

# INSTRUCTION FOR STRATEGIC AND SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT

## GUIDE TO STRATEGIC AND SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT

Encompassing social clauses and compliance  
verification systems and impact gauge



Ayuntamiento de  
**Pamplona**

**Iruñeko**  
Udala

# CONTENTS

## INTRODUCTION

### INSTRUCTION FOR STRATEGIC AND SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT

### GUIDE TO STRATEGIC AND SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT. ENCOMPASSING SOCIAL CLAUSES AND COMPLIANCE VERIFICATION SYSTEMS AND IMPACT GAUGE

#### 1. Cross-cutting and preceptive incorporation of social criteria

#### 2. Analysing and preparing the procurements

2.1. Defining the contract purpose with social criteria

2.2. Labour aspects

2.3. Planning

2.4. Preliminary consultations

2.5. Reducing obstacles and barriers of entry

#### 3. Procurement restrictions

#### 4. Social technical solvency

#### 5. Reserved procurements

5.1. Procurements reserved for Special Employment Centres (SECs) and insertion companies

5.2. Contracts reserved for social economy entities and companies

#### 6. Adjudication criteria

6.1. Regulation and concept

6.2. Application methodology

6.3. Clause proposal with verifiers and indicators

CA.1. Employability of people with difficulties in accessing employment

CA.2. Outsourcing of SECs, Insertion Entities (IEs) and social economy companies

CA.3. Gender equality

CA.4. Quality in the workplace

CA.5. Fair trade

CA.6. Quality and local food produce

CA.7. Social quality criteria

CA.8. Creating employment

CA.9. Complementary adjudication criteria

#### 7. Special execution conditions

7.1. Regulation and concept

7.2. Clause proposal with verifiers and indicators

CE.1. Employability of people with difficulties in accessing employment

CE.2. Outsourcing of SECs, Insertion Entities (IEs) and social economy companies

CE.3. Gender equality

CE.4. Ethics clause

CE.5. Tax responsibility clause

#### 8. COMPLIANCE, VERIFICATION AND IMPACT GAUGE

In the session held on 16th April 2019, the Pamplona/Iruña City Council's Local Government Board approved an Instruction for Strategic and Socially Responsible Public Procurement.

Furthermore, in this session the Guide to Strategic and Socially Responsible Public Procurement was approved, including social clauses, as well as compliance verification tools and impact measuring systems.

With these instruments, the Pamplona City Council is equipped with a mandatory compliance rule, and takes on the commitment to incorporate social and environmental criteria into all municipal public procurement. The aim is to deploy a socially responsible public procurement strategy with a broader vision of citizen service and an impact in terms of social integration, redistribution, equality and sustainability.

A public procurement model is needed that not only upholds the principles of effectiveness and efficiency, but that also integrates and strengthens social objectives, so that each service, work or supply, promotes gender equality, the employment of vulnerable people, the rights of people with disabilities, decent and quality employment, the circular economy, the social responsibility of companies, as well as social and territorial cohesion. Moreover, it should facilitate the contracting of Special Employment Centres, Insertion Companies, social economy entities, SMEs and micro-SMEs.

Finally, it proposes the aim of effectively verifying and assessing the social impact of public procurement. To do this, each social clause is accompanied by a verifier used to prove successful fulfilment, and by an impact gauge that enables its effectiveness and results to be calculated.



# INSTRUCTION FOR STRATEGIC AND SOCIALY RESPONSIBLE PUBLIC PROCUREMENT

## **1. GENERAL PRINCIPLE AND FIELD OF APPLICATION**

1.1. Ownership is accepted of the duty to incorporate social and environmental criteria in all municipal public procurement in a transverse and preceptive way. Article 2.3: B RPPA.

### **1.2. Subjective sphere**

This Instruction should be applied to all the bodies that promote the public procurement of the Pamplona City Council and of its institutional public sector that comprises City Planning, Nursery Schools; Comiruña S.A. and Mercairuña S.A, Pamplona Centro Histórico/Iruña Biziberritzen S.A, ANIMSA, the Operador Energético Municipal S. L. and Fundación Teatro Gayarre, as well as those that may be constituted in the future.

### **1.3. Objective sphere**

- Social clauses will be included in all contracts, regardless of their type, procedure, purpose or amount.
- For minor contracts, when the provision exceeds 3,000 euros, before approving the procurement, the managing unit will request at least three offers unless the urgent nature of the contract can be proven, or if for technical or artistic reasons, or for reasons linked to the protection of exclusive rights, the contract can only be executed by the contractor. The administrative file, in addition to the credit reserve, should reflect the request of offers and the offers received, and the contract necessity shall be justified, as well as the reasons for which the offer selected has been considered timely for the adjudication of the procurement.
- In adherence with external centralised recruitment systems, purchasing networks, management and collective recruitment orders, measures will be taken to include social and environmental clauses.
- This Instruction is applied to legal affairs in the objective sphere of the Regional Public Procurement Act 2/2018, 13th November. However, despite certain businesses and contracts being excluded, they can be included in the criteria and responsibility principles contained within this Instruction. For example: recruiting financial services or credit lines, concessions on public domain assets, the use of patrimonial assets, purchase-sales contracts governed by private law, or requests to instrumental bodies. In all of these, it is advisable to incorporate assessment criteria or social obligations.
- Managing social, cultural, educational and healthcare services can be undertaken with non-profit making entities, in accordance with the Regional Act 13/2017, governing social concerts; and in accordance with the public subsidy legislation, cultural, festive, artistic or sporting activities, or the diffusion of folklore (7.1. RPPA). 15th century).

## 2. PREPARING AND PLANNING PROCUREMENTS

A responsible analysis and preparation of the public procurements shall be performed, which should be duly translated into the specific conditions of the contracts or into the technical specification sheets, via the following measures:

- 2.1. The subject of the contract can be described with social and/or environmental criteria (Article 44.1.c RPPA).
- 2.2. The following labour aspects should be analysed and established:
  - Estimate the staff base needed to execute the contract and their qualifications, as well as labour costs in accordance with the reference labour agreement (Articles 43 and 59 RPPA).
  - Indicate the detailed information about the salary and working conditions of the personnel to substitute (Article 67 RPPA).
  - Expressly anticipate direct payment to outsourcing companies, and the retention of amounts due to the contractor in order to guarantee the payment of employee salaries (Articles 67.8, 152 and 107.6 RPPA).
- 2.3. Public procurement for the year should be planned (Article 2.5 RPPA).
- 2.4. Preliminary market consultations can be performed (Article 48 RPPA).
- 2.5. Administrative burdens and entry barriers should be reduced with the aim of favouring the recruitment of SMEs, micro-SMEs and local business, through the following measures:
  - 2.5.1. In the bidding phase, an affidavit or single European procurement document is required to accredit that it has the capacity and solvency needed to recruit (Articles 55 and 56 RPPA).
  - 2.5.2. Participation requirements linked to technical, financial and professional solvency shall be reduced or eliminated (Articles 16 and 17 RPPA).

The collective participation of bidding companies shall be facilitated and solvency accreditation will be permitted with external means from other companies, regardless of the legal nature of the links they have with them. (Articles 13 and 18 RPPA).

The minimum annual business turnover required as financial solvency shall not exceed the estimated value of the contract, unless the administrative file proves that it should be greater given the risks linked to the nature of the works, the services or the supplies to be contracted (Article 16.2 c) RPPA).
  - 2.5.3. Measures shall be taken to reduce or eliminate the provisional security for participating in the bid. The definitive security shall be established under the specific conditions of each contract by the managing unit, and under no circumstances shall this exceed 4% of the award amount. In general reserved procurements, provisional or definitive securities shall not be required, unless the administrative file can prove that a security should be constituted for the risks linked to the nature of the works, the services or the supplies to be contracted (Articles 70 and 36.8 RPPA).
  - 2.5.4. Apart from justified exceptions, the contract should be split into batches, with limited participation or adjudication in the batches, and some of the batches set aside for Insertion Companies or Special Employment Centres (Article 41 RPPA).

### **3. PROCUREMENT RESTRICTIONS**

The following procurement restrictions shall be incorporated (22. 1.f. RPPA):

- 3.1. Procurement restrictions for companies with more than 50 members of staff that do not comply with the duty to include at least 2% of employees with a disability of 33% or more.
- 3.2. Procurement restrictions for companies with more than 250 members of staff that do not comply with the duty to design and apply an Equality Plan.

### **4. SOCIAL TECHNICAL SOLVENCY**

Specific social solvency criteria can be incorporated.

- 4.1. In the healthcare, social, cultural and educational spheres, a special subjective qualification can be required, which proves the experience, quality and availability of resources (Article 37 RPPA).
- 4.2. In provisions linked to social services, the physical possession of resources and experience may be required to meet the specific needs of the different categories of users (Article 37 RPPA).
- 4.3. In supply contracts, a guarantee of the traceability of management systems in the supply chain may be required, with the aim of guaranteeing compliance with the fundamental Agreements of the International Labour Organisation (Article 17.2 m) RPPA).

### **5. RESERVED PROCUREMENTS**

- 5.1. At least 6% of the total procurements adjudicated the previous year will be reserved, to be adjudicated among social initiative Special Employments Centres and Insertion Companies (Article 36 RPPA).
- 5.2. At least 1% of the total procurements adjudicated the previous year will be reserved, to be adjudicated among social and solidarity economy entities and companies (Article 38 RPPA).

### **6. ADJUDICATION CRITERIA**

- 6.1. Compulsory adjudication criteria of a social nature will be incorporated, with a weight of less than 10% of the total scale (Article 64.6 RPPA). Whenever possible, adjudication criteria of an environmental nature will be incorporated, with a weight of less than 5% of the total scale.
- 6.2. The selection of the criteria and its weight should be adapted to the purpose of the contract and its characteristics: estimated value, execution time frame, staff needed and their qualifications, applicable agreement, market offer, and the level of social responsibility of the sector to be contracted.
- 6.3. The following will correspond to the contracting body:
  - Selecting the themed criteria and the appropriate clauses.
  - Assigning the grading and the suitable weight.
  - Adapting the scales, figures or percentages of each adjudication criteria in accordance with the characteristics of the contract.
- 6.4. Contracting bodies may use the clause proposed in the Guide to strategic and responsible public procurement, which the Pamplona City Council should diffuse internally and update accordingly. Alternatively, it may opt for another clause considered appropriate.
- 6.5. Complementary aspects regarding adjudication criteria:
  - In the search for the best quality-price ratio, the adjudication scale should keep a balanced weight

between economic criteria, technical quality and social criteria.

- The bidding price must take labour costs into account, in accordance with the applicable agreement, and the specifications shall set out offers that do not comply with the collective agreement in force as disproportionately or recklessly low, and will exclude them from the bid (Article 98 RPPA).
- The specific conditions of each contract shall determine whether the technical quality of the proposal is essential for correct contractual service, in which case a minimum score should be established for said technical criteria, below which offers will be excluded (Article 64.4 RPPA).

## **7. SPECIAL EXECUTION CONDITIONS**

Duties and requirements or social-type special execution conditions shall be incorporated preceptively (66, 105 and 106 RPPA).

- 7.1. The specifications should preceptively establish the duty to comply with legal requirements in terms of social issues, gender, accessibility, disability, work safety, taxation and labour rights.
- 7.2. Taking into account the contract characteristics, contracting bodies should establish requirements or special execution conditions linked to socio-labour insertion, gender equality, and quality in employment or others. To this effect, the clause proposed in the Guide to responsible public procurement can be used and adapted, which the Pamplona City Council should diffuse internally and update accordingly, or alternatively opt for another clause considered more appropriate.



## **8. COMPLIANCE VERIFICATION**

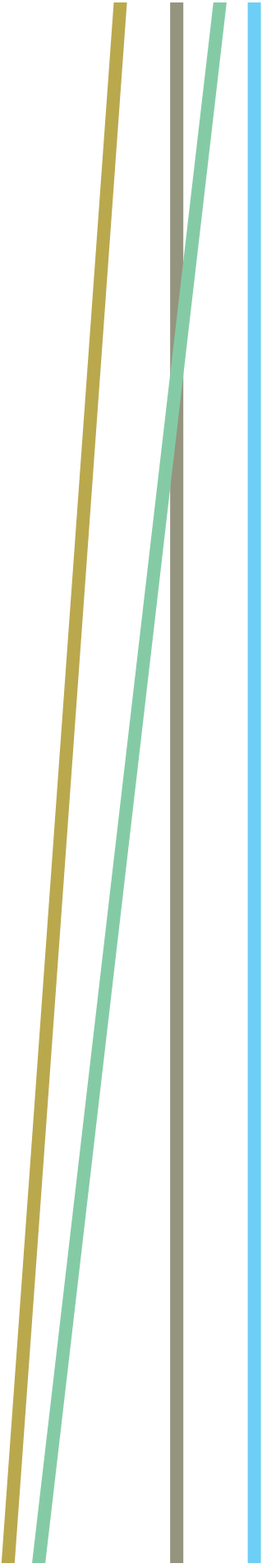
Effective control and verification of compliance with the social and/or environmental criteria shall be performed:

- 8.1. Each social clause must be accompanied in the specific conditions of the contract by an associated verifier, which shall indicate the time and documentation that must be presented by the contractor for each criteria to prove due compliance. It shall also expressly indicate the contracting company's duty to effectively prove compliance with requirements and social engagements. (231 RPPA).
- 8.2. Social criteria should be qualified as essential contractual requirements (Articles 59.2 c) and 106.3 RPPA).
- 8.3. Applicable penalties shall be expressly established in the case of non-compliance with the social clauses, as well as the possibility of contract cancellation, and the possibility of incurring a contracting ban in the event of non-compliance (Articles 22, 146 and 160 RPPA).
- 8.4. The person responsible for the contract or the managing unit shall be expressly allotted the duty to verify compliance with social criteria, and where applicable, to send notification of possible non-compliances and initiate the penalty procedure (Articles 105, 138 and 141 RPPA).
- 8.5. The contract will not be processed when received or be considered fulfilled by the contractor until the social clauses have been complied with satisfactorily for the contacting body, and until successful compliance has been verified (Article 158 RPPA).

## **9. TRANSPARENCY**

The following transparency measures must be applied:

- 9.1. The technical assessment of the offers received in bids of amounts exceeding a minor contract, should be performed by at least two municipal technicians specialised in the subject of the contract.
- 9.2. Procurements in open and simplified procedures will be processed in accordance with the specifications of the general administrative clauses approved by the Corporation Plenary, unless the convenience of approving a regulatory specification that is better adapted to the subject to be contracted can be proved technically. Therefore, for each contract and for minimum contractual documents, Specific Contract Conditions and Technical Specifications Sheet should be filled out.
- 9.3. All procurement must use the file manager as well as the statutory proceeding for each contracting modality appearing in the file manager.
- 9.4. For minor contracts of amounts exceeding 3,000 euros, the "MINOR\_CONTRACT" statutory proceeding must be used.
- 9.5. When acknowledging the duty to pay an expense corresponding to a minor contract in SEPAL, it must be indicated explicitly, regardless of the amount.



# GUIDE TO STRATEGIC AND SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT

Encompassing social clauses and compliance  
verification systems and impact gauges

Once an Instruction for strategic and responsible public procurement has been approved, this guide will address the following contents:

1. Substantiating and analysing the legality of all the criteria and issues established in the agreement, indicating the specific regulatory references.
2. Proposing specific clauses that are likely to be included literally in the procurement contractual document.
3. Accompanying each of the clauses with an associated verifier and an impact evaluator.

As such, the following sections will follow the order of the points established in the agreement mechanism (except for the objective and subjective spheres), taking into account the contents described above:

## **1. CROSS-CUTTING AND PRECEPTIVE INCORPORATION OF SOCIAL CRITERIA**

The first point of the Agreement adopted merely reflects Article 2.3 of the Regional Public Procurements Act 2/2018, 13th April, (RPPA henceforth). The Pamplona City Council emulates this, to instrumental effect rather than declaratory, clearly and unequivocally wording that all public procurements should incorporate social responsibility criteria.

### **Article 1. Subject-matter and purpose**

3. Social and environmental criteria shall mandatorily be incorporated in and across all public procurement procedures whenever relevant to the subject-matter of the contract, in the conviction that their inclusion provides better value for money in the performance of contracts and greater efficiency in the use of public spending. Likewise, access to public procurement shall be made available to small- and medium-sized, and social economy enterprises.

The change of paradigm with the new Procurements Act is notable, as any legal or doctrinal debates about whether or not the social clauses are legal are rendered absurd. In fact, since its entry into force, contracting without having incorporated social criteria is considered illegal through the violation of Article 2.3 RPPA. As a result, the Pamplona City Council proposes to bid and award public contracts, taking into account the precepts of public procurement regulations. This instrument is also strengthened with the preamble of the RPPA:

## **II. Objectives of the regional act**

In accordance with the "Europe 2020 Strategy", public procurement plays a very important role as an instrument required to collaborate towards the emergence of a model of economic development which generates high levels of employment, productivity and social cohesion, while ensuring an efficient use of public spending. In this framework, the Directives envisage objectives intended to achieve this purpose, such as promoting a more competitive market, facilitating the participation of SMEs in public procurement and providing tools to use public procurement as an instrument in social, environmental and research policies, all with a desire for modernisation bearing in mind the context of economic globalisation.

These are, therefore, the objectives shared by this regional act, which aims to adapt the Navarrese legal system in order to make them fully applicable.

The European Union considers it essential to promote a more competitive, single market as a means to achieve greater levels of efficiency in public spending, understanding that increased competition opens the way to greater value for money, a concept that is now key to any award made under the new Directives and this regional act. At the same time, it is considered that in order to achieve the desired level of efficiency and competitiveness, simpler, more effective rules are needed in order to facilitate the work of both the contracting authorities and the enterprises and professionals participating in the tenders.

Moreover, as previously pointed out, facilitating the participation of SMEs in public procurement is one of the major objectives of this regional act, consistent with the provisions of the European Commission, which, in its document COM (2010)608 "Towards a Single Market Act, for a highly competitive social market economy", stated that: "Small and medium-sized enterprises offer the highest potential for employment and are therefore worthy of special attention in the single market, as well as targeted measures to reflect their concerns." To this end, the measures to simplify the procedure and reduce administrative burdens included in this regional act are particularly worthy of note.

The use of public procurement as an instrument in gender equality, social, environmental and research policies is now more relevant because it is considered that these are directly related to the public interest and represent a suitable way of using public spending beyond the specific purpose that each contract seeks to satisfy. For this reason, what could be called "horizontal clauses" have been included in this regional act in these areas: compliance with the regulations governing gender equality between women and men, and social, labour and environmental regulations must be monitored and demanded at every stage of the contract, from the selection of the tenderers to actual performance, and breaches of these requirements may justify the exclusion of a procedure, the rejection of a tender or the termination of a contract already awarded.

## 2. ANALYSING AND PREPARING PROCUREMENTS

The RPPA addresses responsible public procurement from an integral perspective, and prior to drafting the contractual documentation and incorporating social clauses, a series of measures are established. These are both analytical and preparatory, totally sound so that the subsequent criteria and clauses selected are appropriate and adapted to the characteristics of the contract. To this effect, in municipal public procurement, the following guidelines should be considered, indicated in the public procurement regulations.

### 2.1. DEFINING THE SUBJECT OF THE CONTRACT WITH SOCIAL CRITERIA

The Regional Public Procurement Act 2/2018 indicates:

#### **Article 44. Minimum content of the contract**

1. Unless already contained in the procurement documents, contracts must include, necessarily, the following particulars:

- a) Identification of the parties.
- b) Accreditation of the signatories' capacity to sign the contract.
- c) Definition of the subject-matter and type of the contract, taking into account social, environmental and innovation considerations.

#### **Article 138. Procurement dossier following the ordinary procedure**

1. A procurement dossier shall be compiled prior to every contract, without prejudice to the exceptions provided for in this regional act, which shall consist of the documents referred to in paragraph 3 and shall include justification of the need or convenience of the works, supplies or services covered by the contract to satisfy public purposes.

3. The procurement dossier shall be initiated with a reasoned report from the unit managing the contract, stating the nature and extent of the needs intended to be covered, the suitability of the subject-matter to meet those needs, the characteristics and estimated value of the works, supplies or services covered by the contract, the adequacy of the market price, how the award criteria are related to the subject-matter of the contract, the choice of the procurement procedure and the criteria regarding economic standing and technical ability, the specific needs and circumstances affecting the individuals receiving the goods or services, and all other items deemed necessary.

Regulations establish the possibility of defining the subject of the contract, taking into account social considerations and their transfer as minimum content to the public procurement in question. Furthermore, the link to the subject of the contract forms a reiterative issue in the RPPA, hence the importance. It is worth warning that *the adjudication criteria should be directly linked to the subject of the contract* is no longer a governing requirement. This restrictive interpretation was addressed and resolved in the 2014/24/EU Directive, 26th February 2014, regarding public procurement. Its literal design has been incorporated into Articles 106.1 and 64.2. RPPA, putting a clear resolution to this issue.

#### **Article 64. Contract award criteria**

2. Award criteria shall be considered to be linked to the subject-matter of the 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, including factors involved in:

- a) The specific process of their production, provision or trading.
- b) A specific process for another stage of their life cycle.

#### **Article 106. Special social, ethical, environmental or other contract performance conditions**

1. The contracting authorities shall draw up special conditions relating to the performance of the contract, provided that these are related to the subject-matter of the contract, are not directly or indirectly discriminatory, are compatible with Community law and are indicated in the notice of invitation to tender and in the procurement documents.

The legal conclusion is obvious: the link should refer to the contractual service and not strictly and directly to the specific subject of the contract. Therefore, an express or mention or ownership of the subject of the contract is not needed with regards to one or various social issues in the subject of the contract, as these issues in their specific legal definition are intrinsically linked to the subject of the contract. However, once past the legal issue, in specific cases it will be appropriate to define the subject of the contract with reference to the social issue we are going to incorporate, as it gives added value:

1. It facilitates initial information for bidding companies, so they are notified about the content or social requirements of the service.
2. It gives the social clauses that we are going to incorporate greater strength and value, as its importance is declared in the subject of the contract, to a certain extent notifying that the clauses are not rhetorical and their compliance will be verified.
3. It sends a clear message to the business fabric and citizenship, demonstrating an engagement with social responsibility, equality and social cohesion.
4. In line with the mandate established in the Agreement adopted by the Pamplona City Council, it will also be relevant to make an express declaration favouring responsible public procurement in the file Justification and when defining the needs to be fulfilled, providing the bidding procedures with coherence and the social clauses to be incorporated.

## APPLICATIVE PROPOSAL. SUBJECT OF THE CONTRACT AND NEEDS TO FULFIL

When it considers appropriate, the contracting body can indicate specific references to policies for gender, labour insertion, disability, the environment and quality in employment, among others, in the subject of the contract.

For example: Gardening service including criteria of (...)

1. Quality in employment.
2. Gender equality.
3. Social-labour insertion of people with disabilities or at risk of social exclusion.
4. Environmental criteria.

Likewise, the contracting body in contracts considered strategic in terms of social criteria inclusion, the following specific mentions can be made:

1. Among the previous definitions of needs to fulfil, the most appropriate ones shall be indicated in accordance with the characteristics and the subject of the contract. For example: the social-labour insertion of disadvantaged people, equality between men and women, the use of fair trade products, etc.
2. An explicit reference shall be made, comprising institutional purposes pertaining to the Pamplona City Council, such as social cohesion, environmental sustainability, equal rights, local development, decent employment, etc.

## 2.2. LABOUR ASPECTS

The new public procurement regulation not only regulates the search for social purposes in its clauses, but also manifests a clear vocation to create decent and quality employment for the staff base providing the public procurements, for people employed for contractor companies and for sub-contractors alike. The following RPPA precepts are particularly noteworthy:

### **Article 43. Price and funding of contracts**

5. The contracting authorities shall ensure that the price is suitable for effective fulfilment of the contract through a correct estimate of the amount in view of the general market price when setting the initial tender budget and application, if appropriate, of the rules on tenders involving abnormal or disproportionate amounts.

In those awards in which it is necessary to calculate labour costs, the economic terms of the existing sectoral collective agreement with the narrowest scope applicable to the sector in which the activity to procure can be classified shall be considered.

### **Article 59. Special conditions**

1. The documents regulating the procurement shall contain the special conditions of a contract in its legal, administrative and economic aspects.
2. The special conditions shall specify, inter alia:
  - d) The social, labour and environmental considerations to establish; the covenants and conditions which define the rights and obligations of the parties to the contract; the provision to terminate the contract except in those cases in which this is not possible according to the provisions of article 108; the obligation of the successful tenderer to meet, at minimum, the pay conditions of the workers in accordance with the applicable sectoral Collective Agreement; and the other particulars required by this act and its implementing rules. In the case of mixed contracts, the legal regime applicable to their effects, fulfilment and termination shall be specified according to the rules applicable to the different works, supplies and/or services they compound.

### **Article 67. Information on the conditions of novation of employment contracts**

1. The conditions of novation of employment contracts shall be as set out in the sectoral collective agreement for the activity covered by the procurement contract should one exist and should it regulate novation. Should no sectoral agreement applicable to the activity covered by the contract exist or should one exist but fail to regulate novation, the employment contracts of all the workers who, even though they may belong to another enterprise, have been carrying out the activity covered by the procurement contract shall be subject to novation.

The contracting authority shall inform the trade union representatives at the workplace of its intention to put the contract out to tender again so that, within a maximum period of fifteen days, they can report that if an applicable sectoral collective agreement exists, the labour conditions at the workplace of the workers whose employment contracts are to be novated are superior. When the trade union representatives have issued the report on the applicable conditions, the specifications shall include these.

2. The Labour and Social Security rights and obligations of the previous enterprise shall be transferred to the new enterprise, including its pension commitments, under the terms provided for in the specific regulations, and, in general, any obligations regarding supplementary social protection that may have been acquired. When the possibility that the successful tenderer may contract partial performance of the contract out to third parties, this second enterprise is obliged to assent to the novation of the employment contracts of all the workers who had previously been carrying out this activity and the Labour and Social Security rights and obligations of the previous enterprise shall be transferred to the new enterprise, including its pension commitments, under the terms provided for in the specific regulations, and, in general, all the obligations regarding supplementary social protection that may have been acquired.

The services dependent on the contracting authority shall provide the tenderers with the information on the terms and conditions of the employment contracts of the workers affected by novation that they need in order to accurately evaluate the labour costs involved in such a measure, indicating that such information is provided in compliance with the provisions of this article.

For this purpose, the enterprise which has been providing the works, supplies and/or services covered by the contract to be awarded and is the employer of the workers concerned shall be obliged to provide the contracting authority with this information at the latter's request. As part of this information, it must, in all events, provide the lists of the staff



whose employment contracts are subject to novation, indicating: the applicable collective agreement of application and the details of category, type of contract, working hours, seniority date, expiry of the contract, gross annual compensation of each worker and

any covenants in force applicable to them. Failure to comply with this obligation shall give rise to the imposition of a penalty equivalent to 0.1% of the award price for each day of delay in providing the information until total fulfilment of the obligation.

The administration shall verify the information provided by the outgoing enterprise before including it in the procurement documents governing the contract and shall provide the new employer with the information supplied by the previous contractor.

3. The provisions of this article with respect to the novation of employment contracts shall also apply to the worker-members of cooperatives when they are assigned to the service or activity subject to transferal.

...

8. Likewise, and without prejudice to the application, where appropriate, of the provisions of article 44 of the recast text of the Statute of Rights of Workers Act, passed by Royal Legislative Decree 2/2015 of 23 October, the specifications regulating the procurement shall always contain the contractor's obligation to respond to the unpaid compensation of workers whose employment contracts are affected by novation and the social security contributions accrued, even in the event of termination of the contract and transferal of the workers to the new contractor, the obligation under no circumstances resting with the latter. In this case, the administration, once the non-payment of compensation has been accredited, shall retain the amounts due to the contractor in order to ensure payment of the above-mentioned compensation and not return the definitive security until its payment is accredited.

#### **Article 107. Subcontracting**

6. The contracting authority may stipulate in the procurement documents containing administrative clauses that direct payments may be made to subcontractors, without prejudice to the fulfilment of the requirements for payment to the main contractor, when non-payment to the subcontractor can be accredited. It shall be deemed that payments made to the subcontractor are made on behalf of the main contractor, their relationship with the contracting authority being of the same nature of payments on account as that of works certifications.

#### **Article 152. Payment of the contract price**

2. The system for payment of the price shall be determined in the procurement documents. Likewise, and without prejudice to the application, where appropriate, of the provisions of article 44 of the Recast Text of the Statute of Rights of Workers Act, passed by Royal Legislative Decree 2/2015 of 23 October, the specifications shall always contain the contractor's obligation to respond to the unpaid compensation of workers whose employment contracts are affected by novation and the social security contributions accrued, even in the event of termination of the contract and transferal of the workers to the new contractor, the obligation under no circumstances resting with the latter. In this case, the administration, once the non-payment of compensation has been accredited, shall retain the amounts due to the contractor in order to ensure payment of the above-mentioned compensation and not return the definitive security until its payment is accredited, which must not be more unfavourable than those provided for in the regulations in force on combating late payment in commercial transactions.

These precepts are fully applied when addressing the social clauses in the procurement contractual documentation, as we can safely indicate diverse social criteria from the information extracted and the analysis performed. To do this we are going to substantiate its importance and explain its applicative potential:

1. From a technical perspective, contractor bodies are authorised to perform a precise and specific analysis of the staff base needed to execute the contract and its qualification, to determine the applicable agreement, to indicate labour costs, and to establish the bidding budget in accordance with the aforementioned data.
2. The labour sphere forms one of the most obvious paradigms of the impact of social and strategic public procurement. Consequently, using the information that contracting bodies must determine as a starting point, it will be possible to establish the most suitable social clauses in an informed, coherent and precise way in terms of labour conditions and the staff base executing the contract. We will use the following aspects as an example:
  - Figures or percentages can be established that are appropriate for the specific recruitment of people with disabilities or in a situation or risk of social exclusion.
  - Figures or amounts of women and men on the staff base executing the contract can be established, addressing whether it is a male or female-dominated sector.
  - Given that the professional category must be indicated, an exact number of women in qualified positions can be established as adjudication criteria or special execution conditions.
  - The commitment to maintain the most favourable collective agreement during the execution of the contract can be indicated as adjudication criteria, applicable to the execution of the contract.
  - In cases requiring personnel substitution, even more information will be made available, and adjudication criteria can be indicated that envisage improvements to working conditions, the transformation of temporary contracts to indefinite ones, the extension of working days, or positive actions to cover leave, substitutions and staff holidays drawing from disadvantaged profiles from the labour market.
  - It will allow for an effective control to be carried out to guarantee equal salaries for women and men.

The legislation throws up diverse issues, which we have reflected in an applicative proposal:

#### **APPLICATIVE PROPOSAL. LABOUR AND SALARY ASPECTS**

The contracting body shall preceptively incorporate the following into the contractual documentation:

1. The staff base needed to execute the contract should be calculated, as well as their qualification or professional category.
2. The collective agreement applicable to the staff base executing the contract should be indicated.
3. The base bidding budget shall indicate estimated salary costs based on the reference labour agreement.
4. When the awarded company has the duty to substitute itself as employer, all information about affected contracts shall be indicated, in particular details regarding the category, contract type, gross salary and bonuses, as well as all applicable pacts in force.
5. Provisions regarding substitution will also be applicable to associate employees of the cooperatives subscribed to the substitution activity in question.
6. The duty to substitute shall in all cases be compulsory when the company that has been carrying out the service required in the contract to be adjudicated is a Special Employment Centre, in terms of people with disabilities that have been undertaking their activity in the execution of said contract.
7. The particular conditions of the contract can foresee that in the event of proving the awarded company's failure to pay employee salaries, the due amounts can be retained by the contractor to ensure payment of said salaries, and to retain the definitive guarantee payment until these payments have been made. Likewise, specifications may indicate that in the event of proving non-payment by the awarded company to subcontracting and supply companies, direct payment may be made to them.

### **2.3. PLANNING**

The new public procurement regulation establishes the duty to plan public procurement activity and to provide a public procurement plan in advance along with approval of budgets.

#### **Article 2. Principles of public procurement**

5. The entities subject to this regional act shall schedule the public procurement activity that they will develop over a budgetary year or multi-year periods and shall announce their procurement plan in advance, together with approval of their budgets, irrespective of the prior information notice provided for in article 90.

This article aptly proposes to contracting authorities that public procurement should incorporate prior analysis and foresight in its management, and consequently it should identify public procurements that will be tendered in the coming tax year, or at least the most relevant ones, either for their amount or because they are services for people. It also proposes that their contents should be analysed appropriately, involving specialised technical staff in drafting where necessary (specialised in gender, labour insertion, labour aspects, etc.), and to consequently incorporate all aspects and clauses that promote responsible public procurement.

## 2.4. PRELIMINARY CONSULTATIONS

The new RPPA enables and encourages the removal of preliminary market consultations. Its aim is to enable contracting bodies to explore the economic fabric or to meet with companies from the sector, so as to gather all the information needed to improve the drafting of the contractual documentation. Furthermore, it is possible to request guidance from specialised NGOs, professional panels or experts in the subject.

In terms of social responsibility, interest also lies in the ability to perform an appropriate selection and drafting of the social criteria, as consultations make it easier for the contacting body to establish the level of social responsibility in the sector of activity, or to determine if the Special Employment Centres, Insertion Companies or social economy companies operate in the sector of activity to be contracted.

### **Article 48. Preliminary market consultations**

1. The contracting authorities may conduct market studies and consult third parties, which may be independent experts or authorities or market participants, in order to prepare the tendering procedure properly and to inform them of their plans and the requirements which will be demanded in order to compete in the tender process. This advice may be used by the contracting authority to plan the tendering procedure and while it is being conducted. However, the contracting authority must not disclose to the participants in the procedure the solutions proposed by the other participants, in such a way that the solutions advanced are only entirely known to the contracting entity, which shall deliberate and incorporate them, where appropriate, in the definition of the subject-matter of the contract.
2. The preliminary market consultations shall be carried out preferably through the Procurement Portal in order not to distort competition or violate the principles of non-discrimination and transparency. Where appropriate, sufficient reasons for the decision not to use the Procurement Portal must be given in the dossier.
3. Where a tenderer has advised the contracting authority, the latter shall inform the other participants and provide them with the same information and documents which it supplied to the former so that involvement in the preliminary market consultations does not generate incentives or advantages with regard the award of the contract for the enterprises involved.
4. The preliminary market consultation process cannot give rise to a contractual subject-matter so specific and defined that it only conforms to the technical characteristics of one of the participants in such a way that competition is unjustifiably restricted.

Below is a summary of the most interesting aspects and their practical application:

1. It is mandatory to announce consultations on the Navarre Recruitment Portal, or on the Electronic Bidding Platform of Navarre, as these consultations must be public and transparent, and any individual or company interested will have the right to participate.
2. Participation in the consultation does not prevent interested parties from later participating in the bid.
3. A report must be drawn up and published, featuring the companies or entities consulted, questions asked and responses to them.

In terms of social responsibility, it is worth highlighting the advantages and benefits of preliminary consultations:

- It enables the social responsibility level of the market operators to be known.
- It enables potential bidders to question whether certain social criteria entail an excessive burden and could affect their desire to participate in the bid.
- It enables suitable social technical solvency requirements to be indicated.
- It enables the first-hand discovery of good practices of the sector's companies in terms of social and environmental issues.
- It is beneficial to SMEs and local businesses, as consultations inform potential bidders and provide them with a greater margin for the study and preparation of their proposals.

Another interesting option is that of performing preliminary consultations (informal contacts would also be legal) with unions, or the company committee, or directly with the employees of a service that is already being provided, so that the contracting body can discover their proposals or complaints first hand in terms of salary or working conditions, possible conciliatory measures or working day flexibility, working day organisation, promotion policies or training needs.

Undertaking something as simple as asking the staff that are already working in a contractual service for their suggestions, ideas and improvements seems a completely logical yet exceptional option. For this reason, this kind of preliminary consultation is advisable in intensive labour contracts, so as to apply gender, labour insertion or quality in employment clauses that are completely adapted and appropriate to the reality of the contractual service.

#### **APPLICATIVE PROPOSAL. PRELIMINARY CONSULTATIONS**

In contracts considered strategic in terms of the inclusion of social criteria, if considered timely, contracting bodies will be able to perform preliminary market consultations, under the terms established in Article 48 of the Regional Public Procurement Act.

From the perspective of responsible contracting, these consultations will aim to indicate the most suitable social and environmental clauses for the subject and the characteristics of the contract, analyse the level of social responsibility of the socio-economic fabric, and the labour conditions of the sector, gather the opinion of social organisations, or determine if there are Special Employment Centres, Insertion Companies and social economy entities that are able to undertake the contract correctly.

## 2.5. REDUCING OBSTACLES AND BARRIERS OF ENTRY

### 2.5.1. Liability statement

Alleviating the administrative load and substituting the documentation to be presented in the bidding phase in public procurement using a liability statement is both a duty and a necessity.

The general practice involves using the European Single Procurement Document (ESPD, required above the community threshold) consisting in a declaration of financial situation, capacities and appropriateness of companies for a public procurement procedure. As such, companies do not have to provide any other documentation, and once the contract has been awarded, the complete documentation shall be required exclusively of the awarded company. This is a way for both the bidding companies and the public administration to save time, effort, bureaucracy, paper work and money. It is also beneficial to the environment.

#### **Article 55. Justification of the requirements to enter into a contract**

1. Proposals shall be accompanied by a self-declaration signed by the tenderer, stating that:

- a) He/she/it meets the requirements of legal capacity, including the capacity to act, and, where appropriate, that the signatory has the power of representation.
- b) He/she/it meets the requirements of economic and financial standing, and technical or professional ability.
- c) He/she/it is not disqualified due to prohibition on entering into contracts. This statement shall also declare that he/she/it is current in compliance with his/her/its tax or social security obligations under the provisions in force.
- d) He/she/it meets the other legal requirements for the performance of the services covered by the contract and those set out in the procurement documents.
- e) He/she/it submits to the jurisdiction of the courts and tribunals of Spain of every kind in order address all incidents, waiving any other jurisdiction to which he/she/it, in the case of foreign enterprises, may be entitled.
- f) He/she/it has, where appropriate, the written undertaking of other entities regarding the assignment of their means or the availability of their resources. Where a tenderer has advised the contracting authority, the latter shall inform the other participants and provide them with the same information and documents which it supplied to the former so that involvement in the preliminary market consultations does not generate incentives or advantages with regard the award of the contract for the enterprises involved.

#### **Article 56. Self-declaration format**

1. The specifications shall require a self-declaration and provide the format that it shall take.
2. In the case of contracts with an estimated value equal to or greater than the European threshold, the format in the specifications shall follow that of the current European single procurement document.

## 2.5.2. Technical, financial and professional solvency

Another of the aims of public procurement legislation is to facilitate SME access to public procurement, for which it is essential to reduce entry barriers, including the financial, technical or professional solvency required. The RPPA refers to this issue in various articles:

### **Article 16. Economic and financial standing of tenderers**

1. Tenderers must furnish proof of sufficient economic and financial standing to perform the contract. Sufficient economic and financial standing is understood as the adequate economic and financial situation of the enterprise so as not to put at risk or alter proper performance of the contract due to economic and financial incidents. The degree of economic and financial standing required shall be specific to each contract and shall be demanded in a manner related and proportionate to the tender budget for it.

2. Proof of economic and financial standing may be furnished by one or more of the following means:

a) Statements from banks or, in the case of professionals, evidence of relevant professional risk indemnity insurance.

b) Presentation of balance-sheets or extracts from balance-sheets, where publication of the balance-sheet is required under the law of the country in which the natural or legal person is established.

c) A statement of overall turnover and, where appropriate, of turnover in areas similar to those covered by the contract for a maximum of the last three financial years available, depending on the date of creation or start of the activities by the tenderer, as far as the information on these turnovers is available.

The minimum yearly turnover required shall not exceed one and a half times the estimated contract value, except in duly justified cases such as those relating to the special risks attached to the nature of the works, services or supplies, in which case the main reasons for the requirement shall be indicated in the procurement documents.

Where a contract is divided into lots, this criterion shall apply in relation to each individual lot. But the contracting authority may set the minimum yearly turnover required of the tenderers by reference to groups of lots in the event that the successful tenderer is awarded several lots to be performed at the same time.

4. Should for a justified reason the tenderer not be in a position to provide the references requested, it may furnish proof of its economic and financial standing by means of any other document which the contracting authority considers appropriate.

### **Article 17. Technical or professional ability of tenderers**

1. Tenderers must furnish proof that they possess the necessary technical or professional ability to perform the contract. This is understood to be the technical or professional ability to perform the contract adequately because the tenderer has previous experience in similar contracts or because he/she/it has sufficient staff and technical resources. The level of technical or professional ability required shall be specific to each contract and shall be demanded in a manner related and proportionate to the subject-matter of the contract.



### **Article 18. Assessment of the economic standing and technical ability of tenderers by reference to other enterprises**

In order to prove their economic standing and technical ability, tenderers may base themselves on the standing and ability of other enterprises, regardless of the legal nature of their association with these.

In the case of legal persons which control a group of enterprises, the enterprises belonging to the group may be taken into account, provided that they prove that they actually have at their disposal the means belonging to these enterprises which are needed to perform the contracts.

If proof of economic standing and technical ability is furnished through subcontracting, the tenderer must provide a legal document which proves the existence of a formal undertaking with the subcontractors for the performance of the contract, aggregating, in this case, the standing and ability of all of them. Similarly, the tenderer must prove that the subcontractors have the means necessary to perform the contract in the form and under the conditions set forth in articles 16 and 17.

### **Article 13. Joint participation in tendering procedures**

1. The contracting authorities may enter into contracts with joint ventures (Unión Temporal de Empresas) or partnerships. Such participation shall be implemented through the provision of a private document stating the tenderers' will to compete jointly, indicating the percentage of participation of each and appointing a single representative or attorney-in-fact with powers to exercise the rights and fulfil the obligations under the contract until its termination, without prejudice to the existence of joint powers for collection and payment.

2. In all events, the contractors shall be jointly and severally liable for the obligations contracted.

3. The joint venture (Unión Temporal de Empresas) need not be formed by public deed until the contract has been awarded to it.

We have summarised and established recommendations:

1. Technical, professional and financial solvency alike must be reasonable, justified and proportionate, and must not limit the participation of the companies in the bid.
2. In terms of economic and financial solvency, the business turnover required cannot exceed the estimated value of the contract unless it can be proven to be necessary due to the nature or complexity of the contract. Of course, it may fall below this amount, for which this limit can be reduced so as not to prevent access to the bid.
3. With regards to technical and professional solvency, no minimum is established, and it must operate accordingly under the principle of facilitating access of SMEs and micro-SMEs to public procurement, with the possibility of merely requesting the presentation of statements from financial entities, or by proving the possession of professional risk indemnity insurance.
4. Proof of solvency via external means should be facilitated, as long as it can be accredited and demonstrated that solvency and means can be provided effectively throughout the entire duration of the contract execution.

5. Both in the event of creating new companies and in the succession of companies, accreditation of financial, technical and professional solvency, as well as the relationship of works carried out and the relationship of service, can be performed via accreditation of a succession of companies or by proving that its members or associate members or employees have carried out works in other companies, different to the bidding company, of an equal and identical nature.
6. Furthermore, it is possible to compete as a union of temporary companies (UTC), without having to formalise this UTC in public deed until the contract has been awarded in its favour.

### 2.5.3. Provisional guarantee and definitive guarantee

Securities, endorsements or bonds, both provisional (to take part in the bid) and definitive (to the awarded company), entail a complex process and a financial charge, constituting an obstacle to participation in public procurement for small and medium enterprises, local companies, and social economy companies and entities.

For this reason, the Regional Public Procurement Act 2/2018 envisages the reduction or elimination of securities:

#### **Article 70. Provision of provisional and definitive securities**

1. Exceptionally and giving good reasons, the specifications may require a provisional security covering an amount which shall not exceed 2% of the tender budget as a prerequisite for participation in the procedure.

This security shall serve as a guarantee against failure to uphold the bid until the contract is executed and shall be returned to each unsuccessful participant when the contract has been awarded.

2. The specifications may provide for the provision of a definitive security prior to execution of the contract, the amount of which shall not exceed 4% of the award price.

This security is subject to compliance by the contractor with his/her/its obligations until the term of the security expires and, in particular, subject to the payment of penalties for delays and the compensation for any damages for which the contractor may be held liable during performance of the contract.

#### **Article 36. Contracts reserved for social reasons**

8. The provision of security, whether provisional or definitive, is not required for reserved contracts unless, in exceptional cases, reasons for such a requirement are given in the dossier.

As a general rule, provisional security shall not be required, apart from exceptionally and as long as the contracting body requires it.

In the case of the definitive security, there is a clear exception in the event of reserved procurements, in which it cannot be required unless there is an exceptional need in the report.

In both cases limits are established on the percentages of the provisional and definitive securities, maximums in all case, that should be calibrated appropriately and proportionately to the risks of the contract, the existence of liability insurance, or the payment system envisaged in the contractual documentation (certifications, product delivery, completion to the satisfaction of the administration), which often acts as a true definitive security.

Furthermore, it is worth considering Article 230 of Act 6/1990, Local Administration, which establishes the compulsory nature of indicating definitive securities in works contracts exceeding €300,000 and supplies and technical assistance contracts exceeding €60,000.

## 2.5.4. Dividing the contract into batches

Act 2/2018, regarding Public Procurement, refers expressly to the possibility of establishing batches:

### **Article 41. The design of lots**

1. In general, the contracts shall be divided into lots and some of these shall be reserved for the entities identified in article 36 of this act. When the contracting authority decides not to divide the subject-matter of the contract into lots or does not qualify any of the lots as reserved, it must justify its decision.

2. When dividing into lots, the procedural and notice rules to be applied to the award of each lot or differentiated work, supply or service shall be determined according to the cumulative value of the whole, calculated as provided for, unless one of the exceptions referred to in Article 7 applies.

3. In contracts awarded by lots, each lot shall constitute a contract unless another provision is established in the specifications. When tenders which cover more than one lot are presented, these shall constitute a single contract.

4. Valid reasons for justifying the non-division into lots of the subject-matter of the contract are, inter alia, that:

a) Division may entail the risk of restricting competency.

For the purposes of applying this criterion, the contracting authority shall request a prior report from the Navarrese competition authority for the latter to pronounce on its assessment of the circumstances.

b) Independent provision of the different works, supplies or services covered by the subject-matter of the contract could risk rendering the correct performance of the contract excessively technically difficult or the nature of the subject-matter could imply the need to coordinate the provision of the different works, supplies or services.

For the purposes of applying this criterion and where the contracting authority is an entity referred to in article 4.1 e), a prior report must be requested from the public administration to which it is subordinate.

5. The specifications may lay down the following limitations:

a) The number of lots for which one natural or legal person may submit a tender.

b) The number of lots which may be awarded to each tenderer.

6. When the contracting authority considers appropriate to apply either of the two limitations referred to in subparagraphs a) and b) of the preceding paragraph, this shall be expressly stated in the specifications.

When the limitation referred to in sub-paragraph b) of the preceding paragraph is applied, the criteria or rules to be applied should a single tenderer submit the tender which represents the best value for money for a number of lots exceeding the maximum indicated shall also be included.

7. When the contracting authority allows more than one lot to be awarded to the same tenderer, it may award combinations of lots, provided that each and every one of the following requirements is met:

a) This possibility is provided for in the specifications governing the contract. This provision specifies the combination or combinations admitted, where appropriate, and the economic standing and technical ability required for each.

b) A comparative assessment of the tenders has previously been conducted in order to establish whether the tenders submitted by a particular tenderer for a specific combination of lots would, taken as whole, fulfil the award criteria laid down in the specifications with regard to those lots better than the tenders for the individual lots concerned seen in isolation.

### **Article 36. Contracts reserved for social reasons**

2. The reservation may affect the entire subject-matter of the contract or only one or several of the contract lots.

5. The reservation may affect the entire subject-matter of the contract or only one or several of the contract lots.

The purpose of establishing batches (batching a contract) is obvious: to prevent public procurement from becoming an oligopoly of large companies, and to facilitate access of small and medium companies to the awarding of public procurement, as well as Special Employment Centres, Insertion Companies, and promoting the access of local companies, and promoting a circular economy via public procurement.

In terms of reserved procurements, Article 36 is not the only one to indicate the possibility of reserving batches for Special Employment Centres and Insertion Companies; Article 41.1 increases the possibility to the category of requirement, indicating that if the contract is split into batches, one or some of them must be reserved for entities in Articles 36, and in the event that none are reserved, the reasons for this must be justified accordingly.

Therefore, any contract subject to being separated into different functional, quantitative or geographical units can (and should) be divided into batches, or the parts that can be used, loaned or executed separately should be divided.

The limit or prohibition is that under no circumstances should a contract be divided up with the aim of reducing its value and avoiding corresponding publicity or procedural requirements. Due to the novelty and interest involved with the possibility of establishing batches, below is a summary of the most important aspects:

1. Establishing batches is the general rule and not the exception. In fact, excepting the procurement granting public works, if the contract is not split into batches, the contracting body must duly justify its reasons in the record.

2. Regulations indicate the following motives, among others, as valid to the effect of justifying the non-division of the subject of the contract into batches:
  - a) Division may entail the risk of restricting competency. In this case, the contracting body must request a previous report from the authority of defence of the competency corresponding to the Regional Community, to make a statement about the assessment of this circumstance.
  - b) Independent provision of the different works, supplies or services covered by the subject-matter of the contract could risk rendering the correct performance of the contract excessively technically difficult or the nature of the subject-matter could imply the need to coordinate the provision of the different works, supplies or services.
3. Unless proven otherwise, the possibility of reserving batches and qualifying them as reserved procurements for Special Employment Centres and Insertion Companies is enabled and even expressly required.
4. It is legal to decide the size and number of batches.
5. It is legal to limit the number of batches that can be entered or competed for by a single company.
6. It is legal to limit the number of batches that can be awarded to a single company.
7. Under no circumstances may batches be established to reduce their amount, to perform separate adjudications or to avoid their advertisement or corresponding procedure.

### 3. PROCUREMENT RESTRICTIONS

Article 22.1.f) of Act 2/2018, Public Procurements of Navarre, establishes two specific social sphere procurement prohibitions:

1. In terms of those that fail to comply with the duty to employ 2% of people with disabilities in the staff base (for companies with more than 50 employees).
2. In terms of those that fail to comply with the duty to design and apply an Equality Plan (for companies with more than 250 employees).

#### **Article 22. Prohibitions on entering into contracts**

1. Under no circumstances may persons or entities that meet any of the following conditions enter into contracts with the entities subject to this regional act, their being excluded from participation in tendering procedures:

f) Not being current in compliance with tax or social security obligations under the provisions in force according to the terms laid down in the regulations; or in the case of enterprises which employ 50 or more workers, not complying with the requirement that at least 2% of employees must be persons with disabilities, in accordance with article 42 of Royal Legislative Decree 1/2013 of 29 November, passing the Recast Text of the General Act on the rights of persons with disabilities and their social inclusion, according to the conditions laid down in the regulations; or in the case of enterprises with 250 or more workers, not complying with the obligation of having an equality plan in accordance with article 45 of Organic Law 3/2007 of 22 March on the equality of men and women.

#### **Article 23. Assessment of the prohibition on entering into contracts**

2. Procurement prohibitions, established in points d), e), f), g) and h) of the same section, shall be assessed automatically by contracting bodies and shall subsist throughout the duration of the circumstances determined in each case.

Article 42 of the Legislative Royal Decree 1/2013, 29th November, by which the Consolidated Text of the General Law of the rights of people with disabilities and their social inclusion is approved, specifies and regulates the duty of public and private companies that employ 50 or more employees, to ensure that 2 out of every 100 employees are workers with disabilities.

Article 45 of Organic Act 3/2007, 22nd March regarding equality between men and women, specifies the duty of companies with over 250 employees to develop and apply an equality plan, with its content and requisites governed by Article 46.

Companies that fail to comply with any of either duties shall incur a prohibition and cannot be contracted by any public administration, and cannot participate in any bidding procedure. Therefore, if the contracting body verifies that any of the bidding companies have these circumstances, they must exclude the companies from the procedure.

In turn, Article 23 RPPA, refers to the competency, procedure and assessment for applying these prohibitions. This procedure is key, as in the specific case of the two procurement prohibitions addressed here (quota of 2% of people with disabilities; and the duty to design and apply an Equality Plan), the circumstances are assessed and applied directly by the contracting body, providing the competency required to exclude a company.

2. Procurement prohibitions, established in points d), e), f), g) and h) of the same section, shall be assessed automatically by contracting bodies and shall subsist throughout the duration of the circumstances determined in each case.

Yet the relevant issue is how to provide accreditation and at which point in time it should be fulfilled, as Article 55.1.c) RPPA refers exclusively to the presentation of an affidavit: *1. Proposals must be accompanied by an affidavit signed by the bidder, declaring that: c) the bidder has not incurred a prohibition.*

However, an affidavit does not imply legal compliance. Therefore, the affidavit does not justify, rather declare, thus the two phases of the procedure must be distinguished:

- When the bidding companies present their offers, all that is required (Article 55.1.c) RPPA) is an affidavit declaring fulfilment.
- When putting the adjudication proposal to the contracting body, the contracting committee must prove that the contractor meets all the legal conditions enabling it to award the contract, for which at this time the bidder with the highest score may be requested not to engage in these procurement prohibitions.

#### **APPLICATIVE PROPOSAL. PROCUREMENT RESTRICTIONS**

Before putting the adjudication proposal in favour of the company with the highest score in the bid, the contracting committee will require it to provide effective accreditation of that declared, requiring the following documentation:

- In the event of having a staff base of more than 50 people:
  - Nominal list of employees and a copy of their certification of degree of disability in accordance with the Royal Decree 1971/1999, 23rd December.
  - RER (Registered Employee Report), and Social Security certificate, displaying the total and nominal relationship of the company's employees.
  - In the case of having opted for fulfilment of the alternative measures envisaged in the RD 364/2005, 8th April, a copy of the declaration of exception and a declaration from the bidding company with the specific measures to this effect.
- In the event of having a staff base of more than 250 people: copy of the Equality Plan, including the diagnosis, measures adopted, strategies, and assessment and follow-up system.

## 4. SOCIAL TECHNICAL SOLVENCY

We mention the following references from the RPPA:

### **Article 37. Special rules for contracts reserved in the health, social, cultural and educational fields**

b) A special subjective qualification attesting to the experience, quality and availability of adequate means to comply with the provision of the works, supplies or services may be required.

c) Where direct care is to be provided to persons in situations of social exclusion or gender violence, or in cases of the provision of works, supplies or services which at the time regional social services regulations include within the public social services system of Navarre, it may be demanded as a prerequisite for admission that the enterprises or professionals furnish proof of actual possession of the means and the experience required in order to satisfy the specific needs of the different categories of users, including disadvantaged and vulnerable groups, the involvement and co-responsibility of the users, and the innovative solutions that bring greater added value to the service.

### **Article 17. Technical or professional ability of tenderers**

2. Proof of the technical or professional ability of tenderers may be furnished in one or more of the following ways:

h) Indication of the environmental management measures which the tenderer is able to implement, in cases where this is appropriate, for the award of contracts for works, services and supplies.

m) In supply contracts, enterprises may be required to possess the specific technical competence needed to ensure traceability in supply chain management systems in order to guarantee compliance with the basic Conventions of the International Labour Organisation and Human Rights. Such proof shall be required for the acquisition of technological products and products for which there is an alternative in the fair trade market.

Technical or professional solvency is configured as a necessary requirement for participation in a bid, and implies a previous aptitude analysis to verify that the company has the right capacity, team, experience or trajectory needed to duly execute the contract. This analysis is carried out before the assessment of the proposals and determines whether or not the company is admitted into the bid.

In the field of social services, it involves analysing if the contract should ask the bidding companies for training, trajectory or experience in the specific social sphere in question, or particular experience in providing services to disadvantaged and vulnerable groups, or involvement and shared user responsibility, or the development of innovation solutions that contribute a higher added value to the service. All of these can constitute technical or specific professional solvency criteria.

Article 37 refers to technical or professional solvency in social services contracts, adding technical or professional solvency accreditation systems to those already envisaged in Article 17, and when combined, can be applied and required with regards to the specific subject of the contract in question, for example: services for female victims of domestic violence;



social support for homeless people; psycho-educational intervention in disadvantaged neighbourhoods; services for dependent people, etc. Or, more generically: experience and professional team in the sphere of socio-labour insertion, or equality between women and men.

Their application should be undertaken following logical and cautious criteria: the incorporation of social-type solvency requisites cannot be performed as a general rule for all procurements, rather only when the subject of the contract requires specific aptitudes in said subject for its correct execution.

On the other hand, the RPPA also refers to the assumption of specific technical solvency for supply contracts, in which specific technical solvency may be required to ensure the traceability of the supply chain management systems, with the aim of guaranteeing compliance with the fundamental Conventions of the International Labour Organisation and Human Rights. The legal provision also adds that this accreditation shall be required in the acquisition of technological products and products for which there is an alternative on the fair trade market. In this case, the purpose and subjects of the contract to which it should be applied are formulated more clearly.

### **APPLICATIVE PROPOSAL. SOCIAL TECHNICAL SOLVENCY IN SUPPLY CONTRACTS**

1. In supply contracts, specific technical solvency may be required of bidding companies, via which a guarantee can be given of the traceability of management systems in the supply chain, with the aim of guaranteeing compliance with Human Rights and the fundamental Agreements of the International Labour Organisation, in particular:
  - a) Conventions 29 and 105, regarding the Abolition of Forced Labour.
  - b) Conventions 87 and 98, regarding Freedom of Association and Collective Bargaining.
  - c) Convention 100, regarding Equal Remuneration for work of equal value without discrimination on grounds of gender.
  - d) Convention 111, against Discrimination in access to employment and labour conditions on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin.
  - e) Convention 138, regarding the abolition of child exploitation and labour.
  - f) Convention 182, regarding the prohibition of the Worst Forms of Child Labour and immediate steps to eliminate them.
2. Such proof shall be required for the acquisition of technological products and products for which there is an alternative in the fair trade market.
3. The companies must demonstrate compliance by providing a product certification from the company or supply chain, proving compliance with the mentioned International Agreements, such as the Fairtrade certification mark or SA 8000, TCO Certified, OHSAS 8001, ISO 9001, DS 49001, ISO 26000 certifications, or any other equivalent in nature, or accreditation via an external audit.

## **APPLICATIVE PROPOSAL. SOCIAL TECHNICAL SOLVENCY IN SUPPLY SERVICES**

In service contracts requiring specific social aptitudes for their correct execution, a technical or professional solvency requirement shall comprise the specific experience, knowledge and technical means in said social field, for which one or some of the following accreditation systems may be required:

- Experience and trajectory in the field of (employability, services for disadvantaged or vulnerable groups, involvement and shared user responsibility, equal opportunities between women and men, innovation in social service provision, etc.), that can be proven via the relationship of the main services or jobs performed in the past three years of a similar nature and volume to the subject of the contract. To this effect, a minimum of X jobs must be proven and a corresponding minimum turnover amount of XXX euros.
- Capacity of the technical team in the field of employability, dependency services, effective equality between women and men, etc.), that can be proven by indicating the personnel that will expressly participate in the contract execution, noting specific qualifications, training and experience to that field, requiring proof that at least X people have a minimum training of XXX hours in said field, and/or that X people have a work trajectory of X years in said field.

## 5. RESERVED PROCUREMENTS

### 5.1. PROCUREMENTS RESERVED FOR SECs AND INSERTION COMPANIES

Procurements reserved for Special Employment Centres and Insertion Companies are regulated under Article 36 RPPA:

#### **Article 36. Contracts reserved for social reasons**

1. The contracting authorities shall reserve participation in the corresponding procedures for the award of contracts for services, works, supplies and concession of services for Special not-for-profit employment centres, Special social initiative employment centres or Integration enterprises.

For the purposes of applying this regional act, special social initiative employment centres are considered those 90% owned or promoted directly by one or more private not-for-profit entities, be they associations, foundations or other type of social economy enterprise, and which, according to their articles of association or founding agreements, are required to reinvest all their profit to create employment opportunities for persons with disabilities.

2. The reservation may affect the entire subject-matter of the contract or only one or several of the contract lots. In all events, the provision of the works, supplies or services must be suited to the specific characteristics of such entities.

The reservation may be made for all or some of the types of entities in paragraph 1.

3. In the field of sectors subject to centralised procurement, the contracting authorities may contract independently of this system if they choose to reserve the contract, provided that the procurement documents of the relevant centralised procurement procedure cater for such an exception.

4. The amount of the reserved contracts shall be at least 6% of the amount of the contracts awarded in the budgetary year immediately preceding it.

5. All the entities subject to this regional act shall establish and publish the conditions to achieve compliance with 6% of reservation with the contracts they expect to award each year and after analysing the possibility of reservation by dividing into lots. If failure to achieve this is envisaged, they must set forth alternatives to meet the aims of such reservation.

These alternatives include deciding to demand one of the following conditions of the main contractor in those contracts with no room for reservation:

- To subcontract those ancillary services which such enterprises provide out to a Special not-for-profit employment centre, Special social initiative employment centre or Integration enterprise.
- In the event of needing to replace or hire more staff, to prove that he/she/it has submitted the employment offer to the employment services and/or recruitment agencies or the Department of Social Rights in order to fill these positions with persons with disabilities or at risk of social exclusion.
- To organise work placements for persons with disabilities or at risk of social exclusion.

6. The notice of invitation to tender shall make reference to the reservation of the contract for social reasons provided for in this article.

7. When, having followed the procedure of a reserved contract, no tender or no adequate tender has been submitted, the contract may be put out to tender again without the reservation initially envisaged, provided that the initial conditions are not substantially modified. Nevertheless, the amount of the contract shall count towards the percentage laid down in paragraph 4 of this article.
8. The provision of security, whether provisional or definitive, is not required for reserved contracts unless, in exceptional cases, reasons for such a requirement are given in the dossier.
9. The maximum percentage of contracting permitted in reserved contracts shall be 20% of the contract price, unless the subcontracting is carried out through another Special Employment Centre or Integration Enterprise, in which case the general regime of subcontracting provided for in this Regional Act shall apply.
10. All the entities in the regional public sector shall publish the list and total amount of the contracts reserved for Special Employment Centres and Integration Enterprises on a yearly basis.

We analyse the legal provision and highlight some new changes:

### **1. Concept and application to any contract**

Its legal categorisation implies that once a contract is classified as reserved, only certain categories of company can participate in the bid or be contracted. Reserved procurements are defined this way to limit participation to Special Employment Centres of social initiative and Insertion Companies, excluding any other type of company or entity.

An open, restricted or negotiated procedure, a minor contract or a framework agreement can be classified, and tendered or awarded as reserved. Any contract, whether construction works, public service management, supply, public and private sector collaboration and special administrations, can be classified as reserved for Special Employment Centres and Insertion Companies. Any contractual subject can be classified as reserved. Also, an eight-hundred Euro contract and another of eighty million Euros can be reserved. In short, any bid or contract can be classified as reserved for Special Employment Centres of social initiative and Insertion Companies.

### **2. Procedure**

They are processed the same way as any other contract. For this reason, the choice of procedure, publicity or processes, solvency or classification required, or even the competition between the beneficiary entities, does not vary at all. Only three characteristics must be taken into account:

- The bid announcement must indicate that it is a reserved procurement and mention its specific regulation.
- Provisional and definitive securities shall not be required, apart from exceptional cases, which must be justified in the report.
- The right to participate is restricted, for which in the “capacity to carry out works” or “capacity to recruit”, or in the “accreditation of legal personality” the requirement and verification that

only Special Employment Centres of social initiative and Insertion Companies may participate must be established.

### **3. Reserving batches**

The possibility of establishing and later reserving batches, opens up highly interesting pathways to apply the feature of reserved contracts with greater ease and in a greater number of bids, and considerably expands the likelihood of these entities being awarded with a public procurement. For example: a gardening contract that is batched into zones, for which specific batches are qualified as reserved. Or a construction contract in which rubble removal and site clearance batches are qualified as reserved. Or a waste collection contract in which paper and card collection is qualified as reserved. Or a stationer contract in which a batch is created for an established amount.

### **4. Outsourcing is limited at 20%**

So as not to distort the feature of the reserved contract and to prevent an Insertion Company or Special Employment Centre from being awarded only to go on to outsource 70% of the service with a mercantile and profit-making company, a maximum percentage limit of outsourcing has been legally established at 20% of the price of the contract, unless the outsourcing is undertaken with another Special Employment Centre or another Insertion Company, or the promoting entity of the Insertion Company, and always within the terms and limits established in accordance with the Regional Act of General Budgets of Navarre for 2019, whose ninth final provision has modified Section 9 of Article 36 of the Regional Act 2/2018. Below is the complete text:

#### **Ninth final provision. Modification of Regional Act 2/2018 of 13 April on Public Procurement**

Paragraph 9 of article 36 reads as follows:

“The maximum percentage of contracting permitted in reserved contracts shall be 20% of the contract price, unless the subcontracting is carried out through another Special Employment Centre or Integration Enterprise, or with the promoter of the Integration Enterprise awarded the contract, provided that the entity has been previously qualified as a Social and Labour-market Integration Centre and the percentage of its workers subjected to integration processes is at least 50 percent, in which case the general regime of subcontracting provided for in this Regional Act shall apply.”

### **5. The reservation of contracts and publishing of results is compulsory**

Be aware of double obligation, as it is clearly and absolutely established that the entities that comprise the public sector are required to ensure that the amount of reserved procurements is at least 6% of the amount of adjudicated procurements in the immediately previous financial year. Furthermore, all entities that form part of the regional public sector must annually publish the list and total amount of the procurements reserved for Special Employment Centres and Insertion Companies.

## **6. Alternative and complementary compliance systems**

In order to reach the required minimum of 6%, as well as counting the reserved batches, the establishment of special execution conditions are envisaged for the contractor in the event of unreserved contracts, but whose value will be added:

- The outsourcing of Special Employment Centres and Insertion Companies.
- The recruitment of people in a situation or at risk of social exclusion to execute the contract, and for the contractor to do this effectively or to prove it has processed an employment offer to cover these positions with people with disabilities or in a situation of social exclusion.
- Labour insertion practices for people with disabilities or at risk of social exclusion.
- Contracts that after being qualified as reserved have ended up vacant.

## **7. Beneficiary entities.** Only two types of companies can be awarded:

- Registered and activated Insertion Companies in accordance with Act 44/2007, 13th December, for the regulation of the Insertion Company regime, or in accordance with the Regional Decree 94/2016, 26th October, by which the qualification, registration and aids regime for socio-labour Insertion Companies in Navarre are governed. Insertion Companies aim to facilitate the recruitment and social inclusion of disadvantaged people, through a period of accompaniment, training and labour recruitment in a non-profit making mercantile structure. At least 30% to 50% of the staff base must be composed of people in situation or at risk of social exclusion.
- Special Employment Centres of social initiative regulated in the General Act of the Right of Persons with Disabilities and their social inclusion (Legislative Royal Decree 1/2013, 29th November). These are companies that as well as producing goods or providing services, aim for the insertion of people with disabilities into the workplace, for which they have the required personnel and social adjustment services. At least 70% of the staff base must be composed of employees with disabilities of 33% or above.

However, only Special Employment Centres of social initiative are able to participate, defined by the RPPA as those with over 90% direct participation or promotion by one or various private non-profit making entities, whether associations, foundations or other kinds of social economy companies, and that in their statutes or founding agreements are required to fully reinvest their benefits to create employment opportunities for people with disabilities. Therefore, the contracting body must establish two requisites and verify both:

1. That in all cases their statutes or social agreements require the complete reinvestment of their benefits to create employment opportunities for people with disabilities.
2. That their promoted entities, as well as their property or capital, must comprise at least 90% non-profit making entities or social economy entities.

To all intents and purposes, we want to note a double key element in the application and fulfilment of 6% of the figure of the reserved procurements. On the one hand it is about adjusting the offer and demand, i.e. for the procurements to be tendered and the subjects of the contract to coincide with the sectors of activity in which the Special Employment Centres and Insertion Companies are involved. Furthermore it is essential to provide contracting specialists with this information, regarding which procurements can be reserved, as when a procurement is going to be tendered, the contracting personnel do not know - and do not need to know - if there are Insertion Companies or Special Employment Centres that are dedicated to this specific subject of the contract, and this adjustment of the offer and demand is precisely what will determine its appropriateness for reservation.

We recommend the Government of Navarre website, which allows users to know whether or not a procurement can be reserved in just three clicks, as it has a search engine, directories and helpful materials. See:

<https://gcpublica.navarra.es/publica01/SNEContratos/Paginas/default.aspx>

### **APPLICATIVE PROPOSAL. CONTRACTS RESERVED FOR SPECIAL EMPLOYMENT CENTRES OF SOCIAL INITIATIVE AND INSERTION COMPANIES**

1. 6% of the total annual budget volume of municipal public procurements shall be classified as reserved, to be awarded to Special Employment Centres of social initiative and Insertion Companies.
2. Any contract and any subject of the contract can be qualified as reserved.
3. The bid announcement must indicate that it is a reserved procurement.
4. Exclusive reservation can be established for Insertion Companies.
5. In reserved procedures, provisional and definitive securities will not be required, except for in duly justified exceptional cases.
6. The outsourcing limit will be established at 20% of the contract price, unless the outsourcing is performed with another Special Employment Centres or Insertion Companies.
7. Only social-initiative Insertion Companies and Special Employment Centres will be able to participate in reserved procedures, in accordance with the requirements established in Article 36.1 RPPA.
8. To guarantee the application of reserved procurements, the following measures will be adopted:
  - In the annual procurement plan, the nature of the contracts should be analysed to establish their appropriateness to qualify as reserved procurements.
  - When establishing the batches, their appropriateness should be analysed so as to qualify one of some of them as reserved.
  - In the event of dividing the contract into batches, one or some of them must be classed as reserved; otherwise due justification must be provided in the report.
  - Diffusion actions will be undertaken for the products, services and works provided by the Special Employment Centres of social initiative and Insertion Companies.
  - Annually, the total number of reserved procurements and their monetary amount should be collected, calculated and published.

## 5.2. CONTRACTS RESERVED FOR SOCIAL ECONOMY ENTITIES AND COMPANIES

Procurements reserved for social economy companies and entities, constitute one of the major changes of the RPPA, and they are regulated in Article 38:

### **Article 38. Contracts reserved in the health, social, cultural and educational fields**

1. The contracting authorities may reserve those contracts in the health, social, cultural and educational fields referred to in Annex II.B of this regional act for organisations which fulfil all of the following conditions:

- a) The objectives or purposes of the organisation is the delivery of the services referred to in Annex II.B of this regional act.
- b) Profits are reinvested with a view to achieving the objective of the organisation. Where profits are distributed or redistributed, this shall be based on participatory considerations.
- c) The structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders.

2. In contracts exceeding 750,000 euros, the following conditions must also be met:

- a) The maximum duration of the contract, including possible extensions, shall be no longer than three years.
- b) The organisation has not been awarded a contract exceeding 750,000 euros for the services concerned by the contracting authority concerned pursuant to this article within the past three years.

3. These contracts shall be awarded in accordance with the provisions of article 37 of this regional act. The notice of invitation to tender shall make reference to the reservations made in the health, social, cultural or educational fields provided for in this article.

4. The amount of the reserved contracts in the health, social, cultural and educational fields shall be at least 1% of the amount of the contracts awarded in the budgetary year immediately preceding it.

5. The beneficiaries of reserved contracts in compliance with this article shall be social economy entities, solidarity economy entities and not-for-profit entities.

We analyse this regulation and application:

### **1. Concept and application**

Its legal categorisation implies that only certain categories of companies are able to participate in the bid or be recruited, excluding any other legal classification.

Just as with reserved procurements from Article 36, it should be reiterated that the procedure is identical to any other bid (with the exception of the types of companies and entities that can be admitted), though the specific features of Article 37 RPPA should be applied (Special rules for contracts in healthcare, social, cultural and educational spheres).

However, in this case it is not possible to reserve any contract for social economy companies and entities, rather only in those cases and under the requirements established in the RPPA:



- Only bids for contracts in the social, healthcare, cultural and educational spheres can be reserved. Not even all contracts or subjects of the contract can be reserved, only those whose CPV codes appear on the list in APPENDIX II. B RPPA (Procurements of services destined to people, that can be reserved, in accordance with Article 38).
- In the case of procurements with a bidding price exceeding 750,000 Euros, the following requisites are added: the maximum contract duration shall not exceed three years; the social economy organisation must not have been awarded with the same procurements and via the same reservation in the past three years.

## **2. Beneficiary entities**

Article 38 refers generally to social economy, solidarity-based economy and non-profit making entities.

In order to provide legal security and transparency to procurements reserved for social economy companies and entities, contracting bodies must indicate the exact types of companies benefitted by this reservation in the contractual documentation. In this respect we turn to that established in Act 5/2011, 29th March, of Social Economy, for which regulation states that companies or entities constituted in accordance with the following society or social legal figures can participate in the reserved bid of the additional forty-eighth additional provision:

Associations and foundations constituted in accordance with the New Charter of Navarre and whose contributions regime is that of Regional Act 10/1996, 2nd July, regulated by the contributions regime of the foundations and sponsorship activities (or the one that will substitute this contributory regulation); or in accordance with Organic Act 1/2002, 22nd March, regulating the right to association; or in accordance with Act 50/2002, 26th December, of Foundations, as well as the cooperatives, mutual societies, labour societies, insertion Companies, Special Employment Centres, fishing guilds, and agrarian societies engaged in processing, in accordance with that established in Act 5/2011, 29th March, of Social Economy.

## **3. Compulsory reservation**

Once again, it is compulsory reservation, in this case indicating that a minimum of 1% of the amount of the contracts awarded in the immediately preceding financial year will be classified as reserved in accordance with Article 38.

The doubt remains as to whether the mentioned 1% is of the total number of procurements, or whether it only refers to procurements in the healthcare, social, cultural or educational spheres, or even only the CPVs indicated in Appendix II. B RPPA.

## **APPLICATIVE PROPOSAL. PROCUREMENTS RESERVED FOR SOCIAL ECONOMY, SOLIDARITY-BASED ECONOMY AND NON-PROFIT MAKING COMPANIES AND ENTITIES**

1. A minimum of 1% of the amount of procurements indicated in Appendix II must be qualified as reserved for social economy, solidarity-based economy and non-profit making companies and entities, in accordance with Article 38 RPPA. B RPPA.
2. The bid announcement must indicate that it is a reserved procurement in accordance with Article 38.
3. Only the following entities can participate in reserved procedures in accordance with this reservation type: associations and foundations constituted in accordance with the New Charter of Navarre and whose contributions regime is that of Regional Act 10/1996, 2nd July, regulated by the contributions regime of the foundations and sponsorship activities (or the one that will substitute this contributory regulation); or in accordance with Organic Act 1/2002, 22nd March, regulating the right to association; or in accordance with Act 50/2002, 26th December, of Foundations, as well as the cooperatives, mutual societies, labour societies, insertion Companies, Special Employment Centres, fishing guilds, and agrarian societies engaged in processing, in accordance with that established in Act 5/2011, 29th March, of Social Economy.
4. In the case of procurements with a bidding price exceeding 750,000 Euros, the maximum contract duration shall not exceed three years, and any company or entity that has been awarded with the same procurement and via the same reservation in the past three years is excluded from participation.
5. The Pamplona City Council can promote the application of procurements reserved for social economy entities and companies in accordance with the following measures:
  - In the annual procurement plan regarding social, cultural, healthcare and educational service contracts, the appropriate nature of the procurements should be analysed in order to be classified as reserved in accordance with Article 38.
  - When establishing batches of social, cultural, healthcare and educational service contracts, their appropriateness should be analysed so as to qualify one of some of them as reserved.
  - Training and awareness raising actions shall be undertaken by contracting personnel in the field of reserved procurements for social economy companies and entities.
  - Annually, the total number of reserved procurements and their monetary amounts should be collected, calculated and published in accordance with Article 38.

## 6. ADJUDICATION CRITERIA

### 6.1. REGULATION AND CONCEPT

The incorporation of social-type adjudication criteria will involve assessing the bidding companies' proposals (including the best proposal in social terms), determining the best offer, and consequently, establishing the procurement awarded company.

The key moment is that of drafting the regulatory specifications, when it is necessary to select, specify and draw up the most appropriate adjudication criteria in accordance with the needs to meet, the social objectives proposed, and the characteristics of the contract (sector of activity, price, time frame, workforce needed and their qualifications, socio-economic fabric, etc.).

The new public procurements act provides highly interesting new changes to this aspect; therefore we are going to reproduce the most relevant sections of Article 64 RPPA:

#### **Article 64. Contract award criteria**

1. Contracts shall be awarded to the tender offering the best value for money. The criteria to be used to determine this shall be laid down in the procurement documents and must meet the following requirements:

- a) They must be related to the subject-matter of the contract.
- b) They must be formulated precisely and objectively.
- c) They must guarantee that the tenders are assessed in conditions of effective competition.

2. Award criteria shall be considered to be linked to the subject-matter of the 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, including factors involved in:

- a) The specific process of their production, provision or trading.
- b) A specific process for another stage of their life cycle.

3. The tender which is the best value for money shall be determined in any of the following ways:

- a) Purely on the basis of criteria related to the best cost-effectiveness ratio, such as the price, life-cycle costing or other parameter.
- b) On the basis of criteria related to the cost-effectiveness ratio, together with qualitative criteria through which to identify the tender with the best quality-price ratio. These qualitative criteria may comprise, inter alia:

1. Quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, and trading and its conditions; including those criteria relating to the supply or utilisation of fair trade products in the course of the performance of the contract.
2. Organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract.

...

4. When a range of award criteria is used, at least 50% of the score shall be calculated using objective formulas set forth in the procurement documents which determine the relative weightings of each criterion. When the works, supplies or services are of an artistic or intellectual nature, at least 20% of the score shall be obtained using objective formulas.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

The procurement documents shall determine whether any of the criteria is essential or if for any of them there is a minimum score below which the tender shall be excluded.

5. Improvements shall be used as an award criterion in exceptional circumstances and their weightings shall not exceed 10% of the total score. Improvements are understood to be those works, supplies or services ancillary to those defined in the project or the technical specifications which do not alter the nature of said works, supplies or services.

In all events, when the procurement documents provide for improvements as an award criterion, they must set forth the aspects to which they may refer, the requirements and their weightings.

6. Award criteria of a social nature shall have a weighting of at least 10% of the total score and, for this purpose, matters related to the subject-matter of the contract shall be taken into account, such as the social and labour-market integration of persons with disabilities or at risk of social exclusion; equality between women and men; work-life balance; the improvement of labour and pay conditions; the participation of young professionals or small professional enterprises; subcontracting through Special Employment Centres and Integration Enterprises; ethical and social responsibility criteria applied to the works, supplies or services covered by the contract; the training, health protection or participation of the workers involved in providing the works, supplies or services; and others of a similar nature.

Article 64 establishes - without the need for a thorough legal analysis - the full legality of the social adjudication criteria, clearing any existing objections with the previous regulatory framework. For this reason, it is worth analysing the main aspects of interest and their latest changes:

1. A broad and open list is established, with specific topics and aspects that are likely to be included among the adjudication criteria. This way, the social-type adjudication criteria are no longer incurred in a draft leading to restrictive interpretations of its scope. It is relevant to apply them “transversally”, as indicated in the first Article of the act for any subject of the contract.
2. The concept of “direct link to the subject of the contract” has been negotiated, but the link should be established with the contractual service itself. As such, the regulation considers and explains that any issue involved in the contractual service is linked (and is valid), in any of its aspects, in any stage of its life cycle, even when they do not form part of its material substance, in the specific production process, or in terms of production methods or environmental and socially sustainable and fair commercialisation.
3. The concept of “most economically advantageous offer” has been negotiated and substituted by “best quality-price ratio”. Once again, this avoids limited interpretations that arose from the previous regulatory framework and that cited that the social criteria should have an economic transfer and entail a better offer that is measurable in monetary terms. This reasoning has changed to better doctrinal living.

The establishment of this concept was performed and explained in Directive 2014/24/EU, in recital 89: “To avoid confusion over the adjudication criteria currently known as the “most economically advantageous offer” in the Directives 2004/7/EC and

2004/18/EU, proceed to use a different terminology to encompass this concept: the “best quality-price ratio”. Fully aligned with this, the RPPA has completely removed the expression “most economically advantageous offer”, indicating that “procurements will be awarded to the best quality-price offer”.

4. Objective criteria. Finally, it should be noted that we shall exclusively propose objective clauses. Thereon, the Procurements Act indicates that at least 50% of the score should be calculated by applying objective formulas, with the exception of artistic or intellectual-type services, at least 20% of the score shall be obtained via objective formulas.

Obviously there is room to incorporate criteria subject to value judgements, which are completely legal as long as collectively they do not exceed the aforementioned limit. However, practice reveals the clear preference of contracting bodies to objective criteria, to the detriment of criteria subject to value judgements. It is logical, as this choice averts appeals by ensuring impartiality; it also facilitates the job as thanks to the automatic assessment, is not necessary to have specialised knowledge in the social field in question.

This is why all the social-type adjudication criteria that we are going to propose for incorporation into the contractual documentation shall be objective, so they can be assessed and later verified more easily. This should not be an obstacle so that when the contracting bodies consider the incorporation of social adjudication criteria subject to value judgements to be timely or necessary, they can do so without any qualms.

## 6.2. APPLICATION METHODOLOGY

Before proposing clauses, we suggest using the following application methodology:

1. Choosing criteria, the allocated weight and the specific scales, should be performed after a previous analysis of the contract: estimated value, characteristics, execution time frame, market offer, level of social responsibility from the sector being contracted, as well as the number of personnel that will execute the contract and their corresponding qualifications.
2. Clause models with a specific drafting are proposed, but it is obvious that the contracting body could always adapt to the specifications of each bid. Likewise, other types or themes of more appropriate clauses could be drafted or added.
3. Therefore, firstly the most suitable themed block or blocks must be chosen (employability, quality in the employment, fair trade, etc.).
4. Secondly, the most suitable criteria and sub-criteria to the subject of the contract should be selected, and those characteristic of the aforementioned contract. With regards to this issue, we reiterate that all the criteria are objective and do not require value or comparative judgements for the proposals, rather they are scales, formulas or criteria with a “yes or no” answer, with an automatic point allocation, to facilitate the work of the contracting bodies, technicians and committees.

5. Thirdly, a score or specific weight should be assigned to each criteria or sub-criteria. There will be contracts for which it will be convenient to allocate 1 point for one criteria and 12 points for others.
6. Fourthly, the scales should be adapted to these characteristics. For example, there will be contracts for which it is convenient to grant 10 points for the recruitment of 1 person with a disability, and for other contracts it will be appropriate to recruit 3 people with disabilities to obtain 10 points.
7. Fifth, in the specifications each social clause included must be accompanied by its corresponding associated verifier, which will allow for the effective verification of compliance with the social clauses. To do this, an effective and guaranteed system is provided, providing transparency and equal treatment, launching a clear message to bidding companies in that they must fulfil the duties and commitments acquired, and in particular, facilitating the work of contracting bodies and technical staff.

### 6.3. CLAUSE PROPOSAL WITH VERIFIERS AND INDICATORS

#### **CA.1. RECRUITMENT OF PEOPLE WITH DIFFICULTIES IN ACCESSING EMPLOYMENT RECRUITMENT OF PEOPLE WITH DISABILITIES AND/OR PEOPLE IN SITUATION OR AT RISK OF SOCIAL EXCLUSION [SEE VERIFIER AND EVALUATOR]**

1. Bidding companies or entities that commit to recruit people with difficulties in accessing the labour market for their staff base and that maintain this recruitment throughout the entire contractual service shall be assessed with up to X points, as long as the number exceeds that established as a special execution condition.
2. If there is a requirement to substitute personnel, or if the company does not need to recruit new personnel at the time of initiating the contract execution, it must commit to recruiting this profile and the number of people in all new recruitments, leaves and substitutions that take place until this number is reached.
3. The profile of the people to recruit shall be one of the following:
  - People with a certificate demonstrating a degree of disability of 33% or above.
  - People with profiles indicated in Act 44/2007, 13th December, regulating Insertion Companies.
  - People with difficulties accessing the labour market, in accordance with the Legislative Royal Decree 3/2015, 23rd October.
4. Points allocation shall be performed as follows:
  - X points for committing to recruit 1 person with these profiles.
  - X points for committing to recruit 2 people with these profiles.
  - X points for committing to recruit 3 people with these profiles.

Assessment note for these criteria: points shall be allocated depending on the duration of the working days in hours offered by each bidder.

### **VERIFIER ASSOCIATED WITH CA.1.**

1. After formalising the contract. The awarded company shall issue the contract managing unit with the following elements within the time frame of one month from contract formalisation, or in the time frame of one month from the start of the recruitments:

- A nominal list of employees recruited with disabilities or in a situation or at risk of social exclusion, specifying the start and finish dates of their contracts, as well as their working days.
- Copy of work contracts.
- Certificate of disability, or certificate of social public services or an entity with socio-labour insertion purposes, accrediting the profiles required (prior consent and fulfilment of the Personal Data Protection Act).

2. In the contract execution phase. Annually, the awarded company must provide:

- RER (Registered Employee Report), and Social Security certificate, displaying the total and nominal list of the company's employees.

### **EVALUATOR ASSOCIATED WITH CA.1.**

Number of people with disabilities or in a situation of social exclusion hired and their contract durations in months.

## **CA.2.**

### **A. OUTSOURCING OF SECs, IEs AND SOCIAL ECONOMY ENTITIES**

#### **A. OUTSOURCING OF SPECIAL EMPLOYMENT CENTRES, INSERTION COMPANIES AND SOCIAL ECONOMY ENTITIES [SEE VERIFIER AND EVALUATOR]**

Bidding companies or entities that commit to outsourcing a percentage of the procurement adjudication price to Insertion Companies and/or Special Employment Centres of Social Initiative, and/or social economy companies or entities, shall be assessed with up to X points, as long as this percentage is above - where applicable - that established as a special execution condition.

1. To this effect, the documentation provided for the bid must indicate the jobs to be performed, the people and working days to recruit and the economic amount (before leave), broken down for each job. In any case it should be clear, specific and appropriate to the contract. In the documentation to provide for the bid, accreditation should be provided that the outsourcing proposed shall be executed by companies with the characteristics described in the following section.
2. The companies likely to be outsourced shall be exclusively:
  - Special Employment Centres of social initiative, in accordance with the description and requisites indicated in Article 36.1, second paragraph of the Regional Act 2/2018 for public procurements.
  - Subscribed and registered Insertion Companies in accordance with Act 44/2007, 13th December, regulating Insertion Companies.

- Associations and foundations constituted in accordance with the New Charter of Navarre and whose contribution regime is that of Regional Act 10/1996, 2nd July, regulating the contribution regime of foundations and sponsorship activities (or the one that will substitute this contributory regulation); or Organic Act 1/2002, regulating the right to association; or Act 50/2002, of Foundations. As well as cooperatives, mutual societies, labour societies, fishing guilds, and agrarian societies engaged in processing, in accordance with that established in Act 5/2011, 29th March, of Social Economy, or in accordance with Regional Act 14/2006, 11th December, of Cooperatives of Navarre.

3. Points allocation shall be performed as follows:

- A scale is established, via which 1 point shall be awarded for every commitment to outsource 2% of the procurement adjudication price to Insertion Companies, Special Employment Centres of social initiative, and social economy companies.
- A maximum of 10 points shall be allocated for the commitment to outsource at least 20% of the contract adjudication price to the aforementioned companies and entities.
- A proportional score shall be allocated for intermediate proposals.

## **CA.2.**

### **B. VOLUNTARY BATCHES OF CONTRACT EXECUTION BY SPECIAL EMPLOYMENT CENTRES, INSERTION COMPANIES AND SOCIAL ECONOMY ENTITIES**

#### **[SEE VERIFIER AND EVALUATOR]**

Bidding companies or entities that propose a batch to be executed by Insertion Companies and/or Special Employment Centres of social initiative, and/or social economy companies or entities shall be assessed with up to X points, as long as this percentage is higher than that established - where applicable - as a special execution condition.

1. To this effect, the documentation provided for the bid must indicate, the jobs to be performed, the people and working days to recruit and the economic amount (before leave), broken down for each voluntary batch that the contractor proposed to be executed by these kinds of companies. In any case it should be clear, specific and appropriate to the contract. In the documentation to provide for the bid, accreditation should be provided showing that the batch proposed shall be executed with companies with the characteristics described in the following section.

2. Companies likely to carry out these voluntary batches shall be exclusively:

- Special Employment Centres of social initiative, in accordance with the description and requisites indicated in Article 36.1, second paragraph of the Regional Act 2/2018 for public procurements.
- Subscribed and registered Insertion Companies in accordance with Act 44/2007, 13th December, regulating Insertion Companies.
- Associations and foundations constituted in accordance with the New Charter of Navarre and whose contributions regime is that of Regional Act 10/1996, 2nd July, regulating the contributions regime of foundations and sponsorship activities (or the one that will substitute this contributory regulation); or Organic Act 1/2002, regulating the right to association; or Act 50/2002, of Foundations. As well as cooperatives, mutual societies, labour societies, fishing guilds, and agrarian societies engaged in processing, in accordance with that established in Act 5/2011, 29th March, of Social Economy, or in accordance with Regional Act 14/2006, 11th December, of Cooperatives of Navarre.



3. Points allocation shall be performed as follows:

- A scale is established, via which 1 point shall be awarded for every commitment to allocate 2% of part of the contract via voluntary outsourcing a batch of the procurement adjudication price to be executed by Insertion Companies, Special Employment Centres of social initiative, and social economy companies.
- A maximum of 10 points shall be allocated for the commitment to outsource at least 20% of the contract adjudication price to the aforementioned companies and entities.
- A proportional score shall be allocated for intermediate proposals.

4. The main awarded company shall be responsible for coordinating the company that executes the voluntary batch.

5. The corresponding score shall be awarded if the execution of the contract proposal is made by various providers in the Temporary Business Association, or the offer is made by various providers participating, as long as one of them is the a company among those defined in Section 2, with a score assigned depending on the % represented by its participation in this contract.

PAYMENT RULES: In the particular conditions of each contract, the direct payment of the corresponding invoices can be established to the outsourced units or voluntary batches with the entities indicated in point 2. These units shall be certified “to zero” or deducted in the corresponding certification and invoice issued by the contracting part.

#### **VERIFIER ASSOCIATED WITH CA.2.**

1. After formalising the contract. The awarded company shall issue the contract managing unit, within the time frame of one month from the formalisation of the contract, with a declaration including the nominal employee list of the entities to outsource (and indicating if they are Special Employment Centres, Insertion Companies, or social economy companies or entities), indicating the concepts, dates envisaged and amounts to outsource.

2. In the contract execution phase. Annually, the awarded company must provide:

- Copy of the civil or mercantile contract, or invoice, indicating the outsourced Special Employment Centre or Insertion Company, or social economy company, including the detailed concept, economic amount and execution dates, as well as a copy of the registration of the Special Employment Centre or Insertion Company in its corresponding register.

#### **EVALUATOR ASSOCIATED WITH CA.2.**

Amount expressed in Euros of outsourcing or voluntary batches with Special Employment Centres, Insertion Companies and social economy companies and entities.

## CA.3. GENDER EQUALITY

### CA.3.1. Hiring women

[SEE VERIFIER AND EVALUATOR]

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**1. Hiring women.** X points shall be awarded for the commitment to recruit a proportion of women for the staff base throughout the entire contractual service, at least 10 points above the average percentage organised by sex and branch of activity in the latest Working Population Survey by the National Statistics Institute for the sector of (...), referenced to the publication of the bid announcement.

**Alternative.** Valuation for contracting a specific number of women: X points shall be awarded for the commitment to recruit X women onto the staff base for the execution of the contract and throughout the entire contractual service.

**Alternative.** Recruitment of a specific number of women and scaled assessment. As such, for example, 3 points will be awarded for the commitment to employ 1 woman, 6 points for 2 women, and 9 points for 3 women, to be incorporated into the staff base for the entire duration of the contractual service.

#### **2. Hiring women for qualified positions, positions of responsibility or management:**

The engagement to recruit a minimum of 50% of women to execute the contract and during the entire contractual service for positions of responsibility, management or for qualified positions, will be assessed with X points.

**Alternative.** Assessment of the recruitment of a specific number (with or without scale). The engagement to recruit X women for the staff base, who will execute the contract and during the entire contractual service for positions of responsibility, management or for qualified positions, will be assessed with X points.

#### **3. Hiring women for new recruitments (if there is a duty to substitute):**

If there is a duty to substitute personnel, or if the company does not need to recruit new personnel at the time of executing the contract, X points will be awarded for the commitment to recruit women for all (or 50%, or X%) new recruitments made by the company in the provision of the contract.

**Alternative.** If there is a duty to substitute personnel, or if the company does not need to recruit new personnel at the time of executing the contract, X points will be awarded for the commitment to recruit women for all (or 50%, or X%) new recruitments in the framework of the execution of the contract for management, positions of responsibility or qualified positions.

### **VERIFIER ASSOCIATED WITH CA.3.1.**

**1. After formalising the contract.** The awarded company shall issue the contract managing unit with the following elements within the time frame of one month from contract formalisation, or in the time frame of one month from the start of the recruitments:

Nominal list of the women recruited, specifying the start and end date of their contracts, as well as the working day, and where applicable, professional category. Copy of work contracts.

**2. In the contract execution phase.** Annually, the awarded company must provide: RER (Registered Employee Report), and Social Security certificate, displaying the total and nominal list of the company's employees.

### **EVALUATOR ASSOCIATED WITH CA.3.1.**

Number and percentage of female employees in the contract service.

Number and percentage of female employees in the contract service in qualified positions, management or positions of responsibility.

### **CA.3.2. Including the gender perspective when executing the procurement**

Up to X points will be awarded for the company's commitment to adopt one or some of the following improvement actions in the field of equality between women and men in the company. For the commitment to apply or develop each of the following actions, X points will be awarded:

1. By committing to give at least X hours each year of **training in equality** to the staff executing the contract. **[SEE VERIFIER AND EVALUATOR]**
2. By approving and diffusing a protocol or specific measures **to prevent and address sexual harassment and harassment on the grounds of sex in the workplace**, or to prevent sexual harassment of the people benefitted or users of the contractual service; and/or to prevent situations of male violence or for sexual orientation or for gender identity. **[SEE VERIFIER AND EVALUATOR]**
3. By approving and diffusing a specific protocol for the use of gender-based language in the company, so that in all the documentation, publicity, image or material that is produced in view to the execution of the contract, it uses a non-sexist language, avoiding any discriminatory image of women or sexist stereotypes, and promoting an image with values of equality, balanced presence, diversity, shared responsibility and plurality in roles and gender identities. **[SEE VERIFIER AND EVALUATOR]**
4. By designing and executing risk prevention and workplace health with gender perspective, adapted to the differentiated characteristics of sex, in accordance with that stipulated in Articles 5.4 and Articles 26.2 and 26.4 of the Occupational Hazard Prevention Act. **[SEE VERIFIER AND EVALUATOR]**

5. By providing and applying to the staff base that is executing the contract, or by committing to implement a **company agreement that envisages specific measures for effective equality between women and men** within the time frame determining the particular conditions of the contract. **[SEE VERIFIER AND EVALUATOR]**
6. By providing and applying to the execution of the contract, or by committing to implement a **certification or accreditation in the field of equality between women and men**, and by committing to applying the measures and actions required to the staff base that will execute the contract to obtain this certification, in the time frame determining the particular conditions of the contract. To this effect, the Ministry of Healthcare, Social Services and Equality’s “Company in Equality” hallmark is considered valid, with any other similar or equivalent hallmark also admitted. **[SEE VERIFIER AND EVALUATOR]**
7. By committing that the **number of women benefitted or contract users** will be at least 50% of the total. **[SEE VERIFIER AND EVALUATOR]**
8. By committing to present a **report about the impact of gender on recruitment**, on the people benefitting from the action employed or on the personnel executing it. To do this, the data must be presented organised by sex, and indicators that allow for an effective assessment of the equality measures applied.  
**[SEE VERIFIER AND EVALUATOR]**
9. By designing, establishing and applying **conciliation measures for personal, work and family life balance** for the staff base executing the contract, or for the users or people benefitting from it, as long as they improve already existing measures. To this effect, the technical proposal must include a detailed description of the number of people benefitted, the budget allocated to each measure, and a description of the specific measures (improvement or expansion of the permits, licences, or extended leave established by the legal regulation in force; flexibility and/or adjustment of the working day or work schedule, or home-working; support services for conciliation, or others).  
**[SEE VERIFIER AND EVALUATOR]**
10. For the **qualification and experience in equal opportunities between women and men** of the personnel that will execute the contract:
  - X points for each person attached to the execution of the contract with a minimum of 150 accredited training hours in equality between women and men.
  - X points for each person attached to the execution of the contract with accredited work experience of at least three years in positions directly connected with equality between women and men.**[SEE VERIFIER AND EVALUATOR]**

## VERIFIERS AND EVALUATORS ASSOCIATED WITH CA.3.2.

[In correlative order in accordance with sub-criteria 1 to 10]

In all cases the awarded company must issue the documentation to the contract managing unit

1. **Associated verifier.** Annually, a certificate issued by the company or the trainer, indicating the contents, duration and nominal list of attendees, proving that the individuals trained are attached to the execution of the contract.

**Associated evaluator.** Hours of training given and the number of attendees.

2. **Associated verifier.** In the time frame of two months from the contract formalisation, a copy of the protocol or the measures adopted, and a brief report on the impact, which will be certified by a person with specialised training in equality; or accompanied by an affidavit of participation by the staff base or legal representation.

**Associated evaluator.** Number of measures included in the protocol and number of people benefitted.

3. **Associated verifier.** In the time frame of two months from the formalisation of the contract, a copy of the specific protocol for the use of gender-based language, as well as a brief description of the diffusion carried out. Annually, a copy of all the documentation, publicity, posters and all the written or graphic materials used must be presented in digital format.

**Associated evaluator.** Number of materials produced with inclusive language and images. Number of people to whom the protocol has been diffused.

4. **Associated verifier.** In the time frame of two months from the formalisation of the contract, a copy of the occupational risk prevention plan, specifying the measures designed and applied differentiated by sex.

**Associated evaluator.** Number of specific measures and the number of people benefitted (with desegregation by sex), of the occupational health measures adapted to the characteristics differentiated by sex.

5. **Associated verifier.** In the time frame of two months from the formalisation of the contract, a copy of the company agreement indicating equality measures. Associated evaluator. Number of specific measures and the number of people benefitted (with desegregation by sex), of the equality measures envisaged in the company agreement.

6. **Associated verifier.** In the time frame of two months from the formalisation of the contract, a copy of the certification or official insignia.

**Associated evaluator.** Number of employees benefitted by the equality measures applied in accordance with the certification or insignia in the issue of equality.

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### **VERIFIERS AND EVALUATORS ASSOCIATED WITH CA.3.2.**

7. **Associated verifier.** Annually, a statement of the total number and nominal list of users or beneficiaries of the service, broken down by sex (and where applicable, signature or attendance sheets).

**Associated evaluator.** Number of female users or beneficiaries of the service and percentage over the total number of users or beneficiaries.

8. **Associated verifier.** Each year, a copy of the assessment of the impact of actions that favour equality for the people benefitted by the service, or for employees. The data must be presented organised by sex, a list of actions and indicators that allow the measures applied to be assessed effectively.

**Associated evaluator.** Number of specific measures and the number of people benefitted (broken down by sex), of the equality actions applied in the execution of the contract.

9. **Associated verifier.** Annually, a comprehensive technical report of the conciliation measures applied, contents, duration, effects and people benefitted.

**Associated evaluator.** Number of specific measures and number of people benefitted.

10. **Associated verifier.** In the time frame of two months from the formalisation of the contract: academic certification of the equality training received by the people ascribed to the execution of the contract; as well as accreditation via specific certifications, or work, mercantile or professional contracts of the accredited experience of at least three years in jobs directly related to equality between women and men.

**Associated evaluator.** Number of people subscribed to the contract execution with specific training and experience in the area of gender equality.

### **CA.3.3. GENERAL CRITERIA REGARDING THE INCLUSION OF GENDER PERSPECTIVE**

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As well as the specific criteria already indicated, we consider it timely to propose a general clause regarding the incorporation of gender perspective, that is objective and easily verifiable. To this effect, and with the clauses proposed below, adjudication criteria could be included related to equality between women and men, such as:

- Including the gender perspective when executing the procurement.
- Equality measures between women and men in the contract execution.
- Conciliation measures for personal, work and family life balance.

“Up to X points will be awarded for the company’s commitment to (incorporate the gender perspective; or to adopt equality measures between women and men; or to apply conciliation measures for personal, work and family life balance). Technical proposals shall be assessed objectively, awarding X points for each of the following aspects (or those considered timely by the contracting body):

1. If a diagnosis or analysis is performed and incorporated into the design of the measures about the situation of equality between women and men within the company, on the staff base that will execute the contract, or about the contract beneficiaries: 1 point.  
[SEE VERIFIER AND EVALUATOR]
2. If the design of the measures is relevant and there is an application methodology, a timeline, a budget and clearly assigned responsibilities: 1 point.  
[SEE VERIFIER AND EVALUATOR]
3. If an assessment and follow-up plan is included with indicators and final report: 1 point. [SEE VERIFIER AND EVALUATOR]
4. If an equality manager is designated from the personnel, or if an equality specialist is recruited with a minimum of 300 hours on the subject: 1 point. [SEE VERIFIER AND EVALUATOR]
5. If in the creation, design or application of the measures, the main participators are the staff base executing the contract, the Company Committee, or the legal representative of the employees: 1 point. [SEE VERIFIER AND EVALUATOR]
6. If the company’s commitments regarding equality are transmitted internally in a positive way, and are communicated externally both clearly and steadily.

### **VERIFIERS AND EVALUATORS ASSOCIATED WITH CA.3.3.**

In all cases the awarded company must issue the documentation to the contract managing unit

1. **Associated verifier.** In the time frame of two months, a copy of the diagnosis or analysis performed.  
**Associated evaluator.** Number of gender analyses performed and the number of people affected or benefitted.
2. **Associated verifier.** Annually, an inclusive report about the measures adopted, timeline, budget and assigned duties or responsibilities. **Associated evaluator.** Number of measures adopted and number of people benefitted.
3. **Associated verifier.** Annually: final report about the impact and assessment of the equality measures.  
**Associated evaluator.** Number of equality impact reports created and the number of people involved or benefitted.
4. **Associated verifier.** In the time frame of two months from the contract formalisation: company certification expressing the nominal designation of the person responsible for equality; or a copy of the work or professional contract, and CV with a copy of the specific qualifications in equality of the person hired.  
**Associated evaluator.** The number of companies awarded with municipal procurements that have a designated gender equality manager.
5. **Associated verifier.** Annually, a comprehensive list of all internal and external communication actions undertaken, and a digital copy of these actions.  
**Associated evaluator.** The number of companies awarded with municipal procurements that have undertaken communication and awareness actions in the field of gender equality, and the total number of actions undertaken.



## CA.4. QUALITY IN EMPLOYMENT

Up to X points will be awarded for the company's commitment to adopt one or some of the following organisation and qualification policies that entail a better and more efficient provision of the contract. For the commitment to apply or develop each of the following sub-criteria, X points will be awarded with a maximum of X:

### C.A.4.1. Stable employment [SEE VERIFIER AND EVALUATOR]

X points will be awarded for the commitment to integrate at least X% of employees with an open-ended contract into the staff base. The calculation shall be performed with regards to the total number of working days each year of all the people attached to this execution. Partners of cooperatives, labour societies and associated work companies will be provided with open-ended contracts.

**Alternative.** Assessment for recruitment for the provision of a specific number of employees with open-ended contracts.

**Alternative.** Conversion of temporary contracts for open-ended ones. X points will be awarded for the conversion of each (or of X) temporary contract(s) for open-ended ones.

**Alternative.** Application of scales to the aforementioned criteria. For example, 3 points will be awarded for the commitment to recruit 50% of employees with an open-ended contract onto the staff base that will execute the contract for the entire contractual service duration, with 6 points awarded for 75% of employees with open-ended contracts, etc. Or 1 point for the conversion of a temporary contract into an open-ended one, with 2 points for the conversion of two temporary contracts into open-ended ones, etc.

### CA.4.2. Labour and salary improvements [SEE VERIFIER AND EVALUATOR]

X points will be awarded to companies whose technical proposals detail and quantify improvements to labour and salary conditions that exceed that stipulated in the Workers' Statute, or in the sectoral and territorial collective agreement, or where applicable, company agreement, and that are committed to applying them to the staff that will execute the contract.

### CA.4.3. Training of the staff base will execute the contract [SEE VERIFIER AND EVALUATOR]

X points will be awarded for the commitment to design and give training programmes of at least X hours each year, related to the contractual service to the staff base that will execute the contract.

### CA.4.4. Extension of the working day [SEE VERIFIER AND EVALUATOR]

X points will be awarded to those whose most relevant service is direct citizen service, by converting each part-time contract (equal to or below 20 hours a week) into a full-time contract (equal to or exceeding 35 hours a week).

### **CE.4.5. Continuation of employment and of working conditions**

#### **[SEE VERIFIER AND EVALUATOR]**

X points will be awarded to bidders that commit to maintaining the job positions offered for the execution of the contract throughout the entire contractual service, or the job positions required in the specific conditions, and that commit to not unilaterally reducing labour conditions throughout the entire contract execution period, notwithstanding the application of improvements to the basic labour legislation applicable that corresponds at all times to employees attached to the fulfilment of the contract depending on the agreement of the sector applicable upon presenting the offer.

Footnote: the adjudication criteria linked to quality in the employment can only be applied to contracts in which direct citizen service constitutes the most relevant service, and should always be weighted reasonably and proportionately, so as not to unbalance the search for the best quality-price ratio in the overall service.

### **VERIFIERS AND EVALUATORS ASSOCIATED WITH CA.4**

[In correlative order in accordance with sub-criteria 1 to 4]

In all cases the awarded company must issue the documentation to the contract managing unit

#### **CA.4.1. Associated verifier**

In the time frame of two months after the formalisation of the contract, the awarded company must provide:

- Affidavit of the nominal employee list and the number of people attached to the execution of the contract, indicating the working day, the type of contract (open-ended, fixed duration, or partners of the social economy companies).
- RER (Registered Employee Report, issued by the Social Security) and certified report issued by the Social Security indicating the employees, length of service within the company and contribution base.
- Where applicable, the contracting body may require a copy of the company's TC1 and TC2 (Nominal Employee List and Contribution Liquidation List), as well as a copy of the work contracts in standardised model of the State Employment Public Service.

**Associated evaluator.** Number of people with an open-ended contract in the contractual service and the percentage of the entire staff base executing the contract.

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## **VERIFIERS AND EVALUATORS ASSOCIATED WITH CA.4**

### **CA.4.2. Associated verifier**

In the time frame of two months after the formalisation of the contract, the awarded company must provide:

- Affidavit of the specific labour conditions, with details about specific improvements, whether quantitative or qualitative, and comparative in terms of the collective agreement or the applicable regime.
- RER and certified report issued by the Social Security indicating employees and the contribution bases.

**Associated evaluator.** Number of people benefitted from labour or salary improvements.

### **CA.4.3. Associated verifier**

Annually, throughout the entire contract duration and its extensions, the awarded company must provide a certification issued by the company or trainer, indicating the contents, duration and nominal employee list of attendees.

**Associated evaluator.** Hours of training given and the number of attendees.

### **CA.4.4. Associated verifier**

In the time frame of two months after the formalisation of the contract, the awarded company must provide:

- Affidavit of the nominal employee list and the number of people attached to the execution of the contract, indicating the working day and type of contract.
- RER (Registered Employee Report, issued by the Social Security) and certified report issued by the Social Security indicating the employees, length of service within the company and contribution base.
- Where applicable, the contracting body may require a copy of the company's TC1 and TC2 (Nominal Employee List and Contribution Liquidation List), as well as a copy of the work contracts in standardised model of the State Employment Public Service.

**Associated evaluator.** Number of people with a full-time contract in the contractual obligation and the percentage of the entire staff base executing the contract. >>

## **VERIFIERS AND EVALUATORS ASSOCIATED WITH CA.4**

### **CA.4.5. Associated verifier**

In the time frame of two months after the formalisation of the contract, the awarded company must provide:

- Affidavit of the nominal employee list and the number of people attached to the execution of the contract, indicating the professional category and the salary conditions applied.
- RER issued by the Social Security, and certified report issued by the Social Security indicating the employees, length of service within the company and contribution bases.
- Where applicable, the contracting body may require a copy of the company's TC1 and TC2 (Nominal Employee List and Contribution Liquidation List), as well as a copy of the work contracts in standardised model of the State Employment Public Service.

**Associated evaluator.** Number of people employed in the contractual service and the number of people whose salary and working conditions have not been reduced.

## CA.5. FAIR TRADE

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X points will be awarded to bidding companies or people that commit to include fair trade products into the service provision or supply contents.

This criteria will be assessed automatically using the following scale, regarding the amount or percentage of fair trade products compared to the global bidding budget, that the company or person bidding commits to include in the execution of the contract.

- For committing to use at least 20% of fair trade products from the total adjudication budget: 5 points.
- For committing to use at least 40% of fair trade products from the total adjudication budget: 10 points.
- For committing to use at least 60% of fair trade products from the total adjudication budget: 15 points.

### **VERIFIER ASSOCIATED WITH CA.5.**

Annually, the awarded company must issue accreditation to the contract managing unit via invoices or delivery notes, proving that the supplies or products have an accredited label from the World Fairtrade Organization (WFTO), or the Fairtrade label (Fairtrade Labelling Organization), or other equivalent labels; this can also be accredited by any means of proving that these products comply with all the requirements needed to obtain them in accordance with the European Parliament Resolution regarding fair trade and development, 6th July 2006 [2005/2245 (INI)].

### **EVALUATOR ASSOCIATED WITH CA.5.**

Total amount in Euros of fair trade products supplied, as well as the percentage of fair trade products used or supplied over the total.

## **CA.6. QUALITY AND LOCAL FOOD PRODUCE**

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X points will be awarded to bidding companies or people that commit to include quality and/or local food products into the service provision or supply contents. These products will be understood to be those that meet all or some of the following characteristics:

- Products from local circuits, whose transport - from collection, slaughter or processing up to the supply - has used a minimal amount of carbon dioxide (CO<sub>2</sub>) and greenhouse gases (GHG).
- Fresh food that has not required controlled atmosphere chambers or undergone deep-freezing processes.
- Seasonal products in accordance with the description in the Spanish Food Code.
- Products from organic agricultural, fishing or livestock sources, accredited in accordance with the certifications of the Organic Production Board or other similar entities.
- Products that have biodiversity features, traditional varieties, local breeds, as well as products from land crops grown.

This criteria will be assessed automatically using the following scale, regarding the amount or percentage of local and/or quality products compared to the global bidding budget, that the bidding company commits to include in the execution of the contract.

- For committing to use at least 20% of quality and/or local products from the total adjudication budget: 5 points.
- For committing to use at least 40% of quality and/or local products from the total adjudication budget: 10 points.
- For committing to use at least 60% of quality and/or local products from the total adjudication budget: 15 points.

### **VERIFIER ASSOCIATED WITH CA.6.**

Annually, the awarded company must issue the contract managing unit with accreditation by means of invoices, delivery notes, certifications or technical proof that the supplies or products have the strict characteristics established in the contractual documentation: from local circuits; fresh food; seasonal products; certified organic products; or with characteristics of biodiversity, traditional varieties or local breeds.

### **EVALUATOR ASSOCIATED WITH CA.6.**

Total amount in Euros of quality and/or locally supplied products, as well as the percentage of the total amount of quality and/or locally sourced products used or supplies over the total.

## **CA.7. SOCIAL QUALITY CRITERIA**

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The company's commitment to adopt one or some of the following quality, organisational and social involvement policies that entail a better and more efficient provision of the contract will be assessed. For the commitment to apply or develop each of the following sub-criteria, X points will be awarded with a maximum of X:

### **C.A.7.1. Participation [SEE VERIFIER AND EVALUATOR]**

Up to X points will be awarded to companies that include details about the application of participation methodologies and mechanisms in the design, execution, and assessment of the contract in their technical proposals, from the people or agents involved, professional people, or users or beneficiaries of the service.

### **CA.7.2. Coordination [SEE VERIFIER AND EVALUATOR]**

X points will be awarded to companies that include the specific commitment in their technical proposal, of nominal participation in networks or the registration of collaboration agreements with public entities or with associative fabric in social and community interest actions that are directly linked to the subject of the contract and that come into play during the contract execution period.

### **CA.7.3. Awareness [VER VERIFICADOR AND EVALUATOR]**

X points will be awarded to companies that include details in their technical proposal about information or social awareness activities linked to the subject of the contract, as well as the commitment to provide the formal results of the execution of the contract via communications during the execution of the contract or to finalise it in connection with its development, provision and conclusions.

### **CA.7.4. Customer service [SEE VERIFIER AND EVALUATOR]**

Up to X points will be awarded for the commitment to provide a department and personnel for customer service or for services for users or beneficiaries of the service to be contracted in the same place of contract or service provision.

## **VERIFIERS AND EVALUATORS ASSOCIATED WITH CA.7**

[In correlative order in accordance with sub-criteria 1 to 5]

### **CA.7.1. Associated verifier**

Annually, the awarded company must issue the contract managing unit with a comprehensive technical report about the actions and methodologies used, the number of people and/or entities involved, and the assessment of the impact or results obtained from participation.

**Associated evaluator.** Number of people and entities that have participated in the design or execution of the contractual service.

### **CA.7.2. Associated verifier**

Annually, the awarded company must send the contract managing unit certifications issued by the respective entities or networks, proving participation in networks or in collaboration agreement, and indicating dates, participating entities, actions undertaken, as well as the qualitative assessment of the impact and the results.

**Associated evaluator.** Number of public or private entities, and networks that have participated and collaborated in the provision of the contract.

### **CA.7.3. Associated verifier**

Annually, the contract managing unit will be issued with a comprehensive technical report about the actions and activities in informing and raising social awareness, and deliver a copy of the publications.

**Associated evaluator.** Number of actions performed and the number of people reached or benefitted.

### **CA.7.4. Associated verifier**

In the time frame of two months from the contract formalisation, the awarded company must provide a copy of the rent contract or property deeds of the premises, indicating its location and destination

**Associated evaluator.** Number of people attended.



## **CA.8. CREATING EMPLOYMENT**

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Up to 15 points will be awarded on the total scale to bidders that commit to recruit a larger number of people to the staff base that will execute the contract.

For this calculation, the company's proposal must indicate the number of people to recruit, and the duration in hours of each work contract to assign to each employee. This calculation will give the final result of the number of working days throughout the entire contract service.

This criteria will be assessed automatically using the scale established by the contracting body.

For example:

- For committing to contracting or employing at least 12,000 hours in working days: 5 points.
- For committing to contracting or employing at least 15,000 hours in working days: 10 points.
- For committing to contracting or employing at least 18,000 hours in working days: 15 points.

### **VERIFIER ASSOCIATED WITH CA.8**

In the time frame of two months from the contract formalisation, the contract managing unit must be issued with an affidavit with a nominal list of participants, or those that will be attached to the execution of the contract, indicating the duration of each contract and the working day for each of them.

Annually, the Registered Employee Report must be provided, issued by the Social Security, indicating the employees, length of service within the company and contribution bases.

In the event that part of the employment generated does not constitute company employees (i.e. self-employed workers, partners of cooperatives or outsourced company staff), an affidavit and accreditation of their recruitment must be provided, indicating the duration of their contracts and working days.

### **EVALUATOR ASSOCIATED WITH CA.8**

Number of people recruited for the execution of the contract (detailing the duration of the contract and working day of each of them).

## **CA. 9. COMPLEMENTARY ADJUDICATION CRITERIA**

To end the section regarding adjudication criteria from a responsible perspective, three aspects should be taken into account:

1. The weight of the price and the set of adjudication criteria in the scale
2. Unusually low or risky offers
3. The minimum threshold required for the technical proposals

### **1. Weight of the economic criteria**

The procurement act does not indicate that the cost or price of adjudication should have a minimum established weight, despite there still being a trend to denaturalise the search for the best quality-price ratio in many public administrations, by indicating an excessive and disproportionate weight of cost, or price, compared to the other adjudication criteria, and not just social and environmental criteria, but also those that guarantee appropriate quality in the contract provision.

In this respect, it is worth indicating the obvious, in that contracting bodies have the duty to obtain the best adjudication amount and to consequently manage public budgets in a rational and efficient way. However, we also know that cheapness is costly. A well-executed, quality public procurement, under decent labour conditions and paying due attention to users, is more important than a minor saving in cost, and ultimately it is more efficient, even in monetary or economic terms.

Therefore, we should back the social responsibility of procurements, which implies paying a fair price, considering all costs surrounding a service or product, and execution in suitable and decent working conditions, which is not compatible with allowing prices to be cut, or assessing costs with 80% of the adjudication scale.

It does not seem possible a priori, and generally, for the cost or price to have a maximum weight of 30%, 40% or 50%, rather it is necessary to perform a study of the contract characteristics and the sector of activity to determine the ideal and proportionate weight. Furthermore, limiting its weight should be complemented not only with social and quality clauses, but also with measures linked to the applicable formula, labour costs and recklessly low bids.

A clear example would be that in its “City Hall Decree on sustainable public procurement”, the Barcelona City Council establishes that in procurements in which employee payments are determining in the total cost, the adjudication criteria that value the price of the procurement may have a maximum weight of 35% of the total scoring”. Other administrations establish guidance ranges, for example, the price cannot exceed 50% of the total, the technical quality shall be at least 40% of the total and the social and environmental criteria at least 10% of the total.

### **2. Unusually low or risky offers**

Act 2/2018 governing public procurement, regulates unusual (reckless) offers, under Article 98:

## **Article 98. Abnormally low tenders**

1. The specifications shall determine the conditions for considering a tender abnormally low in view of the subject-matter of the works, supplies or services covered by the contracts and market conditions by reference to the tender price or the other tenders submitted.

When an abnormally low tender is submitted which causes the contracting authority to presume that the conditions of the contract are not going to be properly satisfied, it shall inform the tenderer affected before rejecting it so that he/she/it may justify the circumstance as he/she/it sees fit within a period of five days.

The request for information made of the tenderer must be formulated clearly, in such a way as to place him/her/it in a position to justify the feasibility of the tender fully and appropriately, specifying the aspect on the basis of which the tender has been defined abnormal.

2. Justification of the tender may relate to, inter alia:

a) The economics of the manufacturing process, of the services provided or of the construction method.

b) The technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work.

c) The originality of the work, supplies or services proposed by the tenderer.

d) Compliance with applicable obligations in the fields of environmental, social and labour law laid down in European Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in annex XIV of Directive 24/2014.

e) Compliance by the subcontractors with the obligations contained in the previous paragraph.

f) The possibility of the tenderer obtaining state aid. If the contracting authority decides to reject a tender because it considers that the state aid is illegal, it shall inform the European Commission thereof.

3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the price or costs proposed.

Technical advice from the relevant service shall be requested in the procedure.

4. In all events, the contracting authorities shall reject tenders if they discover that they are abnormally low because they violate the regulations governing subcontracting or fail to meet applicable national or international environmental, social or labour obligations, including breaches of the sectoral collective agreements in force, pursuant to the provisions of this regional act.

The following conclusions and their possible application in the contractual documentation can be drawn from this:

1. The contractual documentation must previously indicate, via objective parameters, the offers that will be considered unusual or reckless. For example: any offer below 15% of the bidding price will be considered unusual or disproportionate.
2. The contractual documentation shall also expressly indicate that unusually low offers will be rejected for having failed to include salary costs in their calculation, deriving from sectoral collective agreements in force, applicable to that envisaged in the RPPA.
3. However, the application of recklessly low bids is not automatic, and it is not possible to directly exclude a company for involvement in a disproportionately low bid, in accordance with the parameters indicated in the contractual documentation. However, it is necessary to require the bidder to establish a time frame in order to provide allegations and documentation, or to give rational and broken down details for the low level of prices.
4. Therefore, the labour costs must be broken down and calculated; and a proportionate parameter of an unusual or recklessly low bid shall be established, as well as a qualitative parameter that prevents offers that fall below the labour costs. Following these guidelines and applying the allegations procedure, a company's bid that includes an economic offer that falls below the salary costs stipulated in the sectoral collective agreement in force, can be excluded, whenever this level is not justified.

### **3. Minimum valuation required of the technical offer**

To end this block of issues, that stipulated in Article 64.4 RPPA is of particular interest: *The contractual documentation will determine if any of the criteria are essential, or if any of them have a minimum score below which the offer is excluded.*

This provision aims to avoid the company being awarded 10 points out of 40 in the technical proposal, but obtaining 60 out of 60 in economy, for which by adding both results it is awarded with the procurement, over other companies with better technical and social offers. Unfortunately this occurs frequently, and implies an extremely poor quality service, as well as a likelihood of indecent labour conditions.

To prevent this, the regulation allows a criteria to be qualified as essential (technical and social quality, for example), to coordinate an adjudication procedure by phases and to establish a minimum score or threshold of 50% for each of the phases. This way, in the first phase the technical proposal will be assessed, and any companies that do not obtain 50% of the score, will be ruled out or eliminated from the selection process, unable to move to the next phase: economic proposal assessment.

## APPLICATIVE PROPOSAL. COMPLEMENTARY ASPECTS REGARDING ADJUDICATION CRITERIA

### 1. Unusual or disproportionate withdrawals:

- The contractual documentation shall indicate the economic parameter below which a bid is considered to have a proposal with unusual or disproportionate values.
- It will be considered as an objective parameter to ascertain that the propositions cannot be fulfilled by including unusual or disproportionate proposals when the bidding company's proposal offers a lower price for minimum labour costs by professional category, in accordance with the applicable labour agreement. In these cases, the procedure envisaged in Article 98 RPPA shall be implemented.

### 2. Weight of economic criteria.

- The economic criteria should be weighted equally and reasonably with the technical, social and environmental criteria.
- In the social services procurements, and in those that involve direct citizen service, the weight of the price shall not exceed 30% of the total scale.

### 3. Valuation required of the technical proposal.

In all contracts that need to ensure a suitable level of quality to guarantee the correct provision of the procurement, technical quality shall be qualified as essential, and the adjudication procedure shall be coordinated in phases, establishing that a minimum threshold of 50% will be required of the overall score for technical or quality criteria in order to continue to the selection process. Any bidding companies that do not achieve this threshold of 50% shall be excluded from the procedure.

## 7. SPECIAL EXECUTION CONDITIONS

### 7.1. REGULATION AND CONCEPT

Act 2/2018 governing Public Procurements of Navarre regulates very similar concepts in up to three different Articles. The establishment of social duties qualifies and defines them respectively as requirements and as execution conditions. The Article shall be observed and analysed:

#### **Article 66. Social, environmental and gender-equality contract performance requirements**

1. The procurement documents shall include the special gender equality, innovation, social, environmental and employment contract performance conditions, which must be compatible with European Union law, suited to the characteristics of the contract and associated with the subject-matter of the contract at any stage of its life cycle.

The environmental considerations eligible for incorporation include the supply of bulk products or products in reusable containers, the recovery or reuse of containers or packaging, the collection and recycling of waste or products, by the contractor, the energy efficiency of the products or services, the use of cost-saving and energy efficiency measures, the reduction of greenhouse gases, more sustainable water management, the use of energy from renewable sources, the use of organic products and the maintenance or improvement of natural resources which may be affected by performance of the contract.

Among other clauses of a social nature, measures such as the following shall be included: the hiring of persons with disabilities, disadvantaged persons or members of vulnerable groups among the people assigned to the performance of the contract; the subcontracting of special employment centres or integration enterprises; the hiring of a greater number of people for the performance of the contract; measures to prevent accidents in the workplace; the use of fair trade and local products; the application of equality plans or any other which fosters the social and labour-market integration of persons with disabilities or in situations of or at risk of social exclusion, the reduction of unemployment, in particular youth, female and long-term unemployment, training in the workplace, equality between women and men, work-life balance, the improvement of the labour conditions of those persons involved in the performance of the contract, training in and protection of health and safety at work, and the application of ethical and social responsibility criteria in the works, supplies and services covered by the contract.

2. These requirements must not constitute covert technical specifications, selection criteria or award criteria, nor may they be discriminatory, in such a way that any person with the technical ability to perform the contract must be able to meet them.

3. In all events, the procurement documents must include the following warnings:

a) The contract is subject to compliance with the legal, reglementary and conventional provisions in force regarding taxation, social security, environmental protection, employment protection, gender equality, harassment based on sex and sexual harassment, labour conditions, the prevention of risks in the workplace and other labour-related provisions, and the social and labour-market integration of persons with disabilities, to the obligation to hire a specific number or percentage of persons with disabilities, and, in particular, to the conditions established by the latest sectoral collective agreement with the narrowest scope which exists applicable to the sector in which the activity to procure can be classified.

b) The economic part of the tender must be adequate for the successful tenderer to meet the cost of applying, at minimum, the relevant sectoral collective agreement, under no circumstances it being admissible that the hour prices of the compensation considered be lower than the hour prices plus the hour-price improvements in the collective agreement plus social security contributions.

c) In the case of service and service concession contracts, the procurement is subject to the novation of the employment contracts of all the workers who, even though they may belong to another enterprise, have been carrying out the activity covered by the procurement contract according to the terms provided for in article 67.

4. The contracting authorities may lay down special performance conditions which oblige the successful tenderer to perform the contract according to criteria of fairness in taxation and fiscal transparency, in accordance with current tax law. To this end, the tenderers may be required to make a self-declaration in which they undertake to comply with this special performance condition. These self-declarations shall be public.

#### **Article 106. Special social, ethical, environmental or other contract performance conditions**

1. The contracting authorities shall draw up special conditions relating to the performance of the contract, provided that these are related to the subject-matter of the contract, are not directly or indirectly discriminatory, are compatible with Community law and are indicated in the notice of invitation to tender and in the procurement documents.

In all events, it is mandatory to lay down at least one of the special performance conditions listed in the next paragraph in the specifications which regulate procurement.

2. These performance conditions may relate, in particular, to economic considerations related to innovation, the environment or of a social nature.

In particular, environmental considerations may be established which pursue, inter alia: the reduction of greenhouse gas emissions; the maintenance or improvement of environmental values which might be affected by performance of the contract; more sustainable water management; development of the use of renewable energy; promotion of product recycling and the use of reusable packaging; or furtherance of the supply of bulk products and organic production.

Social or employment considerations may be included for one of the following purposes, inter alia: to realise the rights recognised in the United Nations Convention on the Rights of Persons with Disabilities; to hire a number of persons with disabilities higher than that required by national law; to promote the employment of persons with special difficulties when it comes to entering the labour market, in particular of persons with disabilities or in situations or at risk of social exclusion, through Integration Enterprises; to eliminate inequalities between men and women in the labour market, favouring the application of measures which promote equality between men and women at work; to favour greater participation of women in the labour market and work-life balance; to combat unemployment, in particular youth, female and long-term unemployment; to favour training in the workplace; to ensure health and safety in the workplace and compliance with the applicable sectoral and territorial collective agreements; measures to prevent accidents in the workplace; other purposes which may be established with reference to the coordinated employment strategy defined in article 145 of the Treaty on the Functioning of the European Union; or to ensure respect for basic labour rights throughout the production chain by demanding compliance with the basic Conventions of the International Labour Organisation, including those considerations which seek to favour small-scale producers in

developing countries, with which favourable trading relations are maintained, such as payment of a minimum price or a premium to producers or greater transparency and traceability throughout the market chain.



3. The contractual documentation may establish penalties in the event of non-compliance with these special execution conditions, or attribute them as essential contractual requirements.

4. All the special execution conditions that form part of the contract shall also be required of all subcontractors participating in the execution of the contract.

**Article 105. Obligations relative to taxation, labour, social, environmental protection, employment protection, labour conditions and gender equality provisions**

1. The contracting authorities shall take the pertinent measures to ensure that in the performance of the contracts the contractors comply with the applicable environmental, social and labour obligations laid down in European Union law, national law, collective agreements, the provisions of international environmental, social and labour law binding on the state and, in particular, those set forth in this regional act.

2. The indications given in the previous paragraph are set forth without prejudice to the power of the contracting authorities to take the appropriate measures to check that the candidates and tenderers comply with the obligations referred to in the paragraph during the tendering procedure.

3. Failure to comply with the obligations referred to in the first paragraph and, especially, breaches or repeated delays in the payment of compensation or the application of compensation conditions below those derived from collective agreements shall, when deemed serious and intentional, result in the penalties referred to in article 146.

4. The contracting authority may indicate in the specifications the entity or entities from which tenderers can obtain the pertinent information on obligations regarding taxation, social security, environmental protection, employment protection, gender equality, harassment based on sex and sexual harassment, labour conditions, the prevention of risks in the workplace and other labour-related provisions, the social and labour-market integration of persons with disabilities, the obligation to hire a specific number or percentage of persons with disabilities, and, in particular, the conditions established by the latest sectoral agreement with the narrowest scope which exists for the sector in which the activity to procure can be classified.

5. When the information referred to in paragraph 1 is provided, the contracting authority, as part of a contract award procedure, shall request the tenderers or candidates to declare that they have taken into account when preparing their tenders the obligations derived from the provisions in force regarding taxation, environmental protection, employment protection, gender equality, labour conditions, the prevention of risks in the workplace, the social and labour-market integration of persons with disabilities, the obligation to hire a specific number or percentage of persons with disabilities and environmental protection.

6. This shall not prevent application of the provisions of article 96 on the verification of tenders which involve abnormal or disproportionate amounts.

We analyse the regulation of social-type special execution conditions from a legal and practical perspective:

1. Respectfully speaking, it is worth mentioning that the regional public procurement legislation is somewhat confused over this phase of the procedure, and in fact it has incurred an error, resulting from the two similar amendments that refer to the same issue, both approved and established in the final text without having been transferred or duly merged.

The outcome is that Articles 66 and 106 refer to the same concept and have very similar texts. In truth, this is not important; the determining factor is its regulation. In this guide we will use the concept of special execution conditions in a standardised way, which is completely equivalent and comparable to the requirements in execution.

2. The possibility and legality of incorporating requirements or special execution conditions of social, ethical and environmental-type contracts, does not allow for any legal objection: the legislation of public procurements expressly and clearly backs this opinion.

3. The special execution conditions of the contract are configured as legitimate requirements that all bidding countries take on implicitly upon presenting their proposals, and that the contractor company should preceptively comply with at the time of delivering the contract. They do not constitute a condition or previous requirement, rather a mandatory duty in the contract execution phase, obviously once awarded. Therefore, compliance should not be proven at the time of presenting offers, rather compliance is required during the contract execution phase.

4. Just as with the adjudication criteria, the RPPA offers an extensive themed and exemplified list, with the purpose of completely dispelling any legal objection or qualm. The list is not exhaustive, rather the social, ethical or environmental issues described therein are prone to being expanded and adapted.

5. The reference that special execution conditions should be “linked to the subject of the contract” is reiterated, but again, we clarify that this is in the sense of Article

64. That is to say, that a direct link to the subject of the contract is not required, rather it should be linked with the contractual service itself: any issues integrated within the contractual service, in any of its aspects, in any stage of its life cycle, even when they do not form part of its material substance, in the specific production process, or in terms of production methods or environmental and socially sustainable and fair commercialisation.

6. One new change worth noting is that at least one special execution condition must be indicated. Therefore we find ourselves with a compulsory responsible application of recruitment for all public administrations, and that embodies the precept indicated in the first Article of the Public Procurements Act: *All public procurement shall incorporate social criteria transversally and preceptively.*

Once the compulsory nature of its indication has been established, vague or very easily fulfilled duties should be avoided, as well as simply indicating the accreditation of a legal fulfilment that is already compulsory. Therefore execution conditions that are adapted to the contractual service should be chosen, which contribute to the adoption of social responsibility policies, effectively benefit users, and promote improved labour conditions for the staff base executing the contract.

7. Considering its compulsory nature, we would warn about its application under cautionary and progressivism criteria, to avoid incorporating disproportionate special execution conditions into the documentation, regarding the characteristics of the contract or with the existing market offer.  
Likewise, with regards to excess, it would also not be logical to offer excessive conditions. We therefore do not aim to include the same special execution condition or conditions in a procurement for drafting a technical project for the amount of 5,000 Euros, which requires specific qualification and entails the work of one person in a time frame of two months, as for a home-service contract for a million Euros, which will require fifty staff members, lasting - with extensions - for four years, and which will allow for the application of interesting policies for insertion, equality, or quality in the employment, or will open up niches for the social economy, or for small and medium enterprises.
8. In this guide, and considering the cautionary criteria, a list of social execution conditions is proposed, with a certain minimum requirement nature. However, depending on the characteristics of the contract, it would be perfectly possible to turn to the list of adjudication criteria and include one or some of the clauses contained therein to the execution conditions.  
In other words, there will be contracts in which it is appropriate and proportionate to require (execution condition) that training is given to the staff about equality between women and men; or that it is compulsory to transform X temporary contracts into open-ended ones; or for the staff salary conditions to be improved in a sector of activity that lacks a collective agreement; or for a percentage of the products to be supplied being fair trade.
9. We also reiterate that the (mandatory) special execution conditions and the (voluntary) adjudication criteria, are compatible and completely synergistic. It is not a matter of choosing between them, rather it is recommendable to include both, marking a reasonable compulsory standard that most bidding companies can exceed, and when it comes to incorporating the adjudication criteria the level is raised, so that the bidding companies that contribute a greater commitment or social value to the service, are awarded with higher scores. For example, it is enough to require (execution condition) that one person with disabilities should be recruited for the execution of the contract; and to assess (adjudication criteria) companies that are committed to recruiting two or more people with disabilities.
10. Finally, and of great importance: it is essential to verify successful fulfilment. There is no point drafting and including social clauses, if the specifications do not establish how and when the awarded company will be accredited for their correct execution and the consequences that will arise from non-compliance. For this reason we propose control and verification systems, indicating the time and specific documentation that must be presented by awarded companies.

## 7.2. CLAUSE PROPOSAL WITH VERIFIERS AND INDICATORS

### CE.1. EMPLOYABILITY OF PEOPLE WITH DIFFICULTIES IN ACCESSING EMPLOYMENT

#### CE.1. RECRUITMENT OF PEOPLE WITH DISABILITIES AND/OR PEOPLE IN SITUATION OR AT RISK OF SOCIAL EXCLUSION

1. The awarded company must employ X people with difficulties accessing the labour market onto the staff base that will execute the contract, and maintain this recruitment throughout the entire contractual service.
2. If the company does not need to recruit new personnel at the time of initiating the contract execution, it must commit to recruiting this profile through new recruitments, leaves and substitutions that take place until this number is reached.
3. The profile of the people to recruit shall be one of the following:
  - People with a certificate demonstrating a degree of disability of 33% or above.
  - People with profiles indicated in Act 44/2007, 13th December, regulating Insertion Companies.
  - People with difficulties accessing the labour market, in accordance with the Legislative Royal Decree 3/2015, 23rd October.

#### VERIFIER ASSOCIATED WITH CE.1.

1. After formalising the contract. The awarded company must issue the contract managing unit with the following elements within the time frame of one month from contract formalisation, or in the time frame of one month from the start of the recruitments:
  - A nominal list of employees recruited with disabilities or in a situation or at risk of social exclusion, specifying the start and finish dates of their contracts, as well as their working days.
  - Copy of work contracts.
  - Certificate of disability, or certificate of social public services or an entity with socio-labour insertion purposes, accrediting the profiles required (prior consent and fulfilment of the Personal Data Protection Act).
2. In the contract execution phase. Annually, the awarded company must issue the following to the contract managing unit:
  - RER (Registered Employee Report), and Social Security certificate, displaying the total and nominal list of the company's employees.

#### EVALUATOR ASSOCIATED WITH CE.1.

Number of people with disabilities or in a situation of social exclusion hired and their contract durations in months.

## **CE.2. OUTSOURCING OF SECs, INSERTION ENTITIES (IEs) AND SOCIAL ECONOMY COMPANIES**

### **CE.2. A. OUTSOURCING OF SPECIAL EMPLOYMENT CENTRES, INSERTION COMPANIES AND SOCIAL ECONOMY ENTITIES [SEE VERIFIER AND EVALUATOR]**

1. The awarded company must outsource at least X% of the contract adjudication price with an Insertion Company, or a Special Employment Centre of social initiative; or a social economy company or entity.
2. To this effect, in documentation provided for the bid must indicate, the jobs to be performed, the people and working days to recruit and the economic amount (before leave), broken down for each voluntary batch that the contractor proposes to be executed by these kinds of companies. In any case it should be clear, specific and appropriate to the contract. In the documentation to provide for the bid, accreditation should be provided showing that the batch proposed shall be executed with companies with the characteristics described in the following section.
3. The companies to be outsourced shall be exclusively:
  - Special Employment Centres of social initiative, in accordance with the description and requisites indicated in the additional fourteenth provision of Act 9/2017 for public sector procurements.
  - Subscribed and registered Insertion Companies in accordance with Act 44/2007, 13th December, regulating Insertion Companies.
  - Associations and foundations constituted in accordance with the New Charter of Navarre and whose contributions regime is that of Regional Act 10/1996, 2nd July, regulated by the contributions regime of the foundations and sponsorship activities (or the one that will substitute this contributory regulation); in accordance with Organic Act 1/2002, regulating the right to association; or in accordance with Act 50/2002, 26th December, of Foundations. As well as cooperatives, mutual societies, labour societies, fishing guilds, and agrarian societies engaged in processing, in accordance with that established in Act 5/2011, 29th March, of Social Economy, or in accordance with Regional Act 14/2006, 11th December, of Cooperatives of Navarre.

## **CE.2. B. DEFINITION OF VOLUNTARY BATCHES OF CONTRACT EXECUTION BY SPECIAL EMPLOYMENT CENTRES AND INSERTION COMPANIES AND SOCIAL ECONOMY ENTITIES**

### **[SEE VERIFIER AND EVALUATOR]**

1. The awarded company must define at least X% of the contract adjudication price to be executed by an Insertion Company, or a Special Employment Centre of social initiative; or a social economy company or entity.
2. To this effect, the documentation provided for the bid must indicate the jobs to be performed, the people and working days to recruit and the economic amount (before leave), broken down for each job that the contractor proposes to be executed by these kinds of companies. In any case it should be clear, specific and appropriate to the contract. In the documentation to provide for the bid, accreditation should be provided showing that the batch proposed shall be executed with companies with the characteristics described in the following section.
3. The companies that will execute this batch defined by the successful contract bidder shall be exclusively:
  - Special Employment Centres of social initiative, in accordance with the description and requisites indicated in the additional fourteenth provision of Act 9/2017 for public sector procurements.
  - Subscribed and registered Insertion Companies in accordance with Act 44/2007, 13th December, regulating Insertion Companies.
  - Associations and foundations constituted in accordance with the New Charter of Navarre and whose contributions regime is that of Regional Act 10/1996, 2nd July, regulated by the contributions regime of the foundations and sponsorship activities (or the one that will substitute this contributory regulation); in accordance with Organic Act 1/2002, regulating the right to association; or in accordance with Act 50/2002, 26th December, of Foundations. As well as cooperatives, mutual societies, labour societies, fishing guilds, and agrarian societies engaged in processing, in accordance with that established in Act 5/2011, 29th March, of Social Economy, or in accordance with Regional Act 14/2006, 11th December, of Cooperatives of Navarre.
4. The main contractor shall be responsible for coordinating the company that executes the voluntary batch.
5. This special execution condition will be considered fulfilled if the contract execution proposal is made by various providers in the Temporary Business Association, or the offer is made by various providers participating, as long as one of the providers is a company from those defined in Section 2, and its participation in the contract is less than X%.

**PAYMENT RULES:** In the particular conditions of the contract, the direct payment of the corresponding invoices can be established to the outsourced units or executed as a batch with the entities indicated in point 2. These units shall be certified “to zero” or deducted in the corresponding certification and invoice issued by the main contractor.

**VERIFIER ASSOCIATED WITH CE.2.**

1. After formalising the contract. The awarded company must issue the contract managing unit, within the time frame of one month from the formalisation of the contract, with a declaration with the nominal employee list of the entities to outsource or to execute the batch proposed by the main contractor (and indicating if they are Special Employment Centres, Insertion Companies, or social economy companies or entities), indicating the concepts, dates envisaged and amounts to outsource.
2. In the contract execution phase. Annually, the awarded company must provide:
  - Copy of the civil or mercantile contract, or invoice, indicating the outsourced Special Employment Centre or Insertion Company, or social economy company, including the detailed concept, economic amount and execution dates. Or where applicable, the batch to execute proposed by the main contractor.

**EVALUATOR ASSOCIATED WITH CE.2.**

Amount expressed in Euros of outsourcing with Special Employment Centres, Insertion Companies and social economy companies and entities.

## CE.3. GENDER EQUALITY

### CE.3.1. HIRING WOMEN

[SEE VERIFIER AND EVALUATOR]

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#### CE.3.1.1. Hiring women

The awarded company must recruit a proportion of women for the staff base that will execute the contract throughout the entire contractual service that is at least 5 points above the average percentage, organised by sex and branch of activity in the latest Working Population Survey by the National Statistics Institute for the sector of (...), taking the publication of the bid announcement as reference.

**Alternative.** The recruitment of X women will be required on the staff base that will execute the contract and throughout the entire duration of the contractual service.

#### CA.3.1.2. Hiring women for qualified positions, positions of responsibility or management:

The recruitment of X women shall be required for the execution of the contract, and throughout the entire contractual service, in positions of responsibility, management or qualified positions.

**Alternative:** the conversion and improvement of the professional category of X contracts for women will be required on the staff base that will execute the contract and throughout the entire duration of the contractual service.

#### CA.3.1.3. Hiring women for new recruitments (if there is a duty to substitute):

If there is a duty to substitute personnel, or if the company does not need to recruit new personnel at the time of executing the contract, women must be recruited for all (or 50%, or X%) new recruitments made by the company in the provision of the contract.

**Alternative.** If there is a duty to substitute personnel, or if the company does not need to recruit new personnel at the time of executing the contract, women must be recruited for all (or 50%, or X%) of new recruitments in the framework of the execution of the contract for management, positions of responsibility or qualified positions.



**VERIFIER ASSOCIATED WITH CE.3.1.**

1. After formalising the contract. The awarded company must issue the contract managing unit with the following elements within the time frame of one month from contract formalisation, or in the time frame of one month from the start of the recruitments:

Nominal list of the women recruited, specifying the start and end dates of their contracts, as well as their working days, and where applicable, professional category. Copy of work contracts.

2. In the contract execution phase. Annually, the awarded company must issue the following to the contract managing unit:

RER (Registered Employee Report), and Social Security certificate, displaying the total and nominal list of the company's employees.

**EVALUATOR ASSOCIATED WITH CE.3.1.**

Number and percentage of female employees in the contract service.

Number and percentage of female employees in the contract service in qualified positions, management or positions of responsibility.

### **CE.3.2. INCLUSION OF THE GENDER PERSPECTIVE WHEN EXECUTING THE PROCUREMENT**

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1. At least X hours each year of training in equality must be given to the staff executing the contract. **[SEE VERIFIER AND EVALUATOR]**
2. A protocol or specific measures must be approved and diffused to prevent and address sexual harassment and harassment on the grounds of sex in the workplace, or to prevent sexual harassment of the people benefitted or users of the contractual service; and/or to prevent situations of male violence for sexual orientation or gender identity. **[SEE VERIFIER AND EVALUATOR]**
3. A specific protocol for the use of gender-based language in the company must be approved and diffused, so that in all the documentation, publicity, image or material that is produced in view to the execution of the contract, it uses non-sexist language, avoids any discriminatory images of women or sexist stereotypes, and promotes an image with values of equality, balanced presence, diversity, shared responsibility and plurality in roles and gender identities. **[SEE VERIFIER AND EVALUATOR]**
4. Risk prevention and workplace health with gender perspective actions must be designed and executed, adapted to the differentiated characteristics of sex, in accordance with that stipulated in Articles 5.4 and Articles 26.2 and 26.4 of the Occupational Hazard Prevention Act. **[SEE VERIFIER AND EVALUATOR]**
5. At least 50% of the total number of beneficiaries or contract users should be women. **[SEE VERIFIER AND EVALUATOR]**
6. A report must be provided about the impact of gender on recruitment, on the people benefitting from the action employed or on the personnel executing it. To do this, the data must be presented organised by sex, and indicators that allow for an effective assessment of the equality measures applied. **[SEE VERIFIER AND EVALUATOR]**
7. Conciliation measures for personal, work and family life balance must be designed and applied for the staff base executing the contract, or for the users or people benefitting from it, as long as they improve already existing measures. To this effect, a detailed description must be given of the number of people benefitted, the budget allocated to each measure, and a description of the specific measures (improvement or expansion of the permits, licences, or extended leave established by the legal regulation in force; flexibility and/or adjustment of the working day or work schedule, or home-working; support services for conciliation, or others. **[SEE VERIFIER AND EVALUATOR]**
8. Personnel with qualification and experience in equal opportunities between women and men must be included within the execution of the contract. At least X people attached to the execution of the contract must have a minimum of 150 hours of accredited training in equality between women and men. **[SEE VERIFIER AND EVALUATOR]**

## VERIFIERS AND EVALUATORS ASSOCIATED WITH CE.3.2.

[In correlative order in accordance with sub-criteria 1 to 8]

**1. Associated verifier.** Annually, the awarded company must issue the contract managing unit with a certification issued by the company or trainer, indicating the contents, duration and nominal list of attendees.

**Associated evaluator.** Hours of training given and the number of attendees.

**2. Associated verifier.** In the time frame of two months from the contract formalisation, the awarded company must issue the contract managing unit with a copy of the protocol or the measures adopted, and a brief report on the impact, which will be certified by a person with specialised training in equality; or accompanied by an affidavit of participation by the staff base or legal representation.

**Associated evaluator.** Number of measures included in the protocol and number of people benefitted.

**3. Associated verifier.** In the time frame of two months from the contract formalisation, the awarded company must issue the contract managing unit with a copy of the specific protocol for the use of gender-based language, as well as a brief description of the diffusion carried out. Annually, a copy of all the documentation, publicity, posters and all the written or graphic materials used must be presented in digital format.

**Associated evaluator.** Number of materials produced with inclusive language and images. Number of people to whom the protocol has been diffused.

**4. Associated verifier.** In the time frame of two months from the formalisation of the contract, the awarded company must issue a copy of the occupational risk prevention plan to the managing unit, specifying the measures designed and applied differentiated by sex.

**Associated evaluator.** Number of specific measures and the number of people benefitted (with desegregation by sex), of the occupational health measures adapted to the characteristics differentiated by sex.

**5. Associated verifier.** Annually, the awarded company must issue the contract managing unit with a statement of the total number and nominal list of users or beneficiaries of the service, broken down by sex (and where applicable, signature or attendee sheets).

**Associated evaluator.** Number of female users or beneficiaries of the service and percentage over the total number of users or beneficiaries.

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**6. Associated verifier.** Each year, the awarded company must provide a copy of the assessment of the impact of actions in favour of equality for the people benefitted by the service or for employees. The data must be presented organised by sex, a list of actions and indicators that allow the measures applied to be assessed effectively.

**Associated evaluator.** Number of specific measures and the number of people benefitted (broken down by sex), of the equality actions applied in the execution of the contract.

**7. Associated verifier.** Annually, the awarded company must issue the following to the contract managing unit: a comprehensive technical report of the conciliation measures applied, contents, duration, effects and people benefitted.

**Associated evaluator.** Number of specific measures and number of people benefitted.

**8. Associated verifier.** In the time frame of two months from the contract formalisation, the awarded company must issue the contract managing unit with the academic certification of equality training belonging to the people attached to the execution of the contract.

**Associated evaluator.** Number of people subscribed to the contract execution with specific training in the area of gender equality.

#### **CE.4. ETHICS CLAUSE**

##### **[SEE VERIFIER AND EVALUATOR]**

The awarded company must apply the contract scrupulously, adhering to the following International Conventions and Agreements throughout the entire contract duration, for all people participating in any phase of the production chain and along the entire supply chain:

- The International Convention on the Rights of Persons with Disabilities.
- ILO Convention no. 87, regarding the Freedom of Association and the Protection of the Right to Organise Convention.
- ILO Convention no. 98, regarding the Right to Organise and Collective Bargaining Convention.
- ILO Convention no. 29, regarding Forced Labour.
- ILO Convention no. 105, regarding the Abolition of Forced Labour.
- ILO Convention no. 138, regarding the Minimum Age.
- ILO Convention no. 111, regarding Discrimination (Employment and Occupation).
- ILO Convention no. 100, regarding Equal Remuneration.
- ILO Convention no. 182 regarding the Worst Forms of Child Labour.

#### **VERIFIER ASSOCIATED WITH CE.4**

Annually, the awarded company must issue the following to the contract managing unit:

- Affidavit accrediting the scrupulous execution of the contract in adherence to the International Conventions and Agreements indicated as execution conditions.
- In specific cases, it may be necessary (indicating this previously in the contractual documentation) to present certification, a seal or hallmark proving compliance with the mentioned International Agreements, such as the Fairtrade certification mark or SA 8000, TCO Certified, OHSAS 8001, ISO 9001, DS 49001, ISO 26000 certifications, or any other equivalent in nature, or accreditation via an external audit.

#### **EVALUATOR ASSOCIATED WITH CE.4**

The evaluator is linked to the contractual service, indicating the number and percentage of contracts that have been fulfilled and/or accredited compliance with the ILO Conventions.

#### **CE.5. TAX RESPONSIBILITY CLAUSE**

**[SEE VERIFIER AND EVALUATOR]**

1. The awarded company must avoid tax evasion and avoidance within the framework of the contractual service, as well as guarantee the correct contribution of income resulting from this procurement.
2. In compliance with this special execution condition, the awarded company must issue the contract managing unit with an affidavit in which:
  - a) It declares the commitment to incorporate all of the income resulting from the procurement into its Personal Income Tax declarations, into the Non-Resident Income Tax or into the Company Tax, as applicable.
  - b) It declares that the company does not destine - either itself or via connected entities - (in the terms in the Regional Act 26/2016, 28th December) incomes deriving from this contract to the undertaking of operations in tax havens with the purpose of obtaining tax savings. Alternatively, the company should prove that its operations in a territory classed as a tax haven, respond to valid economic reasons that do not include tax savings.
3. Affidavits cannot be qualified by the companies or bidders as confidential, and they shall be published in the Navarre Recruitment Portal, or on the Electronic Bidding Platform of Navarre, so that any natural or legal person with a legitimate interest may allege the truthfulness of conformity with transparency principles, access to public information and good governance.

### **VERIFIER ASSOCIATED WITH CE.5**

Annually, the awarded company must issue the contract managing unit with an affidavit claiming to have executed the contract without incurring tax evasion or avoidance, and ensuring the correct contribution of income deriving from the contract.

In specific cases, in terms of procurement and sectors in which companies that operate in tax havens may bid, the following text will be incorporated into the specific conditions as a verification system:

1. The awarded company will expressly authorise the contracting body to access its tax data by proxy of the Tax Administration, in accordance with that stipulated in Regional Act 13/2000, 14th December, General Taxation of Navarre.
2. If the awarded company is part of a group in which some of its entities are subject to the requirement to present information country by country, in the terms envisaged in the Regional Order 3/2017, 11th January, of the Councillor of the Treasury and financial policy by which model 231 is approved, “declaration of information country by country”, it will provide the contracting body with a copy of the declarations presented during the execution of the contract, within the ten days following the presentation of each of them to the Tax Administration.
3. If the awarded company is subject to the requirement to present the informative declaration of connected operations and of operations and situations related to havens or territories qualified as tax havens (Regional Order 84/2018, 24th May, by the Councillor of the Treasury and Financial Policy, by which model 232 is approved, “declaration of information about connected operations and of operations and situations related to havens or territories qualified as tax havens”, it must provide the contracting body with a copy of the declarations presented during the execution of the contract, within the ten days following the presentation of each of them to the Tax Administration.
4. Reports may be required from social organisations specialising in the attainment of fair taxation for the verification of this special execution condition.

### **EVALUATOR ASSOCIATED WITH CE.5**

The evaluator shall refer to the number of companies awarded with municipal public procurements that have provided the contract with tax responsibility criteria and without using tax avoidance or evasion in tax havens.

## 8. COMPLIANCE, VERIFICATION AND IMPACT GAUGE

### COMPLIANCE WITH AND VERIFICATION OF THE SOCIAL CLAUSE

We must assume that the verification phase of compliance with social clauses, the most important of all is that regarding the responsible public procurement process.

It is true that an increasing number of public administrations are incorporating different social clauses into their specifications, yet it is also true that only a small part actually verify and check correct compliance by the awarded companies.

This constitutes a genuinely endemic problem, not about responsible public procurement in particular, rather about public procurement in general. As such, the experience and development of responsible public procurement leads us to a very clear conclusion: the keystone of responsible public procurement can be found in the verification of compliance with it.

Aware of this difficulty, we propose a thorough, simple and effective control and verification system, with the added value of greatly facilitating the work of technical procurement staff. The summarised guidelines are as follows:

1. An objective or arithmetic clause is incorporated into the specific conditions of the contract, which avoids value judgement and makes assessment easier for the contracting body, so that the person assessing the social criteria does not have to be an expert in gender equality or in employability, or in labour law.
2. The duty to accompany each social clause with its corresponding associated verifier is established, which provides a standardised compliance control and accreditation system, the description or literal text of which must always be included in the specifications.
3. The verifiers are issued to the presentation of a specific documentation that allow the contracting body or the person responsible for the contract to quickly and easily check effective compliance with each clause, as it is enough to simply examine the specific documentation once or twice a year and to compare its contents with the duties taken on by the awarded company.
4. The trial load (accreditation and fulfilment) is transferred to the awarded company, and for this, always and in all cases, the duty to accredit fulfilment of the social clauses will be established, which must be performed in accordance with the already established standardised documentation in the specific procurement conditions, which will make it easier to examine and later check.

Applying this system, there is complete transparency and equal treatment of the procedure, as all the bidding companies know beforehand which documentation should be provided in the event of being awarded. This way we avoid social clauses being merely symbolic or decorative, transforming them into effective clauses. To do this it is fundamental to establish a systematic and standardised procedure in contractual documentation, as this way we send out a four-fold message to bidders:

- Clauses must be effectively fulfilled.
- The awarded company must prove fulfilment therein by providing pre-established documentation.
- Execution shall be effectively verified, expressly assigning the function of control.
- Non-compliance shall entail serious consequences.

Therefore, the particular contract conditions shall accompany each adjudication criteria and each social-type execution condition, with an associated verifier, which will indicate the documentation that must be presented by the awarded company to accredit fulfilment, as well as the specific time at which it must be presented.

To close this circle, the contractual documentation must include a general clause related to the control and verification system, for which we propose the following draft:

### **APPLICATIVE PROPOSAL. COMPLIANCE AND ACCREDITATION OF THE SOCIAL CLAUSES**

1. The contractor company shall be required, as the sole responsible entity for the complete contract performance, to comply with all the adjudication criteria that it has taken on, and all the special execution conditions of the contract in social issues.
2. The contracting company must effectively prove the correct provision of the contract in terms of the adjudication criteria committed to in its technical proposal, as well as the social-type execution conditions. The documentation indicated in these specifications must be presented to these effects, and at the given time, so as to verify its fulfilment.
3. Adjudication criteria and special execution conditions of a social nature are considered core contractual requirements, and non-compliance is extremely serious. In the event of non-compliance, the contracting body can opt to:
  - Terminate the contract through negligent breach, which could imply the inability to bid for the period of two years in any public bidding procedure.
  - Continue to execute the contract, with the imposition of a penalty that the contracting body must estimate depending on the seriousness of the non-compliance, up to a maximum of 10% of the contract price.
  - An extension shall not be agreed for contracts that include one, when the awarded company has seriously failed to comply with the special execution conditions or the adjudication criteria of a social nature.
4. The person responsible or managing unit for the contract must verify the documentation presented and assess its suitability and conformity with the adjudication criteria and special execution conditions of a social nature, taken on by the contractor. In the event of non-compliance, it must report and where applicable postpone the start of the penalty imposition process or contract termination.



The clauses proposed establish an effective and guided procedure in accordance with the Regional Public Procurement Act (RPPA henceforth):

**Article 106. Special social, ethical, environmental or other contract performance conditions**

3. The contractual documentation may establish penalties in the event of non-compliance with these special execution conditions, or attribute them as essential contractual requirements.

**Article 59. Special conditions**

1. The documents regulating the procurement shall contain the special conditions of a contract in its legal, administrative and economic aspects.

2. The special conditions shall specify, inter alia:

c) The criteria for the award of the contract, the relative weightings given to each of them, determining if any of them is essential, or if for any of them there is a minimum score below which the tender shall be excluded, without prejudice to the right to reject tenders which are technically inadequate or which do not adequately ensure proper performance of the contract.

**Article 141. Supervision and inspection of performance of the contract**

1. The performance of contracts shall be supervised, inspected and controlled by the contract managing unit, which shall ensure correct application of public procurement law and may give the instructions needed for the faithful fulfilment of the contract.

2. Whenever required to do so, the contractor shall justify compliance with the labour conditions laid down in the applicable sectoral collective agreement to the contracting authority.

3. When the contractor or the persons dependent on the contractor commit acts or omissions which compromise or disturb the smooth running of the contract, the managing unit may require the adoption of concrete measures to achieve or restore good order in the performance of the contract.

4. Failure to comply with the orders of the contract managing unit shall lead to penalties, which must be provided for in the specifications.

**Article 138. Procurement dossier following the ordinary procedure**

2. Contracts shall be prepared under the control and responsibility of the relevant unit on the basis of their subject-matter. For the purposes of this regional act, this unit shall be referred to as the contract managing unit.

**Article 158. Fulfilment of contracts and acceptance**

1. It shall be understood that the contractor has fulfilled the contract when he/she/it has performed all its subject-matter in accordance with the terms of the contract to the satisfaction of the contracting authority.

**Article 231. Fulfilment of contracts and acceptance**

1. The contract shall be performed subject to the provisions of the procurement documents and according to the instructions for its interpretation given to the contractor by the contract owner.

2. The contractor shall be responsible for the technical quality of the works carried out, the supplies and services provided and any consequences for the administration or third parties of omissions, errors, inadequate methods or incorrect conclusions in the performance of the contract.
3. If the works, supplies or services provided by the contractor do not comply with the necessary conditions for acceptance, the appropriate instructions shall be given in order that he/she/it can remedy the defects observed and fulfil his/her/its obligations in the time period in which he/she/it is set to do so, acceptance not being warranted until these instructions have been completed, at which time the relevant record shall be made.

**Article 105. Obligations relative to taxation, labour, social, environmental protection, employment protection, labour conditions and gender equality provisions**

1. The contracting authorities shall take the pertinent measures to ensure that in the performance of the contracts the contractors comply with the applicable environmental, social and labour obligations laid down in European Union law, national law, collective agreements, the provisions of international environmental, social and labour law binding on the state and, in particular, those set forth in this regional act.

**Article 146. Penalties for failure to comply**

1. The procurement documents shall provide for penalties for contractors in the event of all or one of the following situations:
  - a) Partial failure to comply in the provision of the works, supplies or services defined in the contract.
  - b) Defective performance of the contract.
  - c) Failure to comply with special contract performance conditions.
  - d) Breach of the conditions laid down for subcontracting.
  - e) Failure to comply with the commitment to devote or assign to the performance of the contract the human or material resources included in the tender.
  - f) Failure to comply with the orders received from the contract managing unit regarding performance of the contract.
  - g) Failure to comply with labour and social obligations regarding his/her/its workers.
  - h) Failure to comply with regulations regarding the equality of women and men.
  - i) In general, any breach or defective compliance which causes damage to the administration or third parties.
2. Breaches by the tenderer awarded the contract shall be classified in the procurement documents as minor, serious or gross according to the type of breach, degree of negligence of the contractor, economic relevance of the damage caused by the breach or recidivism.

In all events, breaches of the special contract performance conditions provided for in article 66 of this regional act shall be considered gross breaches.

3. Breaches by the contractor shall be penalised according to the classification established in the procurement documents, according to the following scale:
  - a) Minor breaches, with up to 1% of the amount of the award.
  - b) Serious breaches, from 1% to 5% of the amount of the award.
  - c) Gross breaches, from 5% to 10% of the amount of the award. This penalty may reach 20% of the amount of the contract in the case of breach of the special performance conditions for the contract provided for in article 66 of this regional act.

#### **Article 160. Reasons for termination of administrative contracts**

1. Administrative contracts shall be subject to termination in the event of any of the following situations:

- g) Breach of the special contract performance conditions laid down in article 66.
- j) Breach of the other essential contractual obligations.

#### **Article 22. Prohibitions on entering into contracts**

1. Under no circumstances may persons or entities that meet any of the following conditions enter into contracts with the entities subject to this regional act, their being excluded from participation in tendering procedures:

- l) Failure to comply with the clauses of a previous contract subject to this regional act, including the special performance conditions laid down in the procurement documents, when the breach was defined in the procurement documents or contract as a serious or gross breach and when it gave rise to penalties or compensation for damages.

## **IMPACT MEASURING SYSTEM**

Finally, each social clause of this guide is accompanied by its corresponding associated evaluator, which should also be linked to a compliance verifier.

The aim is for bidding companies to provide the information needed, which will be checked by the contracting body, so as to compute the results of the public procurement in charge using impact gauges.

These impact gauges should provide objective data from the results that each public procurement has provided in terms of gender, insertion, quality in employment, etc.

The Pamplona City Council proposes the computerisation of the use and handling of this data in the contracting application, so social results can be preceptively included for each procurement and said data can be found in a computerised format, extractable for specific periods of time, depending on the contract type or in accordance with the different social issues.



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