



Social Public Procurement Guide



Ajuntament
de Barcelona



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1. INTRODUCTION

Barcelona City Council is promoting socially responsible procurement, by including the goals of social justice, environmental sustainability and an ethics code in municipal public procurement.

This guide specifies social inclusion, gender equality and social justice measures designed to encourage the award of work, supply and service contracts to companies and professionals that perform public contracts with a business model based on decent wages, stable employment with health and safety protection, environmental sustainability and ethical behaviour, to promote the production players' democratic participation and drive social innovation.

Environmental considerations in municipal public procurement are promoted under the "More Sustainable City Council" programme and fall outside the scope of this guide.

The social public procurement measures launched by Barcelona City Council promote eco-social Barcelona enterprises, under a socially responsible business model, which are to be taken into account by City Council procurement.

This social public procurement guide is based on current legislation, in particular Directive 23/2014 on Concessions and Directive 24/2014 on Public Procurement, pending implementation, and Royal Legislative Decree 3/2011, of 14 November, approving the consolidated text of the Public Sector Contracts Act. The most significant reflections and recommendations on this matter have also been taken into account, as in the *Proposal for Good Practices in the Procurement of People Care Services*, drawn up by the Ombudsman in 2013; the Code of Good Practice for Public Procurement of People-Care Services, as signed in December 2015 by the Generalitat [regional government] of Catalonia with various bodies representing the people-care services sector, and the Guide to Including Social Clauses in Contracts, drawn up by the Generalitat' Public Procurement Advisory Board. The most advanced practical actions have also been taken into account, for example, Instruction 1/2016, of Madrid City Council, on the

incorporation of social clauses, as well as pronouncements by bodies responsible for deciding on special resources with regard to procurement.

The City Council as a whole, and the companies and entities with a majority municipal stake that make up the municipal group must apply the contents of the guide, with the corresponding adjustments, depending on the respective legal framework, sphere of action and jurisdictional powers.

The various measures in the guide will be included in the specimen specific administrative clause for each type of contract.

Barcelona City Council wants business sectors, associations and citizens' organisations to discuss the action criteria included in this guide, so that the dialogue process culminates in the approval of a new municipal decree on social and environmental procurement to replace the Mayoral Decree of 20 November 2013, currently in force, and amend or repeal the corresponding regulations to bring them into line with these goals.

The guide consists of a general introduction, four sections describing works, services, services-for-people and supply contracts, and the list of social clauses.

The concept of social public procurement

In accordance with the European Commission's interpretative communication, published in the OJEU on 28 November 2001, Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, the expression "social clauses or considerations" includes very diverse definitions and spheres of action, ranging from fundamental rights and principles of equal treatment and non-discrimination to the application of legislation on social matters, the reintegration of disadvantaged people excluded from the labour market and positive actions against unemployment and social exclusion.

Under consideration 2 of the preamble to Directive 24/2014, on Public Procurement, public expenditure has to be more efficient, to enable in particular SMEs to participate in public procurement and public authorities to make better use of such participation in support of shared social goals.

Given the economic crisis and deterioration of the environment, public procurement has to strengthen every action that adds value to a contract and help to achieve smart growth, as stated in the European Commission's communication of 3 March 2010, "Europe 2020", by developing an economy based on knowledge and innovation; sustainable growth by promoting an economy that uses its resources more effectively, that is greener and more competitive; and inclusive growth that fosters an economy with a high level of unemployment that contributes to economic, social and territorial cohesion.

Social considerations need to be integrated into the entire contract cycle and feature in the process of selecting contractors that offer works, services and supplies with the aim of finding a balance between quality and price while, at the same time, fostering the values and practices of a socially responsible business model that should enhance the efficiency and quality of service delivery by adding social efficiency to the contract.

All the players involved in public procurement need to share the vision of a new public procurement strategy that includes the achievement of public policy goals as structural elements in the purpose of the contract. More specifically that means promoting employment opportunities, decent jobs, social inclusion, accessibility, design for everyone, ethical trade and broader compliance with social standards, as set out in the "Guide to Taking Account of Social Considerations in Public Procurement" commissioned by the European Commission in 2010.

Social exclusion

The international economic and financial crisis, the social crisis and the crisis of the economic model have expelled millions of people from the social system. Unemployment, poverty and the reduction

in social benefits has caused a social divide. All public policies must consider the overcoming of this social and economic crisis as a general goal. That includes public procurement policies. This guide therefore includes measures that encourage the employment of unemployed and socially excluded persons in the performance of public contracts, depending on the type and features of each contract. It also provides for reserved contracts for special work centres and social integration enterprises, as well as other non-profit organisations, in order to combat social dystocia and favour the inclusion of socially marginalised groups.

The link with the subject matter of the contract

Including social criteria should give public contracts a specific advantage. For example, the purpose of public contracts may include general interests that help to make them more efficient. Article 67(3) of Directive 24/2014 states that any award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, even where they make no reference to their material substance. Public procurement has to consider all the factors involved in the material offer of the works, services or supplies, such as environmental factors involved in production, marketing, recycling and destruction, as well as the social and working conditions of the production process and performance of the contract.

Unfair salary or insecure contractual conditions have a negative effect on the performance of workers implementing the contract, increasing absenteeism and accidents at work. Gender discrimination such as the wage gap, sexual harassment and the lack of women in positions of responsibility are forms of inequality that must be eradicated for a fairer society and at the same time have a negative effect on the competitiveness of businesses tendering for public contracts. Unequal treatment can also arise between businesses with a democratic business model and a profit-share scheme and others that pay their taxes in tax havens and offshore production

processes to earn profits by failing to comply with international regulations protecting workers' and social rights.

Award criteria and performance conditions

The specific measures of social public procurement may be included in several points of the contract cycle and under conditions or criteria with different legal meanings.

Some measures may be included as **special performance conditions** (in other words, as predetermined contractual obligations established by the contracting body before tenders are submitted) in the special administrative clauses and specifications that the contractor must comply with. These measures have to be proportional to the features of the contract and take account of the opinion and comments of the business sectors involved in dealing with their mandatory nature.

Other measures have to be considered as an invitation to tendering companies to adopt them in the performance of the contract but without any obligation, so those companies are encouraged to include them in their tenders. These measures must be included in the administrative clauses as **award criteria**. They are measures designed to produce a change of culture in business sectors and among professionals, and which will be a hallmark of Barcelona City Council: contractors with a social responsibility, with a social, participatory business model, concerned about where they work in and the people who live there. This requirement has no generic validity, merely in the context, application and performance of a specific contract that is tendered according to the benefits its performance will bring. It is not a matter of evaluating the general social responsibility of companies but specific applications of that responsibility which may be part of the tender and represent an added value for the performance of the contract.

Consideration 97 of the preamble to Directive 24/2014 maintains: "Furthermore, with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or

contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance. Criteria and conditions referring to such a production or provision process are, for example, that the manufacturing of the purchased products did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines. In accordance with the case-law of the Court of Justice of the European Union, this also includes award criteria or contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Criteria and conditions relating to trading and its conditions can, for instance, refer to the fact that the product concerned is of fair-trade origin, including the requirement to pay a minimum price and price premium to producers. Contract performance conditions pertaining to environmental considerations might include, for example, the delivery, package and disposal of products, and in respect of works and services contracts, waste minimisation or resource efficiency.”

The principles of competition and equal treatment

Social public procurement must not prejudice business competition or equal treatment in invitations to tender. None of the measures included in this guide implies unequal treatment of tendering companies or candidates in the public procurement procedures promoted by Barcelona City Council and the organisations with a majority municipal stake that make up the municipal group. However, they are intended as a positive action in favour of businesses that demonstrate a social conscience and good practices, so these values are included in the performance of public contracts and increase the social, economic and innovative efficiency of investment in municipal public procurement.

Drawing up procurement contracts

When drawing up municipal contracts, applicable social measures need to be studied in line with the subject matter of each one. That means this guide should not be seen as collection of general clauses applicable to all contracts but rather as a set of guidelines. At the same time, a contracting body may also incorporate a social consideration of special interest not included in this guide, depending on the subject matter of the contract.

Either way, social measures have to be applied in a coherent and systematic fashion. The market needs legal security and confidence in the Authority's conduct. That means contracts with similar provisions and features must have similar social requirements. Successive contracts, which are regularly put out to tender because they constitute fixed administrative or public needs, must keep the same social requirements, without unjustified changes.

Should the incorporation of social measures be regarded as enviable, the promoting unit will have to produce a report justifying their decision, which will remain in the contract file. The report may include the advice and validation of the Socially Responsible Public Procurement Committee, which will offer action criteria and guidelines on applying social measures according to the type of contract provision and the general or specific applicability of those social measures.

This guide does not apply to contracts arising from framework agreements awarded by other public authorities or to extensions to contracts that have been awarded before its coming into force, although the contracting parties may incorporate specific measures voluntarily and by mutual agreement, provided they do not involve any changes to the core obligations agreed to under the contract.

The Socially Responsible Public Procurement Committee is in charge of ensuring social measures are complied with, queries are answered and advice and action criteria are provided, under the provisions set out in the Mayoral Decree of 23 March, 2016, on the establishment of this committee. However, municipal departments

and other bodies represented on the committee may offer specific advice, for example, the Gender Mainstreaming Department, the Municipal Institute for Persons with Disabilities, the local development agency Barcelona Active, SA, and so on.

Implementing social public procurement is a process

This guide is not a public procurement code. It does not provide for general regulations or measures referred to in the public procurement procedures.

It supplements other specific guides on health, safety and risk prevention at work, fair trade, and so on.

The regulation of the social measures in this guide is part of a process that the various social and economic players involved in defining the proposals, together with Barcelona City Council, will have to oversee, with the aim of revising their practical application, checking their strong points as well as looking for any defects or weaknesses, and, if appropriate, studying their formulation or wording to adapt them to new circumstances. That means developing the tools required for overseeing the application of the measures and thus ensuring a process of continuous improvement.

2. CONSIDERATIONS DEPENDING ON THE TYPE OF CONTRACT

The prevailing approach in the legal thinking of advisory bodies and appeal courts is to accept social considerations with greater “ease” as a contract performance condition. It is generally understood that the inclusion of social award criteria is based more on the principles of competition and equal treatment.

The guide takes this state of opinion into account. Social award criteria are regarded as being supplementary to selective economic, technical and qualitative efficiency criteria, so in weighting terms, the former generally do not have a decisive score in the award of a public contract.

2.1 Works and works concession contracts

The economic crisis has had a very negative effect on the construction sector, in Spain and Catalonia, resulting in the closure of thousands of companies and unemployment for hundreds of thousands of people, as well as a downturn in the activity of many professionals and related industries.

A works contract is generally noted for the intensive use of manual labour and subcontracting to specialist companies. However, each type of works contract has its own specific features. For example, renovation and refurbishment of public housing does not require as many workers as new buildings do, while the type of company that performs work on a street’s layout is not the same as a company contracted for a road infrastructure.

The need to achieve budgetary stability and contain the deficit, together with the financial crisis, has led to a big fall in investment in public works. Invitations to tender for public works contracts attract a lot of companies and professionals, and some companies offer price reductions that occasionally threaten the viability of performing the contract efficiently, of complying with fair social conditions for the workers employed and paying subcontractors within the legal time limit.

To sum up, the specific features of the public work that is put out to tender have to be considered for the purposes of evaluating the most efficient and proportionate social measures, taking into account the special situation of this productive sector.

2.2 Service and service concession contracts

We distinguish service contracts from contracts whose beneficiaries are people in receipt of social, educational, cultural and other services, as defined in Article 74 of Directive 24/2014, on Public Procurement.

Service contracts can have very different features that must be taken into account when deciding on the social measures that are the most suitable and genuinely increase the social efficiency of the contract in question: the length of the contract, the number of people performing it, the type of supplier market, the frequency of subcontracting and so on. Once again it must be emphasised that the units promoting the contract have to evaluate which measures are the most efficient, reasonable and proportionate, depending on the features of the contract to be put out to tender.

In some services, the salaries of the people employed to carry out the contract represent a very high percentage of its total cost. Sector labour agreements can set basic salaries and other social conditions that vary from one sector to another.

In service contracts that require a large number of workers, the inclusion of social measures that take into account their working and social conditions can be very important, since a public contract also has to consider the fact that the efficiency of service provision will depend on the training and motivation of the people carrying out the contract, the wages they receive, the relationships between them and gender inequality which creates an intolerable social injustice that distorts the tenders that companies submit in public invitations to tender, by creating unfair competition between tenderers.

In some sectors, social enterprises have a considerable degree of specialisation that needs to be taken advantage of to ensure greater social efficiency.

2.3 Services-for-persons contracts

Directive 24/2014 regards procurement of “social services” (social, health, education or cultural services, as well as other specific services listed under Article 74 and Annex XIV) as a segment of public procurement of services that is of more limited cross-border interest and falls within the community material sphere when the estimated value of the contract is equal to or greater than 750,000 euros. In Article 76(2), the directive envisages that the award of these contracts should take quality and sustainability criteria especially into account.

Companies contracted by a public authority deliver a service to the public. The efficiency and quality of that service delivery will depend on factors such as fair working and social conditions for the professionals who deliver them.

The operational definition of service delivery and the beneficiaries of those services has to ensure it complies with gender equality, under the legal provisions set out in Act 17/2015, of 21 July, on Effective Equality between Men and Women.

The procurement of services for persons is carried out by qualified people with specific professional training. In the supply market for these services, there are non-profit organisations alongside multi-service commercial companies, which in some cases constitutes unfair competition.

Selecting the best offer cannot be based on the lowest price. Providing a good quality service to the service beneficiaries must take precedence.

Fair working and social conditions must also be ensured for the professionals delivering the service, because adequate salaries and stable employment in the company will mean a better service. Likewise, the system of selecting the most profitable tender has to ensure the quality, accessibility and stability of service delivery.

The Code of Good Practice in Public Procurement of Services for Persons, signed on 11 December 2015 by the Generalitat of Catalonia and representative organisations from this sector.

Legal changes are currently taking place in this area of procurement that could lead to readjustments in the guidelines contained in this guide on invitations to tender where the aim is to award contracts for services to persons.

Additional Provision 3 of Generalitat Decree 3/2016, of 31 May, on Urgent Measures for Public Procurement, establishes that social services regulated by Act 12/2007, of 11 October, can be managed under non-contractual formulas.

2.4 Supply contracts

Supply contracts, especially those that consist of acquiring goods through purchase, mean a legal business where the obligation is, in most cases, to supply some goods without the procuring body being able to evaluate the human and material resources involved in the performance of the contract. The situation is different for a mixed contract where, aside from delivering a good, there may be an obligation to install and maintain the goods or items, in which case social measures described in the guide that refer to service contracts could be implemented. It is also possible, in the case of supply contracts that involve leasing, to insert social measures relating to the workers performing the contract.

Social considerations in supply contracts could give a boost to ethical public procurement and fair trade.

3. SOCIAL MEASURES PROPOSAL

3.1 Internal contract definition

- **Subject matter of a socially efficient contract**

Applicable conditions

Consideration 2 of the preamble to Directive 24/2014 calls on contracting bodies to make better use of public procurement in pursuit of common social goals which, it maintains, should lead to more efficient public spending.

When social clauses are included in a public contract that involve specific contractual obligations, social efficiency is being included in the definition of the purpose of the contract. In that case, and so the meaning of the social measures is clearly identified, the title of the subject matter of the contract and the description in the specific administrative clauses (PCAP) and the specifications (PPT) have to specify explicitly that the contract includes social efficiency goals.

Verification of the measure's implementation

The definition of the subject matter of the contract must declare that the contract includes social measures.

The number of contracts that have included social efficiency in the definition of their subject matter, as well as the social clauses that may have been included, must be monitored. In those cases where there is a significantly high impact socially, on the people and interest groups involved, as well as financially, the contractor may be required to draw up a report analysing social impact and the monitoring carried out during the contract.

- **Maximum tender budget**

Applicable conditions

In the specific administrative clauses and the specifications, as well as supplementary documentation available to tendering companies, the promoters must identify the maximum and base budgets of the tender, with a breakdown of the estimated costs, both direct and indirect, of performing the contract. When salaries represent a major

part of the final contract, the breakdown shall include details of the estimated salaries of the workers who will perform the contract, based on a benchmark agreement which should preferably apply. Where possible, this should include details of their occupational group and an itemisation of salary items.

Verification of the measure's implementation

The breakdown of the estimated direct and indirect costs shall be included in the contract file, more specifically, in the requirements report and, in particular, in the specific administrative clauses, so tendering companies might have access to them.

• **Subcontracting information**

Applicable conditions

1. Information on subcontracting **in the tendering stage:**

Under Article 227(2)(a) of the Consolidated Public Sector Contract Act (TRLCSF), the specific administrative clauses and the specifications must state whether the tenderer company has decided which companies it is thinking of performing specific parts of the subject matter of the contract with, identifying the company or companies subcontracted, the part of the activity that will be subcontracted and the percentage of the contract price that each subcontractor will receive. In the case of a work contract, this is a supplementary requirement to managing the Subcontracting Log, as stipulated under Article 8 of Act 32/2006, of 18 October, Regulating Subcontracting in the Construction Sector.

If, during the tendering stage, the company actually does declare its intention to subcontract then, in evaluating that company's technical solvency, the accredited solvency of each subcontracted company for the part of the subject matter it will carry out shall also be taken into account.

If, during the performance stage, the contracted company intends to change the subcontracted companies, the contracting body shall change the subcontracted companies identified in the tender, as stipulated in Article 227 of the TRLCSF. This authorisation shall not be granted if the same solvency conditions offered in the tender stage are not fulfilled.

Verification of the measure's implementation

Confirmation by the contract award committee or the offer evaluating body. Specific description of the subcontracting in the contract document.

2. Subcontracting information **in the performance stage of the contract:**

The contracted company shall notify the contracting body of the subcontracting it intends to carry out, under Article 227 of the TRLCSP.

Verification of the measure's implementation

The specific administrative clauses (PCAP) and the specifications (PPT) shall specify that a penalty of up to 5% of the contract price may be imposed in the event of the contracting body becoming aware of partial contract performance by companies not formally notified by the contracted company, and in the absence of a justifiable cause or reason for this omission.

3.2 Award criteria

• Evaluating the price

Applicable conditions

This measure is supplemented by the calculation for the maximum tender budget, in the sense that the contracting body calculates the maximum tender budget by factoring in, among other factors, wage costs based on the benchmark labour agreement.

In contracts where the remuneration of the employees performing the contract is a decisive factor in the total cost then, in order to prevent tendering companies rashly lowering the estimated wage bill, the award criteria for evaluating the contract price may establish a weighting of up to 35% of the total score. In that way, the contract award is the right combination of quality and price.

The price weighting formula has to be linear and proportional, so that tenders receive a proportionately lower score in relation to the difference between them and the lowest tender accepted,

with a score of 0 points for a tender that represents no reduction on the maximum tender budget or the criteria for calculating the price set in the administrative clauses.

A decision may be taken not to award the maximum score if no company makes a minimum percentage reduction with regard to the maximum tender budget or the criterion fixing the price set in the schedule. In that case, the schedule of administrative clauses shall set the alternative score that will be given to the lowest offer.

Verification of the measure's implementation

Legal validation of the contract file when these considerations are expressly included.

• **Abnormally low offer**

Applicable conditions

The consideration of an abnormally low offer must be regulated in the specific administrative clauses and the specifications. The tender shall be excluded if, during the hearing of the tendering company that has submitted a tender classified as abnormally low, it is proved that the unit wage costs of the workers considered in the tender are below the rates set in the applicable labour agreement.

Verification of the measure's implementation

In order to verify whether or not the tender is adapted to wage costs, and if justified, a supplementary technical report may be required from the body representing the workers or a representative organisation from the sector.

• **Open-ended contracts for workers employed in performing the contract**

Applicable conditions

Should there be no transfer of staff, the specific administrative clauses (PCAP) and the specifications (PPT) may include as an award criterion consideration of stability in the contracting company workforce that has to perform the public contract put out to tender.

This social measure is not intended to impose a particular policy for hiring workers on companies or to socially legislate. The contracting body, considering the subject matter of the contract put out to tender and the economic sector it relates to, decides that taking into account the regular employment of the workers that have to perform the contract in the contracting company' workforce will enhance contract performance efficiency.

The benchmark for weighting the award criterion shall be the minimum number of persons needed to perform the contract, as specified in the technical specifications, along with their professional qualifications if applicable. The number of days worked with the tendering company on the same type of contract in the 36 months prior to the closing date for submitting tenders will be calculated.

Verification of the measure's implementation

In the corresponding envelope containing the part of the tender evaluated under arithmetic criteria, or in the overall tender submitted if the award procedure being followed does not require tender evaluation to be divided into two kinds of award criteria, the tendering company shall provide a list of workers and the number of days worked. This information shall be broken down by sex.

This criterion shall be weighted arithmetically and the maximum score shall be given to the tender that states the workers who will perform the contract being tendered have worked the most days on a stable employment contract in the period.

The score for this award criterion may not exceed 10% of the total tender evaluation score. The other tenders will receive a proportionately lower score.

In order to verify this statement, the contract award committee or the body evaluating tenders may require certification by the administrative bodies competent in this matter or a report from the representative bodies of workers at the company.

Model clause

*Award criteria based on arithmetic evaluation or a formula.-
Maximum weighting ... points.*

*Open-ended contracts for workers employed in performing
the contract*

*Taking into account the minimum number of workers and
the corresponding professional categories established in
clause ... of the technical specifications (PPT), and to ensure
the contract put out to tender is performed more efficiently,
stable employment at the company of the workers specified
in the PPT who will be performing the contract shall be given
a maximum weighting of ... points.*

*The company shall state the number of days each person
has been employed by them on the same type of open-
ended contract in the 36 months prior to the end of the
tender submission period.*

*Based on the information provided, the company with the
most days of stable employment of the minimum number of
workers required in the PPT shall receive the maximum score.
The minimum number of days for awarding the score is ...*

• Wages of workers employed in performing the contract**Applicable conditions**

The general working conditions of workers employed by others are usually decided by collective bargaining.

In public contracts, the contracting body may decide to include consideration of the wages of workers assigned to perform the contract and, among other selective criteria, evaluate the highest tender in terms of their salaries, as well as in relation to the basic wages established in the benchmark labour agreement and taking into account standard professional categories. The tender must be broken down by sex and professional category.

This social consideration is relevant when workers' wages in the economic sector corresponding to the contract being tendered are low, in benchmark terms, compared to those of other sectors.

It does not represent an intrusion on collective bargaining. Nor is it a question of forcing companies to pay set wages. The company that voluntarily pays more money to staff who have to perform the contract put out to tender receives a higher score because this will inevitably result in better performance.

This award criterion is weighted arithmetically and the maximum score is awarded to the company that proposes a higher basic wage or a higher level of the salary item being evaluated. The score corresponding to this measure should not be decisive in awarding the contract. So the points for this award criterion may not exceed 10% of the total tender evaluation score. The other tenders shall receive an inversely proportional score.

The wage offer of the tendering company that wins the tender is a contract performance condition and non-compliance could be penalised as a very serious fault or result in the rescission of the contract.

Verification of the measure's implementation

In order to verify the wage offer, the contract award committee or the body evaluating tenders may require validation by the competent administrative bodies or the representative bodies of workers at the company. The person in charge of the contract may, at any time during the performance of the contract, ask for documents used by the contractor showing staff remuneration according to the offer made.

The tendering company shall supply documentation (via the information collection and management mechanisms defined for that purpose) supporting the conditions claimed for the evaluation of the clause.

Model clause

Award criteria based on arithmetic evaluation or a formula.

*Remuneration of the workers performing the public contract.
Maximum weighting ... points.*

Taking the remuneration set in the labour agreement of ..., published in ..., as a reference, consideration shall be given to higher remuneration that the contracting company may propose to pay the persons who will perform the contract.

Consideration shall be given to wages for the following professional category or categories: ...

The maximum score shall be given to the highest total wage bill in the corresponding professional category. (If applicable, this score may be spread over several professional categories). Consideration shall be given to staff remuneration by calculating the basic wage and the following items: ...

The other offers with wage proposals higher than those set by the benchmark agreement shall receive an inversely proportional score.

3.3 Contract performance conditions

- **Subcontracting social economy enterprises**

Applicable conditions

Article 4 of State Act 5/2011, of 29 March, on the Social Economy, defines some social economy principles: primacy of the individual and social purpose over capital; profits obtained should go to the social purpose of the entity; promotion of solidarity internally and with society, thus fostering a commitment to local development, equal opportunities for men and women, social cohesion, integration of people at risk of social inclusion, creation of stable, quality employment, reconciliation of work with personal and family life,

and sustainability. Article 5 describes which kinds of entities this business model covers. Article 8 includes measures for boosting the social economy.

Article 14(2)(l) of the recent Act 6/2016, of 4 May, on the Social Economy in Galicia, commits Galician public administrations to fostering the social economy through “the introduction of clauses of a social character which, having taken into account the features and values of the social economy, favour its participation in public procurement and enable its contributions to society to be properly evaluated.”

So, subcontracting a specific part or parts of the contract subject matter (specified in the schedule) to social economy enterprises may be established as a contract performance condition in municipal public procurement, the PCAP and the PPT, in order to improve the social efficiency of public investment, taking into account the characteristics of the contract and the possibility of incorporating specialist companies that could contribute technical efficiency, innovation and social value.

The company or companies that the contractor proposes to subcontract may not be dependent on it in any way. They must also demonstrate the requisite economic and technical solvency and capacity for performing the specific parts of the contract subject matter.

Subcontracting social enterprises may not exceed 35% of the contract price.

Model clause

Subcontracting social economy enterprises

For the purposes of ensuring a more efficient contract and incorporating the technical, social and ethical values of the social economy, it is a contract performance condition to

subcontract service delivery consisting of ..., in line with the technical description and justification set out in the PPT, to social economy enterprises, as defined in Article 4 of Act 5/2011, of 29 March on the Social Economy.

Subcontracted companies shall demonstrate the requisite economic and technical solvency and capacity for performing specific parts of the contract subject matter.

It is estimated that this subcontracting represents ...% of the contract budget (it may not exceed 35%).

The subcontracting company shall inform the contracting body once the contract and the subcontracted company or companies have been formalised. Unjustified non-compliance of this performance condition, which is an essential requirement, shall lead to the termination of the contract.

The contracting company may request the advice and help of the municipal company Barcelona Active in selecting a social economy enterprise to collaborate in the performance of the contract.

Verification of the measure's implementation

To facilitate the implementation of this measure, a protocol will be drawn up with Barcelona Active.

The contract performance condition has to be reflected in the contract. On receipt of the contract, the contracting company and the subcontracted company shall be asked for an evaluation report on the contractual activity carried out and any benefits or defects noted in the performance of the contract.

The tendering company shall supply documentation (via the information collection and management mechanisms defined for that purpose) supporting the conditions claimed for the evaluation of the clause.

• Paying subcontracted companies

General applicable conditions

If a subcontracted company notifies the contracting body that the contractor, without justifiable cause arising out of the contract, is not complying with its obligation to pay the price within the legal deadline set under Act 3/2004, of 29 December, which establishes measures to combat late payment in commercial operations, the PCAP clauses and the PPT specifications may make it a contract performance condition that the contracting body shall pay the subcontractor directly, deducting the price from the main contractor.

Prior to that, the contracting body shall offer the contractor a hearing to explain the reason for the late payment, as envisaged in Article 228 bis of the TRLCSP. If the contractor does not offer any reason to justify the non-payment, the social measure shall be activated.

This measure shall be supplemented by applying the provision of Article 228 bis) of the TRLCSP on periodic checks of payments to subcontracted companies and suppliers, taking into account the essential performance condition and sanctioning non-compliance as a very serious fault.

Model clause

Paying subcontracted companies

When a subcontracting company alleges late payment, on the part of the main contractor, of the price due to it for the service provided, under the price payment obligations set out in Act 3/2004, of 29 December, which establishes measures for combating late payment in commercial operations, it is considered a contractual obligation between the parties that the contracting body shall pay the subcontractor directly.

Faced with the demand of a subcontractor, the contracting body shall offer the contractor a hearing so that it can present any arguments it considers relevant within a maximum of 10

days. If it fails to plead a justifiable cause, the contracting body shall pay the subcontractor directly, deducting the price from the main contractor.

Verification of the measure's implementation

The contracting body shall notify subcontractors of the regulation contained in the PCAP clauses and the PPT specifications and ask the contractor, prior to receipt of the contract, to state that it has paid the subcontractors within the required deadline. The same body may also request periodic certification, issued by the contractor, demonstrating that the invoices issued by suppliers and subcontractors in the performance of the work have been paid.

• **Transfer of the workforce**

Applicable conditions

In the case of successive contracts where there is no legal or contractual obligation to transfer the workforce performing the contract over to the new one, the PCAP clauses and the PPT specifications may make it a contract performance condition that the tendering company shall keep the workforce employed by the outgoing company on the contract.

The inclusion of this obligation in a public contract's invitation to tender shall apply where it is considered essential to make sure that people already performing the activity under the previous contract are kept on to ensure maximum technical efficiency in the service provision and as a social goal to guarantee stable employment, in the event that the workers concerned have provided the service without a break over a long period of time.

The contract promoting unit shall consider the economic sector that the measure affects and the technical characteristics of the contract.

Transfer of the workforce from one contract to another has special significance in contracts where manual work is particularly important in both qualitative and quantitative terms. It is advisable for the City Council to maintain a consistent approach, if there is no variation in the conditions, by deciding to include this transfer condition in

certain types of contract, so that successive invitations to tender keep to it if it is not included in the applicable labour agreement.

Where this performance condition is established, the workforce must be listed in an annex with details of their wages and working conditions, so tendering companies can evaluate the corresponding costs. The tender must be broken down by sex and professional category.

Transfer is voluntary for the workers concerned and the outgoing company is responsible for meeting all work, social and social-security obligations until the transfer takes place.

Verification of the measure's implementation

The contract must include this obligation in a specific clause, with a list of all the workers who have said they are willing to accept the transfer in an annex. It is an essential obligation and, in the event of non-compliance during the performance of the contract, it could result in a penalty or the termination of the contract.

Model clause

1. Where the legal or contractual transfer of workers does not apply, it shall be considered a performance condition of this contract that contracting company takes on the workers employed in the performance of the contract by the company currently providing the service (“...”), under Article 118 of the TRLCSP.

This clause does not discriminate against companies participating in the tender process, it expresses Barcelona City Council's intention to promote stable employment for workers performing the contract and boost public procurement that is socially efficient and technically efficient in the quality of the service provision.

2. Transferring workers over means the company awarded the new contract shall maintain the economic, working and social conditions those workers have when the old contract finishes.

3. The transfer shall only apply to people who meet the requirement of being employed for at least one year before the end date of the contract.

4. Transfer is voluntary for the people affected, whose express consent shall be required.

5. For the purposes of Article 120 of the TRLCSP, 'annex number ... is included with the details of the of the workers affected by the transfer, based on the information provided by the current contractor.

6. This condition is an essential obligation, so non-compliance shall result in the rescission of the contract, in accordance with the provisions of Article 223(f) of the TRLCSP. This obligation does not contradict the contracting company's management rights set out in the Workers' Statute and applicable legislation.

7. The forwarding of information, documents and other operational issues relating to the transfer of staff shall be governed by the applicable employment laws. Barcelona City Council shall not bear any obligation towards such staff or any employment obligations relating to social security that correspond to the hiring of workers by companies.

• **Maintaining working conditions while the contract is in force**

Applicable conditions

The contracting body may set a contract performance condition whereby the tendering company shall keep the working and social conditions of workers engaged in the performance of the contract set during the tender-submission period, and based on the applicable labour agreement, while the contract remains in force.

Non-compliance may subject to penalisation as a very serious breach or ground for terminating the contract.

Verification of the measure's implementation

Monitoring effective compliance with this measure may take the form of a statement from the contracting company or a report from the body representing the workers.

- **Hiring unemployed people with particular job-placement and social-exclusion problems**

Applicable conditions

The contracting body may include a social measure to encourage the contractor to include people who are unemployed with special job-placement problems or in a social-exclusion situation.

The schedule of clauses may identify a particular target group for implementing the measure or raise it openly and without differentiating.

For the purposes of this guide, the target groups are regarded as those people who are socially excluded or face special job placement problems, preferably those in the following circumstances:

- People in receipt of the minimum income (RMI).
- People with a recognised disability equal to or more than 33%.
- Women who are victims of gender violence (physical or psychological) and people who victims of domestic violence.
- Young people over the age of 16 and under 30 from youth protection institutions.
- People in prison who may be able to do work or are on probation and ex-prisoners.
- People with drug-addiction and alcohol-related problems undergoing rehabilitation and in the process of being reintegrated into society.
- Refugees and asylum seekers.
- People taking part in municipal social-integration and job-placement programmes for groups at risk of social exclusion or with particular difficulties.
- People who are ineligible for income support but who are at risk of social exclusion, according to reports from the competent public services. (For example: a mother or father of a single-parent family, members of evicted families and homeless people, the long-term unemployed (over 12 months), people over 45, people who are unemployed and have used up their unemployment benefit and have no right to any other benefit or allowance, young people under 25 with particular job-placement difficulties, non-EU immigrants with their papers, people in a situation of unemployment where

all the members of the family unit are without a job, people who might have been involved in prostitution, transsexuals and others at risk of social exclusion).

The specific technical characteristics of the contract put out to tender shall be taken into account in deciding whether to include this social measure or not. It should not be forgotten that in certain contracts, the technical training requirements for the staff involved could make it difficult to include this measure.

In the PCAP clauses and PPT specifications the contracting body will establish, proportionately, the number of unemployed and socially excluded people that the contracting company shall include in the performance of the contract, taking into account the costs, the operational consequences of the measure and the total number of people required for performing the contract. Occasionally, where the intention is to benefit certain sectors or segments of people, the specific social groups the people who have to be hired for the contract's performance must belong to may be specified.

Where there is a transfer of staff, the measure may refer to replacements and new people taken on during the term of the contract's performance.

Barcelona Active SA and the Municipal Institute for Persons with Disabilities in particular may be able to help the contracting company with hiring people through their own intervention programmes.

Verification of the measure's implementation

To help the roll-out of this measure, the contracting body shall notify Barcelona Active about the performance condition to be included in future procurement. Barcelona Active must be able to offer contractors a specific candidate pre-selection service to facilitate the implementation of the measure and provide the necessary advice.

The contractor shall provide the person in charge of the contract with the list of people employed and the corresponding certification to demonstrate their social situation.

The tendering company shall supply documents (using the information-collecting and management mechanisms established for that purpose) supporting the conditions claimed for the evaluation of the clause.

- **Gender equality**

- Applicable conditions

- Unjustified forms of gender discrimination occur in employment relationships. This infringement of the constitutional principle of equal treatment takes various forms: the salaries for performing the same activity are higher for men; the number of women carrying out executive or managerial roles is well below that of men, for no justified reason, and some duties are carried out predominantly by men.

Spanish Framework Act 3/2007, on Effective Equality between Men and Women, and Catalan Act 17/2015, on Effective Equality between Men and Women, set out measures and actions in many areas of social activity to ensure gender equality.

Article 10 of Act 17/2015 calls on Catalan public authorities to include a gender perspective in public procurement tenders and performance conditions for the work that is the subject matter of the contract so that the company awarded the contract shall adopt measures to promote gender equality. Article 36(1)(a) makes it compulsory for companies with more than 250 workers to have equality plans, along with those that have included gender equality in their collective agreement and those required to do so by the labour authority.

Barcelona City Council wants to bolster compliance with these legal measures in the performance of municipal public contracts. This guide treats the verification of compliance with these laws as a contractual performance condition.

The City Council is launching a verification process for equality measures in public procurement, in collaboration with business, to help companies to become aware of and implement these legal requirements in performing municipal public contracts. It is not a question of launching a process to penalise contractors

as a “solution” for compliance with legal obligations. It is about facilitating and boosting the effective implementation of these obligations.

We need to adopt this measure when the municipal public contract performance characteristics are right. The contract must be of a minimum length, and its purpose must require a certain use of human resources for the measure’s implementation to have any meaning, while bearing in mind that the intention is not to check general company policy but the specific application in municipal contracts of a social measure that adds social efficiency to the contract.

So it includes the following measures:

- Equality plan: The contractor company must present the gender equality plan, within the first 10 days following the signing of the contract, that will apply to the individuals performing the contract and, where it is not legally required to draw up this plan, submit the measures that will apply to the individual workers involved in the performance of the contract, for the purposes of achieving equal treatment and opportunities for men and women in the work environment, eliminating stereotypes and fostering real and effective gender equality.

This contractual performance condition shall appear in the PCAP clauses and the PPT specifications, under Article 146(2) of the TRLCSP.

Where the company provides reasons for being unable to submit equality measures within the deadline granted, it will receive municipal instructions, help and advice as well as a new deadline for it to provide information on the requisite practices. Failure to submit the equality plan or measures, after receiving advice, will result in the issue of a 1% financial penalty on the contract price, which will go up by 1% a month to a maximum of 10% of the price.

- Gender parity in professional profiles and categories:

This social consideration may be included in a public municipal contract as a contract performance condition, as it is considered to be an essential requirement for this performance and places an obligation on the contracting company to ensure parity in the various professional profiles and categories of the individuals who will perform the contract and in carrying out positions of managerial responsibility during the performance of the contract.

- Non-sexist language and images:

The contracting company shall ensure that sexist language and images are not used in the performance of the contract.

- Measures against sexual harassment and for reasons of sex:

The contracting company shall submit a plan outlining measures to prevent, avoid and eliminate sexual harassment and harassment based on sex towards staff assigned to the performance of the contract. These measures may consist, at the very least, of information campaigns on what constitutes sexual harassment and harassment based on sex, as well as training and the designation of reference persons to ensure a workplace free of sexist violence and violence against sexist orientation or gender identity.

More specifically, in service contracts where a service is delivered to physical persons, a performance condition may be established whereby the contractor implements specific protection measures for its professionals against the sexual harassment and harassment for reasons of sex they might suffer from service users, as well as adopting training measures for personnel so they are better equipped to spot situations of sexist violence and violence against sexual orientation or gender identity that end users might suffer.

Verification of the measure's implementation

The company must present the person in charge of the contract with an equality plan or measures, within the 10 days following the signing of the contract, for the individual workers performing the contract; it must include measures to prevent, avoid and eliminate sexual harassment and harassment based on sex, sexual orientation or gender, with regard to the staff assigned to carrying out the contract. Where the contractor demonstrates the impossibility of submitting the

plan or measures, the municipal authority must provide sufficient support for the company to be able to design and apply such specific measures under the municipal public contract.

Failure to comply with this contractual performance condition shall result in the issue of the corresponding financial penalties under the provisions set out in the specifications.

Prior to receipt of the contract, the contractor must present the person in charge of the contract with a final report on the application of the measures during the performance of the contract.

- Equal opportunities and non-discrimination against LGBTI people

Applicable conditions

Catalan Act 11/2014, of 10 October, is intended to guarantee the rights of lesbian, gay, bisexual, trans and/or intersex (LGBTI) individuals and to eliminate homophobia, biphobia and transphobia. Article 21(b)(5) establishes the requirement for companies to adopt codes of conduct and action protocols designed to ensure equal opportunities for and non-discrimination against LGBTI people.

Conditions may arise during the performance of a public where the proper application of Act 11/2014 must be ensured. For example, contracts with a significant proportion of manual labour or where the service is aimed at the general public may include a performance condition that the company must adopt codes of conduct and action protocols to ensure equal opportunities for and non-discrimination against LGBTI people in the performance of the contract.

Model clause

Equal opportunities and non-discrimination against LGBTI people

The contract shall submit the action protocol or plan, within a maximum of 15 days following the signing of the contract, for ensuring equal opportunities and non-discrimination against LGBTI people, whether they are members of the staff

performing the contract or service users. The measures may consist of training on the forms of discrimination LGBTI people may suffer from and on awareness of diversity in relation to sexual orientation, gender identity and gender expression.

Where the company demonstrates the impossibility of submitting the action protocol or plan within the established deadline, the person in charge of the contract may grant it an extra 10 days.

Barcelona 'City Council will organise information sessions with council contractors and the companies in the Municipal Group to reflect generally on putting these measures in public contracts.

Verification of the measure's implementation

The person in charge of the contract may ask the contracting company for data supporting the implementation of the measures.

• **Joint responsibility for reconciling work with personal and family time**

Applicable conditions

A contract performance condition may be established to ensure the contracting company adopts measures over joint responsibility for reconciling the work time of people employed in the performance of the contract with their family and personal time. Economic and social measures may be specified that help them to look after children or dependent persons, as well as work-related measures, such as a shorter working day, maternity leave or paternity leave, and more flexibility, adapting or reassigning services and working hours depending on the work-life balance and similar needs.

This social consideration should benefit contract performance and the people involved in that.

Verification of the measure's implementation

The person in charge of the contract shall require proof of the measures, where necessary.

- **Workers with disabilities**

- [Applicable conditions](#)

- Article 60(1)(d) of the TRLCSP establishes that a company with 50 or more employees in its workforce may not enter into contracts with public authorities and their associated public sector unless it demonstrates compliance with the requirement that at least 2% of the staff hired are people with a disability, as required under Article 42 of Royal Legislative Decree 1/2013, of 29 November, approving the consolidated text of the General Act on the Rights of Persons with a Disability and their Social Inclusion. This ban on contracting may not apply, according to Transitional Provision 10 of the TRLCSP, until the rule has a regulatory basis to it. Even so, the Additional Provision 4 of the TRLCSP stipulates that contracting bodies may use documentation to verify that the company is complying with this legal provision.

Barcelona wants to put this legal obligation into practice by including a contract performance condition which will force a contractor that meets the conditions set out in Act 1/2013 to demonstrate its compliance with this legal requirement within the first 10 days following the signing of the contract, by providing a certificate that specifies the total number of workers in the workforce as well as the specific number of persons with a disability, or, if it has opted for compliance with the legal alternatives, a copy of the declaration of exception and a statement by the company with the specific measures adopted to this end.

Verification of the measure's implementation

This certification is understood to be a contract performance condition and non-compliance shall result in the imposition of a fine of 2% of the contract price, which will rise monthly to a maximum of 10% if there is no evidence of compliance.

- **Universal accessibility**

- [Applicable conditions](#)

- The technical specifications for contracts aimed at the general public and City Council staff shall include a compulsory clause which establishes that the contracting company must take into account the United Nations Convention on the Right of People with

Disabilities, as well as universal accessibility and universal design, or design for everyone, criteria as defined in Royal Legislative Decree 1/2013, of 29 November, which approved the consolidated text of the General Act on the Rights of Persons with Functional Diversity and their Social Inclusion.

Improvements in universal accessibility proposed by tendering companies that go beyond the legal obligations established in Catalan Act 13/2014, of 30 October, on Accessibility, may also be considered as an award criterion.

Verification of the measure's implementation

The tendering company that has submitted the offer considered the most advantageous shall draft a declaration of compliance before the decision on the award of the contract is made. The person in charge of the contract may ask for specific certification at any time during its performance. Non-compliance with measures favouring the rights of people with functional diversity or with universal accessibility and universal design, or design for everyone, criteria could result in a financial penalty or termination of the contract.

• Compliance with work and social regulations in the production process and commercial distribution

Applicable conditions

The technical specifications shall include a compulsory clause which establishes that the goods or services which are the subject matter of the contract have been made respecting the social and working regulations in force in the Spanish State and the European Union, and approved by the International Labour Organisation, especially the 1990 Convention on Children's Rights and the International Convention on the Protection of the Rights of Migrant Workers and their Families.

Verification of the measure's implementation

A standard clause shall be drawn up. The tendering company shall submit a declaration of compliance and the contracting body or the person in charge of the contract may ask for a supporting documents or certifications at any time.

4. RESERVED CONTRACTS

Applicable conditions

Within the framework of the annual municipal reservation agreements and depending on the subject matter of the contract, consideration shall be given to tendering by means of contracts reserved for special work centres and social integration enterprises regulated by Act 44/2007, of 13 December, in accordance with Additional Provision 5 of the TRLCSP. In the case of direct contracting with no competition, small contracts, the reservation can be expanded to other non-profit organisations and businesses with the sole purpose of reintegrating socially excluded people in society.

Verification of the measure's implementation

The contract shall specify it is a reserved contract.

