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DE L'ÉCONOMIE, DE L'INDUSTRIE  
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# 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

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DIRECTION  
DES AFFAIRES JURIDIQUES



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## Preface

This guide, which has been the subject of concertation, seeks to facilitate and secure the development of social clauses in public procurement contracts, and in particular of clauses providing for the return to employment and the occupational and social integration of persons suffering from unemployment or exclusion, or of certain disabled persons seeking employment.

Its purpose is not to constitute a general guide to all best practices as regards social clauses. Such clauses may be designed for a number of purposes and other documents pertaining to them may be produced as needed.

The reduction of long-term unemployment and access to employment for those suffering from exclusion 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 1998<sup>1</sup> as amended by ordinance no. 2000-1249 of 21 December 2000 (see Appendix 1) and the 2005 law reinforcing social cohesion.

Since 2001, further and increasingly precise and powerful provisions have regularly been introduced into the regulations governing public procurement contracts to enable the intelligent use of public procurement in helping to combat exclusion. Innovative experiments carried out by certain regional 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 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.

The possibilities offered by the public procurement contracts code are still under-used, however, particularly by government agencies. Society is 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 clauses could be much reduced by more precise and accessible legal information. Social 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 reassurance and technical support both in defining such clauses and in monitoring their performance. Candidate companies, 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.

The aim of this guide is therefore to make the legal aspects of this issue accessible to all. It was drawn up as part of the Public Procurement Economic Monitoring Centre, headed by the Director of Legal Affairs at the Ministry for the Economy, Finance and Industry. In consequence, it enjoyed the support of the Legal Affairs Directorate, without which the guide would not exist.

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<sup>1</sup> Law no. 98-657 of 29 July 1998 on combating exclusion, as amended. Text available at: <http://www.legifrance.gouv.fr/WAspad/Ajour?nor=MESX9800027L&num=98-657&ind=1&laPage=1&demande=ajour>

It 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 the public procurement contracts code henceforth requires, are keen to introduce clauses promoting the employment of persons in difficulty.

This is a guide and not a circular. 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.

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 CNIAE (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 ANRU or Régies de Quartier neighbourhood boards have done.

It is also particularly fortunate that State departments, from leading procurement teams including MIFA (Mission Interministérielle France Achats, the interdepartmental procurement agency for France), the Public Employment Service and the Délégation Générale à l'Emploi et à la Formation Professionnelle (general delegation for employment and vocational training), legal teams from all the ministries are now turning their attention to this issue.

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, however, stipulates that, by virtue of part II, most of these provisions 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 clauses and certain specific aspects of public procurement contracts containing social 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<sup>2</sup>, 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<sup>3</sup>.

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 bid selection criteria) requirements relating to sustainable development in respect of one or more of these key components. The 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 contract consultation 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.

<sup>2</sup> Decree no. 2006-975 of 1 August 2006 establishing the public procurement contracts code.

<sup>3</sup> Brundtland Report – Report of the World Commission on Environment and Development published in 1987 available at: <http://www.un.org/documents/ga/res/42/ares42-187.htm>

## 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 2004<sup>4</sup> 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 those who fall into the following administrative categories:

- the long-term unemployed (registered as unemployed for over 12 months);
- recipients of the RMI minimum integration income 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 enterprise (ETTI), and employees of an occupational integration enterprise (EI) or an integration workshop and project (ACI), as well as those persons covered by specific schemes such as "Défense 2<sup>ème</sup> 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 the national employment agency (ANPE), employment centres (Maisons de l'Emploi), local integration and employment plans (PLIE), local task forces (Missions Locales) or CAP Emploi.

The public purchaser may rely on all national, regional and local agents involved in employment and integration to identify and target unemployed persons encountering specific social and occupational difficulties.

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<sup>4</sup> Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Directive 2005/51/EC of the Commission of 7 September 2005 amending appendix XX of the Directive 2004/17/EC of the European Parliament and the Council on public procurement contracts.

**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 public procurement contracts code of 2001 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<sup>1</sup> is designed to assist the public purchaser in determining which legal vehicle provided in the code is the most appropriate in each case.

2006 PPC Code Articles	Advantages	Comments
<p><b>Article 10: Split contracts</b></p> <p>"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 sub-paragraph III of Article 27. The contracting authority 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. 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."</p>	<p>Makes it possible to determine the content of lots on technical considerations and to identify the lots most amenable to the introduction of an integration clause or to a reserved contract.</p> <p>In offering lots of appropriate volumes, facilitates access to public procurement contracts for various types of integration structure.</p> <p>Whenever possible, the global contract may also allow for integration measures.</p> <p>Makes it possible to set aside reserved batches within the contract on the basis of Article 15.</p>	<p>May make the contract award and performance procedure more cumbersome.</p>

<sup>1</sup> The advantages and comments are presented from the point of view adopted in the guide

2006 PPC Code Articles	Advantages	Comments
<p><b>Article 14: Social and environmental clauses</b></p> <p>"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 in regard to bidders, and shall be indicated in the public call for tenders or in the consultation documents."</p>	<p>Makes it possible to require bidders to give undertakings on integration measures corresponding:</p> <ul style="list-style-type: none"> <li>- either to a predetermined volume of working hours;</li> <li>- or to a predetermined percentage of working hours in the contract.</li> </ul>	<p>Implies prior knowledge of the local situation as regards employment and integration resources effectively available in order to perform the contract.</p> <p>The integration undertaking required of bidders must be set in such a way as not to reduce the number of bidders.</p>
<p><b>Article 15: Reserved contracts</b></p> <p>"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. In such cases, the greater part of the contracts or batches is performed by disabled persons who, on account of the nature or seriousness of their handicap, cannot work under normal conditions. The tender notice refers to this provision."</p>	<p>Makes it possible to reserve contracts or lots for:</p> <ul style="list-style-type: none"> <li>- sheltered workshops (EA);</li> <li>- vocational rehabilitation centres (ESAT);</li> <li>- equivalent structures employing principally disabled persons.</li> </ul> <p>Promotes the medium-term development of such structures.</p>	<p>Implies extensive knowledge of potential suppliers in these categories and their production capacity.</p>

2006 PPC Code Articles	Advantages	Comments
<p><b>Article 30: Procedure applicable to public service contracts whose object is integration</b></p> <p>"I – Public service contracts and framework agreements not mentioned in Article 29 may be awarded, irrespective of the amount concerned, using an adapted procedure, in the conditions set forth in Article 28. [...]</p> <p>III. – When a public service contract or framework agreement covers the provision of services mentioned in Article 29 and services not mentioned in that article, it is awarded in accordance with the rules applying to the service category representing the highest estimated contract amount."</p>	<p>Makes it possible to use an adapted procedure for an occupational qualification and/or integration contract.</p>	<p>Applies only to a contract whose main object is integration.</p> <p>Important to ensure that bid selection criteria are related primarily to the integration and/or qualification initiative, not to the provision of a support service.</p>
<p><b>Article 50: Alternative bids</b></p> <p>"When the contracting authority relies on a number of criteria in awarding the contract, it may authorise candidates to submit alternative bids. The contracting authority shall mention in the tender notice or in the consultation documents whether alternative bids are authorised; failing such specific mention, alternative bids are not permitted.</p> <p>The consultation documents shall stipulate the minimum requirements that any alternative bids must satisfy and how the alternative bids should be presented. Only those alternative bids which meet the minimum requirements will be considered. The alternative bids shall be submitted with the basic bid."</p>	<p>Provides scope for realistic innovative proposals the purchaser may not have thought of.</p> <p>Leaves enterprises the initiative and choice of terms on which to meet integration obligations.</p>	<p>Need for a strict link between the contract object and occupational integration.</p> <p>Remember that alternative bids should be explicitly authorised in the tender notice.</p> <p>The consultation documents must provide for the elements necessary to assess the relevance of the alternative bid.</p> <p>Opening up public procurement to alternative bids adds further complexity to the process of analysing bids on the basis of the published criteria. A transparent analysis method should be put in place.</p> <p>No known experience at this stage.</p> <p>Need to advance with caution and test on a gradual basis.</p>

2006 PPC Code Articles	Advantages	Comments
<p><b>Article 53 paragraph I: Award of contracts/Bid selection criteria</b></p> <p>"In order to award the contract to the bidder presenting the most economically advantageous bid, the contracting authority relies:</p> <p>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 cost of use, return on investment, innovative nature, after-sales service and technical assistance, date and time of delivery or performance. Other criteria may be taken into account if the object of the contract so warrants;</p> <p>2 Or, given the object of the contract, on a single criterion, which is that of price."</p>	<p>May prove a transparent incentive to bidders to present bids with a strong occupational integration component.</p> <p>Transparent identification of a weighting in favour of bids with a strong occupational integration component.</p>	<p>Need for a strict link between the contract object and occupational integration.</p> <p>A reasonable weighting must be assigned to the criterion.</p> <p>Little experience available.</p> <p>As a legal precaution, Article 53 paragraph 1 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.</p>
<p><b>Article 53 paragraph IV: Award of contracts/Preferential right</b></p> <p>"1 In the event of identical prices or equivalent bids for a contract, a preferential right is granted to bids submitted by a workers' production cooperative, an agricultural producers' group, a craftsman, a craftsmen's cooperative society or an artists' cooperative society or by <b>sheltered workshops</b>.</p> <p>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 authority must, before initiating the tendering process, define the public works, services or supplies which shall, all other elements of the bid being equal, be awarded preferentially over all other candidates, to craftsmen or to craftsmen's cooperative societies or workers' production cooperatives or <b>sheltered workshops</b>, up to a maximum of one quarter of the total amount of such works, service or supplies."</p>	<p>Promotes the medium-term development of sheltered workshops or equivalent structures within the meaning of directives 2004-17 and 2004-18.</p>	<p>Limited application.</p>

## 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 circumstance where splitting the contract presents a technical<sup>5</sup>, 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 an 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 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 percentage of hours of work to populations in difficulty, obligation to employ a specified number of young or long-term unemployed).

Each bidder 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 enterprise.

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<sup>5</sup> 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 bid content as regards integration.

The clause so drafted is one of the contract performance conditions that all bidders must undertake to fulfil (see part 2 Questions/Answers) when submitting a bid.

A bid which fails to comply with all the undertakings set out in the contract is deemed to be non-compliant.

The clause must be drafted and applied in accordance with the following rules. It must:

- offer all bidders the possibility of satisfying the clause;
- not set mandatory terms of performance of the clause (see question 2.2.5), 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 bidders, is to put bidders 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 an 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 integration clause.

#### 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.

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 bid 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 bids 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/or 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 falls within the remit of the public entity seeking to award contracts under the terms of Article 30.

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, if the persons employed for the purposes of integration obtained good qualifications.

If Article 30 is applied, competing bids 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 bids, irrespective of legal status: associations are therefore eligible to bid for such contracts, in particular integration workshops and projects.

The public purchaser with a public contract under the adapted procedure is under 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 enterprises 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: Alternative bids*

Alternative bids 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 contract documents, but keen to attract bids incorporating integration objectives. In the consultation documents, a public purchaser may authorise candidates to submit alternative bids relating to social aspects, in accordance with the determination of requirements provided for in Article 5 of the public procurement contracts code.

Using alternative bids 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.

There are as yet few instances of the use of alternative bids in the social field.

Article 50 may be used in isolation or in conjunction with Article 14; in any event, the use of alternative bids of a social nature can only be envisaged if the introduction of a social component is strictly linked with the object of the contract.

When Article 50 is used in isolation, this means that the public purchaser has not included any social performance clause within the meaning of Article 14 in the contract specifications. By allowing economic operators to submit alternative bids on social considerations, the public purchaser allows itself scope, after a comparison of the basic and alternative bids, to choose a bid by an economic operator that has taken social considerations into account. Under this approach, economic operators are free to choose whether or not to submit an alternative bid. Should they opt, however, not to submit an alternative bid and adhere solely to the contract specifications, they potentially run the risk of the public purchaser selecting an alternative bid that is deemed more interesting. Such a choice will in no way be systematic,

however, since on the one hand the alternative bids submitted may not meet the needs of the public purchaser and, on the other, the basic bids may be considered superior overall and the purchaser may choose to give preference to other elements of the contract.

Using Article 50 in isolation does not allow for the application of social performance criteria on the basis of Article 53.1. This is because in this case, all economic operators are required to present a basic bid which, by definition, will not include a social dimension. It will not therefore be possible to apply a selection criterion based on social performance when examining the basic bids, which is a preliminary condition to examining alternative bids (see below).

When the public purchaser wishes to apply Article 50 and Article 14 in the same contract, there are three possibilities:

- the public purchaser may decide to apply Article 50 independently of the integration clause provided for on the basis of Article 14. In this instance, all the bids must comply with the requirements of the social clause but the economic operators may also submit alternative bids on other components of the contract, with different social considerations.
- the public purchaser may also provide for an Article 14 performance clause and authorise the economic operators to submit an alternative bid only on this performance clause. Opening up the procedure to alternative bids therefore leaves the economic operators the choice of proposing solutions, innovative or otherwise, without automatically penalising those economic operators that confined themselves to responding strictly to the requirements of the Article 14 clause as formulated by the public purchaser.

This solution therefore allows for a qualitative assessment of bids on the integration clause by comparing the basic bids with the alternative bids (which are, by definition, more ambitious). This is therefore close to an approach based on the application of Article 53.1;

- the public purchaser may even envisage explicitly authorising alternative bids on the Article 14 performance clause and also authorising alternative bids on other social considerations.

In all these three instances, opening the contract up to alternative bids will enable the economic operators to propose different and possibly more effective mechanisms when the public purchaser has included the Article 14 clause, while responding fully to the need for social integration and submitting a bid which complies with the requirements of the contract.

Conversely, the combined use of Article 14 and Article 53 on bid selection criteria (see below) automatically entails the selection of bids on the criterion of social integration performance and obliges all economic operators to base their bid on this criterion for fear of their bid receiving a low ranking.

In the interests of realistic competition and transparent examination of bids, it is strongly recommended that public purchasers avoid combining too many possibilities for taking social aspects into consideration within a single contract, for example by combining Articles 14, 50 and 53.1.

In the case of Article 50 of the 2006 public procurement contracts code, the terms of its application must be clear. The new wording of Article 50 has modified the conditions of eligibility for alternative bids submitted by candidates for a public procurement contract since, unless otherwise specified, alternative bids are not authorised.

In the case of an adapted procedure, alternative bids are authorised, however, even if no specific mention is made in the consultation documents. They are only rejected if the public purchaser has expressly ruled out the submission of alternative bids.

Similarly, in the case of contracts awarded by contracting authorities that are subject to the second part of the 2006 code, alternative bids are allowed even if the tender notice or consultation documents do not specifically state that such alternative bids are authorised (see Article 157 of the public procurement contracts code).

Further details are also necessary as regards the examination of alternative bids. If the economic operator submits a basic bid and an alternative bid, each of these bids must be clearly identified in the documents submitted to the contracting authority.

When the submission of alternative bids is possible, the public procurement contracts code specifically stipulates that "the alternative bids are submitted with the basic bid". An alternative bid therefore cannot be submitted in isolation, without the basic bid it is destined to accompany. Should this be the case, the alternative bid can only be rejected.

If the basic bid is rejected on examination on the grounds that it is non-compliant, unacceptable or inappropriate, it is nonetheless possible to examine an alternative bid as long as it complies with the contract specifications, is presented on the terms stipulated by the public purchaser and, if not itself set out in full but referring in part to the basic bid, does not contain the components of the basic bid that led to its rejection. An alternative bid which fails to meet these conditions must also be rejected.

To ensure transparency in the comparison of alternative bids, Article 50 stipulates that the consultation documents must mention the minimum requirements that alternative bids must meet and the terms of their presentation. The basic bids and alternative bids must be classified according to the same criteria, either by classifying basic bids and alternative bids separately and comparing the best of each of these proposals, or by classifying the proposals without any prior distinction. The choice of method rests with the public purchaser.

Should alternative bids not be authorised, the public purchaser must reject as ineligible all alternative bids submitted in isolation or as a supplement to a basic bid. The basic bid, however, need not be rejected on the grounds that it is accompanied by one or more unauthorised alternative bids, subject to its being presented in such a way that it is clearly dissociated from the alternative bid or bids.

#### *1.4.6 Article 53- I: Award of contracts/ Bid selection criteria*

Article 53-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.

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 bidders may submit bids that comply with the 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 worthwhile bid in social terms. In contrast, the use of the integration performance criterion under the terms of Article 53-I, combined with an adequate weighting, enables the contracting authority to distinguish between bids 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-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 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 bidders with information on the public purchaser's expectations as regards performance of the 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 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 bidder performs the clause.

#### *1.4.7 Article 53 – IV: Award of contracts/preferential right*

In the event of identical prices or equivalent bids for a contract, a preferential right is granted to bids 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 craftsmen or craft companies or craftsmen's cooperative societies or workers' production cooperatives or sheltered workshops, the contracting authority must, before initiating the tendering process, define the public works, services or supplies which shall, all other elements of the bid 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.

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

## 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 establishments (excluding State-controlled industrial and commercial public establishments), private social security organisations<sup>6</sup>;
- b. Public or private entities subject to ordinance no. 2005-649 of 6 June 2005<sup>7</sup>, 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 5 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 operators<sup>8</sup> 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 establishments whose articles of association include a research function, including scientific and technical public establishments (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.

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<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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 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.

*2.1.3 At what point should the public purchaser consider the introduction of social 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, tender regulations and contract specifications.

*2.1.4 Who decides on the implementation of social 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 a relatively new approach, 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 clause. Experience shows, however, that the implementation of social clauses in public procurement contracts is made easier by the existence of a political undertaking, which often emerges from debate expressing this intention.

b. As regards State public purchasers, the development of socially responsible public procurement is being encouraged through the new procurement policy introduced by the interdepartmental procurement agency for France (MIFA).

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 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 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 question 1.2

The decision must be taken at the time of drafting the consultation documents and before 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 clause?*

No, except in the specific case of the application of Article 30 of the public procurement contract code where it constitutes the actual object of the contract, a public procurement contract cannot refer to a specific area of residence for the employment of populations concerned by a social clause.

One exception is permitted under law, however; and that is the national urban renewal agency (ANRU), whose charter stipulates, under the terms of law no. 2003-710 of 1 August 2003<sup>9</sup>, that project sponsors and clients entering in to 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 experiencing difficulties with occupational integration. The local partners may, however, decide to extend the benefit of the 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. This option 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. It is also useful to note that there is no requirement that projects in a particular neighbourhood should benefit only the residents of that neighbourhood. When several projects exist within a single area, recruitment may be extended across all the sensitive urban areas concerned.

*2.1.7 How can the requirement for an 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 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.

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<sup>9</sup>Framework and planning law no. 2003-710 of 1 August 2003 for the city 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. (...)"

It is, however, possible to develop large-scale integration clauses based on Article 14 of the public procurement contracts code, when three conditions are met: integration opportunities enabling the successful bidder 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?*

A number of contacts may usefully be consulted for information on the local employment situation and the existing vocational training possibilities:

- ANPE (list of branches on <http://www.anpe.fr>): the national employment agency can help in defining the number and occupational profile of populations excluded from the labour market, even on major projects covering several employment catchment areas, as in the case of a railway construction project, for example.
- ANPE's habitual partners, the Missions Locales which monitor more specifically young people excluded from the labour market, and the CAP Emploi structures which monitor disabled jobseekers looking for employment.
- PLIE local integration and employment plans and certain Maisons de l'Emploi that have built up expertise on the subject of social clauses (<http://www.ville-emploi.asso.fr>)
- AFPA adult vocational training association: (<http://www.afpa.fr>)

Other sources of information on the local situation as regards integration through economic activity include:

- Departmental Directorate for Labour, Employment and Vocational Training (Direction Départementale du Travail, de l'Emploi and de la Formation Professionnelle, DDTEFP) - addresses on the Ministry for Labour website: <http://www.travail.gouv.fr>. In addition, the local ANPE can put you 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 (CNLRO: <http://www.regiedequartier.org>)
  - Fédération des Comités and Organismes d'Aide aux Chômeurs par l'Emploi (COORACE: <http://www.coorace.net>)
  - Fédération Nationale des Associations d'Accueil and 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>)

For information on the situation regarding integration structures for the disabled, the public purchaser may usefully contact:

- The departmental centre for the disabled (Maison Départementale des Personnes Handicapées – list available on <http://www.handicap.gouv.fr>)
- Cap Emploi (<http://www.capemploi.net>)
- Union Nationale des Entreprises Adaptées (UNEA: <http://www.unea-asso.com>)

- two associations active in the field: UNAPEI (<http://www.cat-unapei.org>) and ADAPEI (website for each *département*)
- the GESAT network (<http://www.reseau-gesat.com>).

*2.1.9 Are economic operators including structures promoting integration through economic activity (SIAE) permitted to combine in bidding for a public procurement contract?*

Yes, economic operators are allowed to come together to form an ad hoc group.

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.

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

The effectiveness of 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. Enterprises will be more likely to bid for contracts containing integration clauses where these relate to analogous mechanisms and the enterprises 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 concertation and arriving at a consensus on the integration initiatives to be carried out in an area that the various public purchasers can define a type of integration clause appropriate to their overall strategy. This coordination may, under certain assumptions and on certain terms, be simplified when awarding contracts containing integration clauses through the use of common facilitation services (see appendix 3).

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 integration clauses.

## 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 bidding enterprises may be required to undertake to assign part of the contract 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 perfectly possible, within a contract consisting of several lots, to provide for one or more lots to contain a performance clause concerning integration.

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

By ensuring that enterprises likely to bid are able to implement the clause without major obstacles, in a way that is not discriminatory. It is therefore preferable to check in advance with the Public Employment Service what capacities exist for integration. The wording of the clause must not have the effect of reducing the number of economic operators eligible.

### 2.2.4 *What weight or importance can be attributed to these social 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 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 provision 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 specialist structures.

In practice, existing examples of application reflect a social clause that accounts for between 5% and 10% of performance in terms of hours worked on the global contract or contract lots.

If the object of the contract so warrants, however, there is clearly nothing to prevent this percentage being exceeded.

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

Various forms of integration may be envisaged in the contract specifications:

- 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 enterprises to assign performance of the clause to a recently-hired employee 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;
- the provision of employees engaged in an integration scheme on the legal and regulatory terms laid down in the Labour Code. The enterprise 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 a company for the purposes of integration, under the terms of Article L124-2-1-1 of the Labour Code, and/or as part of a CI-RMA-TT (minimum earned income, temporary integration contract);
- the use of employees in pooled employment as part of 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 enterprise (EI) or a structure promoting integration through economic activity (SIAE).

### *2.2.6 Must the public procurement contract impose specific terms of performance of the integration clause?*

No, the public procurement contract need not impose the means of performance of social clauses, which would run counter to contractual freedom. The enterprise decides the terms of performance of the clause from those set out above.

The integration clause may, for example, be limited to setting a target number of hours of integration without requiring the economic operators to pursue a particular form of implementation.

### *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 local authorities, however, suggests that the clause should be drafted as a number of hours of integration to 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 depends on the lots: 70% for interior painting, 50% for masonry, 20% for metal frames.

The public purchaser should refer to current business practices in order to set these percentages.

In addition, certain contracts such as waste processing or cleansing contracts present specific characteristics. Allowance must be made for specific constraints arising from the obligation on the successful bidder to retain employees. In such circumstances, it would be best to include a clause stipulating that during the performance of the contract the enterprise must reserve one vacant or newly created post in every two for persons eligible for the integration schemes.

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

One means of determining the proportion of labour reserved for integration purposes is the following:

- establishing in the estimated cost of the public procurement contract the proportion of expenditure devoted to performance of the clause;
- then converting this sum into hours of work on the basis of a lump-sum assessment of the cost plus social security contributions per hour of labour of a person employed as part of an integration procedure.

Example of such a calculation on a public procurement contract of 1 million euros excluding VAT.

First, the labour component as a proportion of the contract amount is estimated. The average rate of 50% labour on a construction project could be used, giving an amount for labour of 500,000 euros.

- If the integration rate is set by the client at 10%, the cost of integration is calculated to be:  $500,000 \times 10/100 = 50,000$  euros.

The hourly salary rate including social security contributions may vary depending on the trades concerned. Assuming an average cost of 30 euros per hour including social security contributions; the number of hours of integration the enterprise may be asked to provide can be calculated as:  $50,000/30 = 1,666$  hours, equivalent to one full-time position.

- If the client sets the integration rate at 5%, the cost of integration is calculated to be 25,000 euros, equivalent to 833 hours of integration or one part-time position.

*2.2.9 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.

*2.2.10 Can an integration enterprise be awarded a public procurement contract containing an Article 14 social performance clause or must it necessarily function as a subcontractor?*

An integration enterprise may be awarded a public procurement contract containing a social clause as long as its bid corresponds to the object of the contract and complies with the contract documents. There is nothing to prevent subcontracting of part of the contract to a standard enterprise.

In the terms of performance of the Article 14 social clause, the public purchaser may indicate for information that integration enterprises are entitled to function as subcontractors or co-contractors.

*2.2.11 Can an enterprise 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 bids. Bids are to be assessed in accordance with the results required for the contract (see 2.2.5: the different types of employment for persons assigned to performance of the integration clause).

*2.2.12 A public purchaser wishes to draw up a public procurement contract containing an Article 14 integration clause. Which entities should be involved and what precautions, other than legal precautions, should be taken?*

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

- ANPE and DDTEFP (see question 2.1.8);
- PLIEs or registered Maisons de l'Emploi where these exist locally.

*2.2.13 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. 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.

*2.2.14 Who checks that the target populations meet the criteria set down in the tender notice?*

The public purchaser checks the populations (see 1.2) targeted by the call for tenders:

- at the bid selection stage if possible (if enterprises 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.

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

Yes, there are a hundred examples or so of the use of Article 14. Some thirty are listed in the Alliance Ville Emploi guide, compiled with the assistance of CNIAE members and issued in February 2007 (available to order at <http://www.ville-emploi.asso.fr>). The guide also contains a directory of resource persons responsible for implementing the management of social clauses in local authorities, PLIEs 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 enterprises 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 tender notice and/or the contract 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 *What are the equivalent structures, other than the sheltered workshops (EA) and vocational rehabilitation centres (ESAT), mentioned in the code?*

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

### 2.3.4 *Are there any standard references in this field?*

This article 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. The law is relatively recent, which explains why there are as yet so few references in the field. There are relatively few legal difficulties in its application.

### 2.3.5 *Can a specific lot in a public procurement contract containing several lots be reserved for enterprises 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.

2.3.6 *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.

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.

2.3.7 *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.

2.3.8 *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 public State-controlled establishments (other than industrial or commercial), La Poste, regional or local authorities and their public establishments (other than industrial or commercial), including those listed in Article 2 of law no. 86-33 of 9 January 1986<sup>10</sup> containing statutory provisions on the public hospital service. All other public purchasers are liable for the AGEFIPH fund contribution.

2.3.9 *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 enterprise for a number of deductible units of "disabled

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<sup>10</sup> 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.

See Article 2 of the law of 9 January 1986 at: <http://www.legifrance.gouv.fr/WAspad/Ajour?nor=&num=86-33&ind=1&laPage=1&demande=ajour>

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/15,114.26 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 53,755 euros (given an hourly minimum wage in 2006 of 8.27 euros), hence  $13 \times 500 \times 8.27$  euros = 53,755 euros.

NB: The law, however, provides for a discount until 2010. Hence for 2007, the tax for the entity would come to 21,502 euros (40% of the actual amount of the tax), but the total amount will be due in 2010.

- 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  $31,000/15,114.25 = 2.05$ .

In this example, the number of units deductible must be less than 7.5 (50% of the employment obligation of 15 units) – at 2.05 units deductible, this is the case.

The final amount of tax to be paid is 13 shortfall units – 2.05 deductible units, leaving 10.95 shortfall units.

The contribution payable will therefore be 45,278.25 euros.

#### *2.3.10 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. 323-8, paragraph 1 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. 323-2, paragraph 1 of the Labour Code).

Thus the number of units deductible = amount of expenses/16,540 euros (2,000 times the hourly minimum wage of 8.27 euros in 2006).

\* In the case of contracts whereby disabled workers are seconded to a private sector enterprise 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, paragraph 2 of the Labour Code). Note 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 establishments.

Thus the number of units deductible = amount of expenses/13,232 euros (1,600 times the hourly minimum wage of 8.27 euros in 2006).

Note also that if, over a period of more than 3 years, an establishment 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 the terms of Article L. 323-8-1 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 enterprise (Article L. 323-8-2 of the Labour Code).

### *2.3.11 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, paragraph I and IV, may also be used to promote the employment of disabled persons.

In the event of a contract containing a social 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.

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

It is a service contract, the object of which is to provide integration and/or occupational qualification services for persons in difficulty (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 under the terms of 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 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 bids must be based on the integration service with clearly-defined criteria, bids will be judged on the relevance of the integration approach and on the cost of the integration mechanism.

The special administrative terms and conditions (CCAP) include:

- the list of documents constituting the contract, referring in particular to an explanatory note explaining the integration mechanism envisaged and the monitoring methods;
- contract payment methods;
- performance deadlines and penalties.

It is preferable to refer to the special technical terms and conditions (CCTP) to 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?*

An adapted procedure is a contract in which the public purchaser is free to decide the appropriate notice and competitive bidding methods 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 publish the contract and invite competing bids from service providers. This procedure does not allow, therefore, for a contract to be reserved for a given enterprise or association. The public purchaser is, however, free to decide the form and level of publication and of competitive bidding, and in particular to gear these to the object of the contract and the number of bidders 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 bids, 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 the competitive bidding process. 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 clause

*2.5.1 How is a social criterion for the award of a contract to be established? On what legal basis can this be done (art. 53, paragraph 1)? What weighting should this be given in order to avoid any legal risk? Is there any previous experience of the implementation of this article of the public procurement contracts code?*

Article 53, paragraph 1, 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 1.4.6 on Article 53, paragraph 1).

If the public purchaser wishes to use this article of the public procurement contracts code, caution suggests that a reasonable weighting be assigned to this criterion.

There is little reported experience of the use of this article of the public procurement contracts code. Its implementation requires proven experience with the public procurement contract code as regards the integration of populations in difficulty. The combined use of Article 14 and Article 53 paragraph 1 (see 1.4.6) is one possible solution.

*2.5.2 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 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, an 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 substantial and discriminatory modification of the terms of the framework agreement.

*2.5.3 Can the public purchaser use alternative bids (Article 50) or options to promote the integration of persons excluded from the labour market?*

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 bid. Alternative bids may favour the integration of persons excluded from the labour market by allowing economic operators, on the terms of the authorisation appearing in the consultation 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 method of taking into account the integration of persons excluded from the labour market other than 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 alternative bids does not waive the obligation to submit a basic bid. Furthermore, the public purchaser must clearly formulate the meaning and scope of any alternative bids authorised.

Authorising economic operators to submit alternative bids 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.

In the case of options, the public purchaser must clearly state that these are aimed at the integration of persons excluded from the labour market. In a process that is much more restrictive than that of the alternative bid, the option obliges economic operators to propose new or different solutions for the integration of persons excluded from the labour market for each of the options requested. As the instigator of the initiative, the contracting authority is sending a powerful signal regarding its commitment to integration.

In contrast to the alternative bid, however, the restrictive nature of the option in the contract specifications may restrict access to the contract, and should therefore be employed with caution.

## 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 clauses. Experience shows that the introduction of social clauses calls for a minimum experience of both the purely legal aspects of the contract and of its more organisational aspects: assessment of the feasibility of the clause, dialogue with the technical purchasing departments, coordination with the departments responsible for employment and training, concertation with employers, implementation and monitoring of the clause, etc. For this reason, a number of local authorities have appointed special representatives, often known as "clause managers" or "facilitators".

More generally, the most important lessons to be learned from the above experiences is that contracting authorities are strongly recommended to:

- acquire the means to capitalise on know-how regarding social clauses within the organisation;
- rely as necessary on existing experts in the region.

Public purchasers should nevertheless note that while reliance on a single player for all or a majority of support functions might appear to be an attractive solution, any combination of these functions must comply with public procurement laws and with the interests of the purchaser. Furthermore, the legal form of the relationship between the public purchaser and the facilitator must be carefully examined; under certain conditions, it may be subject to public procurement rules (see Appendix 3: "The role of the facilitator in the management of social clauses in public procurement contracts").

### 2.6.2 *Which entities are involved in integration in the field?*

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

a. the national employment agency (ANPE) and the adult vocational training association (AFPA).

The ANPE may play a part in the implementation of social clauses in defining the potential of persons excluded from the labour market (numbers, profile, training needs, etc.), assisting enterprises engaging in a process of integration through social 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, the ANPE and AFPA now offer an integrated support service for jobseeker career plans.

If the ANPE identifies a lack of skills or qualifications when identifying target jobs, the AFPA takes over to draw up a training plan with the jobseeker.

b. Structures for local integration and employment plans (PLIE). They are set up on the initiative of regional or local authorities and public intercommunal cooperation establishments, 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.

#### c. 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 (local authorities, ANPE, the ASSEDIC unemployment benefits agency, etc.) around a local project built on the basis of analysis, action plan and scheduling.

The work of the Maisons de l'Emploi is directed into 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, and also assist with business 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. CAP Emploi

CAP Emploi 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 (Organisme 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. 322-4-16 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 social landlords and seek to maintain and rebuild citizenship, develop popular education and attract employment for neighbourhood residents. They may be approved as occupational integration enterprises (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 enterprises (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 enterprise. 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 occupational 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, local authorities and, under certain conditions, enterprises. 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 enterprises recruit unemployed persons encountering social and occupational difficulties, and make this workforce available to client enterprises 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 groups set up on the initiative of employers keen to pool integration and training paths in order to meet their recruitment needs. Personnel without qualifications and experiencing difficulties integrating are generally made available to members of the group over a long period with a view to acquiring occupational skills.

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 platform, regional integration and qualification associations, local employment and training committees,

h. Ad hoc structures established by the professionals.

### *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 bid selection as part of a public procurement contract for the purposes of integration under the terms of Article 30;
- must be taken into account in a public procurement contract using Article 53 paragraph 1, 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, even if it is certain that those most excluded from the labour market cannot be sustainably included in employment by means of a single, short-term assignment.

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 (ANPE, Missions Locales, CAP Emploi), enterprises, especially those involved in social clauses, and structures promoting integration through economic activity (SIAE).

*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 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 bid which does not meet the specifications of a public procurement contract in terms of integration be considered?*

No, it is deemed non-compliant 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 clause?*

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

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

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

**Important:** The undertaking given must be respected on pain of penalties or even termination of the contract. Any exemption from the obligation to include an integration clause is considered as undermining the conditions of the tender.

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

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

In the event of serious or manifest fault on the part of the contractor, and following the issue of a formal warning to comply with the clauses of the contract, the public purchaser may envisage termination of the contract on the terms set forth in the general or special terms and conditions of the contract.

## 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.

*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 enterprises.

*2.8.3 Is there a possible risk of legal recourse by European enterprises unable to bid for a public procurement contract containing an integration clause?*

The existence of an 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 Partnership contracts under the terms of ordinance no. 2004-559 of 17 June 2004<sup>11</sup> 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.

*2.8.5 Can a public purchaser take into account public procurement contracts containing social clauses awarded as part of the enterprise'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<sup>12</sup> approach. It is advisable for the public purchaser to establish a mechanism for evaluating the impact of integration initiatives undertaken by its procurement department.

*2.8.6 At the national level, will public procurement contracts containing social clauses be included in the national action plan for sustainable public procurement?*

Yes, these initiatives are included in the national action plan for sustainable public procurement.

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<sup>11</sup> Ordinance no. 2004-559 of 17 June 2004, as amended by law no. 2004-1343 of 9 December 2004 and by law no. 2005-845 of 26 July 2005, on partnership contracts, in particular Article 8 thereof.

<sup>12</sup> 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.

## APPENDICES

Appendix 1: Law no. 98-657 of 29 July 1998 on combating exclusion Article 1, as amended by ordinance no. 2000-1249 of 21 December 2000

**Social Action and Family Code**

Article L. 115-2 In force

**Book I: General Provisions.**

**Title I: General Principles.**

**Chapter V: Fight against poverty and exclusion.**

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 authorities, public establishments 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.

Enterprises, 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: The role of the facilitator in the management of social 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 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 clauses (clause content, system of penalties, bid 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 integration clauses, in order to be able to analyse bids in this respect when selecting a contractor, and to assess the implementation of the integration clause by the contractor during the performance phase. The contracting authority has sole power to select bids 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 bidders with assistance on incorporating into their bids proposals relating to the performance of the integration clause. This assistance might involve advice on implementation methods (direct recruitment 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 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. Another valid justification for this solution may be that the area concerned does not as yet enjoy a wide range of facilitation services, particularly 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?").

## **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 an entire 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 parity between 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 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 integration clause.

- this requirement for objectivity and impartiality in the task of monitoring is all the more pressing when the facilitator has also previously performed the function of supplying labour.

## **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 contract 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.