO declarations, and European Commission green papers and communications in this regard constitute an international standard with recognised influence and, consequently, significant potential impact.

The United Nations Global Compact is an international initiative launched in 1999 for implementation of ten universally accepted principles to promote corporate social responsibility in the ambit of human rights and business, employment standards, the environment and the fight against corruption in enterprise activities and business strategy. With more than 13,000 corporate signatories in over 145 countries, it is the largest voluntary initiative for corporate social responsibility in the world.

Companies that endorse the Global Compact “should support and respect the protection of internationally proclaimed human rights” within their range of influence (Principle 1) and “make sure that they are not complicit in human rights abuses” (Principle 2), but measures of control and sanction arising from this commitment are not enshrined in law.

The crucial role of business enterprises in the protection of human rights is emphasised by the human rights-based approach that the United Nations has called for over recent years. This approach seeks to involve all participants in society, both public and private, in establishing human rights on the basis of the actions of each, to a greater or lesser extent and in accordance with their powers and capabilities, which they can and must carry out through protection, respect and fulfilment of human rights.

## El papel crucial que tienen las empresas en la protección de los derechos humanos queda patente si nos atenemos al enfoque basado en los derechos humanos que las Naciones Unidas vienen proclamando desde hace unos lustros

Within the context of the United Nations, in the 2008 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, proposed the “Protect, Respect and Remedy” framework, to establish different areas of responsibility and action for states and business enterprises in order to ensure that the actions of the latter are not detrimental to human rights, by eliminating or, at least, mitigating negative effects, and providing effective remedies for victims, if there are any. This document (criticised over the lack of participation of civil

society in the drafting process) included a list of rights that could be affected by business activity, based on a preliminary study of 320 cases of alleged human rights abuses. Whatever the case, this is neither exclusive nor limiting. The document led to the Guiding principles on business and human rights (2011), which includes specific recommendations and practices for the implementation of the Principles, consolidating the calls of the Global Compact. The list of right affected by business activity, as stated by Ruggie, is as follows:

Workers' rights	Other rights
Freedom of association Right to organise and participate in collective bargaining Right to non-discrimination Abolition of slavery and forced labour Abolition of child labour Right to work Equal pay for equal work Right to equality at work Right to fair and dignified remuneration Right to a safe working environment Right to rest and to leisure	Right to life, liberty and safety of the person Protection against torture or cruel, inhuman or degrading treatment Recognition and equal protection before the law Right to a fair trial Right to self-determination Freedom of movement Right to peaceful assembly Right to marriage and forming a family Freedom of thought, conscience and religion Right to holding opinions, freedom of information and expression Right to political activity Right to privacy Right to a decent standard of living (in particular, food, clothing and housing) Right to physical and mental health, access to medical services Right to education Right to participating in cultural life, to the benefits of scientific progress and the protection of authors' interests Right to social security

Two of the Guiding principles on business and human rights highlight the clear link with public procurement procedures:

- Guiding Principle 5: “States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.”
- Guiding Principle 6: “States should promote respect for human rights by business enterprises with which they conduct commercial transactions”, in which it is particularly noted that states are provided “- individually and collectively - with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.”

In accordance with this framework and the Guiding Principles, although states are not held directly responsible for human rights violations committed by private agents, they may be in breach of their international obligations in this regard if they do not take the necessary steps to prevent, investigate, punish and redress the abuses committed by these private agents.

Despite the positive spirit of the Guiding Principles and the Global Compact leading to a greater degree of guarantee of human rights around the world, the non-binding nature of *soft law* relating to these mechanisms has perpetuated a lack of more incisive action on the part of national governments, which are limited to adopting strategic plans without resulting legal modifications that explicitly oblige business enterprises to observe human rights in their activities.

## 1.1.2 International agreements and international bodies ensuring compliance

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 December 1948, just three years after the end of World War II, was the first instrument regulating human rights, the (political, not legal) value of which in terms of declaration and interpretation is still influential today. The Declaration outlines the following definition of “human rights”, contributed by the United Nations:

“Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.” (OHCHR)

**all these international instruments make no sense if their adoption is not accompanied by the establishment of specific bodies that are responsible for monitoring and control of their application by states**

The Declaration is, therefore, the first approach to the definition of the civil, political, economic, social and cultural rights of each and every one of us, such as equality before the law (Article 7), freedom of thought, conscience and religion (Article 18), the right to education (Article 26) and the right to participate and benefit from cultural life and scientific progress (Article 27).

Since its approval, the non-binding principles established in the UDHR have been developed through over 200 international treaties and their protocols (with legal status for the states that ratify

them), and customs, general principles of international law and other substantive and procedural rules. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both approved in 1966, stand out, but the list is endless: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), the Convention on the Rights of Persons with Disabilities (CRPD) (2006), etc., also incorporating emerging third and fourth generation rights, which have updated and complemented previously recognised and systematised human rights, as new global challenges arise (for example, the human right to water, which was not declared as such - in a non-binding manner - until 2010, the right to a healthy environment, the right to disarmament).

However, all these international instruments make no sense if their adoption is not accompanied by the establishment of specific bodies that are responsible for monitoring and control of their application by states. Through approval of the various instruments seen above, specialised committees have been created within the framework of the United Nations that oversee the actions of states in specific fields of competence. The task of these committees is diverse: review of periodic reports, communications and complaints of individuals (giving them a quasi-judicial role), review of communications and inter-state complaints, *ex officio* fieldwork and visits, urgent

and rapid alert procedures, and the important Universal Periodic Review, carried out under the Human Rights Council, analysing compliance by the state in question in all aspects of human rights. The role of these committees as the main interpreters of the treaties and protocols is widely acknowledged, in terms of monitoring and control mechanisms.

Although the decisions of these bodies are not entirely binding (in fact their task is that of assistance and guidance to states in the implementation of international instruments), the trend is for these and other international institutions to recognise their legitimacy, though a greater appropriation of the case law of these committees in the resolution of cases at a national level (giving mandatory status to the decisions) would contribute to the creation of a more homogeneous system for protection of human rights internationally.

Similarly, there are no coercive mechanisms within the human rights protection system, which prevents redress of damages to individual victims of human rights violations.

Within the framework of the United Nations, but as an independent mechanism, the International Criminal Court was created in 1998, with powers to judge war crimes, genocide, crimes against humanity and the crime of aggression, all leading to the most serious violations of human rights.

Although the International Criminal Court does not judge crimes committed by business enterprises or by states but by specific individuals, we should emphasise the jurisdiction of the Court included in Article 93.10 of the Statute of Rome, which opens the door to the prosecution of serious crimes against the illegal exploitation of natural resources, arms trafficking, trafficking in persons, terrorism, financial crimes, occupation of land and the destruction of the environment, among others, while highlighting the role of these illicit acts in the disfigurement of peace and stability in the world.

### 1.1.3 The European Union and the Council of Europe

In Europe there are two supranational institutions that have played a pioneering role in the field of defence of human rights around the world. One is the European Union, the club of 28 in which the Parliament, the Council, the Commission and the Court of Justice each have their own functions in this field. The other is the Council of Europe, bringing together 47 European states, whose greatest human rights instrument is the European Convention on Human Rights (ECHR), violations of which are monitored by the European Court of Human Rights (ECHR).

In the European Union, the Charter of Fundamental Rights of the European Union, or Charter of Nice, was adopted in 2000. This Charter is intended to systematise the human rights dispersed among various national and international frameworks, always in accordance with the indivisible and universal values of human dignity, freedom, equality and solidarity, and the principles of democracy, the rule of law and, of course, respect for human rights, as proclaimed in Article 2 of the Treaty on European Union. It takes up, among other items, the Community Charter of Fundamental Social Rights of Workers (1989) and the European Charter of Children's Rights (1992).

The Charter, a protective collection of items at the time of its adoption, goes beyond the classification of civil and political rights, on the one hand, and economic, social and cultural rights, on the other, and groups them together with those of the third and fourth generation, based on the principles and values of the Union: dignity, freedom, equality, solidarity, citizenship and justice.

When the Lisbon Treaty entered into force in 2009, the rights, freedoms and principles enshrined in the Charter became legally binding, acquiring the same legal status as the Treaties (Article 6 of the Treaty on European Union). The Charter can be invoked by citizens in relation to actions originating in institutions of the Union, and from member states, provided that they are applying European regulations.

In addition, there are other provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union that include further specific rights, such as Article 8 of the latter treaty, on equality between men and women, and Article 16, on the right to the protection of personal data. Similarly, seeking policy coherence, the European Union has set itself the objective of promoting human rights beyond its borders through external action policies.

With regard to the monitoring and control of respect for human rights, the Treaty on European Union, in Article 7, establishes a mechanism for political control of human rights violations by means of which the Council may decide to suspend certain rights deriving from the Treaties in view of the existence of a serious and persistent violation by a member state of the rights in Article 2. However, this sanctioning mechanism has had hardly any application since its approval.

In addition, the Court of Justice of the European Union, especially through its preliminary rulings (Article 267 of the Treaty on the Functioning of the European Union), has created broad case-law in the field of protection of human rights. And it has done so by reminding us of various existing instruments, both national and international, such as the law of the Union, the international conventions included in the Treaties, the fundamental rights recognised in the constitutions of member states, etc. Within this collection of instruments, we should mention the repeated references to the European Convention on Human Rights. In fact, the Lisbon Treaty itself urges the European Union to adhere to it, which would allow citizens to directly address the ECHR, a body specialising in this matter, to denounce human rights violations by European institutions. (This is an important aspect since it has been shown that citizen complaints lie at the very heart of protection of human rights.) However, since December 2015, adherence to the Convention has been halted because the Court of Justice of the European Union (CJEU) ruled that the draft agreement was not compatible with the Union Treaties.

In December 2015, the Court of Justice of the European Union annulled the trade pact between the European Union and Morocco because it considered that the North African country was extending its sovereignty over Western Sahara, a sovereignty not recognised by the European Union, its member states and, more generally, the United Nations. Thus, it prohibited trade of agricultural and fishery products from that territory by Morocco, which is in violation of international law. In addition, the Court urged the European

Council to ensure that there are no indications of exploitation of the natural resources of Western Sahara under Moroccan control that could be detrimental to its inhabitants and violate their fundamental rights. Although this decision was revoked a year later, the clear message from the Union remains: Morocco has no sovereignty over Western Sahara and should not trade in goods from this territory.

Finally, every citizen of the Union or with residence or a business address in one of the member states has recourse to the European Ombudsman, directly or through a member of the European Parliament, in order to denounce an act of maladministration in the actions of EU institutions that violate human rights recognised in the law of the Union (except the CJEU and the General Court). The European Ombudsman, as is often the case with people’s advocates, is not a sanctioning mechanism, but issues specific reports that include recommendations for violating states, as well as annual reports. Nonetheless, these reports are widely recognised and used as a basis for future actions.

Within the framework of the Council of Europe, a supranational organisation comprising 47 European states, 223 treaties have been approved to date, many of which relate to the protection and promotion of human rights. The most important instrument of the Council of Europe in this area is the Convention for the Protection of Human Rights and Fundamental Freedoms, approved in 1950 (and its additional protocols), cited above. The rights enshrined in the Convention (the right to life, the right to a fair trial in the civil and criminal fields, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion, the right to vote, etc.) are guaranteed by the action of the European Court of Human Rights, which allows victims of human rights violations by one of the states parties to denounce this action provided they have exhausted the internal judicial resources of that country. With respect to other legal instruments, each of them determines the methods of supervision of compliance by states, including analysis of the periodic reports presented by states or visits on the ground, among others.

**The great value of the UDHR and other human rights treaties and protocols, both in terms of interpretation (Article 10.2 already mentioned) and in terms of applicability, is recognised since, under Article 96, international treaties form part of Spanish domestic law**

### **1.1.4 The Spanish Constitution and the Spanish legal framework**

The Spanish Constitution, as the highest-level guarantor of the rights and freedoms of citizens in Spain, explicitly states in Article 10.2 that “the rules regarding fundamental rights and freedoms that the Constitution recognises will be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on these matters ratified by Spain”. The great value of the UDHR and other human rights treaties and protocols, both in terms of interpretation (Article 10.2 already mentioned) and in terms of applicability, is recognised since, under Article 96, international treaties form part of Spanish domestic law.

This is important because, though in principle the fundamental rights included in the Constitution are considered to have greater protection than rights adopted globally, more generically, sometimes international agreements are adopted regarding new rights and new phenomena more rapidly than in Spain, showing that internal regulation is not always as progressive as one might expect.

Spain has ratified the vast majority of international human rights instruments of the United Nations, the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), as shown in the following list and which, as mentioned above, form part of domestic Spanish law.

International instrument	Year of adoption	Year of ratification by Spain
ILO Convention 29. Forced Labour Convention	1930	1932
Convention on the Prevention and Punishment of the Crime of Genocide	1948	1969
ILO Convention 87. Convention 87. Freedom of Association and Protection of the Right to Organise	1948	1977
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others [s1]	1950	1962
Convention Relating to the Status of Refugees	1951	1978
ILO Convention 98. Right to Organise and Collective Bargaining	1949	1977
ILO Convention 100. Equal Remuneration	1951	1967
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	1957	1967
ILO Convention 105. Abolition of Forced Labour	1957	1967
ILO Convention 111. Convention concerning Discrimination in Respect of Employment and Occupation	1958	1967
Convention against Discrimination in Education	1960	1969
International Convention on the Elimination of All Forms of Racial Discrimination, including Article 14, which establishes an individual complaints mechanism before Committee on the Elimination of Racial Discrimination	1965	1969 and 1998 (article 14)
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1966	1977
International Covenant on Civil and Political Rights	1966	1977
First optional protocol of the ICESCR by which individual communications alleging violations may be submitted to the Human Rights Committee	1966	1985
Protocol relating to the Status of Refugees	1967	1978
Protocol instituting a conciliation and good offices commission to be responsible for seeking the settlement of any disputes which may arise between states parties to the Convention against Discrimination in Education	1962	1992

Source: own data

International instrument	Year of adoption	Year of ratification by Spain
Convention concerning the Protection of the World Cultural and Natural Heritage	1975	1982
ILO Convention 138. Minimum Age for Admission to Employment	1973	1977
Convention on the Elimination of All Forms of Discrimination against Women	1979	1984
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 22, which empowers the Committee against Torture to receive individual complaints for alleged violation of any of the rights contained in the Convention	1984	1987
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	1989	1991
Convention on the Rights of the Child	1989	1990
Optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women, which establishes a double system of ex officio investigation and individual complaints to the corresponding committee	1999	2001
ILO Convention 182. Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour	1999	2001
Optional protocols to the Convention on the Rights of the Child concerning the participation of children in armed conflicts and the sale of children, child prostitution and child pornography	2000	2002
United Nations Convention against Transnational Organized Crime and Protocols against the Smuggling of Migrants by Land, Sea and Air, and to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children	2000	2002
Optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, establishing the Subcommittee on the Prevention of Torture, with powers to regularly visit places of detention in States parties in order to prevent torture and other ill-treatment, while obliging States parties to establish one or more national mechanisms for the prevention of torture	2002	2006
Convention on the Rights of Persons with Disabilities	2006	2007
Optional Protocol to the Convention on the Rights of Persons with Disabilities that enables the relevant committee to receive individual complaints	2006	2007
International Convention for the Protection of All Persons from Enforced Disappearance	2006	2009
Convention on the Protection and Promotion of the Diversity of Cultural Expressions	2007	2007
Optional protocol to the ICESCR that enables the Committee on Economic, Social and Cultural Rights to receive individual complaints for alleged violation of any of the rights contained in the Covenant	2008	2010
Optional Protocol 3 of the Convention on the Rights of the Child that enables the respective committee to receive individual complaints and conduct investigations ex officio	2011	2013

On ratification, Spain also accepts the opinions, reports, recommendations and follow-up documents adopted by the corresponding committees but, in the absence of the necessary modification of Spanish domestic legislation, is not subject to them legally (except in the case of final judgements of the ECHR).

This situation is of concern if we take into account that there are several committees that have condemned Spain for violations of human rights (the Committee against Torture, the Committee on Discrimination against Women, the Committee on Economic, Social and Cultural Rights) and we have seen how Spain did not carry out any action or reparation in this regard, in breach of the principle of good faith under which it submitted to the international treaties in question.

Furthermore, various instruments have not been ratified and therefore do not apply to Spain, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968), conventions on apartheid (1973, 1985) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

Within the framework of the Council of Europe, Spain has ratified 129 of the 223 treaties of the organisation. In the field of human rights, most significant are the European Convention on Human Rights (1950, cited above) and its protocols, the European Social Charter (1961), the European Convention on the Exercise of Children’s Rights (1996), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007), the European Convention on Human Rights and Biomedicine (1997), the Convention on the Prevention of Terrorism (2007), the Convention on Preventing and Combating Violence against Women and Domestic Violence (2011), among others.

**In the public sector, autonomous communities and local authorities have also sought to recognise human rights for themselves and reinforce their effectiveness regionally**

Article 53 of the Spanish Constitution classifies rights in accordance with the system of protection. Articles 14 to 38 (Rights and Freedoms, Chapter II) are binding on all public authorities, they must be developed through the passing of laws, and they may be susceptible to rulings of the Constitutional Court through an appeal of unconstitutionality.

These articles include the right to honour, the right to effective judicial protection, the right to education, the right to join a trade union and the right to take strike action. In addition, Articles 15 to 29 (Fundamental rights and public freedoms) and 14 (Principle of equality) can be invoked before ordinary courts through a preferential procedure, and before the Constitutional Court by writ of *amparo*.

In contrast, Chapter II does not include the right to health protection, access to culture, a suitable environment and decent, suitable housing, which come under the “Guiding principles of social and economic policy “(Chapter III) and enjoy a lesser degree of protection, since they can only be claimed before ordinary courts in accordance with relevant laws (the Criminal Code, specific criminal law such as anti-terrorist regulations, etc.).

In Spain it is said there is multilevel protection of human rights (also called fundamental rights), given that there are several public and private powers that help to configure these rights. Thus, not only do we find a list of rights and freedoms established internationally by the United Nations and other organisations, by the Council of Europe and the European Union, and nationally by central powers, including judicial interpretations of new rights. In the public sector, autonomous communities and local authorities have also sought to recognise human rights for themselves and reinforce their effectiveness regionally. However, the Constitutional Court ruled, through sentence 247/2007 (with five dissenting opinions), that regional statutes of autonomy in Spain have no powers to directly establish rights of subjects that are not linked to the central institutional system, and that these foremost texts of autonomous communities should limit themselves to “guidelines, objectives or mandates” (or, as the same institution mentions in sentence 31/2010, “other types of rights”, different from fundamental rights).

Whatever the case, human rights violations, as mentioned, are subject to ordinary legislation or to the Constitutional Court, depending on the human right that is at stake. In addition, the Ombudsman and the public prosecutor are also guarantors of the protection of human rights in Spain, and there are one or more departments with this remit in each ministry or agency. Furthermore, autonomous community institutions entrusted with this mission include the autonomous region Ombudsman and sectoral defence agencies (of the consumer, of children, etc.), the corresponding departments of each ministry and, in some cases (Catalonia, Balearic Islands, Basque Country) specific parliamentary commissions. Finally, the position of defender of human rights at a local level, particularly in Catalonia (the Síndic de Greuges) is more and more common.

In short, in Spain there are numerous legislative and institutional guarantees (both public and private) to ensure respect for human rights within the territory. The Spanish Constitution is the highest-level instrument, serving to identify human rights and granting them a status in accordance with the level of guarantee and protection they deserve (without entering into a discussion of the fact that this categorisation does not take into account the great degree of interconnectedness between them and the problems arising from ignoring this). By reference to guarantees established at European level (through the European Union and the Council of Europe) and internationally (especially through, but not limited to, the United Nations), the Spanish Constitution is a key factor for the protection of human rights in the actions of public administrations, and also of agents in civil society.

## 1.2 Regulatory context of public procurement and mention of human rights in Spain

Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, on public procurement, repealing Directive 2004/18/EC, establishes the basic European community regulations for public procurement. Regarding the purpose of this Guide, we should mention that, for the first time in this area, the Directive enshrines the instrumental nature of public procurement, aimed at supporting certain public policies, such as respect for the environment and social aspects. In this regard, Recital No. 2 of the legal text is particularly illustrative:

“(2) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020, a strategy for smart, sustainable and inclusive growth’ (‘Europe 2020 strategy for smart, sustainable and inclusive growth’), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council and Directive 2004/18/EC of the European Parliament and of the Council should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SME) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”

Among other things, in Article 18 the Directive obliges member states to ensure compliance with regulatory environmental and employment obligations during execution of the contract.

This Directive has opened the door to inclusion of instruments that are becoming more widely used, that is, the introduction of social clauses in different stages of the tender. As far as possible, the doctrine on social clauses should serve as a precedent and point of reference for legal fit for the purpose of this Guide: inclusion of respect for human rights in public procurement processes. However, differences between social clauses and the central aspect of this Guide, human rights, should be taken into account.

Directive 2014/24/EU includes the doctrine developed by the European Union Court of Justice, which has been the driving force behind the introduction of social clauses in public procurement. This doctrine is important insofar as it can assist in the interpretation of the scope of the content of the Directive itself.

The case-law is basically contained in the following sentences: Judgement of 20 September 1988, Beentjes C-31/87; Judgement of 26 September 2000, Commission vs French Republic C-225/98; Judgement of 17 September 2002, Concordia Bus Finland OY AB C-346/06, and Judgement of 17 November 2015, Regiopost C-115/14.

The Spanish Law on Public Sector Contracts (LCSP 2017) has transferred European Parliament and Council Directives 2014/23/EU and 2014/24/EU, of 26 February 2014, into Spanish law.

LCSP 2017 establishes no noteworthy advances in promoting sustainable public procurement, particularly regarding the rights of workers and respect for the environment, issues that clearly affect the field of human rights. In this regard, Section V of the explanatory memorandum of this regulation stipulates that special conditions of execution and award for ensuring human rights can be included. This single mention in the law is pioneering and promotes a strategic vision of such public procurement. In particular, “in addition, in order to promote respect for human rights and, in particular, basic employment rights of working people and small producers in developing countries, it introduces the possibility that both the award criteria and the special conditions of execution incorporate social aspects of production and trade for

works, supplies and services to be provided in accordance with the contract. In particular, it can be required that this process comply with the principles of fair trade established in Section 2 of the European Parliament Resolution on Fair Trade and Development 2005/2245 (INI).”

The final text of LCSP 2017, after parliamentary debate, differs from the project presented by the Government and, although it could have been a greater guarantor of human rights, it includes initiatives such as a specific disposition on corruption (Article 1). It does so in the form of a reference to the principle of integrity, granting legal effects to an ethical principle such as honour, which has been recognised in the United Nations Convention against Corruption, and in accordance with Article 41 of the Charter of Fundamental Rights of the European Union, which, as stated, is integrated into domestic regulations through Spanish Law 1/2008, of 31 July.

In the part that concerns us, LCSP 2017 takes from the transposed Directive the aforementioned consideration of how to use public procurement as an instrument for environmental, social, innovation and development policies and declares in Article 1 that these measures favour a better price-quality relationship in the contract.

## 1.3 The strategic role of public procurement

Every year, public authorities in the European Union invest around 14% of total GDP in the purchase of works, services and supplies. In Spain, this figure is estimated to be as much as 18.5%, according to the Spanish National Commission on Markets and Competition. In addition, in qualitative terms public procurement processes serve to carry out the main works and provide the main supplies the country needs.

According to Report 16/2015 of the Advisory Board on Public Procurement of the Autonomous Community of Aragon, “public procurement has long been considered a legal tool at the service of public authorities for fulfilment of objectives and public policies. It is undeniable that through public procurement public authorities currently intervene in the economic, social and political life of the country and regions.” In the last analysis, provision of public services (through public procurement procedures or otherwise) is no longer governed by criteria of economic benefit (the so-called value for money of the 1980s and 1990s, decades of greatest market liberalisation) but by criteria of effectiveness and public interest, and of cost efficiency, quality and price.

Badalona City Council has begun to introduce social criteria in tender procedures for contracts for cleaning and maintenance services of green spaces and other spaces in the city. Among other factors, value is attached to the successful tenderer reserving contracts for people with functional diversity, at risk of social exclusion or with serious difficulties in access to the labour market; 5% of the contract price has to be reserved for subcontracting to special work and employment centres; the contractor is required to submit an affidavit that it complies with its fiscal obligations, does not resort to tax havens, and undertakes to pay decent wages, to protect staff working rights and to carry out staff training initiatives.

In addition, the predominant role of public procurement as a mechanism for channelling public policies, beyond providing the administration with goods and services, is one of the pillars of the 2020 Strategy of the European Union, as noted above. The Framework Strategy of the Union has broadly recognised it as a tool to achieve smart, sustainable and inclusive growth, while guaranteeing a more efficient and rational use of public funds, in economic terms. As mentioned in Directive 2014/24/EU, “It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy”.

In 2016 Barcelona City Council invited tenders for a new telecommunications services contract, with the incorporation of social, environmental, fiscal and human rights clauses. Thus, in addition to clauses on employment legislation, collective agreements in force, social legislation, occupational risk prevention, gender equality, social integration of people with functional diversity, protection of personal data, the environment, fiscal matters and taxation (guaranteeing, at the same time, suitable working conditions in outsourcing), Barcelona City Council included two crucial factors for achieving ethical public procurement: compliance with international regulations regarding human rights, with special emphasis on the protection of workers and children, and the requirement to inform about the origin of equipment and items linked to the contract, and the location of the factories of origin.

With this tender procedure, the City Council reduced the weighting of economic criteria in evaluation of tenders, and increased the weighting of social and environmental aspects. Regarding the mobile telephone service, for example, the incorporation of socially responsible fair trade terminals was valued: that is, those in the productive chain that respect human rights, fair employment and waste management. In addition, the business enterprise awarded the contract accepts that Barcelona City Council may carry out any checks it deems necessary.

It should also be noted that on 30 April 2017 Barcelona City Council passed a Sustainable Public Procurement Decree.

Similarly, the Spanish Congress of Deputies, in the Report of the Parliamentary Subcommittee to promote corporate social responsibility of 2006 (subsequently passed by the Council of Ministers, 30 January 2009), established that “public purchase and procurement must be tools for the promotion of corporate social responsibility, and they must send signals to the market that business enterprises that offer society added value in environmental and social matters will be recognised and rewarded.”

Thus, as noted earlier, procurers have for some time included environmental, employment and social clauses as catalysts of change towards a fairer, more equitable and sustainable society. And they themselves have adopted a more responsible attitude and have applied measures for greater transparency and sustainability, such as by establishing the use of electronic procedures in public procurement and in other areas of contact with private agents.

At the beginning of 2016, and in the framework of the 2015-2019 Government Action Plan, Madrid City Council approved two structures to make public procurement a tool for the promotion of ethical, socially responsible and environmentally responsible behaviour. Instruction 1/2016 refers to incorporation of social clauses in contracts entered into by the Madrid administration (equality plans, actions to reconcile work and family life, etc.). Instruction 2/2016 refers to incorporation of ethical fair trade clauses in public procurement (that is, demonstrating that production conditions respect the eight fundamental ILO conventions, that a fair price has been paid to the producer, that the entire supply chain can be tracked to guarantee adequate consumer information, etc.).

Commitment to the application of these Instructions is evident from the Strategic Human Rights Plan 2017-2019 of the City Council. The City Council intends, among other things, to include evaluation clauses in the tender specifications on human rights training, to encourage compliance by business contractors with the Guiding Principles on Business and Human Rights of the United Nations, to promote a national plan for human rights and a binding international treaty on the matter.

The United Nations Environment Programme, which has done important work in placing value on the need to adopt sustainable public procurement measures, includes human rights within the social pillar, which along with the economic and environmental pillars must be balanced to promote sustainability. The Programme includes human rights as social sustainability factors, as it does with social justice and equity, safety and working conditions.

However, there is no complete correspondence between human rights and social factors. This is because not all social factors that determine sustainable public procurement are in a human rights context. For example, failure to meet the requirement of employing a specific percentage of people with functional diversity cannot be considered a violation of human rights. Similarly, not all human rights have a social side (although, obviously, they may have repercussions). Civil rights (such as presumption of innocence or the right to asylum) and cultural rights (such as the right to take part in the community's cultural life) show that the concept of "human rights" goes far beyond the social clauses typically included in public procurement.

**In the area of our concern, it seems that in general all social, work and environmental clauses, and also human rights clauses, are included under the term "social considerations" (and variants)**

However, in the area of our concern, it seems that in general all social, work and environmental clauses, and also human rights clauses, are included under the term "social considerations" (and variants). At least, that is what emerges from the interpretation of the progress made on this subject within the European Union

On 25 June 2015, Molenbeek-Saint-Jean (Belgium) adopted a motion that sought to include human rights in the public procurement processes of the Town Council. For almost two years, a working group drafted legal clauses, which were finally approved on 26 April 2017.

In accordance with Article 1.2, the decision about whether an activity violates human rights or international law lies with domestic and international legal and quasi-judicial bodies, including Belgian courts, the European Union Court of Justice, the International Court of Justice and the International Criminal Court. This decision will be based on the activity of the tenderer or business contractor, and that of enterprises in the same group (both holding companies and subsidiaries).

In particular, Belgian society and Belgian public administrations celebrate the “Molenbeek boycott of multinationals involved in the occupation of Palestine”, internationally considered illegal.

The Town Council decision coincided with approval of the Belgian Law of 17 June 2016 on public procurement, which empowers procurers to exclude, if they consider it appropriate, those business enterprises that commit “serious professional offences” (Article 69.3), among which are violations of the Guiding Principles on Business and Human Rights of the United Nations. In accordance with the provisions of this Law, the decision opens the door also to the rehabilitation of tenderers if they carry out actions to deal with the consequences of their actions and prevent further situations of serious professional offences (Article 70), including compensation to victims, publication of the measures taken, and active collaboration in clarifying the facts that led to the violation of human rights or international law and the end of this violation.

Beyond the Guiding Principles, the Sustainable Development Goals, and in particular Goal 12.7 on sustainable public procurement, demand due diligence of states in order to encourage business enterprises to comply with international human rights standards and perform their duty to protect human rights, as recalled by the recent document “10 key recommendations to governments and businesses” of the Working Group on Business and Human Rights of the United Nations.

As an essential obligation in public contracts, Gijón City Council includes compliance with the ten principles of the United Nations Global Compact on human rights, work and the environment. Compliance with the Global Compact has become a key aspect in procurement, the breach of which can lead to termination of the contract.

Some human rights are applied progressively, that is, states are obliged to adopt the necessary positive measures in order to gradually achieve the fulfilment of these rights, acting as quickly and effectively as possible, and using as many available resources as possible. (However, the same human right can entail several obligations, some of an immediate nature and others of a

progressive nature.) In addition, as we have seen, respect for human rights is enforceable in the case of public administrations, citizens and social agents such as business enterprises.

The progressive fulfilment of human rights therefore entails a process of due diligence or use of resources by all agents, as established by the Guiding Principles of the United Nations. While states have the power to choose the methods and means to achieve their goals, public procurement offers a more than adequate opportunity to reward those tenderers that, in a proactive way, contribute to progressive fulfilment of human rights through internal human rights plans and programmes or compliance programmes, as noted in our Guide.

Approval of the National Plan of Business Enterprises and Human Rights of the Spanish Government in July 2017 did not completely satisfy Spanish human rights advocates. With regard to procurement strategy, it includes a measure devised to meet Guiding Principle 5: “Public administrations will exercise appropriate supervision of the possible impact on human rights when they contract services of business enterprises for services inside and outside Spain. This supervision should take into account the criteria of specialist institutions, in accordance with application of the Spanish Strategy for Corporate Social Responsibility.”

Likewise, in relation to Guiding Principle 6, “The Government will examine how to apply criteria aligned with the Guiding Principles” in relation to the Spanish Law on Public Sector Contracts and other contract regulations, and will “establish the necessary measures in a way that does not discriminate against SME, and respects the provisions of the EU Treaty on non-discrimination, equal treatment and transparency, without adding administrative burdens to procurers and business enterprises.”

Furthermore, in the case of armed conflicts it provides for measures to avoid engaging business enterprises involved in these conflicts, such as informing enterprises about the risk of their operations, drafting guidelines for companies on how to address sexual violence in conflicts and commit to including human rights clauses in contracts for military and private security services, among others.

We consider this an extremely feeble effort on the part of Spain to fulfil the achievement of human rights in all three aspects (protect, respect and remedy) in the field of public procurement. This is a Plan that includes nothing specific other than a commitment to include measures, examine how to apply criteria, and merely say that it will exercise proper supervision without establishing any means and methods to carry out this supervision.

In the preparation of the Guide, we have taken into account that the Directive establishes the incorporation of social criteria at four different moments in the procurement process: as requirements of social qualification of the business contractor prior to submitting a tender, as technical specifications of the contracts, as award criteria, and as criteria of execution.

In implementation of the Guide, special attention should be paid to the limits established by the doctrine of the Court of Justice of the European Union on strategic use of public procurement. This is the reason for the requirement that the criteria should be related to the object of the contract, the need for publication and precision in the tender announcement and in the specifications, the fact that an unlimited power cannot be granted to the procurer, and that the principles of EU law, particularly those of free competition and non-discrimination, must be respected.

## 1.4 Conclusion

On the basis of all that we have set forth here and in the light of the data and examples, we conclude with the idea that public procurement can indeed serve as a means to demand respect for human rights. However, though there is *soft law*, especially internationally, which promotes compliance with human rights in the field of public procurement, regulations, especially national regulations, do not give such a free hand to procurers to demand compliance and do not provide for sufficient monitoring, evaluation and reporting mechanisms.

In this context, it is necessary to advocate for competent authorities to enact the necessary legislative measures so that procurement bodies have at their disposal further tools to enforce respect for human rights on business enterprises tendering for and awarded public contracts. In any case, local authorities have a certain margin and several channels of action through strategic procurement to respect and enforce respect for human rights, by enforcing all current legislation.

# 2. Guide for the protection and promotion of human rights in public procurement

## 2.1 Introduction to the Guide

Catalan public administrations, like all Spanish administrations, are obliged to respect and strengthen the content of human rights enshrined in international treaties signed by Spain, the European Convention of Human Rights of the Council of Europe, the Charter of Fundamental Rights of the European Union, and the Spanish Constitution.

Through public procurement, public administrations gain access to the market in works, services and supplies and provide public services indirectly. These contracts involve great public expense. Given the scale of public procurement in recent years, it should not be limited to serving as a transparent and effective means of provision of goods and services for administrations, and should be understood as a legal tool at the service of public authorities for the fulfilment of their general purposes and their public policies. The strategic function of public procurement is thus shaped, and through public procurement other purposes of general interest must be pursued.

Among these other purposes is the defence of the social and environmental values of our society, and the protection and fulfilment of human rights. If the defence and fulfilment of human rights are a key objective of all public administrations and if public procurement is an important part of public spending, this activity must be linked to the primary objective of defence and protection of human rights.

There are two documents of particular value in the treatment of corporate responsibility for human rights violations and the role of states in avoiding these violations. In the “Guiding Principles on Business and Human Rights. Implementation of the United Nations framework to protect, respect and remedy” (which the UN Human Rights Council adopted by means of Resolution 17/4 of 16 June 2011) the following is stated:

**Catalan public administrations are obliged to respect and strengthen the content of human rights enshrined in international treaties signed by Spain, the European Convention of Human Rights of the Council of Europe, the Charter of Fundamental Rights of the European Union**

“States’ international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.

States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

States should promote respect for human rights by business enterprises with which they conduct commercial transactions.”

For its part, the report of the Committee on Foreign Affairs of the European Parliament of 19 July 2016, on the responsibility of companies for serious violations of human rights in third countries states:

“Notes that increasing globalisation and internationalisation of business activities and supply chains will make the role that corporations play in ensuring respect for human rights more important and create a situation in which international norms, rules and cooperation are crucial to avoid human rights abuses in third countries; is deeply concerned by cases of human rights violations committed in third countries, including as a result of some EU corporations and business enterprises management decisions, as well as by individuals, non-state actors and states alike; reminds corporate actors of their responsibility to respect human rights throughout their global operations, regardless of where their users are located and independently of whether the host state meets its own human rights obligations;

Reaffirms the urgent need to act in a continuous, effective and coherent manner at all levels, including national, European and international, in order to effectively address human rights abuses by international corporations when they appear, and to address the legal problems resulting from the extra-territorial dimension of companies and of their conduct, and the related uncertainty as to where the liability for human rights violations lies;

Calls on the EU and the Member States to lay down clear rules setting out that companies established in their territory or under their jurisdiction must respect human rights throughout their operations, in every country and context in which they operate, and in relation to their business relationships, including outside the EU; considers that companies, according to their size and capabilities, and including banks and other financing or lending institutions active in third countries, should ensure that they have systems in place to assess risks and mitigate potential negative impacts related to human rights, labour, environmental protection and disaster-related aspects of their operations and value chains; calls on the Member States to assess periodically the adequacy of such laws and address any shortcomings.”

There is, therefore, an obligation on enterprises to respect human rights, and also an obligation on states to adopt the necessary rules to ensure that enterprises respect human

rights. One way to enforce this respect can be through regulations that establish the relationships between administrations and business enterprises contracted by them. The explanatory memorandum of LCSP 2017 establishes that:

“In addition, with the intention of promoting respect for human rights, and in particular for the basic employment rights of working people and small producers in developing countries, the possibility is introduced that both the award criteria and special conditions of execution incorporate social aspects of the production and commercial processes relating to the works, supplies or services that are to be provided in accordance with the contract in question, and in particular it may be required that the said processes comply with the principles of fair trade established in Section 2 of the European Parliament Resolution on Fair Trade and Development (2005/2245, INI).”

This Guide, in accordance with the principles mentioned, in the context of a strategic conception of procurement, seeks to be a clear, simple tool made available to Catalan public administrations so that they can incorporate instruments for protection and development of human rights.

By means of a mayoral decree in 2016, Barcelona City Council made the innovative decision of including a clause on public procurement that prevents awarding contracts to business enterprises that operate in tax havens.

It is a question of incorporating, through a broad interpretation of current legislation, “a required contract clause in all public municipal contracts, including the entities in the municipal group of enterprises, which establishes that tenderers, contractors and subcontractors, or affiliated business enterprises may not conduct financial operations in tax havens, according to the list of countries prepared by European institutions or endorsed by them or, failing that, by Spain, or in other countries when considered criminal activities, as legally defined, such as crimes of money laundering, tax fraud or fraud against the public treasury” (according to the ruling proposed by the City Council general manager to the Mayor).

With this step, Barcelona City Council went beyond the political declaration of being a city free of tax havens and, pioneeringly, technically regulated in public contracts its desire not to have a legal relationship with a business enterprise that, directly or through front companies or subsidiaries, diverts funds to tax havens with the intention of evading tax or legal obligations. The Parliament of Catalonia addressed this same proposal to the Government through Motion 223/X of 2015, since the current legal framework for public procurement does not establish this as due cause for prohibiting procurement.

As mentioned in the first part of this document, a significant initiative is the Spanish National Plan for Business and Human Rights (Resolution of 1 September 2017, of the Secretary of State for Foreign Affairs, published in the Spanish Government Gazette [BOE] on 14 September 2017). This National Plan contributes to a strategic vision of public procurement, linking the action of the administration in public procurement processes to respect for human rights. The Plan establishes a series of Guiding Principles, the fifth of which states that:

“Public administrations will exercise suitable supervision of the possible impact on human rights when contracting the services of business enterprises for the provision of services, both within Spain and abroad.”

Among the measures envisaged to achieve this, the Plan provides that:

“The Government will examine how to apply criteria aligned with the Guiding Principles in relation to Royal Legislative Decree 3/2011, of 14 November, which gives approval to the consolidated text of the Spanish Law on Public Sector Contracts, Law 24/2011 of 1 August, on contracts in the public sector in the fields of defence and security and other regulations in force in the same field.”

The same Plan affects the observance of the principles of public procurement, in order to maintain harmony between these measures and applicable regulations:

“The Government will ensure strict respect for human rights by business enterprises in commercial transactions carried out with such enterprises, establishing the necessary measures in a way that does not discriminate against SME, respecting the provisions of the Treaty on European Union on non-discrimination, equal treatment and transparency, and without adding to the administrative burden of procurers and business enterprises.”

In fact, the Plan expressly envisages the inclusion of clauses on respect for human rights in procurement, though they are specific to defence contracts. Although this does not strictly speaking constitute the object of this Guide, the clear humanitarian will of Spain in public procurement contributes to justifying its goals and content.

“The Government undertakes to include clauses on respect for human rights in contracting private military and security services in accordance with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), the Code of Conduct for Law Enforcement Officials (1979) and the Arms Trade Treaty (2013).”

In short, this Plan, although lacking regulatory force, marks a clear line of action for administrations by undertaking to ensure compliance with human rights by their contractors in the field of public procurement.

## 2.2 Public procurement and human rights

The object of this Guide is to guarantee the protection and fulfilment of human rights through public procurement. The Guide seeks to facilitate the incorporation of social clauses for the guarantee of human rights by business contractors in all stages of the tender procedure. These clauses may be introduced as admission criteria, award criteria or special mandatory execution conditions. This object must be understood as limited to human rights recognised in certain legal texts used in Spain, in particular the following:

- European Convention on Human Rights, Council of Europe, 1950
- European Social Charter, Council of Europe, 1996
- International Covenant on Economic, Social and Cultural Rights, United Nations, 1966
- International Covenant on Civil and Political Rights, United Nations, 1966
- European Convention on the Exercise of Children's Rights, Council of Europe, 1996
- Charter of Fundamental Rights, European Union, 2000
- Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Council of Europe, 2007
- International Labour Organisation basic agreements
- Spanish Constitution, Articles 10 to 38, 1978

Consequently, all the human rights recognised in these texts need protection. Therefore, the proposed measures serve, first of all, to prevent the violation of these human rights by restricting access in the case of business enterprises that violate human rights; secondly, to promote protection and fulfilment of rights through positive measures in favour of business enterprises that ensure their protection and fulfilment; thirdly, to penalise enterprises that violate these rights.

**The object of this Guide is to guarantee the protection and fulfilment of human rights through public procurement**

When do we consider that a business contractor has violated human rights? For example, in the case of a security company, when it is shown that it has used torture in a prison in Iraq or, in the case of a water supply company, when it is convicted of denying the right to water to certain local communities. Violated rights may vary, through practices such as:

- inhuman or degrading treatment of employees (Article 3 of the European Convention on Human Rights, Article 4 of the Charter of Fundamental Rights of the European Union, Article 7 of the International Covenant on Civil and Political Rights)
- discrimination of workers (Article 7 of the International Covenant on Economic, Social and Cultural Rights, Article 21 of the Charter of Fundamental Rights of the European Union, Article 3 of the International Covenant on Civil and Political Rights)
- forced labour (Article 4 of the European Convention on Human Rights, Article 5 of the Charter of Fundamental Rights of the European Union, Article 7 of the International Covenant on Civil and Political Rights)
- prohibition on creating or forming part of free trade unions (Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 11 of the European Convention on Human Rights, Article 12 of the Charter of Fundamental Rights of the European Union, Article 22 of the International Covenant on Civil and Political Rights)

Within the framework of this Guide, human rights are only understood to have been violated when there is a final administrative ruling or sentence condemning the company for violating human rights.

The final administrative resolution may have been handed down by an administration in Spain or in another democratic state, and it must always refer to convictions for the violation of human rights contained in the provisions mentioned above.

The final ruling may have been handed down by ordinary Spanish courts or by the Constitutional

Court, or by courts in other countries, ordinary or constitutional, provided that it is a sentence condemning the violation of human rights contained in the provisions mentioned above.

A violation of human rights is also understood to have occurred, in the context of this Guide, when there is condemnation by an international organisation of special relevance and recognised by Spain, such as the United Nations.

Currently, in the United Kingdom not only courts can rule on violations of human rights that affect public procurement. The Human Rights Committee of the Parliament of the United Kingdom, in its Human Rights and Business Report 2017, records that “Companies that have been found to have been responsible for abuses, either by the courts or by the National Contact Point, or where a settlement indicates that there have been human rights abuses, should also be excluded from public sector contracts for a defined and meaningful period.”

In this regard, the organisation Lawyers for Palestinian Human Rights reported in 2013 that the G4S security firm had committed human rights violations in the Occupied Palestinian Territories. Following this complaint, the OECD National Contact Point in the United Kingdom was able to confirm these violations. Even so, this finding was insufficient to prevent the award by the Government of a new public contract to this enterprise, an action which was severely criticised by the organisation.

The incorporation of social clauses such as those on elimination of gender-based discrimination, the fight against unemployment, health protection in the workplace and others are not covered in this Guide, though they have a direct relationship with fundamental rights (equality, right to work, health). They have a special regime under special social conditions and have been included in other guides.

## 2.3 Regulatory framework

The legal texts on which this Guide is based, as regards the regulation of public procurement, are the following:

- Directive 24/2014/EU, of 26 July, on public procurement (2014)
- Spanish Law on Public Sector Contracts (2017)

## 2.4 Addressees of the Guide

This Guide is addressed to local authorities in Catalonia, public administrations and municipal enterprises with a majority public shareholding. It could also serve as a reference text for other local authorities in Spain.

As for those that tender for contracts with the administration, the Guide is addressed to contractors and subcontractors. Business contractors must ensure that subcontractors comply with the conditions of execution established in this Guide. Be that as it may, subcontractors are under obligation to the contractor, who assumes full responsibility before the administration for execution of the contract.

## 2.5 Scope of the Guide

The Guide is intended to cover all public contracts, whether governed by administrative or private law, awarded by procurers referred to in the previous section.

Depending on the characteristics of the contract, measures to promote human rights may be included in the following stages of the procurement procedure:

- Preparation stage. Definition of special contract conditions
- Selection stage. Criteria on solvency and admission
- Award stage. Evaluation of tenders
- Execution stage. Execution, sanction and termination conditions

The measures established in this Guide must be included in the administrative solicitation documents or in the specifications of technical conditions, and the person in charge of the contract must ensure they take effect.

This Guide is of a general nature and its use will depend on each type of contract and tender procedure. Given the strategic purpose of this Guide, the protection and fulfilment of human rights, incorporation of these criteria will not lead to a specific advantage in the process for any of the tenderers. Therefore, the defence and fulfilment of human rights may be present in all types of public contract, whatever their object.

## 2.6 Measures that can be introduced into the procurement procedure

The Guide serves to establish general guidelines for action, which the procurer should specify, based on the type and amount of the contract.

### **Linking measures with the object of the contract**

In principle, the measures to introduce in the procurement process in order to enforce respect for human rights should be connected to the object of the contract. This is established in Directive 2014/24/EU and EU case-law (among others, the judgement of the Court of Justice of the European Union, Wienstram C-448/01). Similarly, Article 145.6 of LCSP 2017 states that “an award criterion is considered linked to the object of the contract when it refers to or integrates the benefits that must be made under the said contract, in any of its aspects and at any stage

of its life cycle.” Therefore, the conditions that can be introduced in the stages of preparation, admission, selection or execution of the contract should specifically refer to the works, supplies or services covered by the contract.

However, the prevailing need for the protection and defence of human rights means that this must be considered a mainstream intervention to be present in all contracts. It is not social clauses that impose obligations on business contractors that, as such, must have a specific connection with the object of the contract, such as the provision of a transport service with green energy, or the provision of another service through people with low employment prospects. Any company that intends to undertake a contract with the administration must respect human rights. The imposition is a duty of respect for human rights, ethical behaviour and a prohibition of certain practices. Measures are therefore introduced in the procurement process that seek to guarantee this behaviour, as mainstream, objective measures that fulfil a strategic purpose of public procurement.

These measures must respect the fundamental principles of EU procurement, such as free competition, freedom of access to tender processes, publication and transparency of procedures, non-discrimination and equal treatment of candidates.

In accordance with the above criteria, the measures that can be introduced into the various stages of the procurement process are detailed below.

### **2.6.1 Measures that can be introduced in the preparation of the contract**

In the essential clauses, the procurer must establish the obligation to respect human rights included in relevant regulations.

### **2.6.2 Measures that can be introduced as admission criteria for business contractors**

In the field of human rights, LCSP 2017 and, in particular, Articles 71 and 72 determine that business enterprises cannot be contracted if:

- They have been condemned for trafficking in human beings
- They have committed crimes against workers’ rights
- They have been condemned by means of a final ruling for violations in the field of immigration
- They have been condemned in a final ruling for serious infringement in professional work integration and equal opportunities and non-discrimination of people with functional diversity

In this context, prohibition on contracts and determination of the duration are to be established in accordance with Article 72 of LCSP 2017. In spite of this clearly defined legal framework, in the context of this Guide, we propose that any violation of human rights declared by a final

judicial or administrative ruling whether in Spain or abroad (including any type of extrajudicial agreement reached within the framework of the process), or by resolution of a relevant international organisation can be considered a cause for exclusion from the tender process.

Thus, all types of resolution of the United Nations, the European Union, the OECD, etc., together with reports, advisory opinions, interpretations and other documents that may be issued in this regard, should be taken into account, such as the database being compiled by the United Nations containing the names of business enterprises that have participated illegally in the violation of human rights in the Occupied Palestinian Territories. The existence of these resolutions and databases is an essential tool for determining violations of the most basic rights of citizens and, in particular, creating a window of opportunity for denouncing human rights violations in contexts of armed conflict and illegal occupation.

The United Nations Human Rights Council adopted Resolution 31/36 of 24 March 2016, in which it records, in the context of illegal Israeli occupation of Palestinian territory (including East Jerusalem and Syrian Golan), that business enterprises have a responsibility to respect human rights and international humanitarian law, among other things, while refraining from contributing to violations of human rights arising from a conflict, either through financial transactions, investments, purchases, acquisitions, loans and the provision of services, and other economic and financial activities.

In accordance with Paragraph 17 of this Resolution, the United Nations will create a database that includes all companies that have carried out some kind of activity in the Occupied Palestinian Territories. The list of activities is extensive and includes :

- the provision of equipment and materials that facilitate the construction and expansion of illegal Israeli settlements and the wall, and associated infrastructures
- the provision of surveillance and identification equipment for settlements, the wall and control points directly related to settlements
- the provision of equipment for the demolition of dwellings and properties, the destruction of farms, orchards, greenhouses, olive trees and other crops
- the provision of security services, equipment and materials to business enterprises that operate in the settlements
- the provision of services for the maintenance and existence of settlements, transport included
- the execution of financial and banking operations for the development, expansion and maintenance of settlements and their activities, including mortgages and loans for business development
- use of natural resources, especially water and land, for business purposes
- pollution and discharge of waste in the towns of Palestine, or transfer to them
- impeding development of Palestinian financial and economic markets, and practices that put Palestinian business enterprises at a disadvantage, including restrictions on the movement of goods, services and enterprises, and administrative and legal hurdles
- use of the profits and reinvestments of business enterprises that belong totally or in part to settlers, for the development, expansion and maintenance of settlements

Once this database has been approved, it should be taken into account by procurers, as it will contain valuable information on those business enterprises that are committing human rights violations and should therefore be excluded from tender processes. Since it will be a dynamic database, with regular updates, it should be consulted regularly.

A second measure that the procurer can require, as a condition for business enterprises to participate in the tender process, is the provision of documentation certifying respect for human rights. Specifically, in accordance with this clause, tenderers must demonstrate compliance with human rights through the presentation of an affidavit.

An affidavit is a document signed by the tenderer in which it states that in all its activities, and in activities of any subsidiaries, human rights are respected, and that respect will be maintained throughout the period of execution of the contract. To this end, the contract specifications should list the treaties and articles of the Constitution containing human rights that must be respected.

## To this end, the contract specifications should list the treaties and articles of the Constitution containing human rights that must be respected

The affidavit must be approved at the top executive level in the enterprise, it must specify what actions will be carried out in order to ensure respect for human rights and it must be public and distributed to all enterprise staff. Internal monitoring of actions committed to should also be considered, along with responses to breaches detected.

If a tenderer does not provide an affidavit when demanded in the contract specifications, their tender shall not be admitted, in accordance with the general provisions of Article 95 of LCSP 2017. Respect and protection of human rights can be defined

in tender specifications as a special condition for the execution of the contract, as an essential obligation of the contract (Article 200.3 in relation to Article 211.f of LCSP 2017). Falsification or non-compliance with the content of the affidavit, once the contract is awarded, will lead to termination of the contract. In accordance with Article 202.4 of LCSP 2017, in addition, compliance with such special conditions of execution can be made extensive to subcontractors.

We provide an example affidavit below.

Mr/Ms \_\_\_\_\_, with Spanish National Fiscal Identification number (NIF) (or the document substituting it) \_\_\_\_\_, in his/her own name (or representing the business enterprise \_\_\_\_\_), and with full capacity to act,  
DECLARES ON HIS/HER RESPONSIBILITY:

a) That he/she has not been convicted by a final judicial or administrative ruling (whether national or international) for any violation of human rights included in national provisions and international treaties signed by Spain.

- b) That he/she undertakes to act with effective, responsible, due diligence in order to ensure respect for human rights throughout the entire execution of the contract, allowing and facilitating the supervisory functions of the procurer, with a view to accrediting this.
- c) That he/she undertakes to act with effective, responsible due diligence so that human rights obligations are taken into account by all subcontractors that participate in the execution of the contract, and to inform the procurer if there is any breach on their part.
- d) That the business enterprise and its subcontractors have not been convicted by a final administrative ruling (of international organisations such as the United Nations, the OECD, etc.) for violation of human rights, in accordance with Spanish law and international treaties signed by Spain.
- e) That the enterprise and its subcontractors are not complicit in any violation of an international treaty signed by Spain.
- f) That the workers of the tenderer and subcontractors have not been convicted of human rights violations in the context of their professional work.
- g) That the workers have received training on human rights and international humanitarian law and / or the company will offer this training throughout the period of execution of the contract.
- h) That, in the context of the production of the goods or supplies or the provision of services, particularly in initial stages such as extraction of materials, the business enterprise and its subcontractors have not violated human rights.
- i) That the products and services covered by the contract have not been tested on civilians or in situations of illegal occupation of a territory.

The requirement of certain measures for tenderers and contractors may sometimes be (almost) impossible to carry out. For example, in the field of electronics, it is difficult to certify the origin of the equipment provided to the procurer, and much more so to certify that throughout the production chain the various business enterprises involved have complied with human rights (since in this field there are few fair manufacturing alternatives). For small and medium-sized enterprises, compliance with the required measures becomes an even greater effort. Therefore, depending on the object of the contract, the type of contract, potential tenderers and other similar criteria, sometimes it may be appropriate to speak of “due diligence”, to require tenderers and contractors due diligence in their relationship with suppliers.

Thirdly, the tender specifications can also establish as a condition for participation in the procurement process that business enterprises incorporate the supply chain into their tender. The objective is to identify all enterprises that are part of the production of the goods or services

which are the object of the contract and that it can be verified that these enterprises respect human rights. The main purpose of this requirement is to discourage participation of businesses that include companies violating human rights in their supply chain. This requirement finds regulatory support in Article 89.1.g of LCSP 2017.

This requirement shall be evaluated in line with the protection of human rights, as stated in the previous section. Its application could be limited, if considered proportionate, to harmonised contracts for works and services.

If, when reporting on the production chain, business enterprises that have been convicted in a final ruling (or one of the other forums mentioned above) are identified as human rights violators, the tenderer will be required to break off relations with them or otherwise be excluded from the tender procedure.

If during contract execution it is verified that business enterprises in the production chain have been convicted of human rights violations, the contractor will be required to break off relations with such enterprises, or otherwise the contract will be terminated in accordance with the indications above.

Below is the wording of the essential obligation established in this section:

#### OTHER HUMAN RIGHTS OBLIGATIONS OF THE ENTERPRISE AWARDED THE CONTRACT

1. Inform the procurer of the value chain, describing the sequence of activities in the business organisation of the business contractor in all stages of production (extraction of materials and testing included), and also for subcontractors.
2. Inform the procurer of the means that the business contractor will use to influence the policies of supplier companies and thus prevent human rights violations

The Modern Slavery (Transparency in Supply Chains) Bill 2017, pending approval in the United Kingdom, will modify the Modern Slavery Act 2015 in order to strengthen provisions regarding transparency in supply chains concerning slavery and human trafficking.

If the version that has been put forward is passed, Section 54 of the Modern Slavery Act 2015, which requires some business enterprises to publish an annual declaration of actions carried out to eradicate slavery and human trafficking in their organisations and their suppliers will be amended so that:

- Some contents of the declaration will become obligatory instead of voluntary
- If an organisation declares that it has done nothing to eradicate slavery and human trafficking, it will have to explain why
- Public authorities will also be obliged to make this statement
- The Secretary of State will be required to publish an accessible list of all commercial organisations obliged to publish declarations

In addition, it is proposed that Law 57 of Public Contracts Regulations 2015 be modified so that the tenderer who does not comply with the obligation of publishing the declaration (when so obliged) will be excluded from public procurement procedures.

### 2.6.3 Measures that can be introduced as award criteria

The tender announcement and specifications can establish that tenderers include an enterprise compliance programme, specifically referring to the protection and fulfilment of human rights.

Compliance programmes are a set of preventive tools in the context of the enterprise that adopts them aimed at preventing violation of criminal law, and other types of regulations, ethical codes, internal policies and provisions adopted in order to avoid any possible sanctions that could create a legal responsibility for the enterprise.

Although not mandatory, compliance programmes also allow demonstration before authorities and third parties that the enterprise complies with and is committed to legality and good practice in its sector and others that the organisation may propose. The introduction of protective measures and fulfilment of human rights undoubtedly gives added value to the enterprise and its activities.

To be positively evaluated, the compliance programme must include an internal model of organisation and management that guarantees the protection and defence of human rights. Tender specifications can give a weighting to the content required in the compliance programme in line with the type and amount of the contract.

Points scored for submission of a compliance document must be limited in order to avoid possible discrimination because of the cost involved in the production of this document for small and medium-sized enterprises.

In accordance with the provisions of Article 127.2 of Spanish LCSP 2017, submission of the ISO 20400 certificate can also be established as a social label award criterion insofar as it provides information about the acquisition strategy and processes of business enterprises, defining principles of sustainability for acquisitions in terms of transparency, respect for human rights and ethical behaviour.

In the light of these considerations, we propose the following draft of award criteria.

#### CRITERIA FOR THE AWARD OF THE CONTRACT

The criteria for the award of the contract are as follows:

#### CRITERIA EVALUATED BY MEANS OF A VALUE JUDGEMENT:

- Provision in the execution of the contract of a compliance plan for human rights in which the establishment of adequate policies and procedures is established to ensure that the tenderer,

including, where appropriate, its personnel manager, employees and related agents, complies with the regulatory framework applicable to human rights .....Up to 2 points

#### CRITERIA EVALUATED BY MEANS OF FORMULAS OR AUTOMATICALLY:

- Submission of the ISO 20400 certificate .....Up to 2 points

In the process of evaluating tenders, administrative bodies may require specific reports from social and civic organisations for the verification of social and environmental considerations, and also in the field of protection and defence of human rights, in accordance with Article 157.5 of LCSP 2017.

## 2.6.4 Measures that can be introduced in the contract execution stage

As a special condition in relation to the execution of the contract, procurers may establish respect for human rights by tenderers, and their subcontractors, throughout the contract execution process. This condition should be stated in the tender announcement and specifications.

Special conditions must also be specified in the document formalising the contract. These are obligations that the selected tenderer must comply with when executing the contract. In this case, obviously, the obligation is respect for human rights.

Failure to comply with the essential condition of respecting human rights on the part of the successful tenderer is determined, when the contract is under execution, through the resolutions set forth in Section 2.2 of this Guide, and the enterprise may be convicted of violations of human rights in actions occurring before or during the execution of the contract.

Failure to comply with the special condition may lead to:

- Imposition of a sanction, in accordance with Articles 192.1 and 202.1 of LCSP 2017
- Termination of the contract, in accordance with Article 211.f of LCSP 2017

Below we give an example clause:

#### OTHER OBLIGATIONS OF THE BUSINESS ENTERPRISE AWARDED THE CONTRACT IN REGARD TO PROTECTION OF HUMAN RIGHTS

1. In addition to being obliged to comply with all the obligations established in current regulations, the successful tenderer must also comply with the following essential obligations:

a) The fulfilment and promotion of human rights provided for in the treaties subscribed to by Spain and in other provisions of application, both nationally and internationally. The successful tenderer must accept that the procurer's own services may carry out any checks needed to

verify this compliance. In particular, the successful tenderer shall actively collaborate with the person in charge of the contract in order to provide accreditation of compliance with these obligations.

b) Communication to the procurer of possible violations of human rights which it knows about, both in public procurement processes and during the execution of the contract.

c) Collaboration with the procurer in the checks referred to in Section a) of this clause. Likewise, the successful tenderer shall provide any information requested in order to certify fulfilment of human rights, and also information that laws on transparency and public sector contracts impose on enterprises awarded contracts, notwithstanding compliance with obligations of transparency deriving directly from other legal provisions.

d) Communication of the value chain to the procurer, in order to give details of the conduct of activities of the business enterprise awarded the contract in all stages of production.

e) In order to certify the above obligations, the successful tenderer must provide an affidavit of this, under their own responsibility.

2. These obligations are also required for all subcontractors that participate in the execution of the contract.

As has been stated, breach of these obligations would already constitute a cause for termination of the contract, without the need for any further details in the specifications, since this is envisaged by applicable regulations. However, as is the usual practice and in order to reinforce the pioneering, informative nature of this Guide, this cause of termination could be expressly set out in the tender specifications:

#### CAUSES OF TERMINATION

The following are causes of contract termination:

a) Failure to comply with the human rights obligations set forth in the contract specifications.

### 2.6.5 Measures for monitoring and control

Once the contract has been formalised, the person in charge should periodically supervise the fulfilment of obligations imposed as essential conditions for the successful tenderer and, when applicable, the subcontractors.

With regard to the role of the person in charge of the contract, Article 62 of LCSP 2017 establishes that procurers may designate a person in charge, who will be responsible for overseeing the execution of the contract, making decisions and giving the instructions needed in order to ensure the correct performance of the agreed service, within the scope of powers attributed. Most procurers, in the absence of operative regulations, do not attribute clear supervisory tasks

**In some European cities where monitoring and control mechanisms have been introduced (such as Malmö, Sweden, or municipal waste treatment company Lipor, in Portugal), it has been found that successful tenderers respond positively**

to the person in charge of the contract, much less in a specific way when dealing with monitoring social and environmental clauses, and respect for human rights. The causes could be diverse, such as the absence of specialised staff, an accumulation of simultaneous tasks for the person in charge of the contract, lack of concern for supervision of innovative aspects, etc.

There are a whole series of available mechanisms for a greater degree of monitoring and control of the execution of contracts by public administrations, with special emphasis on monitoring the human rights clauses proposed in this Guide.

Thus, for example, it could be established, within the process of executing the contract, that the successful tenderer respond to a follow-up survey, using an evaluation model, or that the person in charge of monitoring performs an inspection of facilities and procedures, or that there be mandatory participation by the successful tenderer and subcontractors (as far as possible) in workshops on human rights.

In some European cities where monitoring and control mechanisms

have been introduced (such as Malmö, Sweden, or municipal waste treatment company Lipor, in Portugal), it has been found that successful tenderers respond positively.

Although human rights violations could sometimes be a cause of contract termination, monitoring and control processes can also be used to correct the adverse impacts on human rights that have been identified (financial compensation, remedy, etc.), in order to favour a change in the behaviour of successful tenderers and promote greater awareness of the need for compliance with human rights. It is necessary to act in accordance with the principle of proportionality, to measure the degree of intention and knowledge of business behaviour, and to introduce measures, which do not necessarily have to be penalties (they could also be corrective or dissuasive actions).

In the field of corporate social responsibility, the city of Malmö in Sweden applies a successful verification and control system for the execution of public contracts by business contractors. Initially this system was applied as a pilot in sectors such as computer equipment, fittings and office supplies, but it is intended to extend it to other sectors. The system is based on four items:

- The code of conduct. This is a list of commitments that tenderers must include in their offer. Non-acceptance implies automatic exclusion.
- The follow-up survey. Within the process of contract management, suppliers shall respond to a survey four months after the award of the contract. Together with the document, advice on how to respond will be provided.
- The evaluation model. This is used so that the municipality can evaluate the responses of the follow-up survey, as part of the contract management process.

- Inspections. At any time, all suppliers may be required to undergo an inspection of their facilities.

This system of verification and control that Malmö shares with other Swedish municipalities has allowed them to save time and money, and to exchange essential information about tenderers and contractors. It was found that they did not respond negatively. (In fact, it seems to have encouraged them to improve their tendering activities.) Moreover, the costs of procurement have not increased, despite the introduction of this system of verification and control

The inclusion of clauses on respect for human rights in public procurement is an important social benefit, a powerful driver for the achievement of competition policies of procuring administrations, as has already been discussed. But this achievement may be reduced, or even undermined completely, if the contract execution stage does not have a reliable, dedicated supervisory structure.

In order to ensure appropriate actions of the person in charge of the contract, they should take part in the definition stage of the service that will be the object of the contract. The person in charge of the contract can provide their knowledge in the field of human rights with a view to assessing the inclusion of clauses of this kind.

Furthermore, compliance with the obligations included in the tender specifications should be ensured. To carry this out, documents that justify the fulfilment of the above obligations will need to be received. The procurer should collaborate with the person in charge of the contract in the resolution of incidents, interpretations and modifications of the contracts relating to fulfilment of the above obligations. An appropriate channel should be ensured for informing the procurer of potential contract breaches verified through preventive checks. The person in charge of the contract should be able to propose corrective actions to the procurer in order to correct any deviations observed in the fulfilment of the obligations of the business contractor. Given the absence of specific regulations, all these functions and measures should be explicitly set out in the tender specifications.

Systematic audits of supervisory tasks could also be carried out by the person in charge of the contract in order to evaluate compliance with contract execution conditions.

The monitoring and control mechanisms for tenderers and contractors proposed in this Guide will be reinforced by the future creation of a centre for studies and evaluation of the impact of Catalan business enterprises with investments abroad. This centre, proposed in Catalan Parliament Resolution 359/XI, will dispose of instruments to ensure compliance by enterprises with current legislation in the field of human rights, with the participation of civil society, the Catalan Government and the Parliament of Catalonia.

In addition, the Catalan Agency for Development Cooperation has commissioned a research group at the Universitat Rovira i Virgili to draw up a proposal for an ethical code of respect for human rights and gender equality for responsible internationalisation of Catalan business enterprises and to propose mechanisms of implementation and monitoring.

In the Resolution mentioned above, the Catalan Parliament supports “the creation of a legally binding international instrument to ensure compliance with human rights obligations by transnational corporations and other business enterprises, and it supports the Working Group of the United Nations Human Rights Council, which is mandated to draw up this instrument”.

A further initiative aimed at procurement bodies within local public administrations, which should be structured through regulatory development, if applicable and resources allow, is the establishment of human rights monitoring commissions, as already exist in practice for social clauses. Here the role of non-governmental organisations and other civic platforms without specific powers can play an important role as whistleblowers and informers to these commissions. The Catalan Ombudsman (Síndic de Greuges) or municipal Ombudsman can perform the same function.

We should bear in mind Article 334 of LCSP 2017, which provides for development of a public procurement strategy at different levels of public administration. Therefore, measures in Catalonia to promote, monitor and verify the protection of human rights in public procurement will need to be incorporated into plans and strategies.

Over recent decades the electronics industry has become one of the largest in the world economy, with some 18 million workers. In fact, one in five computers in Europe is bought by the public sector, which annually spends more than 90 billion euros on electronic products. However, manufacturing workers in many countries are at risk of human rights violations such as violation of freedom of association, forced labour, child labour, pitiful wages, lack of health and safety at work protection, and discrimination.

The Electronics Watch Foundation is an independent observatory that offers affiliate organisations an independent monitoring service on working conditions in factories where goods for contracts are produced (in the electronics sector). The Foundation has drawn up contract execution clauses for publication in tender specifications, with suggested work regulations for monitoring activities.

For example, business contractors are obliged to disclose the names of assembly plants and high-risk component factories, and also a chemicals inventory for each factory, product and component; to allow factory access on detection of risk of non-compliance; to prepare a fair wage strategy report; and, when necessary, to prepare a report on correction of non-compliance with any measures.

In September 2017, Electronics Watch published a Guide to help contractors comply with due diligence with contractual conditions, through the “Compliance or justification” system, so that only if they do not cooperate with Electronics Watch, as far as possible and with the support of the Foundation, will contractors risk contract termination. The Guide for contractors is available at

[http://electronicswatch.org/guia-per-als-contractistes-setembre-de-2017\\_2525991.pdf](http://electronicswatch.org/guia-per-als-contractistes-setembre-de-2017_2525991.pdf)

# Epilogue

Observatory for Human Rights and Business in the Middle East and North Africa (OHRB)

## **Putting an end to corporate impunity, starting at a local level**

Over recent decades, under the dominant neoliberal economic model, we have seen an increasing concentration of capital in large business conglomerates with enormous economic and political power. The political influence of these large conglomerates, with the ability to influence government decisions, to appoint politicians to their executive bodies, and to blackmail states with the threat of divestment, is reflected in the establishment of a set of binding regulations for states that guarantees impunity for business actions, undermining the pillars of the rule of law and the most basic human rights.

Civil society organisations have for years denounced the systematic violation of human rights by business enterprises and the great difficulty in calling these corporations to account for their abuses. This is due to the establishment of Global Corporate Law and the creation of complex supply chains and business groups that make it difficult to attribute responsibilities. We are therefore faced with an authentic architecture of impunity that protects the interests of corporations over and above the human rights of communities affected and working people.

Impunity is the norm, not the exception. Access to justice and effective remedies is only a forlorn hope for most victims of violations and abuse. These situations occur systematically both in America or Asia, and also in our own Mediterranean region, where business profits seem to have become normalised in occupied zones such as Palestine or Western Sahara. In occupied territories, for example, business enterprises around the world benefit from access to natural resources without the consent of local communities and without any benefit for them. In fact, it is not uncommon for large Spanish business enterprises to arrive at agreements or contract the services of foreign companies that have been convicted of or are being investigated for human rights violations, including war crimes. Large corporations that are guilty of human rights violations hide behind this opaqueness (the so-called corporate veil) and allege the innocence of parent companies, which claim to have no responsibility for the actions of subsidiaries and subcontractors.

Six years after the approval of Ruggie's Guiding Principles, the number of violations has not diminished, and naming and shaming of business enterprises has led to no significant change in business attitudes that might encourage us to count on self-regulation and voluntary principles. Transnational activity makes it urgent to establish binding and effective mechanisms to control the supply chain of transnational corporations, which is essential for ensuring respect for human rights.

Laws such as the one passed in France in March 2017, despite shortcomings, put in place mechanisms to lift the corporate veil, to control due diligence of business enterprises and to encourage them to remain vigilant that in all their chain of values, from the investments that finance them, to mines from which raw materials are extracted, to the product that reaches the consumer, there are no human rights violations.

In today's world, there are widespread cases of child exploitation, slavery, crimes against the natural environment and the resources that support entire communities, and also cases of torture, sexual abuse, etc. The International Labour Organisation reminds us that there are 25 million people in a situation of forced labour.

This impact on human rights obliges us to think again both globally and locally in order to find new strategies to prevent these abuses, to dismantle the architecture of impunity and to build a culture in the corporate sphere of respect for human rights, with enterprises that are socially responsible with regard to their environment and the communities where they operate. The working sessions of the United Nations Human Rights Council for the creation of an international treaty for transnational corporations and Resolution 359/XI passed by the Parliament of Catalonia in 2016 represent efforts to strengthen global governance and state instruments to ensure that transnational corporations also respect human rights beyond our own borders.

### **The importance of public procurement**

Faced with global injustices that make us feel helpless, one way to start working from the shelter of proximity is to promote public procurement that respects human rights throughout the supply chain. Brave, creative, and truly fair public procurement currently has sufficient legal cover for the creation of mechanisms that oblige business enterprises to carry out due diligence in their actions, not merely through statements of intent or sealed protocols, all too often without any effective follow-up.

European, Spanish national and local administrations have created a complex infrastructure for carrying out the different stages of tender processes; from initial announcement through to monitoring of compliance with requirements and functions agreed between the procurer and the business contractor. All this takes place within a context of efficient management of taxpayers' money, which has traditionally favoured selection of the cheapest offer among various tenders.

At present, however, as is argued in the Guide, it is generally recognised, and particularly in Europe, that public procurement has a strategic role in promoting "more sustainable and respectful human rights practices on the part of tenderers". Public administrations are also obliged to exercise the "role of protecting and overseeing these fundamental rights".

European Directive 24/2014 on public procurement represents a paradigm shift in this direction. Social and environmental criteria are incorporated as parameters of quality of works, supply and services offered. Furthermore, the procurer is now able to evaluate any aspect of the life cycle of the works, supply or services that it intends to acquire, from production to destruction, including specific processes in subsequent stages of the life cycle, even when these factors are intangible.

These legislative changes in Europe are the reflection of a global tendency to consider public procurement a tool for social transformation and the defence of human rights. Now public administrations can start to work to put an end to impunity for the human rights violations of transnational corporations. At the Observatory for Human Rights and Business in the Middle

East and North Africa, we see this Guide as an important step towards transformation of the economy, so that it becomes a genuine tool at the service of peoples and citizens, consistent with human rights here and abroad.

The struggle around the world builds from the bottom up, from the thousands of activists worldwide who are mobilising, at times putting their own bodies and lives on the line, to put an end to the violations and abuses that transnational corporations carry out in pursuit of profit. Therefore, from below and in the local community is where we can articulate the most transformative, courageous proposals. It is at the local level that we can articulate effective proposals, best practices and examples that imbue the global struggle with a sense of strength, legitimacy and realism.

Building from the bottom up also involves establishing mechanisms for participation and coordination between public administrations, study centres, civil society and communities, in order to ensure that the economy is really put to the service of people, and that transnational corporations cannot simply equip themselves with large teams of lawyers, protocols, paperwork and private seals to overcome any mechanism aimed at supervising and promoting respect for human rights.

Beyond the regulations that make the fulfilment of human rights operational, it is necessary to establish permanent mechanisms and spaces for dialogue and participation with public administrations, and to democratise public structures. Working more closely with organisations and civil society can help raise awareness among citizens, promoting good practice and, above all, avoiding the pursuit of final legal rulings to exclude business enterprises from public procurement processes. We need to ensure that communities can make their voices heard and that public administrations really listen to them.

# Business enterprises that violate human rights

The Observatory for Human Rights and Business in the Middle East and North Africa has carried out research on business enterprises that are often contracted by Catalan public administrations and that violate human rights. Information on these findings will be updated on the website at [www.993responsible.org](http://www.993responsible.org), with the following QR code:



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# Annex

## PROPOSED CLAUSES TO INTRODUCE INTO CONTRACTS

### I. CONDITIONS FOR PARTICIPATION IN THE TENDER PROCESS

#### A. Affidavit

Mr/Ms \_\_\_\_\_, with Spanish National Fiscal Identification number (NIF) (or the document substituting it) \_\_\_\_\_, in his/her own name (or representing the business enterprise \_\_\_\_\_), and with full capacity to act,

DECLARES ON HIS/HER RESPONSIBILITY:

a) That he/she has not been convicted by a final judicial or administrative ruling (whether national or international) for any violation of human rights included in national provisions and international treaties signed by Spain.

b) That he/she undertakes to act with effective, responsible, due diligence in order to ensure respect for human rights throughout the entire execution of the contract, allowing and facilitating the supervisory functions of the procurer, with a view to accrediting this.

c) That he/she undertakes to act with effective, responsible due diligence so that human rights obligations are taken into account by all subcontractors that participate in the execution of the contract, and to inform the procurer if there is any breach on their part.

d) That the business enterprise and its subcontractors have not been convicted by a final administrative ruling (of international organisations such as the United Nations, the OECD, etc.) for violation of human rights, in accordance with Spanish law and international treaties signed by Spain.

e) That the enterprise and its subcontractors are not complicit in any violation of an international treaty signed by Spain.

f) That the workers of the tenderer and subcontractors have not been convicted of human rights violations in the context of their professional work.

g) That the workers have received training on human rights and international humanitarian law and / or the company will offer this training throughout the period of execution of the contract.

h) That, in the context of the production of the goods or supplies or the provision of services, particularly in initial stages such as extraction of materials, the business enterprise and its subcontractors have not violated human rights.

i) That the products and services covered by the contract have not been tested on civilians or in situations of illegal occupation of a territory.

## B. Supply chain information

### OTHER OBLIGATIONS OF THE SUCCESSFUL TENDERER IN RELATION TO HUMAN RIGHTS

1. Inform the procurer of the value chain, describing the sequence of activities in the business organisation of the business contractor in all stages of production (extraction of materials and testing included), and also for subcontractors.
2. Inform the procurer of the means that the business contractor will use to influence the policies of supplier companies and thus prevent human rights violations.

## II. CONTRACT AWARD CRITERIA

### CRITERIA FOR AWARD OF THE CONTRACT

The criteria for the award of the contract are as follows:

#### CRITERIA EVALUATED BY MEANS OF A VALUE JUDGEMENT:

- Provision in the execution of the contract of a compliance plan for human rights in which the establishment of adequate policies and procedures is established to ensure that the tenderer, including, where appropriate, its personnel manager, employees and related agents, complies with the regulatory framework applicable to human rights ....Up to 2 points

#### CRITERIA EVALUATED BY MEANS OF FORMULAS OR AUTOMATICALLY:

- Submission of the ISO 20400 certificate .....Up to 2 points

## III. EXECUTION OF THE CONTRACT

### A. Special conditions that must be included in the tender announcement and specifications

#### OTHER OBLIGATIONS OF THE SUCCESSFUL TENDERER IN RELATION TO PROTECTION OF HUMAN RIGHTS

1. In addition to being obliged to comply with all the obligations established in current regulations, the successful tenderer must also comply with the following essential obligations:

a) The fulfilment and promotion of human rights provided for in the treaties subscribed to by Spain and in other provisions of application, both nationally and internationally. The successful tenderer must accept that the procurer's own services may carry out any checks needed to verify this compliance. In particular, the successful tenderer shall actively collaborate with the person in charge of the contract in order to provide accreditation of compliance with these obligations.

b) Communication to the procurer of possible violations of human rights which it knows about, both in public procurement processes and during the execution of the contract.

c) Collaboration with the procurer in the checks referred to in Section a) of this clause. Likewise, the successful tenderer shall provide any information requested in order to certify fulfilment of human rights, and also information that laws on transparency and public sector contracts impose on enterprises awarded contracts, notwithstanding compliance with obligations of transparency deriving directly from other legal provisions.

d) Communication of the value chain to the procurer, in order to give details of the conduct of activities of the business enterprise awarded the contract in all stages of production.

e) In order to certify the above obligations, the successful tenderer must provide an affidavit of this, under their own responsibility.

2. These obligations are also required for all subcontractors that participate in the execution of the contract.

## **B. Causes of termination**

### **CAUSES OF TERMINATION**

The following are causes of contract termination:

a) Failure to comply with the human rights obligations set forth in the contract specifications.





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