Public procurement contracts and access to employment for persons excluded from the labour market

Guide for the use of public purchasers, produced by the Workshop on social aspects of public procurement contracts

Version: December 2010
## Contents

<table>
<thead>
<tr>
<th>Table of Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>List of appendices</td>
<td>5</td>
</tr>
<tr>
<td>Preface</td>
<td>6</td>
</tr>
</tbody>
</table>

### 1 Presentation of the main articles of the public procurement contracts code relating to social integration clauses and certain specific aspects of public procurement contracts containing social integration clauses

#### 1.1 The public purchaser must examine, at the determination of requirements phase, the possibility of incorporating sustainable development objectives into a public procurement contract, particularly as regards the integration of persons excluded from the labour market

#### 1.2 What populations excluded from the labour market may the public purchaser promote within the framework of a public procurement contract?

#### 1.3 What legal resources are offered by the public procurement contracts code to facilitate access to employment for persons excluded from the labour market?

#### 1.4 How are these legal resources to be implemented?

1.4.1 Article 10: Split contracts
1.4.2 Article 14: Social and environmental clauses
1.4.3 Article 15: Reserved contracts
1.4.4 Article 30: Public service contracts whose object is occupational integration and qualification
1.4.5 Article 50: Variants (see Appendix 3)
1.4.6 Article 53 paragraph I: Award of contracts/tender selection criteria
1.4.7 Article 53 paragraph IV: Award of contracts/preferential rights

### 2 Questions/Answers

#### 2.1 Questions which may arise prior to a public procurement contract

2.1.1 Which public purchasers are concerned by this guide?
2.1.2 Should the public purchaser consider the introduction of social integration clauses into public procurement contracts?
2.1.3 At what point should the public purchaser consider the introduction of social integration clauses into public procurement contracts?
2.1.4 Who decides on the implementation of social integration clauses?
2.1.5 How are the object of the clause and the target populations determined? Who is responsible for determining the population eligible for the integration initiative?
2.1.6 Can a public procurement contract refer to the area of residence of populations concerned by a social integration clause?
2.1.7 How can the requirement for a social integration clause be defined simply and precisely without restricting competition? Are there any simple, standardised methods? If so, what are they?
2.1.8 Which contacts of choice can the public purchaser turn to in order to gain a better knowledge of integration opportunities?
2.1.9 Who can assist a purchaser in designing and implementing social integration clauses?
2.1.10 Are economic operators including structures promoting integration through economic activity (SIAE) permitted to combine or form an ad hoc group in submitting a tender for a public procurement contract?
2.1.11 Should the approaches of public purchasers to social integration clauses within a single area be coordinated and how should this be done?

2.2 Questions that may arise when preparing and drawing up a public procurement contract including a performance clause under the terms of Article 14

2.2.1 What is a performance clause concerning the integration of persons excluded from the labour market?

2.2.2 In the case of a public procurement contract consisting of several lots, is it possible to restrict a performance clause to one lot or certain lots?

2.2.3 What steps can be taken in advance to prevent the risk of non-performance of the clause?

2.2.4 What weight or importance can be attributed to these social integration clauses in the performance of a public procurement contract before they risk being considered discriminatory?

2.2.5 What are the different types of employment for persons assigned to performance of the social integration clause?

2.2.6 Can the public procurement contract impose specific terms of performance of the social integration clause?

2.2.7 How should the clause be drafted: as a percentage of hours of integration? As a number of hours of integration?

2.2.8 How can a public purchaser draft a performance clause for service contracts that cover activities where there is an obligation to continue employing the current site staff?

2.2.9 How should the number of hours of integration be calculated for a public procurement contract including a performance clause?

2.2.10 Is it possible, as part of the performance of an Article 14 clause, to give preference to economic operators which function as structures promoting integration through economic activity (SIAE)?

2.2.11 Can an integration undertaking be awarded a public procurement contract containing a social performance clause pursuant to Article 14, or must it necessarily function as a subcontractor?

2.2.12 Can an economic operator regard integration initiatives undertaken as part of other public procurement contracts as contributing to its obligations under a given public procurement contract?

2.2.13 A public purchaser wishes to draw up a public procurement contract containing an Article 14 social integration clause. Which entities should be involved?

2.2.14 Can the gathering of information from economic agents and entities engaged in integration through economic activity be envisaged?

2.2.15 Who checks that the target populations meet the criteria set down in the contract notice?

2.2.16 Are there any standard references in this field? Where are they to be found?

2.3 Questions which may arise when preparing and drawing up a public procurement contract that the public purchaser wishes to reserve for undertakings employing disabled workers

2.3.1 Which article of the code should be cited?

For the preparation of a reserved contract, Article 15 of the public procurement contracts code should be used

2.3.2 How should a public procurement contract based on Article 15 be drafted?

2.3.3 How can structures in the sheltered/protected sector that have the capacity to submit a tender for a public procurement contract be found?

2.3.4 What are the equivalent structures other than the sheltered workshops (EA) and vocational rehabilitation centres (ESAT) referred to in the code?

2.3.5 Are there any standard references in this field?

2.3.6 Can a specific lot in a public procurement contract containing several lots be reserved for undertakings employing a majority of disabled persons?

2.3.7 Does the implementation within a public procurement contract of a reserved contract designed to promote the employment of disabled persons generate extra costs? If so, how can this be justified in economic terms?

2.3.8 How may a public purchaser ensure that the award of a contract to sheltered workshops (EA) or vocational rehabilitation centres (ESAT) is taken into account as part of the fulfilment of obligations to employ disabled persons?
2.3.9 Which purchasers are concerned by the FIPH-FP fund contribution?

2.3.10 How should the contribution paid to the fund for the integration of disabled persons in public sector employment (FIPH-FP) be calculated to allow for the award of a public procurement contract to sheltered workshops (EA) or vocational rehabilitation centres (ESAT)?

2.3.11 How should the contribution paid to the association for the management of funds for the integration of disabled persons in employment (AGEFIPH) be calculated to allow for the award of a public procurement contract to sheltered workshops (EA) or vocational rehabilitation centres (ESAT)?

2.3.12 What other possibilities exist to promote the employment of disabled persons?

2.4 Questions which may arise when preparing and drawing up an integration and/or occupational qualification contract under the terms of Article 30

2.4.1 Which article in the public procurement contracts code allows for the award of an integration and/or occupational qualification contract?

2.4.2 What is an integration and/or occupational qualification service contract?

2.4.3 Which public purchasers are empowered to award this type of contract?

2.4.4 How should an integration and/or occupational qualification service contract be worded?

2.4.5 To which budget line should it be allocated?

2.4.6 What is an adapted procedure under the terms of Article 30?

2.5 Other questions which may arise when preparing and drawing up a public procurement contract containing a social integration clause

2.5.1 On what legal basis is it possible to establish a social criterion for the award of a public procurement contract (Article 53, paragraph 1)? What weighting should this be given in order to avoid any legal risk?

2.5.2 How can the performance criterion be used with regard to the integration content of tenders?

2.5.3 Can a framework agreement promote the integration of persons excluded from the labour market and, if so, how?

2.5.4 Can the public purchaser use variants (Article 50)?

2.6 Some questions relating to integration and persons excluded from the labour market

2.6.1 Is a specific structure required in support of the public purchaser?

2.6.2 Which entities are involved in integration in the field?

2.6.3 Can the quality of integration proposals put forward by candidates be taken into account?

2.6.4 Is there a minimum period of action for a successful integration initiative?

2.6.5 Is it necessary to gather information on the existing availability of integration provision and its capacity for development?

2.6.6 Can forward-looking management of social integration clauses promote integration at local level and the introduction of appropriate training?

2.7 Questions which may arise during performance of a public procurement contract awarded under the terms of Articles 14, 15 and 30 of the public procurement contracts code

2.7.1 Can a tender which does not meet the specifications of a public procurement contract in terms of integration be taken into consideration?

2.7.2 How to monitor the performance of a public procurement contract and ensure compliance with the conditions of performance of the social integration clause?

2.7.3 What are the penalties in the event of non-performance of the social integration clause? What are the limits on such penalties?
2.8 Other questions

2.8.1 What rules of procedure and publication apply when the purchase concerned is below the threshold of 4,000 euros net of VAT?
2.8.2 Can a specific location for a contractor be stipulated in a public procurement contract?
2.8.3 Is there a possible risk of legal recourse by European undertakings unable to submit a tender for a public procurement contract containing a social integration clause?
2.8.4 How should the short-term difficulties faced by undertakings be taken into account?
2.8.5 Partnership contracts within the meaning of ordinance no. 2004-559 of 17 June 2004 are not addressed in this guide. Is it nevertheless applicable to them?

2.8.6 Can a public purchaser take into account public procurement contracts containing a social integration clause awarded as part of the undertaking's sustainable development policy?
2.8.7 At the national level, are public procurement contracts containing social integration clauses included in the national action plan for sustainable public procurement?

2.9 Can public procurement contracts help promote diversity?

List of appendices:


Appendix 2: French Constitution - Charter for the Environment

Appendix 3: Rules governing the use of Article 50

Appendix 4: Example of wording of social integration clauses

Appendix 5: Ministerial answers to parliamentary questions

Appendix 6: The role of the facilitator in the management of social integration clauses in public procurement contracts

Appendix 7: Example of a social integration clause in a cleaning services framework agreement

Appendix 8: Rules governing the implementation of the system for dealing with short-term economic difficulties

Appendix 9: References of the principal sources cited

Appendix 10: Comparison between the French public procurement contracts code, ordinance no. 2005-649 of 6 June 2005 on contracts awarded by public or private entities that are not subject to the public procurement contracts code and Directives 2004/17/EC and 2004/18/EC of 31 March 2004
Preface

In July 2007, the Observatoire économique de l’achat public issued a guide to assist public purchasers in using public procurement contracts to facilitate access to employment for persons who are excluded from the labour market, such as persons suffering from unemployment or exclusion, or certain disabled persons seeking employment.

The purpose of this guide, which was the subject of an in-depth consultation, was not to constitute a general guide to all best practices as regards social integration clauses. Such clauses may be designed for a number of purposes and other documents pertaining to them are produced.

If it appeared desirable to place particular emphasis on the reduction of long-term unemployment and access to employment for those suffering from exclusion, it is because these are human economic and social issues which engage all of society. This principle has been clearly stated in several recent laws, in particular the law on combating exclusion of 29 July 1998¹ as amended by ordinance no. 2000-1249 of 21 December 2000 (see Appendix 1) and the 2005 law reinforcing social cohesion.

Since 2001, the regulations governing public procurement contracts contain precise and powerful provisions to enable the intelligent use of public procurement in helping to combat exclusion. Innovative experiments carried out by certain regional and local authorities show that public purchasers can effectively build into procurement contracts clauses to promote the employment of groups experiencing difficulties, in ways that are non-disruptive and fruitful for all, including the companies performing the contracts. Furthermore, public procurement contracts containing social integration clauses can make it possible to draw back into the labour market persons who were hitherto excluded from it, thereby helping to relieve tensions in the labour market in certain sectors of the economy experiencing labour shortages, such as the construction industry and in some service sectors.

The possibilities offered by the public procurement contracts code were still under-used, however, particularly by government agencies. Society was therefore depriving itself of a lever for narrowing the social divide.

The guide was produced in response to this fact and to the finding that certain obstacles, real or imagined, hampering the development of employment-related social integration clauses could be much reduced by more precise and accessible legal information. Social integration clauses are often perceived as a source of additional complexity in an environment, that of public procurement contracts, which is already sufficiently complex in itself. Public purchasers therefore require legal certainty and technical support both in defining such clauses and in monitoring their performance. Candidates, for their part, need reassurance as to their capacity to apply such clauses and support, as necessary, in doing so. A degree of intermediation engineering, covering various aspects, frequently appears necessary, not to say vital.

The aim of the 2007 guide was therefore to make the legal aspects of this issue accessible to all. Three years later, it appears necessary to take stock of the difficulties encountered when using the guide, in a context that has also changed. This version, which was drawn up with the benefit of experience, was in fact already scheduled when the first edition was published. The workshop that prepared the first version was reconvened and enjoyed the invaluable support of the Legal Affairs Directorate at the Ministry for the Economy, Finance and Industry.

This second edition has retained the same general approaches used for the original version. The guide analyses the various articles of the code concerned and attempts to provide precise and concrete answers to the various questions that may legitimately suggest themselves to public purchasers who, as they evaluate their needs in the light of sustainable development objectives, as provided for in Article 5 of the public procurement contracts code, are keen to introduce clauses promoting the employment of persons in difficulty in their public procurement contracts.

This is a guide and not a circular. This distinction is important. The spirit of the public procurement contracts code has changed, and now provides a framework enabling public purchasers to assume their responsibilities to the full. Consequently, the guide provides interpretations of the code, offers advice or opinions, identifies and possibly validates practices, but is non-prescriptive. The reader will therefore find no standard clauses or boilerplate document, only applications.

Lastly, mainly because its purpose is principally legal, the guide does not cover every aspect of the issue, in particular organisational matters, which are dealt with more specifically in other documents of a similar type, such as the guide produced by Alliance Ville Emploi with the assistance of members of the CNIAS (national council for integration through economic activity). Naturally, it in no way precludes key operators or network heads from producing their own guides, as the national urban renewal agency (ANRU) or neighbourhood boards (Régies de Quartier) have done.

Several aspects of the context have nevertheless changed and should be taken into account.

Firstly, the 25% rise in the number of persons out of work caused by the economic crisis has, more than ever, made it necessary to steer purchasers towards the long-term unemployed, who are at risk of being the last to benefit from economic recovery and who should not be left in its wake. In parallel, the economic crisis has made it necessary to adapt practices in the field so that undertakings that are awarded public procurement contracts with social integration clauses, which are themselves experiencing short-term difficulties and finding themselves forced to lay off workers or move to short-time working, do not breach labour legislation by hiring new persons in order to perform these clauses.

Secondly, the State has designed an ambitious policy: the Council of Ministers statement of 9 April 2008 on the "development of a socially responsible public procurement policy" stipulates that, in market sectors with a labour component of more than 50%, social integration clauses should be present in at least 10% of the State's ordinary purchases. This target was reiterated in the circular of 3 December 2008 on the exemplary State (in particular in section 19). The Public Procurement Department (Service des achats de l'État, SAE) has organised itself in such a way as to implement this progressively and has trained its ministerial and regional correspondents with this in mind. In order to introduce realistic clauses into the lots of their procurement contracts, government agencies can use a network of "facilitators" introduced in the local integration and employment plans (PLIE) and in the Maisons de l'Emploi for the benefit of local authorities. This network has expanded, in particular through the support of European funding. Government agencies can also consult several websites in order to check that there is an integration offer that is compatible with the clauses they wish to include. The Direction générale de l'emploi et de la formation professionnelle (general directorate for employment and vocational training, DGEFP), for its part, has implemented a network of experts within its local branches, in order to improve the integration offer, so that it is in a position to respond effectively to the demand for clauses.

Thirdly, field practices have developed and have highlighted the quality of the implementation of clauses whereby some of the hours of work stipulated in procurement contracts are performed by persons who are excluded from the labour market. Tendering or contracting undertakings are encouraged to propose sustainable integration systems, through mentoring, training or partnership arrangements, which lead to genuine paths towards employability. An interest in promoting diversity has also been observed, even though the concept is not easy to grasp from a legal standpoint.
The objectives and tools therefore do exist. However, despite the genuine efforts made, they have been slow to gain traction in government agencies, and have fallen well short of the objectives set or even the progress made by the local authorities. Social integration clauses that benefit persons who are excluded from the labour market are far from what they should be, namely a standard, normal component of the policy to professionalise the procurement function in government agencies and public entities. An ongoing effort to ensure mobilisation, certainty, facilitation and control is therefore still necessary. The example of the national urban renewal agency does show, however, that when these conditions are met, impressive results can be achieved.

I trust that the new edition of this guide will contribute to this.

Thanks are due to all those who took part in drawing up this document, government agencies, social welfare funds, professional organisations, associations of elected officials, social sector associations and experts. Thanks to their contributions, this guide will be able to assist those operating in the public procurement contracts sector to fulfil their social responsibilities under the optimum conditions. Combating exclusion needs all our efforts, and those of public purchasers in particular.

Jean-Baptiste de Foucauld
General Inspector of Finance
Chair of the Workshop

This guide concerns the entire field of public procurement contracts. The provisions of part I of the 2006 public procurement contracts code highlighted here apply to contracting authorities. Article 141 of this code, however, stipulates that, by virtue of part II, most of these provisions also apply to contracts and framework agreements concluded by contracting entities. Contracting entities and authorities subject to the ordinance of 6 June 2005 are partially concerned by the recommendations made in this guide.
1 Presentation of the main articles of the public procurement contracts code relating to social integration clauses and certain specific aspects of public procurement contracts containing social integration clauses

1.1 The public purchaser must examine, at the determination of requirements phase, the possibility of incorporating sustainable development objectives into a public procurement contract, particularly as regards the integration of persons excluded from the labour market

This obligation was introduced by the new Article 5 of the public procurement contracts code\(^2\), which stipulates that "the nature and scope of the requirements to be met are precisely determined (...) taking into account sustainable development objectives". This obligation first appeared in French law in Constitutional Law no. 2005-205 of 1 March 2005 pertaining to the Charter for the Environment. Article 6 of the Charter stipulates that public policies shall promote sustainable development and shall reconcile the protection and enhancement of the environment with economic development and social progress (Appendix 2: Charter for the Environment).

Article 5 of the public procurement contracts code places an obligation on the contracting authority to consider the determination of its requirements in the light of sustainable development objectives in the broadest sense, since there are three key components that must be reconciled as far as possible: economic efficiency, social equity and ecologically sustainable development\(^3\).

In view of the various articles of the public procurement contracts code that will be addressed in this guide, it is clear that the occupational integration of those excluded from the labour market is a key component in social progress. Sustainable development, as defined by the Brundtland report, is development that "satisfies the needs of the present generation without compromising the chance for future generations to satisfy theirs".

For each purchase, therefore, the public purchaser is now obliged to consider the possibility of incorporating into the contract (technical and other specifications, conditions of performance) or in the award procedure (selection of candidates or tender selection criteria) requirements relating to sustainable development in respect of one or more of these key components.

This obligation is imposed on the public purchaser from the determination of requirements stage, i.e. prior to launching the procedure. The public purchaser is not required, however, to offer proof to the economic operators of the impossibility of taking sustainable development objectives into account in the tender documents.

In that this is an obligation imposed by the public procurement contracts code, however, the public purchaser must at all times be in a position to furnish contract oversight bodies with proof of the impossibility of taking such sustainable development objectives into account.

It is recommended that the contracting authority use the presentation report referred to in Article 79 of the public procurement contracts code to justify its decision (form NOY14: optional contract consultation presentation report available on the Economy Ministry website at www.economie.gouv.fr).

\(^2\) Decree no. 2006-975 of 1 August 2006 establishing the public procurement contracts code.

1.2 What populations excluded from the labour market may the public purchaser promote within the framework of a public procurement contract?

Directive 2004/18/EC of 31 March 2004⁴ in (33) of the Preamble allows for a very broad scope, as does the public procurement contracts code.

In the interests of simplicity, consistency, efficiency and legal certainty, however, both for public purchasers and the companies required to apply these clauses, the recommended definition of target populations is that given in Article L. 322-4-16 of the Labour Code pertaining to structures for integration through economic activity: "The purpose of integration through economic activity is to enable unemployed persons encountering specific social and occupational difficulties to gain access to employment contracts with a view to facilitating their social and occupational integration. Such integration deploys specific conditions of intake and support."

In concrete terms, persons eligible are, inter alia, those who fall into the following administrative categories:

- the long-term unemployed (registered as unemployed for over 12 months);
- recipients of the RSA, (social integration benefit) or their assigns;
- registered disabled workers, within the meaning of Article L323-3 of the Labour Code which establishes the list of beneficiaries of the employment obligation;
- recipients of the following benefits: specific solidarity allowance (ASS), integration allowance (AI), single-parent allowance (API), allowance for disabled adults (AAH), disability allowance;
- young persons below education Level 5, i.e. with a level below that of CAP/BEP qualifications;
- persons covered by the integration through economic activity scheme (IAE), i.e. seconded by an intermediate association (AI) or by a temporary employment integration undertaking (ETTI), and employees of an occupational integration undertaking (EI) or an integration workshop and project (ACI), or accredited neighbourhood boards (Régies de quartier), as well as those persons covered by specific schemes such as "Défense 2e chance", for example;
- persons employed in employers' groups for integration and qualification (GIEQ) and in associations pursuing the same objective.

In addition, persons encountering specific difficulties may be considered as belonging to a category particularly excluded from the labour market on the specific recommendation, with justification, of Pôle Emploi (the result of the merger between the national employment agency and the unemployment insurance network), employment centres (Maisons de l'Emploi), local integration and employment plans (PLIE), local task forces (Missions Locales) or departmental employment centres for disabled persons (MDPH).

The public purchaser has every reason to rely on all regional and local entities involved in employment and integration to identify and target unemployed persons encountering specific social and occupational difficulties.

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1.3 What legal resources are offered by the public procurement contracts code to facilitate access to employment for persons excluded from the labour market?

The 2001 edition of the public procurement contracts code provided the public purchaser with a range of tools that was further extended in 2006, to enable the implementation of sustainable development objectives.

Each of these instruments has its own characteristics, but they may be combined. Their proper use must be based on a precise definition of the needs of the public entity and the existence in the field of a need for integration likely to result in an organised response.

The following table\(^5\) is designed to assist the public purchaser in determining which legal vehicle provided in the code is the most appropriate in each case.

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<th>2006 PPC Code articles</th>
<th>Advantages</th>
<th>Comments</th>
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<tr>
<td>Article 10: Split contracts</td>
<td>Makes it possible to determine the content of lots on technical considerations and to identify the lots most amenable to the introduction of a social integration clause or to a reserved contract. In offering lots of appropriate volumes, facilitates access to public procurement contracts for various types of integration structures. Whenever possible, the global contract may also allow for integration measures. Makes it possible to set aside reserved lots within the contract on the basis of Article 15.</td>
<td>May make the contract award and performance procedure more cumbersome.</td>
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\(^5\) The advantages and comments are presented from the point of view adopted in the guide.
### 2006 PPC Code articles

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<th>Article 14: Social and environmental clauses (currently being amended&lt;sup&gt;6&lt;/sup&gt;)</th>
<th>Advantages</th>
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<td>&quot;The performance conditions of a contract or framework agreement may include social or environmental components pursuing sustainable development objectives by reconciling economic development, protection and enhancement of the environment and social progress. Such performance conditions shall not have a discriminatory effect with regard to potential candidates, and shall be indicated in the contract notice or in the tender documents.&quot;</td>
<td>Makes it possible to require tenderers to give undertakings on integration measures corresponding to a predetermined volume of working hours.</td>
<td>Implies prior knowledge of the local situation as regards employment and integration resources effectively available in order to perform the contract. The integration undertaking required of tenderers must be set in such a way as not to reduce the number of tenderers.</td>
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<th>Article 15: Reserved contracts</th>
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<td>&quot;Certain contracts or certain lots of a contract may be reserved for the sheltered workshops or the vocational rehabilitation centres referred to in Articles L. 5213-13, L. 5213-18, L. 5213-19 and L 5213-22 of the Labour Code and in Article L. 344-2 of the Social Action and Family Code, or equivalent structures where most of the employees concerned are handicapped persons who, by reason of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions. The contract notice shall make reference to this provision.&quot;</td>
<td>Makes it possible to reserve contracts or lots for: - sheltered workshops (EA); - vocational rehabilitation centres (ESAT); - equivalent structures employing principally disabled persons. Promotes the medium-term development of such structures.</td>
<td>Implies extensive knowledge of potential suppliers in these categories and their production capacity.</td>
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<sup>6</sup> The amendment of Article 14 concerns the inclusion of diversity considerations in public procurement.
### Article 30: Procedure applicable to public service contracts whose object is integration

"I – Contracts and framework agreements which have as their object services that are not listed in Article 29 may be awarded, irrespective of the amount concerned, using an adapted procedure, in the conditions set forth in Article 28. […]

III. – Contracts or framework agreements which have as their object both services that are listed in Article 29 and services that are not listed therein shall be awarded in accordance with the rules that apply to the category of services for which the estimated amount is highest."

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<td>Makes it possible to use an adapted procedure for an occupational qualification and/or integration contract.</td>
<td>Applies only to a contract whose main object is integration. Important to ensure that tender selection criteria are related primarily to the integration and/or qualification initiative, not to the provision of a support service.</td>
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### Article 50: Variants

"I - For contracts awarded under a formalised procedure, when the contracting entity relies on a number of criteria in awarding the contract, it may authorise candidates to submit variants. The contracting entity shall indicate in the contract notice or in the tender documents whether or not it authorises variants; failing such indication, variants are not authorised. […]

II - For contracts awarded using an adapted procedure, when the contracting entity relies on several criteria in awarding the contract, it may authorise candidates to submit variants, unless the contracting entity has specified in the tender documents that it is opposed to the use of this option. The contracting entity may specify in the tender documents minimum requirements […]

III - The variants shall be submitted along with the basic tender."

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<td>Provides scope for realistic innovative proposals the purchaser may not have thought of.</td>
<td>Need for a link between the contract object and occupational integration. Remember that variants should be explicitly authorised in the contract notice. The tender documents must provide for the elements necessary to assess the relevance of the variant. Opening up public procurement to variants adds further complexity to the process of analysing tenders on the basis of the published criteria. A transparent analysis method should be put in place. No known experience at this stage. Need to advance with caution and test on a gradual basis.</td>
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Leaves undertakings the initiative and choice of terms on which to meet integration obligations.
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<td>Article 53, paragraph I: Award of contracts/Tender selection criteria</td>
<td>May prove a transparent incentive to tenderers to present tenders with a strong occupational integration component. Transparent identification of a weighting in favour of tenders with a strong occupational integration component.</td>
<td>Need for a link between the contract object and occupational integration. A reasonable weighting must be assigned to the criterion. Little experience available. As a legal precaution, Article 53, paragraph I should be employed in association with a performance clause under Article 14, for example, to take into account the quality of the occupational integration initiative proposed under the performance clauses in question.</td>
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"In order to award the contract to the tenderer presenting the most economically advantageous tender, the contracting authority relies:
1 Either on a number of non-discriminatory criteria pertaining to the object of the contract, in particular quality, price, technical merit, aesthetic and functional features, performance in terms of environmental protection, performance in terms of occupational integration of persons in difficulty, total running costs, cost-effectiveness, innovative nature, after-sales service and technical assistance, date of delivery and delivery or completion time. Other criteria may be taken into account if the object of the contract so warrants;
2 Or, given the object of the contract, on the sole criterion of price."

Article 53, paragraph IV: Award of contracts/Preferential right (undergoing amendment)7

"1° In the event of identical prices or equivalent tenders for a contract, a preferential right is granted to tenders submitted by a workers' production cooperative, an agricultural producers' group, a craftsman, a craftsmen's cooperative society or an artists' cooperative society or by sheltered workshops.
2° When the contracts relate, wholly or partly, to work likely to be performed by craftsmen or craft companies or craftsmen's cooperative societies or workers' production cooperatives or sheltered workshops, the contracting entities must, before initiating the tendering process, define the public works, services or supplies which shall, all other elements of the tender being equal, be awarded preferentially over all other candidates, to craftsmen or to craftsmen's cooperative societies or workers' production cooperatives or sheltered workshops, up to a maximum of one quarter of the total amount of such works, service or supplies."

Promotes the medium-term development of sheltered workshops or equivalent structures within the meaning of Directives 2004/17 and 2004/18.

Limited application.

7 The contemplated amendments to Article 53 paragraph IV concern the extension of the preferential right.
1.4 How are these legal resources to be implemented?

1.4.1 Article 10: Split contracts

Article 10 of the public procurement contracts code establishes the following principle: “in the interests of the broadest possible competition, and unless the object of the contract does not lend itself to the identification of distinct lots, the contracting authority may award the contract in separate lots”. The main aim of this article is to make public procurement more accessible to small and medium-sized enterprises (SMEs) not necessarily equipped to perform the full extent of a public contract.

The splitting of public contracts under Article 10 of the public procurement contracts code allows primarily for:
- in the case of Article 14, introducing into one or more lots an occupational integration clause for persons excluded from the labour market;
- in the case of Article 15, to reserve one or more lots for sheltered workshops (EA), vocational rehabilitation centres (ESAT) and other equivalent structures.

Furthermore, in certain cases and for certain small lots, the splitting of contracts facilitates the use of the adapted procedure, in accordance with Article 27, paragraph III of the public procurement contracts code.

The public purchaser may opt for a global contract in circumstances where splitting the contract presents a technical, economic or financial difficulty. The principle is therefore subject to exceptions at the discretion of the contracting authority, possibly subject to the oversight of the judge.

Global contracts may also provide scope for addressing the problem of integration by using the different forms of inclusion defined in paragraph 2.2.5.

Any contract, split or global, may therefore contain a social integration clause.

1.4.2 Article 14: Social and environmental clauses

This article makes it possible to stipulate public contract performance clauses to promote the integration of persons excluded from the labour market.

Two ministerial responses of July 2005 set out the terms on which contractual obligations of a social nature may be included in contracts. These responses set out:
- the elements that social integration clauses may contain (promoting the employment of persons encountering difficulties in finding employment: see 1.2 Possible target populations);
- the scope of the obligations that may be imposed on the co-contracting party (allocation of a certain number of hours of work to populations in difficulty, obligation to employ a specified number of young or long-term unemployed).

Each tenderer may, for example, be asked to give an undertaking to reserve a proportion of the hours generated by the contract for persons engaged in an path towards employability.

Application of this article has no impact on the choice of undertaking.

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8 In particular, when the contracting authority is unable itself to ensure the tasks of organisation, steering and coordination.
Applied in isolation, therefore, Article 14 does not provide for an assessment of the quality of the tender content as regards integration.

The clause so drafted is one of the contract performance conditions that all tenderers must undertake to fulfil (see part 2 Questions/Answers) when submitting a tender. A tender which fails to comply with all the undertakings set out in the contract is deemed to be non-compliant (see Article 35 I 1 of the public procurement contracts code).

The clause must be drafted and applied in accordance with the following rules. It must:
- offer all tenderers the possibility of satisfying the clause;
- not set mandatory terms of performance of the clause (see questions 2.2.5 and 2.2.6), but instead offer several possibilities;
- not be discriminatory;
- not restrict competition.

On this point, it should be made clear that the effect of such obligations, imposed in identical fashion on all competing tenderers, is to put tenderers on an equal footing, as regards both the best-efforts undertaking required of them and their chance of being awarded the contract. Furthermore, the terms of performance stipulated must not lead to any restriction of competition.

The legal basis for Article 14 is the most common and legally the safest basis for integration of persons excluded from the labour market.

Example:
A public purchaser wishing to incorporate a social integration clause into a public contract may include in the tender regulations a specific article relating to integration. This article may be drafted as follows: "The contract is subject to a performance condition with respect to the integration and employment of priority populations...". The special administrative terms and conditions set out the populations concerned, the possible means of implementation, any support measures for the public purchaser and, where appropriate, the specific penalties in the event of non-performance or partial performance of the social integration clause. (See Appendix 4 for an example of wording for social integration clauses, which should not be reproduced verbatim but adapted to each procurement contract[9])

1.4.3 Article 15: Reserved contracts

Certain contracts or lots within a contract may be reserved for sheltered workshops (Entreprises Adaptées or EA, formerly known as Ateliers Protégés or AP), for vocational rehabilitation centres (Etablissements et Services d'Aide par le Travail or ESAT, formerly Centres d'Aide par le Travail, or CAT) or equivalent structures, when the majority of workers concerned are disabled or, by virtue of the nature or gravity of their disability, are unable to engage in occupational activity under normal conditions.

The concept of equivalent structure leaves the door open to other legal categories in existence, particularly in other member States of the European Union. It does not allow this clause to be used for structures which do not employ mainly disabled persons within the meaning of law no. 2005-102 of 11 February 2005 on equal rights and opportunities, participation and citizenship of disabled persons.

[9] This example, along with others, can be found (in French) in the "toolbox" for green and socially responsible procurements from the SAE, on its intranet site:
- Ministry of Finance: http://alize.alize/alize16/achats/service_achats_etat/ar_textes_de_bases.html
- Other ministries: www.finances.ader.gouv.fr/achats/
The origin of this provision is to be found in Article 19 of Directive 2004/18/EC of 31 March 2004. According to this directive, sheltered workshops and protected employment programmes contribute effectively to the integration or rehabilitation of disabled persons in the labour market. As such workshops "are not in a position to win contracts under normal conditions of competition", provision is made for "member States to reserve for such workshops the right to participate in public contracts award procedures or to reserve performance of such contracts as part of the framework of protected employment".

Example:
A public purchaser may decide as part of a printing contract to contract for several lots in order to ensure security of supply, and to reserve one of these lots, under the terms set out in Article 15, for a sheltered workshop or vocational rehabilitation centre or any other equivalent structure, in the tender regulations.
When selecting the tender for the reserved lot, it is important to carry out a realistic assessment of the contract performance capacity of the sheltered workshops and vocational rehabilitation centres. Competing tenders from potential suppliers must be invited in accordance with the rules of the public procurement contracts code.

1.4.4 Article 30: Public service contracts whose object is occupational integration and qualification

Public service contracts whose object is the integration of populations in difficulty are governed entirely by Article 30 of the public procurement contracts code. Subject to certain specific provisions, mainly as regards publication, these are subject to the adapted procedure set out in Article 28 of the public procurement contract code. It is important to ensure that integration may fall within the remit of the public entity seeking to award contracts under the terms of Article 30, under the conditions set out in paragraph 2.4.3.

Considerable caution is required when drafting the object of the contract. If the public purchaser's intent is to award an integration contract, this means that the object of the contract is an integration initiative to which the execution of work or provision of services is ancillary. The integration content must be sufficiently substantial to avoid reclassification of the contract by the judge.

Criteria for evaluation of the services must therefore not relate, or at least not primarily, to the quality of the work or services performed but rather to the object of the contract, i.e. the quality of the integration project: for example, the potential of the training dispensed to enable persons employed for the purposes of integration to obtain good qualifications in order to improve their employability.

If Article 30 is applied, competing tenders must be invited and there can be no reserved contract process.

All providers of this type of service are eligible to apply as candidates and submit tenders: associations are therefore eligible to submit a tender for such contracts, in particular integration workshops and projects.
The public purchaser with a public contract under the adapted procedure is under an obligation to organise a contract award procedure, and hence to publish the call for competitive tenders. The terms may be freely set by the public purchaser depending on the nature and characteristics of the needs to be met, on the number and location of economic operators in a position to respond, and the circumstances of the purchase. Put more simply, the public purchaser is thus free to determine the form and level of publication and opening up to competition, particularly by gearing these to the object of the contract and the number of respondents potentially concerned.

In concrete terms, in the case of a public procurement contract for a small amount involving a specific integration initiative and which is only likely to be of interest to one or two associations, the public purchaser may confine its actions to contacting these service providers and negotiating the award with them, as long as it ensures that both bodies are treated on an equal footing during the negotiations and on the award of the contract, and that its selection is based on objective criteria well known to all the economic operators concerned.

When the public procurement contract involves a larger sum and the number of potential service providers is greater, the public purchaser is required to implement publication measures which may include publishing a tender notice in a specialist journal and extending the call for tenders to all service providers expressing an interest, or restricting the field by, for example, setting objective and non-discriminatory application criteria. The contract award procedure applicable to occupational integration contracts therefore remains very much open to the associations frequently called upon by public authorities: it is simply a matter of abiding by a principle of publication and competition proportionate to the size of the contract and to the sector concerned.

1.4.5 Article 50: Variants (see Appendix 3)

Variants are a tool of the public procurement contracts code that the public purchaser should explore when unsure of how to draft social integration requirements in tender documents, but keen to attract tenders incorporating integration objectives. Under formalised procedures, a public purchaser may, in the tender documents, specifically authorise candidates to submit variants relating to social aspects, in accordance with the determination of the public purchaser's requirements provided for in Article 5 of the public procurement contracts code. Under adapted procedure contracts, economic operators are free to propose variants without needing authorisation from the purchaser. Purchasers may decide not to authorise variants.

Using variants gives the public purchaser the opportunity to rely on the initiatives of economic operators to perfect and diversify their proposals as regards integration for those excluded from the labour market.

A variant, where permitted, can only be reviewed if the candidate has submitted a basic tender.

There are as yet few instances of the use of variants in the social field.
Article 53, paragraph I of the current public procurement contracts code allows for a performance criterion in respect of the occupational integration of populations in difficulty to be taken into account, in addition to the "classic" selection criteria such as technical merit, price or performance times. Its use by the public purchaser indicates that it meets the definition of the purchaser's requirements in accordance with Article 5 of the public procurement contracts code.

Under precedents established in the European Court of Justice (ECJ), this social criterion can only be implemented when linked to the object of the contract, i.e. when the nature of the work or services requested is clearly related to an integration initiative. This is obviously the case when the actual object of the contract is an integration initiative.

It is also possible to envisage the application of this criterion when the contract relates to a classic provision of work, supply or services combined with an integration programme which may be implemented as part of a performance clause under Article 14 of the public procurement contracts code (see Appendix 5 Ministerial Responses to Parliamentary Questions of 27/07/2006 and 8/10/2009).

The integration performance criterion may not be applied, however, when the object of the contract includes no social dimension. Naturally, it is difficult to determine whether the requirement met by a contract covers both these dimensions or has no social aspects whatsoever. For this reason, it is strongly recommended that public purchasers carefully examine the nature of the requirement before introducing an integration performance criterion.

Assuming that a contract explicitly includes such a social dimension, the integration performance criterion is likely to optimise the application of Article 14. When a contracting authority applies Article 14 in isolation, several tenderers may submit tenders that comply with the social integration clause in the contract specifications even though these solutions will differ widely as regards integration. The public purchaser is thus unable to determine the most advantageous tender in social terms. In contrast, the use of the integration performance criterion under the terms of Article 53 paragraph I, combined with an adequate weighting, enables the contracting authority to distinguish between tenders on the basis of the integration component, by making it possible to score the quality of the proposals submitted by the economic operators in this field, and to assign a degree of importance to this criterion. The use of Article 53 paragraph I, combined with Article 14, encourages the economic operators to submit a more sophisticated integration approach than would be required by mere compliance with the social integration clause featuring in the contract specifications, since by so doing they may hope for a higher score.

The other potential advantage offered by an integration performance criterion is that it provides tenderers with information on the public purchaser's expectations as regards performance of the social integration clause. Through the judicious use of sub-criteria, the public purchaser may signal that its assessment of the social criterion will take into account several aspects of an integration initiative such as, for example, the quality of mentoring provided to beneficiaries of the social integration clause or the level of occupational qualification attained by beneficiaries at the end of their participation in the contract. The assessment of sub-criteria by the public purchaser may not under any circumstances be discriminatory as regards the nature of the contractual arrangements (direct recruitment or use of third party) under which the tenderer performs the clause.
1.4.7 Article 53, paragraph IV: Award of contracts/preferential right

In the event of identical prices or equivalent tenders for a contract, a preferential right is granted to tenders submitted by a workers' production cooperative, an agricultural producers' group, a craftsman, a craftsmen's cooperative society or an artists' cooperative society or by sheltered workshops or equivalent structures as defined by Directives 2004/17/EC and 2004/18/EC.

When the contracts relate, wholly or partly, to work likely to be performed by the entities mentioned above, the contracting authority must, before initiating the tendering process, define the public works, services or supplies which shall, all other elements of the tender being equal, be awarded preferentially over to all candidates, other than those mentioned above, up to a maximum of one quarter of the total amount of such works, service or supplies.

When the contracts relate, wholly or partly, to work of an artistic nature, preference shall be given, all other elements of the tender being equal as provided above, to artists or artists' cooperatives, up to a maximum of one half of the total amount of such works, service or supplies.
2 Questions/Answers

2.1 Questions which may arise prior to a public procurement contract

2.1.1 Which public purchasers are concerned by this guide?

They include:

a. Entities subject to the public procurement contracts code, contracting authorities or contracting entities:
   - the State, regional or local authorities or their entities (excluding State-run industrial and commercial public entities), private social security bodies ¹⁰;

b. Public or private entities subject to ordinance no. 2005-649 of 6 June 2005¹¹, and in particular bodies under public law defined as follows: created specifically to meet general interest needs neither industrial nor commercial in nature; being a distinct legal entity; whose activity is majority financed or controlled by the State, regional or local authorities or other bodies under public law, or whose administrative, management or supervisory bodies are made up for over half their number of members appointed by the State, regional or local authorities or other bodies under public law (see Appendix 10 for a comparison between the public procurement contracts code, ordinance no. 2005-649 of 6 June 2005 pertaining to contracts awarded by certain public or private entities not subject to the public procurement contracts code and Directives 2004/17/EC and 2004/18/EC of 31 March 2004):
   - contracting entities which are network operators¹² in the energy, water, transport and postal sectors (EDF, RTE, SNCF, La Poste, etc.)
   - contracting authorities:
     - public interest groupings (GIP), certain economic interest groupings (GIE), certain commercial companies (HLM low-cost housing companies, for example), certain non-profit-making associations under the 1901 law which meet the above criteria, semi-public companies, unemployment insurance funds;
     - non-profit-making private hospitals;
     - administrative public entities whose articles of association include a research function, including scientific and technical public entities (EPST) which, since programme law no. 2006-450 of 18 April 2006 on research, are subject to the provisions of ordinance no. 2005-649 of 6 June 2005, but only in respect of purchases relating to their research activity. They remain subject to the public procurement contracts code for all other types of purchase.

¹⁰ Article L.124-4 of the Social Security Code makes these bodies subject to the rules applicable to the State under the public procurement contracts code, on conditions established by order, in this instance the order of 4 October 2005 on the regulation of public procurement contracts awarded by social security bodies, which is in the process of adoption by the Ministry of Health.

¹¹ Ordinance no. 2005-649 of 6 June 2005, as amended by law no. 2006-450 of 8 April, on contracts awarded by public or private entities not subject to the public procurement contracts code, in particular Article 38 thereof.

¹² These are sectors which represent strategic interests for the State. EC law provides for more flexible procedures as regards these sectors, which are divided into two categories: those which concern the provision or operation of fixed networks (electricity, gas, water, etc.) and those which concern the exploitation of a geographic region (oil, gas or coal extraction, operation of ports, airports, railway stations, etc.).
2.1.2  *Should the public purchaser consider the introduction of social integration clauses into public procurement contracts?*

Yes, the question should be considered, but there is no obligation to respond positively.

Article 5 of the public procurement contracts code requires the contracting authority to consider the determination of its requirements in the light of sustainable development objectives, which must reconcile the protection and enhancement of the environment with economic development and social progress.

Experience shows that it is possible to include a social integration clause for persons excluded from the labour market in most public procurement contracts for work or services that use manpower, including those that involve intellectual services.

2.1.3  *At what point should the public purchaser consider the introduction of social integration clauses into public procurement contracts?*

When reviewing public procurement contracts to be prepared over the coming year, public purchasers should consider the possibility of incorporating social integration clauses into the contracts. They should then put their intentions into concrete form when drafting the tender notice or the adapted procedure contract, tender regulations and contract specifications.

In any event, including social integration clauses in a public procurement contract involves a certain amount of anticipation and this matter should not be raised when preparing the tender documents, but rather when determining the procurement requirement or, at the latest, at the pre-planning stage.

2.1.4  *Who decides on the implementation of social integration clauses?*

As a general rule, it is up to the public purchaser to assess whether, when all the legal conditions are met, to implement articles of the public procurement contracts code pertaining to the integration of persons excluded from the labour market. Given that this is an active public policy initiative, it must be clearly incorporated into the procurement policy guidelines by a number of methods, some of which are set out below.

a. In regional or local authorities, the contracting authority is also empowered to introduce and hence to draft the social integration clause. Experience shows, however, that the implementation of social integration clauses in public procurement contracts is made easier by the existence of a political undertaking, which often emerges from debate expressing this intention or from a sustainable development policy.
b. As regards State public purchasers, the development of socially responsible public procurement is being encouraged through the new procurement policy introduced by the Public Procurement Department (Service des Achats de l'Etat, SAE) (see question 2.8.7).

c. As regards Social Security funds: the 2007-2010 framework sustainable development plan adopted for the general scheme by the executive committee of directors of the union of national insurance funds (UCANSS), and issued to all agencies, includes in its social component an "aid for integration" target with the introduction of social integration clauses into public procurement contracts (and the development of purchasing from the sheltered employment sector). Furthermore, the self-employed workers' scheme (Régime Social des Indépendants, RSI) participates in the working group set up to address this issue by the Social Security Directorate and steered by UCANSS.

d. In the case of hospitals, the contracting authority is also empowered to introduce and hence to draft the social integration clause.

e. In the case of unemployment insurance, representatives of employers and trade unions on the bureau of the national unemployment insurance scheme (UNEDIC), and the management of UNEDIC have established a policy to promote the employment of disabled persons. Among the measures applicable, the reservation of public procurement contracts or lots within public procurement contracts for sheltered workshops (EA) or vocational rehabilitation centres (ESAT) is covered by a directive issued to unemployment insurance agencies.

2.1.5 How are the object of the clause and the target populations determined? Who is responsible for determining the population eligible for the integration initiative?

See the answer to questions 1.2 and 2.2.6.

The decision must be taken before drafting the tender documents, and therefore prior to launching the contract award procedure, taking into account the effective capacity for implementation of the clause concerned.

2.1.6 Can a public procurement contract refer to the area of residence of populations concerned by a social integration clause?

No, a public procurement contract can only refer to a specific area of residence for the employment of populations concerned by a social integration clause in two specific cases:

- the application of Article 30 of the public procurement contracts code to contracts which have as their object the integration of the target populations;

- the national urban renewal agency (ANRU), whose charter stipulates, under the terms of law no. 2003-710 of 1 August 2003, that project sponsors and owners entering into multi-year agreements with the ANRU must undertake to reserve 5% of the hours worked on investments financed by the ANRU for residents of sensitive urban areas (ZUS) experiencing difficulties with occupational integration. There is no requirement that projects in a particular neighbourhood should benefit only the residents of that neighbourhood. When several ZUS exist within a single...

13Framework and planning law no. 2003-710 of 1 August 2003 on urban policy and urban renewal.

Article 10 "A public establishment of an industrial and commercial nature is founded, known as the national agency for urban renewal, "Agence nationale pour la rénovation urbaine (ANRU) (...)"

Within nine months from its creation, the ANRU will formulate and adopt an integration charter incorporating requirements for the occupational integration of residents of sensitive urban areas into the national urban renewal programme. (…)"
area (e.g. an agglomeration), recruitment may be extended across all the sensitive urban areas concerned. The local partners may, moreover, decide to extend the benefit of the social integration clauses marginally to a wider area (that of the urban social cohesion contract, for example), particularly if recruitment within the sensitive urban area concerned proves difficult. These options must be approved in the charter's local application plan, one object of which is to define the target populations based on an analysis of employment.

2.1.7 How can the requirement for a social integration clause be defined simply and precisely without restricting competition? Are there any simple, standardised methods? If so, what are they?

The general rules and questions to be considered when drafting social integration clauses are set out in this guide. Because each contract is a special case, however, it is not possible to provide totally standardised resources.

It is, however, possible to develop large-scale social integration clauses based on Article 14 of the public procurement contracts code, when four conditions are met: knowledge of the existing support mechanisms, integration opportunities enabling the successful tenderer to subcontract performance as it sees fit, a range of performance possibilities sufficiently wide and appropriate to the diverse situations of the economic operators and, finally, a volume of hours of integration that is relatively modest compared to the contract as a whole.

2.1.8 Which contacts of choice can the public purchaser turn to in order to gain a better knowledge of integration opportunities?

Sources of information on the local situation in terms of integration through economic activity include:

- organisations that facilitate the use of social integration clauses, in particular those that act within the scope of local integration and employment plans or Maisons de l’Emploi (see the list at http://www.ville-emploi.asso.fr);
- the local branches of the local offices of the Regional Directorates for Businesses, Competition Policy, Consumer Affairs, Labour and Employment (Directions régionales des entreprises, de la concurrence, de la consommation, du travail et de l’emploi, DIRECCTE) where an IAE officer can be found, who is tasked with professionalising the structures in this sector in order to make them more suitable for participating in the integration hours of work provided for by the social integration clauses (see DGEFP Circular of 7 May 2010 on the national support programme for the integration offer. In addition, the local Pôle emploi branch can put the public purchaser in touch with the appropriate person.
- various member associations of the national council for integration through economic activity (Conseil National de l'Insertion par l’Activité Economique, CNIAE: http://www.cniae.gouv.fr), for example:
  - Comité National de Coordination des GEIQ (CNCE GEIQ: http://www.geiq.net)
  - Conseil National des Entreprises d’Insertion (CNEI: http://www.cnei.org)
  - Comité National de Liaison des Régies de Quartier (CNLRQ: http://www.regiedequartier.org)
  - Fédération des Comités et Organismes d’Aide aux Chômeurs par l’Emploi (COORACE: http://www.coorace.net)
  - Fédération Nationale des Associations d’Accueil et de Réinsertion Sociale (FNARS: http://www.fnars.org)
  - Association Nationale des Acteurs du Chantier École (Chantier école: http://www.chantierecole.org)
- Les Jardins de Cocagne (http://www.reseaucocagne.asso.fr)

All of the 4,500 structures promoting integration through economic activity (SIAE) are listed on the website of the CNAR_IAE (national support and resource centre for integration through economic activity) that is administered by the AVISE (an association that advises on social entrepreneurship) at the following address: http://www.socialement-responsable.org/.

For information on the situation regarding integration structures for the disabled, the public purchaser may usefully contact:
- Union Nationale des Entreprises Adaptées (UNEA: http://www.unea-asso.com)
- the GESAT network (http://www.reseau-gesat.com).
- the associations active in the field: UNAPEI (http://www.cat-unapei.org) the FEGAPEI and ADAPEI (website for each département), in particular.

The HANDECO association, which federates associations that manage sheltered workshops (EA) or vocational rehabilitation centres (ESAT), offers a website that brings together 2,000 sheltered workshops and vocational rehabilitation centres, and that makes it possible to access a procurement contracts platform, at the following address: http://www.handeco.org.

2.1.9 Who can assist a purchaser in designing and implementing social integration clauses?

The aim of a social integration clause is to enable hours to be worked by persons who are excluded from the labour market. It is easy to understand that a public purchaser is not always fully aware of the procedures and methods that are conducive to achieving this aim.

The experience gained by regional or local authorities and, since 2007, by central government, shows that successfully incorporating social integration clauses into public procurement contracts involves the purchaser and the undertaking being supported by a "facilitator".

The role of this facilitator, who acts in the interests of both public purchasers and undertakings, in compliance with the principles governing public procurement contracts is:
- to assist with the quantitative and qualitative definition of clauses that are adapted to each specific procurement contract in light of local reality and the capacity of the integration structures;
- to inform undertakings that are potential tenderers concerning the possibilities of satisfying the social performance clause;
- to identify the persons who are potentially concerned, in consultation with the local public employment service and the integration structures themselves, and even to design and propose to the undertakings concerned the conditions for recruiting or seconding short-listed candidates;
- to ensure communication between all the stakeholders;
- to monitor the proper performance of the commitments made by the undertakings and the beneficiaries, on behalf of the contracting public purchaser.

Without the assistance of these trained, specialised, persons, public purchasers may find it difficult to impose social integration clauses "blindly" in public procurement contracts. Clauses so imposed would run the risk of being ineffective and, in addition, tenderers would find it difficult to assess their full purport.
For reasons of consistency, visibility and effectiveness, it is desirable for undertakings to use the same "facilitator", who will be their common point of contact throughout the geographical area in which they operate, regardless of the public purchaser.

Facilitators can primarily be found (see Appendix 6) in PLIE and Maisons de l’Emploi (see the Alliance Villes Emploi website: http://www.ville-emploi.asso.fr).

In November 2010, there were 240 facilitators (this figure is steadily rising), but not all areas were covered. If there is no local facilitator, public purchasers can contact the regional office of the DIRECCTE, or even their local Pôle Emploi branch.

2.1.10 Are economic operators including structures promoting integration through economic activity (SIAE) permitted to combine or form an ad hoc group in submitting a tender for a public procurement contract?

Yes, economic operators are allowed to combine or come together to form an ad hoc group (Article 51 of the public procurement contracts code). Creating a group may make it possible to submit tenders for contracts beyond the capacity of a single economic operator, with a single entity (the representative agent) responsible for the organisation, steering and coordination, as in the case of the single contract.

2.1.11 Should the approaches of public purchasers to social integration clauses within a single area be coordinated and how should this be done?

The effectiveness of social integration clauses in public procurement contracts awarded within a single area (an employment catchment area, for example) depends partly on their degree of convergence and particularly on the compatibility of the populations targeted by the different clauses. Undertakings will be more likely to submit tenders for contracts containing social integration clauses where these relate to analogous mechanisms and the undertakings can then propose consistent occupational paths to persons excluded from the labour market, possibly by employing them in the performance of several contracts.

The convergence of clauses presupposes, however, overall coordination of integration policies pursued by the authorities or services concerned across the area. It is through consultation and reaching a consensus on the integration initiatives to be carried out in an area that the various public purchasers can define a type of social integration clause appropriate to their overall strategy. This could be the role of the facilitator, who, acting as an intermediary between the public purchaser and the economic operators, guarantees this consistency for practices in a given area (see Appendix 6).

More generally, it is very much in the interests of public purchasers to exchange experiences and share with other contracting authorities the benefits of competencies acquired in the field of social integration clauses.

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14 DGEFP memorandum of 3 November 2010
15 Two regions, for example, have structured their integration network: Lorraine and Poitou-Charentes, with the Initiative Régionale pour l’Insertion et la Solidarité-IRIS (website: http://wwwobservatoire-environnement.org/lien/IRIS-Initiative-Regionale-pour-I.html).
2.2 Questions that may arise when preparing and drawing up a public procurement contract containing a performance clause under the terms of Article 14

2.2.1 What is a performance clause concerning the integration of persons excluded from the labour market?

It is a clause by which tenderers may be required to undertake to assign part of the contract, in the form of hours of work, to an initiative for the integration of persons excluded from the labour market as part of a public procurement contract, by a variety of possible methods (see question 2.2.7).

2.2.2 In the case of a public procurement contract consisting of several lots, is it possible to restrict a performance clause to one lot or certain lots?

Yes, it is possible, within a contract consisting of several lots, to provide for one or more lots to contain a performance clause concerning integration. These clauses need not necessarily cover all the lots.

2.2.3 What steps can be taken in advance to prevent the risk of non-performance of the clause?

By ensuring that undertakings likely to submit tenders are able to implement the clause without major obstacles, in a way that is not discriminatory. It is therefore preferable to check in advance whether there are integration opportunities (see question 2.1.9), or persons who could perform such a clause and get support. The wording of the clause must not have the effect of reducing the number of economic operators eligible.

The clause should be worded with reference to a number of hours of work.

2.2.4 What weight or importance can be attributed to these social integration clauses in the performance of a public procurement contract before they risk being considered discriminatory?

It is difficult to establish an absolute limit beyond which the number of hours stipulated in the social integration clauses would in principle be discriminatory. To avoid any such impact, it should be borne in mind that any economic operator, irrespective of legal status, must be in a position to satisfy this clause if, of course, prepared to undertake a process of integration. The limit must be set in such a way that an operator may, without difficulty, recruit persons excluded from the labour market, engage in co-contracting or subcontracting or the secondment of employees, taking into account the existing integration opportunities available.

In concrete terms, a clause stipulating that 50% of contract performance be executed by populations encountering difficulties would effectively rule out conventional economic operators and benefit only structures that specialise in integration through economic activity.

In practice, existing examples of application show that the portion of hours worked that social integration clauses represent in the performance of the procurement contract is a minimum of 5% for all or part of the lots, as is the case for ANRU procurement contracts, which often reach 10% (overall target set for State procurement contracts) and, in some cases, for service contracts, may reach up to 30%.
To be relevant, the target must be defined in accordance with both the sector of activity and the characteristics of the population available where the service that is the object of the procurement contract will be performed.

2.2.5 What are the different types of employment for persons assigned to the performance of the social integration clause?

Various forms of integration may be envisaged in the contract specifications, including those undertakings that submit tenders choosing themselves the form(s) that they believe are most suitable:

- direct recruitment of persons suffering from exclusion. All types of employment contract are theoretically possible. The public purchaser’s attention should be drawn to the wish sometimes expressed by undertakings to assign performance of the clause to an employee who was recently hired in respect of a previous procurement contract and who, prior to recruitment, fell into one of the categories set out in 1.2. In such instances, the public purchaser must, depending on the context, assess the reality of the integration effort made, with respect, for example, to the possibility of further recruitment;[16]

- the provision of employees engaged in an integration scheme on the legal and regulatory terms laid down in the Labour Code. The undertaking makes contact with an outside organisation that provides workers participating in an integration scheme for the duration of the contract. These include SIAE (Entreprise de Travail Temporaire d’Insertion and Association Intermédiaire), but also temporary employment firms (entreprise de travail temporaire, ETT) under ordinary law when they provide an employee to an undertaking for the purposes of integration and with a commitment to monitoring progress, under the terms of Article L124-2-1-1 of the Labour Code;

- the use of employees hired by an employers’ group for integration and qualification (GEIQ) or any other association of a similar nature;

- the use of co-contracting or subcontracting with an occupational integration undertaking (EI) or, where necessary, a structure promoting integration through economic activity (SIAE) that has the capacity to perform the tasks provided for in the public procurement contract.

2.2.6 Can the public procurement contract impose specific terms of performance of the social integration clause?

No, a public purchaser must not impose specific terms for performance of the social integration clause. For example, a public purchaser cannot oblige the undertaking to use an SIAE or to hire employees under indefinite-term contracts.

A public purchaser must give undertakings discretion so that the tenderer chooses the integration solution that is best adapted to its individual characteristics and its needs. The undertaking must be able to choose one of the options listed in paragraph 2.2.5.

The social integration clause must be limited to setting a target number of hours of integration without requiring the economic operators to pursue a particular form of implementation.

[16] In this case, the apprenticeship may, under certain circumstances, be an appropriate response for a designated period, as it is not the performance method that is in question, but the public beneficiary: in this case, an unemployed young person (see 1.2).
Moreover, purchasers must not impose any geographic criteria for the performance of the social integration clause, with the exception of the cases mentioned in paragraph 2.1.6 (Article 30 of the public procurement contracts code and contracts subsidised by the ANRU).

2.2.7 How should the clause be drafted: as a percentage of hours of integration? As a number of hours of integration?

Several methods are possible. The experience of regional or local authorities, however, suggests that the clause should be drafted as a number of hours of integration, which should be determined on a case by case basis in view of the specific nature of each contract. This form of drafting simplifies monitoring of contract performance.

In setting the number of hours, it is important to take into account the difference in labour intensiveness depending on the type of activity. In public works, for example, an average rate of 30 to 40% could, for example, be taken into account as an order of magnitude. In construction, the proportion of labour varies widely depending on the sectors, the lots and the worksites concerned: 70% for interior painting, 47% for masonry and 20% for metal frames, for example.

The public purchaser should refer to the websites of trade associations in order to set these manpower percentages.

2.2.8 How can a public purchaser draft a performance clause for service contracts that cover activities where there is an obligation to continue employing the current site staff?

In certain sectors such as cleaning and waste disposal services, caretaking and mass catering, sector-wide collective bargaining agreements oblige the new holder of a contract to continue employing the personnel assigned to the site serviced by the previous holder. When a procurement contract is renewed, this provision precludes the "classic" implementation of social integration clauses.

Under these circumstances, a public purchaser may ask the contractor to systematically stagger the performance of the integration hours over the entire term of the procurement contract by progressive "ramping up" linked to the conditions under which the contractor is managed (taking advantage of staff turnover, on the basis of additional services, etc.), and to publish a reporting table (see for example in Appendix 7 the framework agreement drafted by the Public Procurement Department).

2.2.9 How should the number of hours of integration be calculated for a public procurement contract containing a performance clause?

One means of determining the number of manpower hours reserved for integration purposes is the following:

- establishing in the estimated cost of the public procurement contract the proportion of expenditure devoted to manpower and to the performance of the clause;
- then converting this sum into hours of work on the basis of a lump-sum assessment of the cost charged (including social security contributions) per hour of labour of an employee.
The purchaser will find calculation examples below. Purchasers should not use these examples without adapting them to their own procurement contract and to the local employment situation in the professional sector concerned.

Initially, it is essential for purchasers to assess the proportion the labour component represents in the cost of the procurement contract.

Examples:

Public procurement contract for services of 1 million euros excluding VAT: an average rate of 50% labour could be used, giving an amount of 500,000 euros.

- If the integration rate is set by the awarding authority at 10%, the cost of integration is calculated to be: 500,000 x 10/100 = 50,000 euros.

The hourly salary rate including social security contributions may vary depending on the trades concerned. Assuming an average cost of 25 euros per hour including social security contributions, the number of hours of integration the undertaking may be asked to provide can be calculated as: 50,000/25 = 2,000 hours, equivalent to practically 1.5 full-time position.

- If the awarding authority sets the integration rate at 5%, the cost of integration is calculated to be 25,000 euros, equivalent to 1,000 hours of integration.

For most works and some construction procurement contracts (excluding painting, for example, where the percentage of labour is higher), an average labour component of 30% can be used. For a contract of 10 million euros excluding VAT, this gives an amount of 3,000,000 euros.

- If the integration rate is set by the awarding authority at 10%, the cost of integration is calculated to be 3,000,000 x 10/100 = 300,000 euros.

The hourly salary rate including social security contributions may vary depending on the trades concerned. Assuming an average cost of 35 euros per hour including social security contributions, the number of hours of integration the undertaking may be asked to provide can be calculated as 300,000/35 = 8,570 hours.

- If the awarding authority sets the integration rate at 5%, the cost of integration is calculated to be 150,000 euros, equivalent to 4,280 hours of integration.

2.2.10 Is it possible, as part of the performance of an Article 14 clause, to give preference to economic operators that function as structures promoting integration through economic activity (SIAE)?

No, no preference may be given to any particular kind of structure, any more than to any economic operator.

2.2.11 Can an integration undertaking be awarded a public procurement contract containing a social performance clause pursuant to Article 14 or must it necessarily function as a subcontractor?

An integration undertaking may be awarded a public procurement contract containing a social integration clause as long as its tender corresponds to the object of the contract and complies with the tender documents. There is nothing to prevent subcontracting of part of the contract to a standard undertaking.
In the terms of performance of the Article 14 social integration clause, the public purchaser may indicate for information that integration undertakings are entitled to function as subcontractors or co-contractors.

2.2.12 Can an economic operator regard integration initiatives undertaken as part of other public procurement contracts as contributing to its obligations under a given public procurement contract?

Performance obligations must be met in respect of the contract concerned. Under Article 14 of the public procurement contracts code, the very concept of performance clause renders it impossible for the public purchaser to regard integration initiatives taken in respect of other (earlier or simultaneous) contracts as contributing to its performance obligations.

In consequence, previous integration initiatives as such may not be taken into consideration when assessing tenders. Tenders are to be assessed in accordance with the results required for the contract (see question 2.2.5).

2.2.13 A public purchaser wishes to draw up a public procurement contract containing an Article 14 social integration clause. Which entities should be involved?

The entities to be involved outside the public entity awarding the contract are, inter alia:

- PLIE or registered Maisons de l'Emploi facilitators, where they exist locally (see question 2.1.9);
- Pôle Emploi and DIRECCTE (see question 2.1.8);
- MDPH.

In any event, care should be taken to ensure that there are potential response capacities in the sectors of the IAE or sheltered/adapted workshops (see in particular the websites www.socialementresponsable.org and www.handeco.org).

2.2.14 Can the gathering of information from economic agents and entities engaged in integration through economic activity be envisaged?

It may be useful for public purchasers to add to their economic knowledge of the market, possibly with the assistance of a facilitator. They should give priority to contacts with public entities with a good knowledge of the potential providers of integration opportunities.

Beware, however, of favouring a competitor by means of contacts prior to consultation.

2.2.15 Who checks that the target populations meet the criteria set down in the contract notice?

The public purchaser checks the populations (see question 1.2) targeted by the contract:
- at the tender selection stage if possible (if undertakings have indicated the clause performance methods);
- at the clause performance stage in any event.

In carrying out this check, the public purchaser may call directly on various components of the Public Employment Service, or use an intermediary: a facilitator, for example.
2.2.16 Are there any standard references in this field? Where are they to be found?

Yes, there are numerous examples of the use of Article 14.

For instance, best practices are listed:

- by the websites of CNAR and IAE (www.socialement-responsable.org, administered by the AVISE), the ADEME "sustainable public procurement contracts" networks and the Réseau 21 (http://www.clausessociale.fr);
- by the Alliance Villes Emploi guides17 and the publications of the Comité National de Liaison des Régies de Quartier; the market study grouping guide "Développement durable" also contains extremely useful information.

17 This guide also contains a directory of contacts ("facilitators") who facilitate the management of integration clauses in regional or local authorities, PLIE or Maisons de l’Emploi.
2.3 Questions which may arise when preparing and drawing up a public procurement contract that the public purchaser wishes to reserve for undertakings employing disabled workers

2.3.1 Which article of the code should be cited?

Article 15 of the public procurement contracts code should be used to prepare a reserved contract.

2.3.2 How should a public procurement contract based on Article 15 be drafted?

In the article in the contract notice and/or the tender regulations setting out the object of the contract, it should be specified that the contract or part of the contract will be reserved for sheltered workshops (EA) or vocational rehabilitation centres (ESAT) in accordance with Article 15 of the public procurement contracts code.

2.3.3 How can structures in the sheltered/protected sector that have the capacity to submit a tender for a public procurement contract be found?

Associations that manage EA and ESAT have pooled their resources in order to create a website that lists sheltered workshops and vocational rehabilitation centres, as well as their vocational specialities and their capacities: www.handeco.org. Moreover, the umbrella organisations for EA and ESAT directors (the UNEA and the GESAT network) act as coordinators in some sectors, which facilitates the identification of and responses to public procurement contracts, most frequently by forming an ad hoc group of undertakings (GME).

2.3.4 What are the equivalent structures, other than the sheltered workshops (EA) and vocational rehabilitation centres (ESAT), referred to in the code?

These are primarily undertakings in other European Union countries which employ mainly disabled persons.

2.3.5 Are there any standard references in this field?

Article 15 of the public procurement contracts code was introduced by the law of 11 February 2005 on equal rights and opportunities, participation and citizenship of disabled persons. Its application is still therefore relatively recent, but presents relatively few legal difficulties.

It is most frequently used to reserve lots (sectoral or geographical), or even procurement contracts – very often for a low amount – for supplies or services (cleaning, gardening, laundry, catering, envelope insertion, sewing, etc.).
Article 15 was also used by the UGAP (public sector purchasing platform) on behalf of the Public Procurement Department in order to fill an interdepartmental procurement contract with regional lots involving the destruction of electrical and electronic equipment) this contract was exclusively reserved for sheltered workshops (EA) or vocational rehabilitation centres (ESAT), which responded by joining forces, for the most part in the form of ad hoc groups organised by the UNEA and GESAT players concerned.

2.3.6 Can a specific lot in a public procurement contract containing several lots be reserved for undertakings employing a majority of disabled persons?

It is perfectly possible to envisage reserving one or more lots in a contract containing several lots, on the basis of Article 15. This means that the tender procedure on this lot or lots will be applied to the various structures listed in Article 15: sheltered workshops (EA), vocational rehabilitation centres (ESAT) and other equivalent structures.

2.3.7 Does the implementation within a public procurement contract of a reserved contract designed to promote the employment of disabled persons generate extra costs? If so, how can this be justified in economic terms?

The implementation of such a contract may generate extra costs, sometimes up to 15 or 20%. However, the revenue generated by the reserved contract may be deducted from the tax due if the public purchaser does not meet its obligation to employ disabled persons. This deduction is capped, however, at 50% of the employment obligation.

2.3.8 How may a public purchaser ensure that the award of a contract to sheltered workshops (EA) or vocational rehabilitation centres (ESAT) is taken into account as part of the fulfilment of obligations to employ disabled persons?

The award of a contract may be offset against the financial penalties for failure to meet obligations to employ disabled persons, up to a maximum of 50% of the obligation.

2.3.9 Which purchasers are concerned by the FIPH-FP fund contribution?

The public purchasers concerned by the FIPH-FP fund contribution are listed in Article L 323-2 of the Labour Code. This contribution applies to the State, certain State-run public entities (other than industrial or commercial), La Poste, regional or local authorities and their public entities (other than industrial or commercial), including those listed in Article 2 of law no. 86-33 of 9 January 1986 containing statutory provisions on the public hospital service. All other public purchasers are liable for the AGEFIPH fund contribution.

18 The following establishments are concerned: public health establishments and inter-hospital syndicates mentioned in Articles L. 711-6 and L. 713-5 of the Public Health Code, public hospices, public retirement homes, except those dependent on the Paris Bureau d’Aide Sociale, public or quasi-public establishments operated by departmental children’s social aid services and children’s homes of a social nature, public or quasi-public establishments for disabled minors or adults, with the exception of national establishments and correctional educational or teaching establishment, public or quasi-public accommodation and social rehabilitation centres, referred to in Article L. 345-1 of the Social Action and Family Code, the Nanterre reception and hospital centre.

2.3.10 How should the contribution paid to the fund for the integration of disabled persons in public sector employment (FIPH-FP) be calculated to allow for the award of a public procurement contract to sheltered workshops (EA) or vocational rehabilitation centres (ESAT)?

The amount of the contribution is calculated according to:
- the number of shortfall units in respect of the employment obligation
- and the size of the workforce.

More precisely, the contribution per shortfall unit is:
- 400 times the hourly minimum wage (SMIC) for public employers with a workforce of between 20 and 199;
- 500 the hourly minimum wage (SMIC) for public employers with a workforce of between 200 and 749;
- 600 the hourly minimum wage (SMIC) for public employers with a workforce of 750 and over.

Spending directed to sheltered workshops (EA) or vocational rehabilitation centres (ESAT) reduces the amount of the contribution and qualifies the undertaking for a number of deductible units of “disabled employee equivalents” (Equivalent Emploi Travailleur Handicapé, EETH) which are deducted from the number of shortfall units.

A public entity which has not fulfilled its obligations thus has two possible solutions in addition, of course, to the direct employment of disabled workers: either to pay the tax in full, or award contracts to sheltered workshops (EA) or vocational rehabilitation centres (ESAT).

NB: Number of units deductible = amount of spending/16,125.24 euros (the minimum gross annual wage paid to an employee during the previous year)

The number of units deductible may not exceed 50% of the employment obligation.

Example: a public entity employing a workforce of 250 including 2 disabled workers.

Its employment obligation is 6%, equivalent to 15 workers. Having already recruited 2 disabled workers, this leaves the entity with a shortfall of 13 units.
- If the entity pays the tax in full, this will amount to 57,590 euros (given a gross hourly minimum wage in 2010 of 8.86 euros), hence 13 x 500 x 8.86 euros = 57,590 euros.
- If the entity awards a contract to an EA or ESAT, the amount of tax due is reduced.

Supposing that a contract worth 31,000 euros is awarded.

The number of units deductible is 31,000/16,125.24 = 1.92.

In this example, the number of units deductible must be less than 7.5, which is the case with 1.92 units deductible.

The final amount of tax to be paid is 13 shortfall units – 1.92 deductible units, leaving 11.08 shortfall units.

The contribution payable will therefore be 49,084.40 euros (11.08 x 500 x 8.86).

2.3.11 How should the contribution paid to the association for the management of funds for the integration of disabled persons in employment (AGEFIPH) be calculated to allow for the award of a public procurement contract to sheltered workshops (EA) or vocational rehabilitation centres (ESAT)?

Just like the public purchasers defined above, private sector and industrial and commercial public sector employers subject to the obligation to employ disabled workers may fulfil up to 50% of that obligation by entering into contracts for supplies, subcontracting or services with sheltered workshops (EA), home-
work distribution centres (centres de distribution de travail à domicile, CDTD, considered as equivalent to sheltered workshops), or vocational rehabilitation centres (ESAT) (Article L. 5212-6 of the Labour Code).

The number of employment obligation beneficiary equivalents represented by these contracts should be calculated as follows:

* In the case of contracts for supplies, subcontracting or services, by the quotient calculated by dividing the price before VAT of the supplies, works or services featured in the contract, after deduction of the cost of raw materials, products, materials, consumables and selling costs, by 2,000 times the hourly minimum wage (SMIC) in force at 31 December of the year of liability for the employment obligation (Article R. 5212-6 of the Labour Code). Thus the number of units deductible = amount of expenses/17,720 euros (2,000 times the hourly minimum wage of 8.86 euros in 2010).

* In the case of contracts whereby disabled workers are seconded to a private sector undertaking by an EA or ESAT, which are considered as a specific type of service contract, the hourly base used is 1,600 times the hourly minimum wage (Article R. 323-2, second subparagraph of the Labour Code). It should be noted that because these are service contracts, the disabled workers seconded under these contracts cannot be counted as beneficiaries of the employment obligation by the host entities. Thus the number of units deductible = amount of expenses/14,176 euros (1,600 times the hourly minimum wage of 8.86 euros in 2010).

It should also be noted that if, over a period of more than 3 years, an entity subject to the employment obligation has awarded no contracts to a sheltered workshop, CDTD or ESAT, has not employed any beneficiaries of the employment obligation or applied any agreement concluded under Articles L. 5212-8 and L. 5212-17 of the Labour Code, its AGEFIPH contribution will be calculated on the basis of 1,500 times the hourly minimum wage irrespective of the number of employees in the undertaking (Articles L. 5214-1, L. 5212-9, L. 5212-10 and L. 5212-11 of the Labour Code).

2.3.12 What other possibilities exist to promote the employment of disabled persons?

Outside the framework of reserved contracts under Article 15, the provisions of Articles 14, 30 and 53, paragraphs I and IV, may also be used to promote the employment of disabled persons.

In the event of a contract containing a social integration clause on the basis of Article 14, it can be stipulated that part of the contract should be performed by disabled persons.
2.4 Questions which may arise when preparing or drawing up an integration and/or occupational qualification contract under the terms of Article 30

2.4.1 Which article of the public procurement contracts code allows for the award of an integration and/or occupational qualification contract?

Article 30 of the public procurement contracts code allows for the award of an integration and/or occupational qualification service contract through an adapted procedure contract.

2.4.2 What is an integration and/or professional qualification service contract?

It is a service contract, the object of which is to provide integration and/or occupational qualification services for persons in difficulty depending on the geographical scope of intervention of the public purchaser (such as support and assistance towards employment, training, etc.).

Services such as park and garden maintenance, for example, may provide one form of support for the integration initiative concerned, but may not constitute the object of the contract awarded pursuant to Article 30.

Conversely, if the public purchaser wishes to add a social dimension to a works or service contract, Article 14 should be used.

2.4.3 Which public purchasers are empowered to award this type of contract?

Public purchasers may only award this type of contract if occupational integration falls within the scope of their powers, in the case of public entities, or within their corporate object in the case of private entities wishing to award contracts based on the provisions of this article.

The Labour Code and the Social Action and Family Code, in particular, entitle regional or local authorities, each at their own level, to manage integration initiatives. As with all public procurement contracts, those awarded on the basis of Article 30 of the public procurement contracts code must meet a need expressed by the contracting authority. As regards integration, this need at the level of the commune, département or region is defined in relation to the population (at commune, département or regional level) defined as excluded from the labour market.

2.4.4 How should an integration and/or occupational qualification service contract be worded?

In the initial notice and/or in the tender regulations, the object of the contract must refer clearly to the social and occupational integration of the population concerned and the insertion support service(s). It should be made clear that the paid working hours for the support service must be matched by a support mechanism.

Since the choice of tenders must be based on the integration service with clearly-defined criteria, tenders will be judged on the relevance of the integration approach and on the cost of the integration mechanism.
The special technical terms and conditions (CCTP) may specify the social and occupational support measures expected of the economic operator.

The CCTP cover the following items:
- review of the object of the contract;
- the population concerned by the integration mechanism;
- the integration and employment support approach;
- the status of persons employed;
- methods of monitoring contract performance.

2.4.5 To which budget line should it be allocated?

For a public procurement contract subject to Article 30, the expense would be best allocated, whenever possible, to a budget item associated predominantly with social issues rather than related to the support activity.

2.4.6 What is an adapted procedure under the terms of Article 30?

An adapted procedure is a contract in which the public purchaser is free to decide the appropriate means to use to publicise contracts and call for competition in accordance with the object and amount of the contract.

The public purchaser seeking to award a contract under the adapted procedure is obliged to organise a contract award procedure, hence to publicise the contract and invite competing tenders from service providers. This procedure does not allow, therefore, for a contract to be reserved for a given undertaking or association. The public purchaser is, however, free to decide the form and level of publication and call for competition, and in particular to gear these to the object of the contract and the number of tenderers potentially concerned.

The methods for awarding the contract are therefore left to the discretion of the public purchaser, irrespective of the amount of the requirement to be met, of the number or location of economic operators likely to submit tenders, and the circumstances of procurement (Articles 28 and 30 of the public procurement contracts code).

In the event of a manifest lack of competition, the public purchaser may dispense with a call for competition. Public purchasers are advised to exercise caution in making use of this provision, however.
2.5 Other questions which may arise when preparing and drawing up a public procurement contract containing a social integration clause

2.5.1 On what legal basis is it possible to establish a social criterion for the award of a public procurement contract (Article 53, paragraph I)? What weighting should this be given in order to avoid any legal risk?

Article 53, paragraph I, allows for the inclusion of a social criterion in the award of a public procurement contract. The object of this contract must contain an explicit social dimension (see paragraph 1.4.6 on Article 53, paragraph I), since this criterion must be linked to the object of the contract. Caution suggests that a reasonable weighting be assigned to this criterion.

Its implementation is also possible via combined use of Article 14 and Article 53, paragraph I (see paragraph 1.4.6).

2.5.2 How can the performance criterion be used with regard to the integration content of tenders?

Article 53, paragraph I makes it possible to use the performance criterion with regard to the integration content of tenders, either as part of a contract for which the very object is integration (Articles 30 and 15) or in combination with performance conditions (Article 14).

This criterion should be given reasonable weighting when used in combination with Article 14. It can, however, be given greater weighting if the very object of the procurement contract is integration (Articles 15 and 30).

This criterion is assessed by analysing the terms of performance with reference to integration, these terms being defined in the tenders submitted by candidates. The following may be taken into account, for example:

- the quality of the mentoring, i.e. the way in which the undertaking will manage and supervise the beneficiaries of the integration initiative during the performance of the contract;
- the nature of the skills the beneficiaries may acquire during the contract, i.e. the reality of the transmission of a genuine work experience or training that will enable the beneficiaries to progress in terms of specialised skills;
- the quality of the link between the undertaking and the integration through economic activity scheme (IAE) structures, i.e. the way in which the undertaking reports to the IAE structures that supervise the beneficiaries, in particular as regards the employability of the beneficiaries or any difficulties that are encountered. This link makes it possible to influence the beneficiaries’ path to employability by making it more effective;
- if the purchaser has stipulated a minimum volume of hours, when analysing the tenders any additional hours to which the undertaking commits may be taken into account. However, caution should still be exercised with regard to this type of criterion, which should be carefully delineated, as the objective is to determine the qualitative aspects of the integration initiative;
- the social support for the social integration clause beneficiary.

Of course, this list is not exhaustive.
Several experiments have been conducted in this area, in particular for works and construction procurement contracts, first by regional or local authorities (Nantes, Rennes, Lille, etc.), then by central government departments (Economy and Budget ministries).

2.5.3 Can a framework agreement promote the integration of persons excluded from the labour market and, if so, how?

Yes, a framework agreement can promote the integration of persons excluded from the labour market. When the public purchaser wishes to provide for social performance clauses in one or more contracts following on from a framework agreement, this should preferably be stipulated in the agreement itself.

Article 76 of the public procurement contracts code does provide for the terms of contract performance to be set out in a contract subsequent to the conclusion of a framework agreement, but it is important to emphasise that the mere addition of a social integration clause into a public procurement contract substantially modifies the balance of the contract, and this is not authorised by either Directive 2004/18/EC or the public procurement contracts code.

Similarly, a social integration clause may not be removed from a subsequent contract if included in the framework agreement. The removal of the performance clause would again constitute a material and discriminatory modification of the terms of the framework agreement.

2.5.4 Can the public purchaser use variants (Article 50)?

The authorisation, which must be explicit except in the case of an adapted procedure, enables economic operators to propose new methods of performing services not envisaged by the public purchaser in the basic tender. Variants may favour the integration of persons excluded from the labour market by allowing economic operators, on the terms of the authorisation appearing in the tender documents:

- either to introduce performance conditions conducive to integration into contracts in which Article 14 was not used by the public purchaser;

- or to propose a way of integrating persons excluded from the labour market that is different from that defined in the contract specifications (Article 14). On this point, the economic operators could well propose solutions based on schemes that have proven their worth in other States;

- or to meet the requirements laid down by the performance clause (Article 14) to promote integration by developing methods complementary to those stipulated in the specifications.

It should be noted that the authorisation to submit variants does not waive the obligation to submit a basic tender. Furthermore, the public purchaser must clearly formulate the meaning and scope of any variants authorised.

Authorising economic operators to submit variants enables them not only to propose new ways of taking into account the integration in contracts of persons excluded from the labour market but can also provide an opportunity for adapting the contracting authority’s integration requirement to the economic operator’s own internal organisation, which introduces an element of real flexibility for the economic operator while simultaneously satisfying the purchaser’s priorities.
2.6 Some questions relating to integration and persons excluded from the labour market

2.6.1 Is a specific structure required in support of the public purchaser?

It is advisable to have the advice of an expert or resource person when implementing social integration clauses (see Appendix 6: The role of the facilitator in the management of social integration clauses in public procurement contracts).

The attention of public purchasers should however be drawn to the fact that while relying on a single entity for all or the majority of the support missions may appear to have its advantages, the combination of these various functions must comply with the standard provisions of law that govern public procurement and competition and remain in keeping with the interest of the purchaser itself. Using a single entity must not result in anti-competitive practices being facilitated, in particular cartels being created by undertakings that exchange information.

Moreover, the legal form of the relationship between the public purchaser and the facilitator should be carefully examined. It is therefore advisable to draw up an agreement with the “support” structure for the facilitator, who performs this function free of charge. To this end, by memorandum dated 3 November 2010 the DGEFP gave its agreement for use of the European Solidarity Fund to create new facilitators’ positions in structures for local integration and employment plans (PLIE) and in Maisons de l’Emploi as part of government public procurement contracts.

If the organisation to which the facilitator reports wishes to charge for its services, this will then become a purchase that is subject to the rules governing public procurement contracts (see Appendix 6).

2.6.2 Which entities are involved in integration in the field?

A number of entities are involved and may be called upon:

a. Structures for local integration and employment plans (PLIE).

They are set up on the initiative of regional or local authorities and public intercommunal cooperation entities, with different forms of legal status (non-profit-making association, public interest grouping, etc.). They act as partnership platforms within which to coordinate integration and employment programmes and initiatives within their area.

The PLIE structures are also responsible for:

- bringing together local players and operators around quantitative targets to give persons “in difficulty” access to lasting employment, by organising personalised paths toward employability for such individuals with extra support provided by specialist experts;
- providing technical and financial engineering for local initiatives and schemes helping beneficiaries to find jobs and to remain in employment for over 6 months;
- financing tailored action plans according to the needs of the area and the persons who are supported by the PLIE experts.
b. Maisons de l’Emploi
The task of the Maisons de l’Emploi is to ensure better cooperation, in close proximity to the field, between the various participants involved (regional or local authorities, Pôle Emploi, the ASSEDIC unemployment benefits agency, etc.) around a local project built on the basis of analysis, an action plan and scheduling.

The work of the Maisons de l’Emploi is directed to three main areas:
- local diagnosis. The first priority of the Maison de l’Emploi is clearly to identify the employment issues affecting the employment catchment areas in its region;
- access and return to employment for the most excluded populations. The Maison de l’Emploi is also responsible for the access and return to employment of the most excluded individuals. It is here that the personalised support programmes and reintegration initiatives for jobseekers will be designed and developed, by "optimising and centralising the service offering from partners";
- the development of employment and business start-ups. The Maisons de l’Emploi help to promote the development of employment and business start-ups.

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- the development of employment and business start-ups. The Maisons de l’Emploi help to promote the development of employment and business start-ups.

c. Pôle Emploi and the adult vocational training association (AFPA).
Pôle Emploi may play a part in the implementation of social integration clauses in defining the potential of persons excluded from the labour market who may be concerned by such clauses (numbers, profile, training needs, etc.), assisting undertakings engaging in a process of integration through social integration clauses in public procurement contracts (in particular Article 14 clauses), and potentially issuing the approvals provided for in the integration through economic activity scheme.

In addition, since the implementation in 1998 of the National Action Plan for Employment and the development of complementarity between departments, Pôle Emploi and the AFPA now offer an integrated support service for jobseeker career plans.

If Pôle Emploi observes a lack of skills or qualifications when identifying target jobs, the AFPA takes over to draw up a training plan with the jobseeker, the aim of which is to assist in corporate takeovers.

d. Missions Locales
These are structures receiving young people aged between 16 and 25 without employment or qualifications. They are responsible for assisting with their integration. Their task is to listen, inform, guide and support in the fields of employment, training, health, housing and leisure.

Founded in 1982, they play an important role in the occupational integration of young people, in conjunction with the Permanences d’Accueil, d’Information and d’Orientation (PAIO, reception, information and guidance structures).

e. Maison départementale des personnes handicapées (MDPH)
The MDPH is a network responsible for finding employment for disabled persons working in open employment. They can be found within each département through the EPSR (Equipes de Préparation et de Suite de Reclassement - reintegration preparation and follow-up units) and OIP (Organismes d’Insertion et de Placement - Integration and Placement Agency) structures and are financed essentially by AGEFIPH.

f. The various structures promoting integration through economic activity (SIAE), as referred to in Articles L. 5132-1 and following of the Labour Code (see question 1.2), set out below.

• The Régies de Quartier (neighbourhood boards) bring together residents, public authorities and providers of housing for low-income households and seek to maintain and rebuild citizenship, develop popular education and attract employment for neighbourhood residents. They may be approved as occupational integration undertakings (EI), and may set up integration workshops
and projects or create long-term activities, particularly in neighbourhood services, recruiting employees under ordinary law.

• Occupational integration undertakings (EI) operate in the private sector. They are subject to the same commercial, legal, tax and social obligations (VAT, corporation tax, social security contributions) as any other undertaking. They may adopt any legal form (joint stock or limited liability company – cooperative or not – or a non-profit-making association under the law of 1901). For a period which is necessarily limited, they hire persons in difficulty on a contract of employment, to enable them to adapt or readapt to a work activity. As part of their activity of production and marketing of goods or services, the EI put in place the tools and methods needed to develop an occupational project and acquire the experience and knowledge essential for access to the conventional labour market.

• Associations Intermédiaires (AI) or intermediate associations are approved by the State and their purpose is to recruit a workforce made up of unemployed persons encountering social and occupational difficulties, and make this workforce available on a paying but non-profit-making basis to individuals, associations, regional or local authorities and, under certain conditions, undertakings. This provides an economic basis for a variety of objectives, ranging from evaluation of skills to validation of an occupational project. They operate, for the most part, in the private sector.

• Entreprises de Travail Temporaire d'Insertion (ETTI) or temporary employment integration undertakings recruit unemployed persons encountering social and occupational difficulties, and make this workforce available to client undertakings on temporary secondment. They are subject to the regulatory and tax framework applicable to the temporary employment sector and pay salaries to their personnel on the principle of parity of pay. They also draw largely on the training resources of the professional branch to enhance the level of qualification of their employees.

• Groupements d'Employeurs pour l'Insertion et la Qualification (GEIQ) or employers' groups for integration and qualification are associations steered by employers keen to pool integration and training paths in order to meet their recruitment needs. GEIQs recruit personnel without qualifications who are experiencing difficulties accessing the labour market, second them to group members and organise their training with a view to professionalisation and occupational qualification. Employees benefit from social and vocational support throughout their pathway to employment, which lasts from 6 to 24 months, in consultation with the undertaking mentor and trainers from the training organisation.

• Ateliers et Chantiers d'Insertion (ACI) or integration workshops and projects engage in socially useful activities, which include producing goods and services to be marketed. The work placement must be part of a collective programme. These structures generally recruit on the basis of subsidised contracts in the non-market sector (employment solidarity contracts and consolidated employment contracts, now replaced by the employment access contracts and “contracts for the future” created under the social cohesion plan).

g. Employment platforms, regional integration and qualification associations, local employment and training committees,

h. Ad hoc structures established by the professionals or major construction groups, in particular.
NB: area administrative officers (Préfets de Région) have appointed IAE (integration through economic activity) specialist experts in the Regional Directorates for Businesses, Competition Policy, Consumer Affairs, Labour and Employment (DIRECCTE) or DIRECCTE local offices, who are responsible for implementing a plan to support the extension of IAE sector's integration opportunities (see the DGEFP circular of 7 May 2010).

2.6.3 Can the quality of integration proposals put forward by candidates be taken into account?

The quality of the integration proposal:
- may not be taken into account when the public purchaser uses Article 14 in isolation;
- forms an integral part of tender selection as part of a public procurement contract for the purposes of integration pursuant to Article 30;
- must be taken into account in a public procurement contract using Article 53 paragraph I, possibly in combination with Article 14.

2.6.4 Is there a minimum period of action for a successful integration initiative?

There is no absolute rule. On the one hand, the fact that a short-term social integration clause can make it possible to start on a pathway to employment should not be underestimated, provided that this pathway is defined and managed. On the other hand, a clause for a number of hours that is less than 1 month of work is not particularly useful. In any event, the nature of the services to be performed should be systematically taken into account in order to determine the benefit of an integration initiative over a short period of time.

It is therefore important:
- not to underestimate the opportunity that even short-term assignments may represent for certain jobseekers;
- to stress the importance of proper organisation of the paths of persons outside short-term assignments, particularly through proper coordination between the public employment service (Pôle Emploi, Missions Locales, MDPH), undertakings, especially those involved in social integration clauses, and structures promoting integration through economic activity (SIAE). This is precisely the role of the facilitator.

2.6.5 Is it necessary to gather information on the existing availability of integration provision and its capacity for development?

Yes, because this is a condition for integration and determines the scope of the clauses that may be recommended.

2.6.6 Can forward-looking management of social integration clauses promote integration at local level and the introduction of appropriate training?

Yes, it is in the interests of public purchasers to publicise their schedule of contracts and requirements to promote a forward-looking approach.
2.7 Questions which may arise during performance of a public procurement contract awarded under Articles 14, 15 and 30 of the public procurement contracts code

2.7.1 Can a tender which does not meet the specifications of a public procurement contract in terms of integration be taken into consideration?

No, it is deemed non-compliant (Article 35 I 1° of the public procurement contracts code) and must be rejected.

2.7.2 How to monitor the performance of a public procurement contract and ensure compliance with the conditions of performance of the social integration clause?

It is important to stipulate measures for the regular monitoring and assessment of the conditions of performance of the social integration clause throughout the life of the public procurement contract, in both qualitative and quantitative terms. The facilitator can provide this monitoring.

2.7.3 What are the penalties in the event of non-performance of the social integration clause? What are the limits on such penalties?

The social integration clauses are subject to the same legal constraints as any other stipulations in contract specifications. In the event of non-performance or improper performance, the public purchaser applies the penalties provided for in the procurement contract.

The undertaking given must be respected on pain of penalties. Any exemption from the obligation to include a social integration clause is considered as undermining competitive conditions.

It is important, therefore, when drawing up the contract, to ensure that the social integration clause envisaged is effectively capable of application and performance. The public purchaser may, however, marginally alter the content of the social integration clause prior to awarding the contract, as part of the "final negotiations" with the successful tenderer.

Once the contract is awarded, if it appears that the social integration clause has not been performed, the public purchaser applies the penalties provided for in the contract (for example: fine or reduction of the contract price).
2.8 Other questions

2.8.1 What rules of procedure and publication apply when the purchase concerned is below the threshold of 4,000 euros net of VAT?

Below the threshold of 4,000 euros net of VAT, no particular procedure applies. In this case, it is possible to contact all types of integration structures or all types of sheltered or vocational rehabilitation workshops directly.

2.8.2 Can a specific location for a contractor be stipulated in a public procurement contract?

No, EU law forbids any discrimination on the basis of the location of undertakings.

2.8.3 Is there a possible risk of legal recourse by European undertakings unable to submit a tender for a public procurement contract containing a social integration clause?

The existence of a social integration clause does not create any incompatibility in principle. The content of the clause may, however, prove to be discriminatory in terms of the methods of implementation stipulated. The clause should be carefully worded.

2.8.4 How should the short-term difficulties faced by undertakings be taken into account?

The result of short-term difficulties experienced by undertakings is to trigger an immediate increase in social expectations for integration, while, in certain cases, reducing undertakings' capacity to meet these expectations.

An occupational integration clause obligates a contractor to make partial use of labour from outside the undertaking. Such a provision is liable to conflict with the contractor's other obligations pursuant to the Labour Code (Articles L 1233-45 and L 1242-5) when the contractor has to deal with short-time working or redundancies within its undertaking, as these measures generally carry a prohibition on new hires.

It is legitimate for a purchaser to accede to a request by the undertaking to reduce or suspend the social integration clause for as long as these difficulties and the risk of breach of the Labour Code continue. Appendix 8 provides an example of the procedure that can be used in such a case.

This situation should be evidenced in a work order issued by the purchaser.

This situation only applies to an undertaking (identified by its registration number with the Trade and Companies Registry or its registration number with the trades registry) that is responsible for the primary performance of the contract (or the sub-contractor, if the sub-contractor is concerned by the social integration clause).

In both of these situations, the application of the clause is waived by the contracting authority, subject to compliance by the undertaking with the formalities and conditions that it is advisable to specify within the framework of the special administrative terms and conditions (CCAP).
2.8.5 **Partnership contracts within the meaning of ordinance no. 2004-559 of 17 June 2004** are not addressed in this guide. Is it nevertheless applicable to them?

Yes, the analyses contained in this guide are applicable to all contracts which fall under the scope of Directive 2004/18/EC of 31 March 2004, subject to consultation of the provisions applicable to partnership contracts. The methodological guide (October 2010) for partnership contracts acknowledges that these contracts can provide solutions for implementing the social component of sustainable development.

2.8.6 **Can a public purchaser take into account public procurement contracts containing social integration clauses awarded as part of the undertaking's sustainable development policy?**

Yes, this type of action is entirely in keeping with sustainable development policies. It may thus inspire other purchasers to follow suit. It may also form part of an Agenda 21 approach.

It is advisable for the public purchaser to establish a mechanism for evaluating the impact of integration initiatives undertaken by its procurement department and by the various departments that use this type of clause.

2.8.7 **At the national level, are public procurement contracts containing social integration clauses included in the national action plan for sustainable public procurement?**

Yes, these initiatives are included in the national action plan for sustainable public procurement and, more widely, in "exemplary administration plans" drawn up by all ministries, as stipulated in the Prime Minister's circular of 3 December 2008 (Official Journal of 17 February 2009). The objective is for these clauses to represent 10% of work or services procurement contracts that have a labour component of more than 50%. Attaining this objective is rewarded by one of the "incentive fund" indicators (a type of bonus/penalty for the administrations).

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21 Adopted by the signatory countries to the Rio de Janeiro Declaration in June 1992, Agenda 21 is a programme of actions for the 21st century related to sustainable development: combating poverty and social exclusion, the production of sustainable goods and services, protection of the environment. It is a guide to the implementation of sustainable development. Nations that have signed up to its implementation must apply it at national, regional and local level.
2.9 Can public procurement contracts help promote diversity?

Initial observations have shown that social integration clauses aimed at persons who are excluded from the labour market are, in practice, one way to combat most forms of discrimination and therefore ultimately a means of promoting diversity.

Purchasers may, if they so wish, associate this objective with promoting the employment of persons who are excluded from the labour market, and arrange for its effects to be clearly measured and thus made visible, while complying with the anonymity rules imposed by the regulations.

There are currently plans to complete the public procurement contracts code by introducing the concept of diversity into Article 14, in order to facilitate this approach.

There are plans for experiments, in the major central government contracts that are for at least €1 million excluding VAT, to include a progress questionnaire to assess the efforts made by the contractor to promote non-discrimination and therefore diversity in its management. This takes the form of an initiative based on trust, which cannot be penalised, but that meets a genuine concern many undertakings have in this area for various reasons, in particular their desire for social responsibility. This questionnaire will be finalised by a working group organised by an independent high commission for equality and against discrimination (Haute Autorité de Lutte contre les Discriminations et pour l’Égalité, HALDE).

The Diversity Label, a government system that also involves industry representatives and experts, makes it possible to confirm, following on-site recurring audits by third parties, the effective and effectual implementation of human resources management that aims to prevent discrimination and promote diversity. European legislation does not currently make it possible to rely on this criterion alone to award the contract to the tenderer presenting the most economically advantageous tender.
Combating exclusion is a national imperative based on respect for the equal dignity of all human beings, and a priority for all the public policies of the nation.

It seeks to guarantee nationwide effective access for all to fundamental rights in the fields of employment, housing, health protection, justice, education, training and culture, and the protection of the family and of childhood.

The State, regional and local authorities, public entities including communal and inter-communal social action centres, social security funds and social and medico-social institutions all pursue a policy designed to identify, prevent and eradicate all situations likely to give rise to exclusion.

They take the necessary steps to inform each individual of the nature and scope of his/her rights and to assist the individual, where necessary with personalised support, to complete the administrative or social formalities necessary for their implementation in the shortest possible order.

Undertakings, professional or inter-professional organisations, representative trade union bodies, provident institutions, mutual insurance companies, associations operating primarily in the field of integration and the fight against exclusion, citizens and all those engaged in the social and voluntary sectors contribute to the realisation of these objectives.
Appendix 2: French Constitution – Charter for the Environment

Constitutional law no. 2005-205 of 1 March 2005 pertaining to the Charter for the Environment

The French People

Considering that

Natural resources and equilibriums have conditioned the emergence of mankind;

The future and very existence of mankind are inextricably linked with its natural environment;

The environment is the common heritage of all mankind;

Mankind exerts ever-increasing influence over its living conditions and evolution;

Biological diversity, the fulfilment of the person and the progress of human societies are affected by certain types of consumption or production and by excessive exploitation of natural resources;

Care must be taken to safeguard the environment along with the other fundamental interests of the Nation;

In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardise the ability of future generations and other peoples to meet their own needs,

Hereby proclaim:

Art 1 - Everyone has the right to live in a balanced environment which shows due respect for health.

Art 2 - Everyone is under a duty to participate in preserving and enhancing the environment.

Art 3 - Everyone shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequences of such damage.

Art 4 - Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment.

Art 5 - When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage.

Art 6 - Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress.
Art 7 - Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment.

Art 8 - Education and training with regard to the environment shall contribute to the exercising of the rights and duties set out in this Charter.

Art 9 - Research and innovation shall contribute to the preservation and development of the environment.

Art 10 - This Charter shall inspire France’s actions at both European and international levels.
Appendix 3: Rules governing the use of Article 50

Article 50 can be used in isolation or in combination with Article 14; in all cases, the use of socially-oriented variants can only be contemplated if the introduction of a social component is strictly related to the object of the procurement contract.

When Article 50 is used in isolation, this means that the public purchaser has not provided for any social performance clause within the meaning of Article 14 in its specifications. In allowing economic operators to propose a variant that takes into account social considerations, public purchasers give themselves the option of selecting a tender from an economic operator who has taken into account social considerations, following a comparison of basic and variants. This method means that economic operators have complete discretion as to whether or not they propose a variant. However, if economic operators do not propose a variant and merely meet the specifications, they leave themselves open to the possibility of the public purchaser selecting a basic tender with an alternative that it considers to be the most worthwhile. Nevertheless, such a choice will never be systematic given that, on the one hand, the variants proposed may not correspond to the expectations of the public purchaser and, on the other hand, the basic tenders may be deemed to be more worthwhile overall and the purchaser may prefer to focus on other aspects of the contract.

Applying Article 50 but not Article 14 precludes the use of social performance criteria on the basis of Article 53, paragraph I, inasmuch as when Article 50 is applied in isolation, all the operators are required to submit a basic tender, which, by definition, does not have a social dimension. A selection criterion that is based on social performance cannot therefore be used to assess the basic tenders, which is a prerequisite for analysing any variants (see below).

When the purchaser wishes to implement Article 50 and Article 14 in the same procurement contract, three possibilities can be considered:

- the purchaser can decide to implement Article 50 independently of the social integration clause provided for on the basis of Article 14. In this case, all the tenders must comply with the requirements of the social integration clause, however the economic operators may, in addition, propose variants with differing social considerations, in respect of other aspects of the contract;

- the public purchaser may also provide for an Article 14 performance clause and only authorise economic operators to submit a variant on the basis of this performance clause. Thus, the possibility of submitting variants gives economic operators the choice of proposing more or less innovative solutions, without for all that automatically penalising economic operators that merely meet the requirements of the Article 14 clause, as worded by the public purchaser. This solution therefore makes it possible to carry out a qualitative assessment of tenders on the basis of the social integration clause by comparing the basic tenders with the variants (which are by definition more ambitious). This is therefore similar to an approach based on Article 53.1;

- variants to the Article 14 performance clause can even be contemplated, as well as authorising variants on the basis of other social considerations.

In the last three cases, allowing variants to be submitted will permit economic operators to propose different systems and, if possible, more effective systems when the public purchaser has included an Article 14 clause, while perfectly meeting the need for integration and designing a tender that still meets the requirements of the procurement contract.
Conversely, the combined use of Article 14 and of Article 53 on tender selection criteria (see below) automatically leads to tenders being selected on the criterion of integration performance and obligates all the economic operators to build their tender on the basis of this criterion, failing which their tender will be poorly ranked.

For the sake of a realistic tendering process and a transparent tender assessment process, it is not recommended initially to multiply the possibilities of taking into account social considerations for the same contract, in particular by combining Articles 14, 50 and 53, paragraph I.

The terms of use of Article 50 of the 2006 public procurement contracts code need to be specified, as the new wording of Article 50 has changed the conditions of admissibility for variants proposed by candidates for a public procurement contact since, absent a provision to the contrary, variants are not authorised.

For contracts awarded using the adapted procedure, variants are however authorised, even if there is no provision to this effect in the tender documents. Variants are only rejected if the public purchaser has expressly stipulated that submitting variants is prohibited.

Similarly, for contracts concluded by the contracting entities, which are governed by part two of the code (2006 edition), variants are authorised even if the contract notice or the tender documents do not specifically state that they are (see Article 157 of the public procurement contracts code).

Certain points need to be clarified as regards the analysis of variants. If an economic operator submits a basic tender and a variant, the operator must clearly identify each of these tenders in the documents submitted to the contracting authority.

When it is authorised to submit variants, the public procurement contracts code specifically states "Variants shall be submitted along with the basic tender". A variant cannot therefore be submitted in isolation, without an accompanying basic tender. If a tenderer nevertheless submits only a variant, it would inevitably be rejected.

If, following assessment, a basic tender is rejected on the grounds that it is non-compliant, unacceptable or inappropriate, it is nevertheless possible to analyse a variant, provided that it conforms to the specifications, that it is presented in accordance with the terms specified by the public purchaser and, if it is not drafted in full but in part refers to the basic tender, that it does not include the aspects of the basic tender which led to the basic tender being rejected. If these conditions are not met, the variant must also be rejected.

In order to be able to compare variants transparently, Article 50 requires the tender documents to mention the minimum requirements the variants must meet, as well as the rules governing their presentation. Basic tenders and variants must be ranked using the same criteria, either by ranking the basic tenders and the variants separately and then comparing the best of both, or by ranking basic tenders and variants with no prior separation. How the tenders are ranked is left to the discretion of the public purchaser.

If variants are not authorised, the public purchaser must reject as being inadmissible all variants that are submitted in isolation or as a complement to a basic tender. In contrast, a basic tender should not be rejected on the grounds that it is accompanied by one or more unauthorised variants, provided that it is presented in such a way as to be clearly distinguishable from the variant(s).
Appendix 4: Example of wording of social integration clauses

Implementing a social integration clause

Model contractual provisions to be included in public procurement documents that contain social integration clauses for the benefit of persons who are excluded from the labour market are provided below.

Warning: this is not a standard clause that can be duplicated, but rather guidelines to be adapted to the specific characteristics of the procurement contract that is being drafted. Purchasers are therefore strongly advised first to obtain information on the local economic situation and the integration sector potential in the area(s) where the service that forms the object of the contract will be provided; the most efficient method is to be assisted by an experienced "facilitator", especially with a view to ensuring the quality of the integration initiative by using it as a selection criterion (that is not heavily weighted, see Article 53, paragraph I) that is linked to the performance condition (Article 14).

1) In the contract notice
In the "procurement contract terms and conditions – other special terms and conditions" section of the contract notice, the answer to the question as to whether performance of the procurement contract is subject to other special terms and conditions should be YES and the following statement should be added: "The procurement contract contains a mandatory performance clause for the integration of persons who are excluded from the labour market".

2) In the tender regulations
It is advisable to include a warning in the recitals to the tender regulations in this form: "With the aim of promoting employment and combating exclusion, the awarding authority has decided to apply the provisions of Article 14 of the public procurement contracts code by including a mandatory clause in the specifications for this procurement contract, which provides for integration through economic activity. This clause is applicable (to the entire contract, or to the lots identified in Appendix 1 to the special administrative terms and conditions (CCAP)). Each undertaking that is awarded (the contract or one of these lots) must perform an integration initiative that allows persons faced with specific social or professional difficulties to gain access to or return to the labour market. Article (...) of these regulations specifies the conditions of implementation. Candidates are not authorised to express reservations in their tender concerning the mandatory clause that provides for integration through economic activity\(^{22}\). A tender that does not meet this performance condition shall be declared null and void for failure to comply with the specifications."

In Article (...) of the tender regulations, it should be specified: "Performance conditions concerning integration through economic activity. In order to promote employment and combat exclusion, the awarding authority wishes to call on its economic partners, namely the undertakings that submit tenders in response to its contract notices.

\(^{22}\) Any more than the other provisions of the specifications.
Pursuant to Article 14 of the public procurement contracts code, any undertaking which is awarded the contract will be requested to propose an integration initiative for the performance of the procurement contract that allows persons who are faced with specific social or professional difficulties to have access to or return to the labour market.
This obligation is detailed in Article (...) of the special administrative terms and conditions (CCAP).
The quantities of hours stated in Appendix 1 of the special administrative terms and conditions (CCAP) are a mandatory minimum.
A tender that does not meet this condition shall be declared null and void for failure to comply with the specifications.
Tenderers are asked to request all information on the practical application of this clause (targeted populations and practical terms of implementation) from (name of the facilitator – full contact details).

If the contracting authority decides to use a combination of Article 14 and Article 53, paragraph I (tender selection criterion that takes into account the quality of the integration component of the tender that is linked to the performance condition)\(^{23}\), it shall specify here:

"The assessment of the tenders shall incorporate, as part of the weighting of the selection criteria, with specific reference to the technical merit, a measurement of the quality of the performance of the social integration clause (see Appendix 2 of the document in which the undertaking commits to an integration initiative)."

And said authority shall state in the article (concerning the tender selection criteria) the purpose of the additional technical merit criterion:

"– rules governing the implementation of the social integration clause", and shall specify the weighting given to them (between 5 and 15% at the most).

3) In the special administrative terms and conditions (CCAP).
A specific "social integration clause" article must be included that will precisely define the content of the clause.
For example:

**Undertaking to perform integration initiatives**

For (the entire contract, or the lots referred to in Appendix 1 of these administrative clauses), the contractor shall perform an integration initiative that allows persons faced with specific social or professional difficulties to access or return to the labour market.

Within this framework, the contractor undertakes, as a minimum, throughout the term of the procurement contract, including any extensions to the term thereof, to perform the number of integration hours specified in this appendix. At the end of each year of performance of the procurement contract, a report on this undertaking shall be prepared to measure progress made by the beneficiaries of the integration obligation and to adapt, if necessary, the rules governing the integration obligation provided for in this contract.

The system implemented shall aim to facilitate access or return to the labour market for persons who find themselves in the following situations: the long-term unemployed, recipients of the in-work income supplement (RSA activité) or minimum welfare payments, disabled workers, young people who leave school without qualifications or with no vocational experience, persons who benefit from integration through economic activity or, more generally, persons who are encountering specific difficulties and who may, following a substantiated recommendation by the Pôle Emploi, Maisons de l'Emploi, Plans Locaux

\(^{23}\) A useful exercise if the object of the contract is suitable and if there is already some experience of performance clauses.
Pour l'Insertion et l'Emploi, Missions Locales or CAP Emploi, be deemed to be excluded from the labour market.

For all information concerning the social integration clause, undertakings can contact the person responsible for the management of this clause: (name and full contact details for the facilitator).

**Control of the integration initiative**

A (periodic) control shall be performed on the performance of the integration initiatives to which the service provider committed. To this end, each (month) (with the invoice), the service provider shall disclose all information concerning the implementation of the integration initiative.

The exact information to be provided shall be determined jointly between the awarding authority and the contractor after the award of the contract has been notified. As a minimum, said information shall include:

- the profile(s) of the person(s) concerned,
- the hiring date,
- the number of hours worked,
- the type of contract,
- the position held.

Refusal to provide this information may lead to the application of a penalty provided for in Article (…).

In any event, the service provider must inform the awarding authority, by registered letter with return receipt, that it is encountering difficulties in meeting its commitment, so that the means to be used to attain the targets set can be studied.

If the contractor breaches its integration commitment, the awarding authority may terminate the procurement contract under the conditions provided for in Article (…) of these special administrative terms and conditions.

Upon completion of the procurement contract, the contractor undertakes to study all possibilities of subsequent recruitments of persons on integration paths who were trained during performance of the procurement contract”.

Add a clause to the Article on penalties:

"In the event of non-compliance with the integration obligations on the part of the contractor, the undertaking is liable to a penalty equal to (between 50 and 100) euros including VAT per hour of integration not performed.

If the information needed to control the performance of the integration initiative is not provided or disclosure thereof is refused, the entrepreneur is liable to a penalty equal to (a minimum of 100) euros including VAT per day's delay as from the service of formal notice by the awarding authority."

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24 Specific case of certain service professions: If the undertaking that was awarded the contract transfers to its workforce the personnel previously employed by the enterprise that lost the contract (Article L 1224-1 of the Labour Code and the national collective bargaining agreement for the profession dated...........) and if the volume of the services to be performed under the new contract is identical to the previous contract, the performance of the integration clause can potentially not be immediate. In this case, the integration obligation can be implemented during the performance of the contract, when a job position becomes vacant or is created (replacement of one person out of two, for example).
4) In the document containing the integration undertaking.
This involves making a proposal to the tenderer to make a formal undertaking to perform the clause. The tenderer will be provided with an appendix to fill out and sign, as per the following model:
"I, the undersigned,
Surname of the signatory: ___________________________________________________
First name: ___________________________________________________
Capacity: ___________________________________________________
DECLARE having consulted the special administrative terms and conditions and, in particular, the provisions concerning the social integration clause stipulated for the benefit of unemployed persons who are faced with specific social or professional difficulties.
UNDERTAKE, if I am awarded (one or more lots), to reserve, in the performance and throughout the term of the contract, a number of integration hours that is at least equal to that stated in Article (…) of the special administrative terms and conditions.
UNDERTAKE to provide, at the request of the awarding authority and within the timeframe allotted to me, all useful information that is needed for a full assessment of the performance of the integration initiative.
UNDERTAKE, to ensure the implementation of the social integration clause, to apply the stated option from the terms proposed below, namely:
- the direct recruitment of … persons,
- the secondment of persons who are on a pathway to employment by a temporary employment integration undertaking (ETTI), an intermediate association (AI) or an employers' group for integration and qualification (GEIQ) (name and contact details of the structure promoting integration through economic activity (SIAE))
- use of co-contracting or sub-contracting with an integration undertaking (EI) (name and contact details).

In
On
For the contractor (signature and stamp)"

When the contracting authority uses the combination of Article 14 and Article 53, paragraph I, it shall propose a supplementary appendix to the document containing the integration undertaking, which shall include the quantitative and description of the integration initiative.

For example:
*Appendix 2 to the document in which the undertaking commits to an integration initiative
OCCUPATIONAL INTEGRATION TECHNICAL FORM
(To be completed by the candidate)

1 – Technical supervision and mentoring proposed for persons on integration paths:
- Mentor's title, grade and position in the undertaking:
- Practical details of the supervision:
In this section specify how and by whom the work and progress made will be assessed, the frequency of assessments and the method of monitoring the person (individual interviews or team meetings, etc.)
2 – Measures adopted to support (or arrange for the support) of employees on integration paths from a socio-professional standpoint:
   - Internal management: by whom and how?
   - Outsourced management: to which organisation and under which terms?
In both cases, state the arrangements made to ensure communication between the technical expert referring officer and the social and professional expert referring officer.

3 – Vocational training offered to employees on integration paths
   - "On the job" training by the technical supervisor; on which bases?
   - Accredited vocational training; which type? Within which framework? (training to adapt to job positions, professional training contract, temporary occupational integration contract, temporary professional development contract, etc.)

4 – Level of professional qualification likely to be achieved by the employee on integration paths and prospects of transitioning to a permanent job
   - Professional qualification possible for the employee on an integration path:
   - Prospect of a permanent job in the undertaking:

In
On
For the contractor (signature and stamp)
Appendix 5: Ministerial answers to parliamentary questions

Written question no. 22618 from Mr Georges Mouly (Corrèze département - European Democratic and Social Rally party, RDSE) published in the French Senate Official Journal of 06/04/2006 - page 971

Mr Georges Mouly draws the attention of the Minister Delegate for Employment, Labour and Youth Employment to the positions adopted by certain local or regional elected officials, regional and departmental council members or even presidents of such councils with regard to new employment contracts (CNE) or first employment contracts (CPE). Some of them have announced that contract notices will henceforth contain a "social highest tenderer" clause ("mieux-disant social") that allows the tender commission to reject tenders from undertakings that use these contracts, since they are in principle considered by said elected officials as being associated with job insecurity. Yet, if we refer to the circulars of 29 December 1993 and 14 December 1995, as well as to the Conseil d'État decision of 10 March 1996, the clause known as the "social highest tenderer" clause can and must be taken into account as a priority when a given undertaking carries out occupational integration initiatives for the benefit of persons who are faced with specific difficulties in accessing the labour market. Given that, in this regard, the purpose of the CNE and CPE contracts is precisely to meet this need, he respectfully asks the Minister Delegate to specify to him what the outcome will be of any attempts by a given authority to reject tenders by all undertakings that use CNE and CPE contracts.


Decree no. 2004-15 of 7 January 2004, as amended, which is now part of the public procurement contracts code, allows public procurement stakeholders to incorporate social concerns into their purchasing process at each stage of the procedure for concluding and performing a public procurement contract. When selecting tenders, purchasers can take into account various criteria that differ according to the procurement contract in question, in order to choose the most economically advantageous tender. These include social criteria, such as the "performance as regards integration of persons in difficulty" criterion. However, the inclusion of social concerns should not distort or breach the fundamental principles that govern public procurement contracts, which are freedom of access for economic operators, equality of treatment of candidates and the transparency of procedures. The purpose of the code is first and foremost to organise tender conditions that guarantee access to public procurement contracts for all potential service providers.

Consequently, the possibility for purchasers to select the most economically advantageous tender based on social criteria must imperatively be contingent on four conditions: these criteria must be connected to the object of the procurement contract or to its performance conditions and they must not confer on the purchaser unconditional freedom of choice, they must comply with the fundamental principles of law and of public procurement, in particular the principle of non-discrimination, and the contract notice or tender regulations must mention them. The social criteria must thus make it possible to assess the quality of the services and must not allow for certain tenders to be excluded arbitrarily. The purchaser must therefore be capable of justifying the relevance of its criteria in selecting tenders. Using the "performance as regards integration of persons in difficulty" criterion to exclude undertakings that use the CNE from public
procurement contracts is thus liable to constitute grounds for a preliminary or outright infringement procedure that could result in the procurement procedure being halted or a procurement contract that is already signed being declared null and void. In this respect, it should be noted that, following a referral by the Préfet of the Gironde département, the Bordeaux administrative court suspended the enforcement by the Bègles town hall of the decision of the municipal council of Bègles taken on 6 April last aimed at excluding undertakings that used the CNE from its public procurement contracts. The administrative court held that the non-compliance of the impugned decision with the public procurement contracts code, in particular Article 53, and the way in which this decision breached the principles of free competition and equal access for candidates to public procurement contracts was, in light of the court's investigations, liable to give rise to a serious doubt as to the legality of the litigious action. The court also ruled that the municipality had no authority to decide measures, the purpose or result of which is to thwart, on its territory, the application of legislative measures. (See Bordeaux administrative court, order no 0602049 of 15 June 2006 Préfet de la Gironde contre commune de Bègles). It should be pointed out that such exclusions could be cited in support of complaints lodged on the basis of Article 432-14 of the penal code, which prohibits unjustified benefits being granted.

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Written question no. 00422 from Mr Bernard Piras (Drôme département – SOC party) published in the Senate Official Journal of 05/07/2007 - page 1164

Mr Bernard Piras draws the attention of the Minister for the Economy, Finance and Employment to the fact that Article 58 of law no. 2005-32 of 18 January 2005 introduced into Article 53, paragraph II of the public procurement contracts code the "performance as regards integration of persons in difficulty" criterion. This is a criterion, which, like the others mentioned in this article of the code, can only be used if it is justified by the object of the contract. The issue is therefore whether this criterion can be used given that, although the provisions of Article 14 of the same code allow so, no performance condition that involves promoting the employment of persons who are faced with specific integration difficulties and combating unemployment was defined prior to the call for tenders in the general specifications for a procurement contract. Moreover, the same issue arises in terms of the selection criterion "tender performance in terms of protection of the environment" (Article 53, paragraph II) and the need to define performance conditions in the procurement contract general specifications that aim to protect the environment (Article 14). Mr Piras asks the Minister to specify to him whether, in the Minister's opinion, the person responsible for the procurement contract may use the "performance as regards integration of persons in difficulty" selection criterion if the candidates for the procurement contract have not been put in competition with each other on the basis of performance conditions that aim to promote the occupational integration of persons in difficulty.
The public procurement contracts code gives public purchasers numerous tools to take into consideration their social and environmental concerns when making purchases. The criteria for selecting candidates and performance conditions, for example, play a major role. When selecting tenders, Article 53, paragraph I authorises occupational integration and environmental protection criteria to be taken into account, in addition to the standard selection criteria such as price, performance deadlines or technical merit. However, these criteria can only be implemented when they are connected to the object of the procurement contract, i.e. when the nature of the services requested is related to an integration initiative. With this major proviso, the use of these criteria is entirely discretionary. It is therefore not contingent on the existence of specific performance conditions. Article 14 authorises the stipulation in the contract notice or in the tender documents of performance conditions that contain social or environmental aspects. Tenderers must undertake to comply with these conditions under penalty of having their tender rejected on the grounds of non-compliance. These conditions must not, however, breach the fundamental principles that govern public procurement contracts and, in particular, must not affect the equal treatment of candidates. It would moreover be contrary to contractual liberty for the public procurement contract to set forth the concrete terms and conditions of performance. Within these limits, purchasers are free to use performance conditions and are not obligated to combine them with specific selection criteria. Selection criteria and performance conditions can therefore be used independently without violating any law. Nevertheless, when a purchaser implements Article 14 in isolation, it leaves itself open to receiving tenders which, although compliant with the social or environmental performance clauses, differ considerably on these points, without being able to select the most competitive tender. By combining Article 53, paragraph I and Article 14, purchasers encourage economic operators to propose a sustainable development approach that is more sophisticated than that which would be required by mere compliance with the performance clause. We therefore recommend using these two techniques in conjunction with each other whenever possible.
Appendix 6: The role of the facilitator in the management of social integration clauses in public procurement contracts

What is the role of the facilitator?
The task of the "facilitator" in fact covers several functions providing assistance to public purchasers and economic operators on the introduction and management of social integration clauses in public procurement contracts. The task may be performed by employees of the public purchaser or by external service providers.

Facilitation on behalf of the public purchaser may involve advising the public purchaser on the drafting of social integration clauses (clause content, system of penalties, tender selection criteria) and on the choice of contractor at the award stage. During the contract performance phase, the public purchaser may find it useful to have assistance on monitoring the implementation of the clause by the contractor, which may also include monitoring of the contractor.

Irrespective of the configuration adopted, public purchasers are advised to develop in-house competency in the matter of social integration clauses, in order to be able to analyse tenders in this respect when selecting a contractor, and to assess the implementation of the social integration clause by the contractor during the performance phase. The contracting authority has sole power to select tenders and the public purchaser is, in the last resort, the sole authority competent to judge the performance of the contract. An external facilitator is therefore no substitute for the public purchaser's own departments on these two issues.

As far as economic operators are concerned, it may be useful to provide tenderers with assistance on incorporating into their tenders proposals relating to the performance of the social integration clause. This assistance might involve advice on implementation methods (direct recruitment, secondment by a structure promoting integration through economic activity (SIAE) or subcontracting). It might also be provided during the performance phase: a facilitator may be called in to help the contractor implement the clause or even to supply the necessary labour in the event of direct recruitment.

Can several public purchasers entrust the functions of assistance to the contracting authority to a single entity?
When a number of public purchasers (communes, EPCI, départements, regions, devolved services) in the same area wish to award public procurement contracts containing social integration clauses, then employing a single entity to provide assistance to several contracting authorities is likely to facilitate coordination of the procurement policies of the various purchasers.

Use of this solution can be all the more the warranted as having a single point of contact also gives undertakings the assurance of benefiting from genuine consistency in the request and the various practices of public purchasers in the same geographical area.

And, above all, the facilitator gives the certitude of mobilising all the relevant resources for building an integration path for beneficiaries, in particular if the geographical area concerned does not yet enjoy a wide range of facilitation services, especially where private initiative is manifestly lacking.

This solution must, of course, be implemented in accordance with the rules of public procurement (see "What legal form should the services of a facilitator take?").

25 The vast majority of facilitators are employed by PLIE and Maisons de l’Emploi (see the website of the Alliance Villes association www.ville-emploi.asso.fr).
Can a single entity combine all the functions of facilitation?

It may be tempting for one or more contracting authorities to employ a single service provider for a range of facilitation assignment, including assignments on behalf of economic operators.

Public purchasers should be advised, however, that certain assistance functions are not easily reconcilable. Precautions should therefore be taken, as regards both the law governing public procurement and the public purchaser's own interests:

- if a single entity provides assistance to both the public entity and the economic operators: at the award stage, the economic operators using the services of such a facilitator must under no circumstances have greater access to information obtained from the contracting authority than those operators not using these services, on pain of breaching the principle of equal treatment of candidates. In any event, care must be taken to ensure that all the economic operators, and in particular non-national economic operators, enjoy equal access to the facilitator's services. In other words, the facilitator must be in a position to advise and assist all types of economic operator.

- if a single entity provides assistance to both the public purchaser and the contractor: during the contract performance phase, if the facilitator is asked to monitor the proper performance of the social integration clause, any service provider also involved in the assistance provided to the contractor must obviously be rigorous and objective in carrying out the task of monitoring the quality of performance of the social integration clause.

- this requirement for objectivity and impartiality in the task of monitoring is all the more pressing when the facilitator has also pre-selected the workforce.

What legal form should the services of a facilitator take?

Where the assistance to the public purchaser and/or to the economic operators is provided by a project manager within the contracting authority, this is a service internal to the public entity and requires no formal legal arrangement.

When the task of facilitator is to be assigned to a third party (i.e. to a person legally distinct from the contracting authority), the public purchaser must clearly address the question of its legal and functional links and its financial relation with the facilitator in order to determine the appropriate legal framework for the facilitator's intervention. If the public purchaser exercises direct oversight over the third party, or if the facilitation service is provided without charge, a simple agreement will suffice to establish the terms of this intervention. In the absence of any control over the facilitator and in the event of any remuneration, even indirect, of the facilitator's activities, the service provided is likely to be considered as constituting a public procurement contract. In this respect, the existence of a subsidy agreement may not necessarily prevent reclassification as a public procurement contract, especially if the subsidy exactly covers the expenses incurred in the facilitation assignment and is explicitly mentioned in the status of the facilitator.

A public procurement contract may, in the light of its object, fall within the scope of Article 30 of the public procurement contracts code, in which case it is awarded on the basis of an adapted procedure.
APPENDIX 7:
Example of a social integration clause in a cleaning services framework agreement

INTEGRATION OF PERSONS WHO ARE EXCLUDED FROM THE LABOUR MARKET
As part of the sustainable development objectives, and in particular social and occupational integration objectives set out in the circular entitled "État exemplaire" issued by the Prime Minister on 3/12/2008, contractors must undertake to reserve a certain number of hours for persons who are on the pathway to employment as and when subsequent procurement contracts are performed and throughout their duration.

This performance condition will be implemented and tracked lot by lot:
- by the replacement of all vacant job positions (following a voluntary departure or when sites accede to a procurement contract that do not have personnel who are transferred pursuant to Appendix VII of the Collective Bargaining Agreement for Cleaning Undertakings);
- for all orders for services that fall outside the scope of the limit defined in the contract (Article T4-4 of the special technical terms and conditions).

50% of the corresponding volumes of hours must be assigned to persons who are eligible for integration arrangements.

Team leaders and supervisors shall be included in the calculation of the volume of hours worked on all subsequent contracts.

To this end, the contractor may:
- directly hire persons on integration paths (indefinite-term contracts or fixed-term contracts for the entire duration of the procurement contract);
- sub-contract to a structure promoting integration through economic activity (SIAE) – the sub-contracting agreement must be based on a number of hours of work for one or more lots of the procurement contract;
- co-contract with an integration undertaking or sheltered workshop. The two partners jointly undertake to meet the integration target and answer the call for tenders together;
- use personnel seconded by an SIAE: pooling of hours of work via the use of temporary workers supplied by temporary employment integration undertakings (ETTI) or intermediate associations (AI) or membership of an employers' group for integration and qualification (GEIQ).

These solutions make it possible for successful tenderers to benefit from the expertise of SIAE in the area of social and professional support.

The contractor can seek out relevant solutions:
- for SIAE, by going to www.socialement-responsable.org
- for sheltered workshops by going to http://www.handeco.org/ and www.unea.fr;
- for hiring persons on integration paths an in all cases from "facilitators" (managers of social integration clauses) who can be found at Maisons de l'Emploi, PLIE or certain local or regional authorities (see the site of the AVE association: www.ville-emploi.asso.fr).

Otherwise, from public services: the Pôle emploi and the area branch of the DIRECCTE or the "integration task force" at the conseil général in each département.
The contractor shall arrange for sufficient numbers of supervisory staff to support persons who are benefitting from integration arrangements.

Moreover, disabled workers within the meaning of Article L5212-13 of the Labour Code, which stipulates the list of beneficiaries of employment obligations, may be deemed to be excluded from the labour market. However, the entity that recruits must then provide proof of exceeding the conditions provided for in Articles L5212-2, L5212-3 and L5212-5 of the Labour Code.
APPENDIX 8:

Rules governing the implementation of the system for dealing with short-term economic difficulties

1 What are the possible conditions under which a social integration clause can be suspended in the event of short-time working?

The contractor – or its sub-contractor if the sub-contractor is concerned by the social integration clause – must inform the contracting authority as soon as possible if a short-time working measure is implemented on its site.

To this end, the contractor shall supply a copy of the “decision to grant a specific allowance” issued by the Regional Directorates for Businesses, Competition Policy, Consumer Affairs, Labour and Employment (DIRECCTE), which shall determine the duration and maximum authorised volume or a copy of the “short-time work agreement”. Then, the contractor shall provide the monthly report sent to the DIRECCTE that mentions, as a minimum, the functions concerned as well as the volume of hours not worked.

In light of these two supporting documents, the contracting authority will issue a monthly official document to inform of the suspension of the application of the social integration clause, the period during which the suspension applies, its consequences for the contractual volume of hours devoted to integration, and the new contractual volume that remains owed pursuant to the procurement contract.

The suspension of the application of the clause can only be granted if the duration of the short-time work measure corresponds to an active performance phase of the procurement contract for the contractor and if the functions concerned by this measure correspond to those covered by the social integration clause. Moreover, the suspension cannot be granted if the contractor uses a sub-contractor for the tasks covered by the social integration clause and if the sub-contractor is not affected by short-time working measures.

Suspension leads to a reduction in the contractual volume of hours dedicated to integration on a pro rata basis. The contractual volume of hours is first of all reduced to an average daily volume in light of the term of the contractor's procurement contract. This average daily volume is then multiplied by the number of business days counted as part-time working under the conditions mentioned above. The result is then deducted from the aggregate volume.

2 What are the conditions under which the social integration clause can be suspended in the event of dismissals on economic grounds?

The contractor – or its sub-contractor if the sub-contractor is concerned by the application of the social integration clause – must inform the contracting authority, as soon as possible, if employees are in line for dismissal on economic grounds on its site.

To this end, the contractor shall provide a copy of the information provided to the DIRECCTE and a copy of the registered letter – if need be with the employees' names redacted but not the positions held – and of the letter inviting to attend the preliminary meeting prior to dismissal of the employee(s) concerned. Then, the contractor must provide a copy of the registered letter – if need be with the employees' names redacted but not the positions held – that notified the dismissal on economic grounds and its date of effect.

In light of these two supporting documents, the contracting authority will issue an official document to inform of the suspension of the application of the social integration clause, the period during which the suspension applies, its consequences for the contractual volume of hours devoted to integration, and the new contractual volume that remains owed pursuant to the procurement contract.
The application of the clause can only be suspended if the dismissal is on economic grounds and was implemented less than one year (the timeframe that is applicable to priority re-hiring) before an active performance phase of the procurement contract for the contractor and if the functions concerned by this measure correspond to those covered by the social integration clause. Moreover, the suspension cannot be granted if the contractor uses a sub-contractor for the tasks covered by the social integration clause and if the sub-contractor is not affected by dismissals on economic grounds.

Suspension leads to a reduction in the contractual volume of hours dedicated to integration on a pro rata basis. The contractual volume of hours is first of all reduced to an average monthly volume in light of the term of the service provider's procurement contract. This average monthly volume is then multiplied by the number of business days validated in respect of the part-time working under the conditions mentioned above. The result is then deducted from the aggregate volume.

3 How can the contracting authority control these specific situations (part-time working and dismissals on economic grounds)?

The contracting authority reserves the right to have all controls carried, in particular by the administrations with authority, to ensure the undertaking is complying with its obligations during a period of short-time working or dismissals on economic grounds, and in particular to ensure that manpower from outside the undertaking is not being used.
Appendix 9: References of the principal sources cited


**Framework and planning law no. 2003-710** of 1 August 2003 on urban policy and urban renewal Text available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000428979


**Ordinance:**
http://www.legifrance.gouv.fr/affichTexte.do?jsessionid=F54D07408B6634E5650CECA702F028EF.tpdjo04v_2&dateTexte=idoridTexte=JORFTEXT000000629820&categorieLien=cid

**Implementing decrees:**
http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000420648
http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000811078
Decree no. 2006-975 of 1 August 2006 establishing the public procurement contracts code
Text available at:
http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000264576&dateTexte=

Prime Minister's Circular no. 5351/SG of 3 December 2008 on the "exemplariness of the State in the area of sustainable development with respect to the running of its departments and State-run public entities"
Text available at:
http://www.fonction-publique.gouv.fr/IMG/20081203_Circulaire_5351_SG.pdf

DGEFP Memorandum of 3 November 2010 on the joint financing of the development phase of positions for facilitators of social integration clauses in public procurement contracts in respect of the national Regional Competitiveness and Employment Operational Programme funded by the ESF..

National Charter for Integration applicable to project sponsors and owners that enter into contracts with the Agence Nationale pour la Rénovation Urbaine (national urban renewal agency, ANRU), as approved by the ANRU Board of Directors on 9 February 2005.
Text available at:
Appendix 10: Comparison between the French public procurement contracts code, Ordinance no. 2005-649 of 6 June 2005 related to contracts awarded by public or private bodies which are not subject to the public procurement contracts code and Directives 2004/17/EC and 2004/18/EC of 31 March 2004.

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26 This appendix should be printed in A3 format.
### Article 10

In the interests of the broadest possible competition, and unless the object of the contract does not lend itself to the identification of distinct lots, the contracting entity may award the contract in separate lots under the conditions set forth in paragraph III of Article 27. The contracting entity is free to determine the number of lots, taking into account the technical characteristics of the work requested, the structure of the economic sector in question and, where appropriate, the rules governing certain professions. Requests to participate and tenders shall be reviewed on a lot by lot basis. Candidates cannot present tenders that vary according to the number of lots that are liable to be obtained. If several lots are awarded to the same contractor, it is however possible to sign only a single procurement contract with said contractor that combines said lots.

The contracting entity may, however, award a global contract, with or without the identification of distinct lots, if it considers that splitting the contract into separate lots is likely, in the case in question, to restrict competition or to render performance more difficult in technical terms or more costly, or if the contracting authority is not itself in a position to carry out the necessary tasks of organisation, steering and coordination.

If the contracting entity uses separate lots for a transaction for which the object is both the building and operating or maintenance of a structure, the building and operating or maintenance services cannot be combined within the same lot. If the contracting entity uses a global contract, this must obligatorily show separately the respective building and operating or maintenance prices. The remuneration for the operating or maintenance services may not on any account contribute to the payment of the building service.

### Article 14

The performance conditions of a contract or framework agreement may include social or environmental components pursuing sustainable development objectives by reconciling economic development, protection and enhancement of the environment and social progress. Such performance conditions shall not have a discriminatory effect with regard to potential candidates, and shall be indicated in the contract notice or in the tender documents.

### Article 15

Certain contracts or certain lots of a contract may be reserved for the sheltered workshops or the vocational rehabilitation centres referred to in Articles L. 5213-13, L. 5213-18, L. 5213-19 and L. 5213-22 of the Labour Code and in Article L. 344-2 of the Social Action and Family Code, or equivalent structures where most of the employees concerned are handicapped persons who, by reason of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions.

The contract notice shall make reference to this provision.

### Article 16 Ord

Certain contracts or certain lots of a contract may be reserved for the sheltered workshops or the vocational rehabilitation centres referred to in Article L. 323-31 of the Labour Code and in Article L. 344-2 of the Social Action and Family Code, or equivalent structures where most of the employees concerned are handicapped persons who, by reason of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions.

### Article 33 CE Decree

The decision to reserve certain procurement contracts or certain lots for sheltered workshops and vocational rehabilitation centres pursuant to Article 16 of the aforementioned Ordinance of 6 June 2000 shall be mentioned in the contract notice.
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<tr>
<td>Article 146.2</td>
<td>Article 9 CE Decree</td>
<td>Article 32</td>
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<tr>
<td>I - Contracts and framework agreements which have as their object services that are not listed in Article 29 may be awarded, irrespective of the amount concerned, using an adapted procedure, in the conditions set forth in Article 146.</td>
<td>With the exception of Articles 2, 3 and 45, the provisions of this decree shall not apply to service contracts, the object of which are services that are not listed in Article 8. Said contracts shall be awarded in accordance with terms that are freely defined by the contracting entity.</td>
<td>Contracts which have as their object services listed in Annex XVII B shall be governed solely by Articles 34 and 43.</td>
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<td>II. - However:</td>
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<td>Article 33</td>
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<td>1° The provisions of paragraph III of Article 150 are not applicable;</td>
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<td>Contracts which have as their subject-matter services listed both in Annex XVII A and in Annex XVII B shall be awarded in accordance with Articles 34 and 43.</td>
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<td>2° When the estimated amount of the services requested is equal to or greater than 387,000 euros excluding VAT, they shall be defined in accordance with the provisions of Article 29 and the contract shall be the subject of an award notice under the conditions laid down in Article 172;</td>
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<td>3° Contracts for an amount that is equal to or greater than 193,000 euros excluding VAT shall be awarded by the tender commission for regional or local authorities;</td>
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<td>4° The contracting entity shall ensure compliance with the ethics principles and regulations, if any, that apply to the professions concerned;</td>
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<td>5° Contracts for legal services are not subject to the provisions of paragraph IV of this article. Moreover, those contracts for legal services which have as their object representation of a regional or local authority with a view to the settlement of a dispute shall not be sent to the State representative.</td>
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<td>III. - Contracts which have as their object both services that are listed in Article 29 and services that are not listed therein shall be awarded in accordance with the rules that apply to the category of services for which the estimated amount is highest.</td>
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<tr>
<td>Article 52. (pursuant to Article 142)</td>
<td>Article 22 CE Decree</td>
<td>Article 36</td>
</tr>
<tr>
<td>I. - For contracts awarded under a formalised procedure, when the contracting entity relies on a number of criteria in awarding the contract, it may authorise candidates to submit variants. The contracting entity shall indicate in the contract notice or in the tender documents whether or not it authorises variants. If such indication is not given, variants are not authorised. The tender documents shall stipulate the minimum requirements to be met by the variants and any specific requirements for their presentation. Only those variants that meet the minimum requirements shall be taken into consideration.</td>
<td>When the contracting entity relies on several criteria in awarding the contract, it may authorise the candidates to submit variants. The contracting entity shall specify in the contract notice or in the tender documents whether or not it authorises variants. The tender documents shall stipulate the minimum requirements to be met by the variants and any specific requirements for their presentation. Only those variants that meet the minimum requirements shall be taken into consideration. For supply or service contracts, a variant cannot be rejected on the sole ground that, if successful, it would respectively lead to a service contract rather than a supply contract, or a supply contract rather than a service contract.</td>
<td>1. Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities. Contracting entities shall indicate in the specifications whether or not they authorise variants, and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation.</td>
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<td>II. - For contracts awarded using an adapted procedure, when the contracting entity relies on several criteria in awarding the contract, it may authorise candidates to submit variants, unless the contracting entity has specified in the tender documents that it is opposed to the use of this option. The contracting entity may specify in the tender documents minimum requirements to be met by the variants and any specific requirements for their presentation. In this case, only those variants that meet these minimum requirements shall be taken into consideration. However, reference to the minimum requirements to be met and to any specific requirements for their presentation may be concise.</td>
<td>For supply or service contracts, a variant cannot be rejected on the sole ground that, if successful, it would respectively lead to a service contract rather than a supply contract, or a supply contract rather than a service contract.</td>
<td>2. In procedures for awarding supply or service contracts, contracting entities which have authorised variants pursuant to paragraph 1 may not reject a variant on the sole ground that it would, if successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.</td>
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<td>III. - Variants shall be submitted along with the basic tender.</td>
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<td>For supply or service contracts, a variant cannot be rejected on the sole ground that, if successful, it would respectively lead to a service contract rather than a supply contract, or a supply contract rather than a service contract.</td>
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<td>Subsection 2 – Award of contracts (pursuant to Article 142)</td>
<td>Article 53</td>
<td>Article 35.1</td>
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<td>Article 53</td>
<td>Article 53.1</td>
<td>1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall:</td>
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<td>I. - In order to award the contract to the tenderer presenting the most economically advantageous tender, the contracting entity relies:</td>
<td>1. Either on a number of non-discriminatory criteria pertaining to the object of the contract, in particular quality, price, technical merit, aesthetic and functional features, performance in terms of environmental protection, performance in terms of occupational integration of persons in question, such as delivery or completion date, running costs, cost-effectiveness, environmental characteristics, technical merit, innovative nature, after-sales services.</td>
<td>27 Replaces Article 30</td>
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of environmental protection, performance in terms of occupational integration of persons in difficulty, total running costs, cost-effectiveness, innovative nature, after-sales service and technical assistance, date of delivery and delivery or completion time. Other criteria may be taken into account if the object of the contract so warrants;
2 Or, given the object of the contract, on the sole criterion of price.

IV. – 1° In the event of identical prices or equivalent tenders for a contract, a preferential right is granted to tenders submitted by a workers’ production cooperative, an agricultural producers’ group, a craftsman’s cooperative society or an artists’ cooperative society or by sheltered workshops.
2° When the contracts relate, wholly or partly, to work likely to be performed by craftsmen or craft companies or craftsmen’s cooperative societies or workers’ production cooperatives or sheltered workshops, the contracting entities must, before initiating the tendering process, define the public works, services or supplies which shall, all other elements of the tender being equal, be awarded preferentially over all other candidates, to craftsmen or to craftsmen’s cooperative societies or workers’ production cooperatives or sheltered workshops, up to a maximum of one quarter of the total amount of such works, services or supplies.
3° When the contracts relate, wholly or partly, to artistic work, they, in the event of identical prices or equivalent tenders provided for in paragraph 2, shall be awarded preferentially to craftsmen or an artists’ cooperative society up to one half of the total amount of said work.

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<td>of environmental protection, performance in terms of occupational integration of persons in difficulty, total running costs, cost-effectiveness, innovative nature, after-sales service and technical assistance, date of delivery and delivery or completion time. Other criteria may be taken into account if the object of the contract so warrants;</td>
<td>function nature, environmental characteristics, technical merit, innovative nature, after-sales service and technical assistance, price, delivery date, and performance in terms of occupational integration of persons in difficulty. Other criteria may be taken into account if the object of the contract so warrants;</td>
<td>quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after-sales service and technical assistance, commitments with regard to parts, security of supply, and price or otherwise</td>
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<td>2 Or, given the object of the contract, on the sole criterion of price.</td>
<td>2 Or, given the object of the contract, on the sole criterion of price.</td>
<td>b) the lowest price only.</td>
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### SECTION I – SCOPE AND FUNDAMENTAL PRINCIPLES

**Chapter I – Determination of the needs to be met**

**Article 5**

I. – The nature and scope of the requirements to be met shall be determined precisely prior to all contract notices or all negotiations not preceded by a contract notice, taking into account sustainable development objectives. The exclusive object of the procurement contract(s) or framework agreement(s) entered into by the contracting authority shall be to meet these requirements.

**Chapter IV – Split contracts**

**Article 10**

In the interests of the broadest possible competition, and unless the object of the contract does not lend itself to the identification of distinct lots, the contracting authority may award the contract in separate lots under the conditions set forth in paragraph III of Article 27. The contracting entity is free to determine the number of lots, taking into account the technical characteristics of the work requested, the structure of the economic sector in question and where appropriate, the rules governing certain professions. Requests to participate and tenders shall be reviewed lot by lot. Candidates cannot present tenders that vary according to the number of lots that are liable to be obtained. If several lots are awarded to the same contractor, it is however possible to sign only a single procurement contract with said contractor that combines said lots.

The contracting authority may, however, award a global contract, with or without the identification of distinct lots, if it considers that splitting the contract into separate lots is likely, in the case in question, to restrict competition or to render performance more difficult in technical terms or more costly, or if the contracting authority is not itself in a position to carry out the necessary tasks of organisation, steering and coordination.

If the contracting authority uses separate lots for a transaction for which the object is both the building and operating or maintenance of a structure, the building and operating or maintenance services cannot be combined within the same lot. If the contracting authority uses a global contract, this must obligatorily show separately the respective building and operating or maintenance prices. The remuneration for the operating or maintenance services may not on any account contribute to the payment of the building service.

**Chapter VI – Social and environmental clauses**

**Article 14**

The performance conditions of a contract or framework agreement may include social or environmental components pursuing sustainable development objectives by reconciling economic development, protection and enhancement of the environment and social progress. Such performance conditions shall not have a discriminatory effect with regard to potential candidates, and shall be indicated in the contract notice or in the tender documents.

**Article 4 CA Decree**

The performance conditions of a contract or framework agreement may include social or environmental components pursuing sustainable development objectives by reconciling economic development, protection and enhancement of the environment and social progress. Said conditions shall be specified in one of the contract notices referred to in Article 16 or in the tender documents. Said performance conditions cannot have a discriminatory effect with regard to potential candidates.
### Chapter VII – Reserved contracts

**Article 15**

Certain contracts or certain lots of a contract may be reserved for the sheltered workshops or the vocational rehabilitation centres referred to in Articles L. 5213-13, L. 5213-18, L. 5213-19 and L. 5213-22 of the Labour Code and in Article L. 344-2 of the Social Action and Family Code, or equivalent structures where most of the employees concerned are handicapped persons who, by reason of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions.

The contract notice shall make reference to this provision.

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**Article 16 Ord**

Certain contracts or certain lots of a contract may be reserved for the sheltered workshops or the vocational rehabilitation centres referred to in Article L. 323-31 of the Labour Code and in Article L. 344-2 of the Social Action and Family Code, or equivalent structures where most of the employees concerned are handicapped persons who, on account of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions.

The contract notice shall make reference to the decision to reserve certain procurement contracts or certain lots for sheltered workshops and vocational rehabilitation centres pursuant to Article 16 of the aforementioned Ordinance of 6 June 2005.

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**Article 18**

Reserved contracts

Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes, where most of the employees concerned are handicapped persons who, on account of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions. (…)

The contract notice shall make reference to this provision.

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**Article 27 CA Decree**

(…) The contract notice shall make reference to the decision to reserve certain procurement contracts or certain lots for sheltered workshops and vocational rehabilitation centres pursuant to Article 16 of the aforementioned Ordinance of 6 June 2005.

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**Article 30**

I. – Contracts and framework agreements which have as their object services that are not listed in Article 29 may be awarded, irrespective of the amount concerned, using an adapted procedure, in the conditions set forth in Article 29.

II. – However:

1° the provisions of paragraphs III and IV of Article 40 are not applicable;

2° when the estimated amount of the services requested is equal to or greater than 193,000 euros excluding VAT, they shall be defined in accordance with the provisions of Article 6 and the contract shall be the subject of an award notice under the conditions laid down in Article 6;

3° contracts for an amount that is equal to or greater than 193,000 euros excluding VAT shall be awarded by the tender commission for regional or local authorities and following an opinion issued by the tender commission for the State, public healthcare establishments and public social or social and medical establishments;

4° the contracting authority shall ensure compliance with the ethics principles and regulations, if any, that apply to the professions concerned;

5° Contracts for legal services are not subject to the provisions of paragraph IV of this article. Moreover, those contracts for legal services which have as their object representation of a regional or local authority with a view to the settlement of a dispute shall not be sent to the State representative

III. – Contracts or framework agreements which have as their object both services that are listed in Article 29 and services that are not listed therein shall be awarded in accordance with the rules that apply to the category of services for which the estimated amount is highest.

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**Article 29 CA Decree**

With the exception of Articles 2, 3 and 47, the provisions of this decree shall not apply to service contracts which have as their object services that are not listed in Article 8. Said contracts shall be awarded in accordance with terms that are freely defined by the contracting authority.

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**Article 31**

Service contracts listed in Annex II B shall be subject solely to Articles 23 and Article 35(4).

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**Article 35(4)**

Contracts which have as their object services listed in Annex II B shall be awarded in accordance with Articles 23 to 55 where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B. In other cases, contracts shall be awarded in accordance with Article 23 and Article 35(4).
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<th>2006 PUBLIC PROCUREMENT CONTRACTS CODE - CONTRACTING AUTHORITIES</th>
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<td><strong>Article 50</strong></td>
<td><strong>Article 21 CA Decree</strong></td>
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| I. - For contracts awarded under a formalised procedure, when the contracting entity relies on a number of criteria in awarding the contract, it may authorise the tendering parties to submit variants. The tendering entity shall indicate in the contract notice or in the tender documents whether or not it authorises variants; failing such indication, variants are not authorised. The tender documents shall stipulate the minimum requirements to be met by the variants and any specific requirements for their presentation. Only those variants that meet the minimum requirements shall be taken into consideration.  
II. - For contracts awarded using an adapted procedure, when the contracting entity relies on several criteria in awarding the contract, it may authorise candidates to submit variants, unless the contracting entity has specified in the tender documents that it is opposed to the use of this option. The contracting entity may specify in the tender documents minimum requirements to be met by the variants and any specific requirements for their presentation. In this case, only those variants that meet these minimum requirements shall be taken into consideration. However, reference to the minimum requirements to be met and to any specific requirements for their presentation may be concise.  
III. - Variants shall be submitted along with the basic tender.  
For supply or service contracts, a variant cannot be rejected on the sole ground that, if successful, it would respectively lead to a service contract rather than a supply contract, or a supply contract rather than a service contract. | When the contracting authority relies on several criteria in awarding the contract, it may authorise the candidates to submit variants. The contracting authority shall specify in the contract notice or in the tender documents whether or not it authorises variants. The tender documents shall stipulate the minimum requirements to be met by the variants and any specific requirements for their presentation. Only those variants that meet the minimum requirements shall be taken into consideration.  
For supply or service contracts, a variant cannot be rejected on the sole ground that, if successful, it would respectively lead to a service contract rather than a supply contract, or a supply contract rather than a service contract. |

| 2008 PUBLIC PROCUREMENT CONTRACTS CODE - CONTRACTING AUTHORITIES |
|---|---|
| **Article 53** | |  
| I. - In order to award the contract to the tenderer presenting the most economically advantageous tender, the contracting authority relies:  
1 Either on a number of non-discriminatory criteria pertaining to the object of the contract, in particular quality, price, technical merit, aesthetic and functional features, performance in terms of environmental protection, performance in terms of occupational integration of persons in difficulty, total running costs, cost-effectiveness, innovative nature, after-sales service and technical assistance, date of delivery and delivery or completion time. Other criteria may be taken into account if the object of the contract so warrants;  
2 Or, given the object of the contract, on the sole criterion of price. | |  
| Article 14 Ord | The contract or framework agreement shall be awarded to the tenderer or tenderers presenting the most economically advantageous tender under the conditions defined by a decree issued following consultation with the Conseil d’État. | Article 24 CA Decree |  
| II. - In order to award the contract to the tenderer presenting the most economically advantageous tender, the contracting authority relies:  
1° Either on a number of non-discriminatory criteria pertaining to the object of the contract, in particular delivery or completion time, total running costs, cost-effectiveness, quality, aesthetic and function nature, environmental characteristics, technical merit, innovative nature, after-sales service and technical assistance, price, delivery date, and performance in terms of occupational integration of persons in difficulty. Other criteria may be taken into account if the object of the contract so warrants;  
2° Or, given the object of the contract, on the sole criterion of price. | | Article 24 Ord | Variants  
1. Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.  
2. Contracting authorities shall indicate in the contract notice whether or not they authorise variants; variants shall not be authorised without this indication.  
3. Contracting authorities authorising variants shall indicate in the specifications the minimum requirements to be met by the variants and any specific requirements for their submission.  
4. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration. In procedures for awarding public supply or service contracts, contracting authorities which have authorised variants may not reject a variant on the sole ground that it would, if successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract. | | Article 50.1 Contract award criteria  
1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:  
a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or  
b) the lowest price only. |
IV. – 1° In the event of identical prices or equivalent tenders for a contract, a preferential right is granted to tenders submitted by a workers’ production cooperative, an agricultural producers’ group, a craftsman, a craftsmen’s cooperative society or an artists’ cooperative society or by sheltered workshops.

2° When the contracts relate, wholly or partly, to work likely to be performed by craftsmen or craft companies or craftsmen’s cooperative societies or workers’ production cooperatives or sheltered workshops, the contracting authorities must, before initiating the tendering process, define the public works, services or supplies which shall, all other elements of the tender being equal, be awarded preferentially over all other candidates, to craftsmen or to craftsmen’s cooperative societies or workers’ production cooperatives or sheltered workshops, up to a maximum of one quarter of the total amount of such works, services or supplies.

3° When the contracts relate, wholly or partly, to artistic work, they, in the event of identical prices or equivalent tenders provided for in paragraph 2, shall be awarded preferentially to craftsmen or an artists’ cooperative society up to one half of the total amount of said work.