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Preferential Contracting for Persons with Disabilities:

**Approaches to Improving Employment
Opportunities and Outcomes for
Persons with Disabilities and
Disability Inclusion in Business Practices**



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List of Abbreviations and Acronyms

ADB	Asian Development Bank
AGPO	Access to Government Procurement Opportunities (Kenya)
ASEAN	Association of Southeast Asian Nations
CRPD	Convention on the Rights of Persons with Disabilities
DBE	Disadvantaged Business Enterprise (United States)
DVBE	Disabled Veteran Business Enterprises (United States)
DWP	Department for Works and Pensions (United Kingdom)
ESCAP	United Nation Economic and Social Commission for Asia and the Pacific
EU	European Union
GDP	Gross Domestic Product
HLCM	High-Level Committee on Management (United Nations)
ILO	International Labour Organization
MBDA	Minority Business Development Agency (United States)
MBE	Minority Business Enterprises
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPD	Organization of Persons with Disabilities
OSDBU	Office of Small and Disadvantaged Business Utilization (United States)
PPPFA	Preferential Procurement Policy Framework Act (Republic of South Africa)
RFP	Request for Proposals (services and works)
RFQ	Request for Quotations (goods)
SBA	Small Business Administration (United States)
SDG	Sustainable Development Goals
SMB	Small and Medium (sized) Businesses
SVM	Social Value Model (United Kingdom)
UNITED KINGDOM	United Nations Disability Inclusion Strategy (United Nations)
UNOPS	United Nations Office for Project Services
VEVRAA	Vietnam Era Veterans' Readjustment Assistance Act (United States)
VNR	Voluntary National Review (SDGs)
WOSB	Women-Owned Small Business (United States)
WTO	World Trade Organization

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I. Introduction

Governments use preferential contracting through public procurement to link and advance their social and economic objectives. It can be used to increase the employment of certain populations, support contractors that fit a certain profile or operate in a manner the government wants to promote. As such, through preferential contracting governments can support groups disadvantaged in the economy such as women, ethnic minorities and persons with disabilities to achieve economic gains, or they can provide opportunities to small businesses generally, those operating in targeted sectors, or those that have adopted, for example, sustainable business practices.

This study focuses on governments' practice of using preferential contracting to promote the employment of persons with disabilities and disability inclusion in business practices. This practice originated nearly 100 years ago and is a reflection of the public sector's commitment to supporting persons who face barriers to employment.

Despite some broader employment strategies and more narrowly targeted preferential contracting efforts, the topic of using public procurement to promote the employment of persons with disabilities remains relatively unexamined. Data shows that persons with disabilities remain disproportionately underemployed and unemployed.¹ Data also suggests that persons with disabilities make good employees and that small and medium-sized businesses owned by persons with disabilities provide more of an economic benefit, in terms of GDP, than large companies.²

Given the need to close the employment gap between persons with and without disabilities, and the positive spill-over effect of contracting with contractors that are more disability-inclusive, this study aims at putting forward recommendations on ways to use preferential contracting to promote the employment of persons with disabilities. This paper addresses the five main questions below.

- Could preferential contracting for persons with disabilities in public procurement contribute to efforts to mainstream disability in development and support progress toward the Sustainable Development Goals (SDGs)?
- What are the comparative advantages of preferential contracting system compared to other initiatives and systems to promote employment of persons with disabilities and disability inclusion in business practices?
- What are the weaknesses of present preferential contracting laws and practices?
- How can governments use preferential contracting initiatives to promote the employment of persons with disabilities in the labour market and disability inclusion in business practices?
- What criteria should be used to determine whether a contractor is disability-inclusive?

Three developments over the past fifteen years signal the need to look at these issues anew. First, the adoption and ratification of the Convention on the Rights of Persons with Disabilities (CRPD) has led governments to give more attention to understanding challenges and new

¹ World Health Organization and World Bank (2011).

² Bonaccio, Silvia and others (2020). pp. 135-158; and Varshney, Sanja B. and Tootelian, Dennis H. (2009).

opportunities for supporting the inclusion of persons with disabilities in social and economic life.

Second, the framing of Sustainable Development Goals (SDGs) has recognized that the goals and targets will not be attainable if persons with disabilities are excluded from the national development agenda. It is important to place the social objective for preferential contracting within the frame of SDG 8.5, which aims to achieve “full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.”³

Third, in 2019 the United Nations launched the Disability Inclusion Strategy (UNDIS) that signaled its commitment to fully mainstream disability inclusion throughout all pillars of the United Nations, at headquarters as well as at regional, subregional and country levels. The UNDIS promotes disability-inclusive procurement within the United Nations system, encourages suppliers to demonstrate a commitment to providing accessible goods and services, and gives guidance on promoting purchasing “from disability-inclusive suppliers.”⁴

Background

The first public procurement laws were introduced in the 1940s in Japan and the United States of America, but most countries adopted procurement legislation in the 1990s or 2000s, informed and influenced by a model general procurement resolution published in 1994 by the United Nations Commission on International Trade Law.⁵ As a result, “[t]he regulation on the books in many countries is consequently similar, though in practice may differ.”⁶

Over the past fifty years, governments have explored using procurement for social justice objectives, including requirements around sustainable procurement and the provision of employment opportunities for groups who have historically been disadvantaged.

The first approach for using procurement to promote employment of persons with disabilities was in the United Kingdom of Great Britain and Northern Ireland through preferentially contracting sheltered workshops in which World War I veterans with disabilities were placed.⁷ As such, the practice of promoting employment of persons with disabilities predated the codification of national procurement laws. The British Government helped to support the establishment of sheltered workshops where persons with disabilities manufactured a limited number of goods, and the government gave preferences for the purchase of those goods.⁸

Governments have promoted the employment of persons with disabilities through procurement methods including set-asides, targets and quotas, point-or-price preferences in bid evaluation, affirmative action, discretion in solicitations and awards, and support for disability-inclusive companies. All of these methods are discussed in more detail in the body of this study.

³ United Nations General Assembly (2015), A/RES/70/1, Sustainable Development Goal 8.5.

⁴ United Nations High Level Committee on Management, Procurement Network Secretariat (2020), indicator 8.iv, p. 26.

⁵ A/RES/49/54.

⁶ Bosio, Erica and Simeon Djankov (2020).

⁷ Christopher McCrudden (2007), p. 4.

⁸ McCrudden (2007), p. 4.

Scope and structure of this study

ESCAP has commissioned two studies on public procurement to better understand how it can be used as a tool to promote social and economic equality for persons with disabilities. In 2019, ESCAP published a policy paper focusing on using public procurement to promote universal design and accessible products and services. This study complements that research by focusing on another tool governments can use to advance specific economic and social justice issues for persons with disabilities, namely preferential contracting through public procurement.

The introduction section of this study provides general background information and explains the methodology, scope and limitations of the study. The second section defines and clarifies the meaning of key terms.

The third section looks at the status quo with respect to the employment of persons with disabilities, presenting data, an overview of international and regional mandates and commitments, and some existing approaches to address disability gaps.

The fourth section presents an overview of the prospect of preferential contracting for closing gaps in employment. It underscores why preferential contracting is important, presents data on the size of public procurement, and shows how preferential contracting has been used for other disadvantaged populations.

The fifth section presents the case for why and how the use of preferential contracting for persons with disabilities in public procurement is an important tool for governments as part of their development plans.

The sixth section returns to the five questions from the introduction and discusses the main findings. The final two sections offer conclusions and recommendations.

Methodology

This study is the result of desk research undertaken by the author with assistance from ESCAP staff and interns. Research has included:

- a) A review of procurement laws and policies in sixty-three countries or territories, comprising fifty-seven countries or territories in Asia and the Pacific, four countries in Europe, and two countries in North America
- b) A global review of programmes to provide preferential contracting for persons with disabilities
- c) A review of preferential contracting for minorities and women, focusing on the United States, Canada, and the European Union
- d) A review of the CRPD and the CRPD Committee's Concluding Observations and General comments pertaining to employment
- e) A review of reports written by the International Labour Organization (ILO) and the World Bank on the employment of persons with disabilities
- f) Targeted outreach to experts in China, Japan and Korea regarding laws, policies, and programmes in their respective countries

Limitations

There are several main limitations. First, this study focuses on public procurement at the central or national level, while acknowledging that procurement systems vary considerably in terms of size of budgets, and national versus local contracting methods and practices. Sub-national governments may have more discretion in their procurement methods and decisions, and in some cases their expenditures are greater than those at the national level (see Table 1). However, aside from one case study from the state of California in the United States, this study does not focus on sub-national processes.⁹

Second, this study does not consider the objections to linking public procurement to social equality measures in theory, nor does it present arguments in favor of linking procurement to social equality efforts.¹⁰ Instead, this study presumes governments have the right to facilitate that linkage and choose the best approaches for pursuing links while bearing in mind their assessment of the legal and policy opportunities and constraints within their country.

Third, given the diversity of legal systems and practices across the globe, this study cannot present an exhaustive list of the nature and manner of potential legal challenges to preferential contracting in procurement policy.

Fourth, this study has a focus on national or domestic uses of public procurement, i.e. it does not explore issues related to using procurement to influence policies in other countries or bilateral agreements governing trade between specific countries. Though it is mentioned in passing, this study also does not discuss in any detail membership in the World Trade Organization (WTO) or how that influences procurement related decisions.

Fifth, there is a paucity of data on the effectiveness and impact of using different preferential contracting methods specifically for promoting the employment of persons with disabilities.

II. Key concepts and terms

It is important at the outset to introduce and define key terms. These definitions are thematically grouped: first, terms related to disability; second, those related to public procurement, and finally, those related to measures to promote employment:

First, the following provides definitions and explanations of **key terms and concepts related to persons with disabilities**.

Accessibility: the obligation to ensure that persons with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications, including information and communications technologies and systems, and other facilities and services open or provided to the public, both in urban and in rural areas.¹¹ Access “refers to the complete and seamless interaction with an environment, good or service, on an equal basis with others.”¹²

⁹ The economy of the state of California is larger than most countries. By itself it would be the fifth largest economy in the world. See Kieran Corcoran (2018).

¹⁰ See McCrudden (2007), pp. 114-128.

¹¹ United Nations General Assembly (2006), Resolution 61/106, Annex I, Article 9.

¹² United Nations, Economic and Social Commission for Asia and the Pacific (2019), pp. 11-12.

Inclusive equality: a relatively new term and standard adopted by the CRPD Committee. Inclusive equality “embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socio-economic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.”¹³

Organizations of Persons with Disabilities (OPDs): though definitions vary based on context, generally a civil society organization with a majority of staff who are persons with disabilities and all or a majority of board members are persons with disabilities. OPDs operate from a rights-based perspective, in other words not charity or medical approaches to disability.

Persons with disabilities: The CRPD provides the following open-ended definition: “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹⁴

Reasonable accommodation: “necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”¹⁵ This study considers the terms “reasonable accommodation” and “reasonable adjustment” as synonyms.¹⁶

Sheltered workshop: a segregated place of work that is set up specifically as a place where persons with disabilities, often those with intellectual or developmental disabilities, work.¹⁷ There is no universally accepted definition of the term “sheltered workshop.” It is often operated as part of a social welfare scheme. The CRPD Committee recently affirmed that sheltered workshops and other segregated employment schemes should not be “considered as a measure of progressive realization of the right to work.”¹⁸

Universal design: “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”¹⁹

Second, the following provides definitions and explanations of key terms and concepts related to **procurement and preferential contracting**.

¹³ CRPD Committee (2018), General Comment 6, para 11.

¹⁴ CRPD, Article 1.

¹⁵ CRPD, Article 2.

¹⁶ “Reasonable accommodation” is more commonly used in United Nations documents and the United States, whilst “reasonable adjustment” is used in the United Kingdom and some Commonwealth countries.

¹⁷ United States Social Security Administration (2017), RS 02101:207 Services for Sheltered Workshops.

¹⁸ CRPD/C/GC/8 (2022), para 15.

¹⁹ CRPD, Article 2.

Contracting agency: any public sector entity at the national level that uses public procurement for the purchase of goods and services.

Contractor: used as a catch-all term for different types of companies and social welfare enterprises competing for public procurement contracts. Contractors can be:

1. Larger companies that subcontract with smaller companies
2. Social enterprises, i.e. cause-driven for-profit companies
3. Micro-sized, small, and medium businesses or enterprises²⁰
4. Social welfare enterprises or organizations, including those that operate sheltered workshops

Discretion in solicitations: the practice of providing contracting agencies with some flexibility regarding the setting of contracting conditions. This can include targeting specific types of contractors for certain solicitations, requiring sub-contractors that meet particular profiles, and other actions that have social and economic objectives for under-served or disadvantaged individuals.

Labour market: the availability of employment and labour, in terms of supply and demand.

Preferential contracting: options for and preferences given to contractors by a government with certain characteristics, such as ownership structure, or business practices, such as sustainable environmental practices or fair wages. This study focuses on using this method to promote the employment of persons with disabilities in particular.

Price or point preferences: a tool used by contracting agencies to give preference to contractors that meet designated preference criteria. Agencies can either deduct a certain per cent from the bid of contractors that meet those criteria or add a certain per cent to those bids from contractors that do not meet the criteria.

Procurement for social justice: public procurement can be used to advance social justice. Broad objectives can include one or more of the following: to enforce anti-discrimination law in the employment context; to advance a wider conception of distributive justice; to stimulate increased entrepreneurial activity by disadvantaged groups; to require bidders to ensure fairness and equality when services are transferred from the public to the private sector; and to influence or discourage companies from engaging with authoritarian or repressive regimes. An example is the campaigns to boycott products from the Republic of South Africa during the Apartheid era.²¹

Public procurement: the process by which government and public entities purchase goods, services, capital, and technologies for their own or the public's use.²²

²⁰ This study uses the terms "enterprises" and "businesses" in accordance with how the terms are used at the national level. Thus, "small and medium enterprises" and "small and medium businesses" would be considered synonyms.

²¹ McCrudden (2007), p. 9.

²² World Bank (2016), *Preferential Public Procurement: Policy Case Studies on Inclusive Business*.

Public spending: the overall amount of government expenditures at the national level. This includes salaries and pensions for state employees, payment of debts, and public procurement.

Set-aside: the reservation of a number or per cent of contracts that are designated for a particular type of contractor, such as small business or women-owned and operated business.²³ The sum amount set-aside by the government is guaranteed to go to a particular type or types of contractors.

Socially responsible public procurement: aims to address the impact on society of the goods, services and works purchased by the public sector. The European Union has described some objectives of socially responsible procurement:

- to promote employment opportunities and social inclusion
- to provide opportunities for social economy enterprises
- to encourage decent work
- to support compliance with social and labour rights
- to ensure accessibility (and universal design)
- to respect human rights and address ethical trade issues
- to deliver high-quality social, health, education and cultural services²⁴

Sustainable procurement: the making of “purchasing decisions based on the entire life cycle of the goods and services, taking into account associated costs, environmental and social risks and benefits, and broader social and environmental implications.”²⁵

Procurement for social justice, socially responsible public procurement, and sustainable procurement are related as follows: procurement for social justice is a broader term at the level of a goal or impact, whereas socially responsible procurement describes sets of objectives that can be used to achieve social justice, and sustainable procurement provides more tactical or logistical level guidance for assessing bids that take into account the lasting social, environmental and economic impact, in terms of costs and benefits, of the goods and services.

Third, the following terms are related to the **promotion of employment of members of socially disadvantaged groups**.

Affirmative Action: “the practice or policy of favoring individuals belonging to groups known to have been discriminated against previously.”²⁶ Also referred to as “positive discrimination.” It is a broad term that encompasses various actions to promote social justice. In this study, the term “affirmative action” includes policies to permit preferential contracting broadly, including requirements for preferential hiring that are in place for contractors after they have received an award. The CRPD Committee has noted that “Preferential purchasing policies that promote or support segregated employment are not affirmative action measures consistent with the Convention.”²⁷

²³ United States Small Business Administration, *Set-Aside Procurement*.

²⁴ European Union (2020), p. 5.

²⁵ Government of Australia (2020), p. 33.

²⁶ Oxford English Dictionary (online). Available from www.lexico.com/en/definition/affirmativeaction.

²⁷ CRPD/C/GC/8 (2022), para 42.

Decent Work: a term coined and a concept developed by ILO, it refers to “Productive work in which rights are protected, which generates an adequate income, with adequate social protection. Also means sufficient work, in the sense that all should have full access to income-earning opportunities.”²⁸

Supported employment: the concept of supported employment was first developed in the United States and has been adapted and adopted in Europe and Asia and the Pacific. The European Union defines it as “providing support to people with disabilities or other disadvantaged groups to secure and maintain paid employment”²⁹ in the labour market.

Quota: in this context, a proportional part or share of a total that is set by a government to ensure the employment of members of a minority group, women, or persons with disabilities.

Target: the identification of a goal that a government wants to achieve with respect to hiring members of a protected class. Quotas and targets are similar but differ in important ways. The government can require that an entity meet a quota and that entity can be penalized for non-compliance. As targets are aspirational, there is usually no penalty for failing to meet one. For example, the United States Federal Government has a target of seven per cent for employment of persons with disabilities for each job group (or the entire workforce) of contractors that have been awarded contracts.³⁰

III. Current status quo and gaps in employment of persons with disabilities

a. Data on disability gaps in employment

Ever since its 2011 World Report on Disability the World Bank has documented, in several studies, gaps in various socio-economic indicators, including employment rates and wages between persons with disabilities and non-disabled persons.³¹ Sophie Mitra and others looked at six indicators in their recent publication: employment to population ratio, unemployment rate, idle rate among youths, and shares of workers in the informal sector, manufacturing sector and managerial positions. While noting that disaggregation was not possible given data set limitations,³² they concluded that “persons with difficulties are more likely to be both out of work and out of the labour force, and thus not captured in the unemployment rate.”³³

Sophie Mitra and others note the consistency of their findings with those of previous studies along several main results: 1) that persons with disabilities are less likely to be employed; 2) when employed they are more likely to be working in the informal sector (due in part to barriers they face in the formal sector); and 3) the relative employment rate, i.e., there tends

²⁸ International Labour Office (2015), *National Employment Policies: A Guide for Workers' Organisations*. Section 8. Note, paragraph 32 of the Biwako Millennium Framework for Action defines decent work as “productive work in conditions of freedom, equity, security and human dignity.”

²⁹ European Union of Supported Employment (2010), p. 9.

³⁰ Government of the United States, Code of Federal Regulations, *Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Individuals with Disabilities*, Sect. 60-741.45.

³¹ World Health Organization and World Bank (2011), and Mitra, Sophie and others (2021).

³² Mitra and others (2021), p. 11.

³³ Mitra and others (2021), p. 28. The report notes that once they stop looking for work, persons with disabilities are no longer counted as unemployed.

to be less of a gap in employment rates between persons with and without disabilities in lower-income countries than in middle-income countries.³⁴ Their study, they noted, “adds to the literature by showing the functional difficulty gradient in the disability gap and the higher idle rate among youths with disabilities.”³⁵ Finally, they sounded a note of caution to governments on their use of the unemployment rate indicator as part of the SDGs (indicator 8.5.2), given that persons with disabilities may no longer be captured in the unemployment rate once they drop out of the labour force.³⁶

Collecting data on conditions for persons with disabilities is necessary not only to inform government policies and planning but also for reporting on national development, including through the SDG mechanisms. While countries have submitted over 220 national reports, known as the Voluntary National Reviews (VNRs), to the United Nations since 2016, and there is an obligation to provide data on employment, few reports include adequate coverage of measures to improve employment of persons with disabilities.³⁷

Other studies, focusing primarily on data from the United States and the United Kingdom, have shown gaps in educational and employment outcomes between youth with disabilities and their non-disabled peers.³⁸ Finally, a recent survey and study in the United Kingdom has shown that some conditions (workloads, negative impacts on physical health, and more pressure to and anxiety about returning to work) for workers with disabilities have worsened since the COVID-19 pandemic.³⁹

b. International and regional mandates related to preferential contracts for persons with disabilities

International trade regulations and agreements have limited the ability of countries to use preferential contracting, though countries have carved out exceptions to rules that prohibit considerations other than cost.⁴⁰ In the United States, for example, preferential treatment can be given to minority or disadvantaged groups or to small businesses.⁴¹ Against this backdrop, international law permits and regional and subregional agreements and practices have evolved to set parameters for the use of preferential contracting, not only for the promotion of the employment of persons with disabilities, but also for protecting and supporting the growth of domestic industries, in particular small and medium businesses, or for advancing the practice of sustainable procurement, discussed in the section on SDGs below.

³⁴ Mitra and others (2021), p. 28. In other words, the gap in employment rates between persons with disabilities and non-disabled persons tends to be lower in lower-income countries than in higher-income countries.

³⁵ Mitra and others (2021), p. 28.

³⁶ Mitra and others (2021), p. 28.

³⁷ The VNRs submitted by Egypt describe some initiatives but do not provide data on employment. The 2020 VNR from Moldova includes some data on persons with disabilities and their households but these are not related to SDG 8. Finally, the 2016 and 2020 VNRs for Uganda include some information on governmental programs to support economic security and development for persons with disabilities but there is no data related to the employment of persons with disabilities.

³⁸ Velthuis, Sanne and Stella Chatzitheochari (28 April 2021), p.26.

³⁹ Suff, Rachel (2021).

⁴⁰ World Trade Organization (undated) and European Union (2014). The principles of non-discrimination and fair competition have been used to restrict the authority of contracting agencies to use preferential contracting.

⁴¹ Government of the United States, Department of the Treasury(undated), Part II: Small Business Administration and Preferential Contracting Programs.

ESCAP has advised, in a Macroeconomic Policy and Development Division Policy Brief from 2014 that Governments in Asia and the Pacific can use sustainable public procurement to foster inclusive and sustainable development.⁴² Labour conditions in the production of goods and the delivery of services is one of the impacts that need to be considered when determining whether or not a bid is sustainable. The brief notes that because governments have immense buying power, they can exert significant influence on the behavior of suppliers, who have a strong incentive to comply with the terms defined in solicitations.⁴³

1. The Convention on the Rights of Persons with Disabilities

The CRPD, as international law, has established a rights-based approach to understanding the concept of disability. Regarding the promotion of employment of persons with disabilities, the CRPD has established that persons with disabilities have “the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.”⁴⁴

The CRPD reaffirms that persons with disabilities are rights holders on an equal basis with others. As such, states are obliged to ensure that persons can exercise their rights and fundamental freedoms, on an equal basis with others. Given that persons with disabilities experience significant disparities and barriers in employment, states are therefore obliged to take measures to promote their employment.

The CRPD further advises that each state should use “the maximum of its available resources” to progressively realize economic, social and cultural rights⁴⁵ while not prejudicing obligations that require immediate application. The CRPD obliges States to take the following measures:

- 1) Modify or abolish “existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.”⁴⁶ Once legislation has been amended, States are obliged, in all policies and programmes, to “take into account the protection and promotion of the rights of persons with disabilities.”⁴⁷
- 2) Adopt/advance a legal framework that guarantees non-discrimination to the equal protection and benefit of the law, and recognizes that all persons are equal before and under the law.⁴⁸ The CRPD prohibits all discrimination on the basis of disability,⁴⁹ defines the term “reasonable accommodation”, obliges the provision of it,⁵⁰ and clarifies the denial of reasonable accommodation is to be considered discrimination on the basis of disability.⁵¹ States are required to “ensure that reasonable accommodation is provided to persons with disabilities in the workplace.”⁵²

⁴² United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) (2014).

⁴³ ESCAP (2014), p. 2.

⁴⁴ CRPD, Article 27 (1).

⁴⁵ CRPD, Article 4(2).

⁴⁶ CRPD, Article 4(1)(b).

⁴⁷ CRPD, Article 4(c).

⁴⁸ CRPD, Article 5(1). Other treaties, including the International Covenant on Civil and Political Rights (ICCPR) prohibit discrimination on any ground and guarantee equality before the law and equal protection of the law. ICCPR (1976), Article 26. Available from www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

⁴⁹ CRPD, Article 5(2)

⁵⁰ CRPD, Articles 2, 5(3) and 27.

⁵¹ CRPD, Article 2.

⁵² CRPD, Article 27(1)(i)

- 3) Enact “legislative, administrative and other measures” to implement the rights recognized in the CRPD.⁵³ The CRPD permits States to take measures “necessary to accelerate or achieve de facto equality of persons with disabilities,”⁵⁴ noting that such measures are not to be considered discrimination. This permits governments to take affirmative action, including making use of preferential contracting, to address current inequalities in employment. The CRPD outlines several ways this can be realized: advancing the principle of participation by closely consulting with persons with disabilities (Article 4), providing support for persons with disabilities to live independently and in the community (Article 19), requiring adherence to employment conditions and standards and allows for the promotion of affirmative action (Article 27(1)(a) and 27(1)(h)), and linking the right to an adequate standard of living to the provision of social protection programmes and services (Article 28).

2. A brief analysis of obligations and conditions related to employment

The CRPD Committee and the Special Rapporteur have commented on three obligations that have a bearing on the employment of persons with disabilities: to repeal particular discriminatory laws and practices, provide reasonable accommodation, and adopt proactive measures to facilitate socio-economic inclusion for persons with disabilities. As an example of the first, the Committee and the Special Rapporteur have repeatedly found that sheltered employment contravenes the principles of non-discrimination, participation, and inclusion and therefore have urged States to take actions to repeal it.⁵⁵

The Special Rapporteur has noted that States have an immediate duty to ensure the availability and provision of reasonable accommodation.⁵⁶ If States implement measures to promote employment, such as through preferential contracting, but do not include provisions for reasonable accommodation, it renders persons with disabilities vulnerable to unsafe working conditions and it can impact their capacity to carry out their work. In some countries there are insufficient legal protections for employees with disabilities from “dismissal and the insufficient provision of reasonable accommodation.”⁵⁷ The failure to provide reasonable accommodation can be due to the lack of regulations,⁵⁸ though even when regulations are in place, persons with disabilities may experience difficulties given ineffective procedures to obtain reasonable accommodation⁵⁹ or inadequate monitoring of the provision of reasonable accommodation.⁶⁰ In places where there are low levels of formal employment these challenges are exacerbated.⁶¹

⁵³ CRPD, Article 4(1)(a).

⁵⁴ CRPD, Article 5(4). Note, While the CRPD does not explicitly state that affirmative action needs to be consistent with the overall principles of the CRPD, it is implied. Once understood as such, it calls into question the use of procurement to promote sheltered employment.

⁵⁵ A/70/297 (2015), para. 68.

⁵⁶ A/HRC/31/62 (2016), para. 73. Employers can deny requests for reasonable accommodation only if funding the request would constitute an undue burden for the employer, based on an assessment of the employer’s overall budget.

⁵⁷ CRPD/C/SRB/CO/1, para. 53.

⁵⁸ CRPD/C/MEX/CO/1, para. 51(c) and CRPD/C/SYC/CO/1, para 45(c).

⁵⁹ CRPD/C/GTM/CO/1 para. 63.

⁶⁰ CRPD/C/LUX/CO/1, para. 46(b).

⁶¹ CRPD/C/GTM/CO/1 para. 63.

Third, States have an obligation to take actions to promote social and economic inclusion, including the promotion of inclusive employment in the labour market. The Committee has advanced the concept of “inclusive equality”, consisting of **four dimensions: redistribution, recognition, participation, and accommodation**. The *redistributive dimension* requires States to ensure that persons with disabilities “receive equal access to mainstream social protection programmes and services...as well as access to specific programmes and services for disability related needs and expenses.”⁶² The *recognition dimension* requires States to combat stigma, providing employers with specific incentives,⁶³ and to adopt measures aimed at an inclusive open and accessible labour market,⁶⁴ and at eliminating discrimination, with clear targets based on comparable disaggregated data.⁶⁵

The *participative dimension*, while not limited to employment, can be understood as requiring the introduction of affirmative action measures for persons with disabilities in the labour market, especially for women and youth with disabilities.⁶⁶ The final dimension, *accommodating*, requires States to recognize difference as dignity. This includes guaranteeing the full legal capacity of persons with disabilities, and well-functioning mechanisms for supported decision-making that respect the autonomy, choice, will, and preferences of persons with disabilities.⁶⁷

Despite the presence of employment quotas, the CRPD Committee has noted that unemployment is still higher for persons with disabilities, and in particular for women with disabilities.⁶⁸ The Committee has also noted the failure to comply with quotas that have been set⁶⁹ and the low participation of persons with disabilities in the labour market.⁷⁰

The Committee has noted that women with disabilities face unique barriers to equal participation in the workplace. Barriers include being at risk of sexual harassment, receiving unequal pay, and “lack of access to seek redress because of discriminatory attitudes dismissing their claims, as well as physical, information and communication barriers.”⁷¹

In addition to the above issues, the Special Rapporteur on Violence against Women has noted that women with disabilities have fewer career opportunities, citing employers’ unwillingness to provide reasonable accommodation, lower pay, and women being directed to less prestigious career paths.⁷²

3. 2030 Agenda for Sustainable Development including the SDGs

The seventeen SDGs provide a framework for the international development agenda between 2015-2030. They also guide reporting by States through the VNR process.

⁶² A/70/297 (2015), para. 20.

⁶³ CRPD/C/SYC/CO/1, para. 46(b) and CRPD/C/SVN/CO/1 para. 46(b); and CRPD/C/BIH/CO/1 para. 49.

⁶⁴ CRPD/C/SYC/CO/1, para. 46(a) and CRPD/C/SVN/CO/1 para 46(a)

⁶⁵ CRPD/C/TKM/CO/1, para. 14

⁶⁶ CRPD/C/MMR/CO/1, para. 52 (b)

⁶⁷ CRPD/C/RWA/CO/1, para. 24

⁶⁸ CRPD/C/KOR/CO/1 para. 51

⁶⁹ CRPD/C/ESP/CO/2-3, para. 50 (c), and CRPD/C/IRN/CO/1, para. 50(a).

⁷⁰ CRPD/C/IRN/CO/1, para. 50(d).

⁷¹ CRPD/C/GC/3 (2016), para .58.

⁷² A/67/227, (2012), para. 67.

The social justice objective for preferential contracting fits within the frame of SDG 8.5, which aims to achieve “full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.”⁷³

In addition, two targets and three indicators refer directly to procurement. SDG target and indicator 12.7 require the promotion of sustainable public procurement practices. The UN Global Marketplace describes sustainable procurement as integrating environmental, social, and economic requirements, specifications and criteria.⁷⁴

Sustainable procurement needs to bear in mind economic, environmental and social considerations. This includes issues such as “poverty eradication, international equity in the distribution of resources, labour conditions, [and] human rights.”⁷⁵ Thus, public procurement that fails to consider the effect procurement has had and could have on persons with disabilities cannot be considered sustainable.

Finally, SDG 16 is centered on the promotion of “just, peaceful and inclusive societies.” SDG target 16.6 foresees the development of effective, accountable and transparent institutions, and tracks as its first indicator the extent to which expenditures match approved budgets. Its second indicator addresses accountability in another way, namely by ascertaining the extent to which the population is satisfied with “their last experience of public services.”⁷⁶

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has created a resource on the realization of the CRPD and SDGs. OHCHR has identified indicators to track changes in structures, processes, and outcomes related to “the right to gain a living by work freely chosen in a labour market and work environment that is open, inclusive and accessible.”⁷⁷ One of the structural indicators is the adoption of comprehensive national employment strategies that “should include provisions...to promote employment which may include affirmative action programmes, incentives...”⁷⁸ Two of the outcome indicators refer to unemployment rates (SDG 8.5.2) and hourly earnings disaggregated by sex, age, occupation and disability status (SDG 8.5.1).

SDG 10 guides governments to take measures to reduce inequalities within their countries, including for persons who are marginalized, such as persons with disabilities. OHCHR and others have recognized that the COVID-19 pandemic has disproportionately negatively affected persons with disabilities, and exacerbated rather than reduced inequalities.⁷⁹ The International Monetary Fund has tracked policy responses to COVID-19 and, as of July 2021, they noted only three examples of governments revising public procurement policies to address conditions caused by COVID-19: the Central African Republic eased some procedures, Chile enabled quicker disbursements of funds, and Panama has improved the availability of data. None of these adjustments specifically target the employment of persons with disabilities.⁸⁰

⁷³ A/RES/70/1. Target 8.5. SDG 8.5 requires the collection of employment data to be disaggregated by disability.

⁷⁴ United Nations Global Marketplace, *What is Sustainable Procurement?*

⁷⁵ United Nations Global Marketplace, *What Is Sustainable Procurement?*

⁷⁶ A/RES/70/1. SDG 12.7 and SDG 16.6.

⁷⁷ United Nations OHCHR (2020), *Article 27: Illustrative indicators on work and employment*.

⁷⁸ OHCHR (2020), pp 2, 4.

⁷⁹ Office of the High Commissioner for Human Rights (2020), *Covid 19 and the Rights of Persons with Disabilities: Guidance*.

⁸⁰ <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>

The realization of the SDGs takes as a precondition that all persons should have choices with respect to employment and States should consider and elaborate strategies, including affirmative action, to fulfil the right to work for persons with disabilities. Preferential contracting needs to be considered as a policy tool that can support countries to realize their SDGs.

4. Regional mandates in Asia and the Pacific

iven population projections, the Asia-Pacific region will be home to nearly 60 per cent of the world's population over 80 years of age by 2050. Since the region already has a market size larger than the EU, procurement policies in Asia and the Pacific that promote employment of persons with disabilities and accessible goods and services will have "an enormous economic impact."⁸¹

The 2002 Biwako Millennium Framework for Action set employment as a priority area for action for governments to address.⁸² This included three employment targets and eleven specific actions to achieve those targets. While the Biwako Framework did not mention procurement or preferential contracting, it did highlight the need for governments to develop and implement incentives and strategies to promote open employment and encouraged the examination of anti-discrimination legislation.

The Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific ("Incheon Strategy") was adopted in 2012, and its first goal is to reduce poverty and enhance work and employment prospects for persons with disabilities. Targets include the undertaking of actions to increase work and employment "for persons of working age with disabilities who can and want to work (Target 1.B), and actions "to increase the participation of persons with disabilities in vocational training and other employment-support programmes funded by governments" (Target 1.C).⁸³

With regards to public procurement, the Incheon Strategy placed importance on defining technical standards that would ensure accessibility for and safety of persons with disabilities. The Incheon Strategy recommended that governments take actions to ensure all government procured goods and services are accessible including all content on government websites.⁸⁴ The Incheon Strategy also recommended cross-sector programmes and collaboration to promote universal design and accessibility in training programs and higher education curricula.⁸⁵

The Beijing Declaration, including the Action Plan to Accelerate the Implementation of the Incheon Strategy ("Beijing Declaration" and "Action Plan"), was adopted in 2017 to clarify obligations and identify actions to be undertaken by governments in the region. The Action Plan included recommendations to support the employment of persons with disabilities through improved access to financial services, capacity-building programs, and the development of schemes to promote employment.⁸⁶ Specific suggested measures include the

⁸¹ ESCAP (2019), p.47.

⁸² ESCAP (2003).

⁸³ ESCAP (2012).

⁸⁴ ESCAP (2012), Recommendations 12(c)(i) and (ii), p. 56.

⁸⁵ ESCAP (2012), Recommendation 12(c)(iii), p. 56.

⁸⁶ ESCAP (2018), Recommendations 10a-10b, p. 52.

provision of financial and other incentives to employers to hire persons with disabilities and the promotion of “disability-inclusive business as a new business model, as distinct from the corporate social responsibility approach to disability, and incorporating disability perspectives into all stages of the business cycle.”⁸⁷

5. Subregional mandate: Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities and the Pacific Framework for the Rights of Persons with Disabilities

During the 33rd Association of Southeast Asian Nations (ASEAN) Summit in 2018, delegates adopted the Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities. That plan called for economic integration of persons with disabilities at the regional level, including actions to ensure employment and decent work for persons with disabilities. Key points of action included the development of policies to facilitate harmonization with the CRPD, including encouraging work environments that are disability-inclusive (AEC 1), the creation of business opportunities to support inclusion (AEC24), the promotion of an inclusive global economy, and non-discrimination through the “the promotion of equitable opportunity to employment and entrepreneurship and economic integration for all” (AEC25).⁸⁸ The Masterplan called for national procurement policies and regulations to promote products made by persons with disabilities (ASCC 10) and for raising awareness on “procurement and distribution” as one method for promoting inclusive skills-training on entrepreneurship (ASCC 25), but did not explicitly call for using procurement to promote employment through preferential contracting.

The Pacific Framework for the Rights of Persons with Disabilities contains the same ten goals as the Incheon Strategy. While it does not provide additional guidance on strategies or methods for public procurement or preferential contracting, it references the obligations of States to undertake measures to comply with and implement actions to advance the rights articulated in the CRPD.

As part of the first goal (reduce poverty and enhance work and employment prospects) the Framework noted the disparities in employment, especially for persons who are deaf or are hard of hearing, persons with psychosocial disabilities, and women with disabilities. In addition, the Framework cited the CRPD in noting States’ obligation “to take appropriate measures, including through legislation, to prohibit discrimination on the basis of disability in all aspects of employment and to protect the equal rights of persons with disabilities to just and decent working conditions, including equal pay, vocational training, and reasonable accommodation in the workplace.” Finally, the Framework noted the need to remove barriers to employment, “including discriminatory law and inaccessible workplaces, and promoting private sector initiatives in support of entrepreneurial activities by persons with disabilities.”⁸⁹

c. Existing approaches to address disability gaps in employment

Governments have used a variety of approaches to address gaps in employment experienced by persons with disabilities. The ILO and others have documented the approaches taken at the national level. These have included support services, vocational training programmes,

⁸⁷ ESCAP (2018), p. 53.

⁸⁸ Association of Southeast Asian Nations (2018).

⁸⁹ Pacific Framework for the Rights of Persons with Disabilities: 2016-2025, p. 12.

wage and other subsidies either for the employer or employee, the provision of reasonable accommodation, quota systems, and anti-discrimination legislation and protections.⁹⁰

The ILO has noted that quota schemes are one of the most commonly used methods to promote employment, as evidenced by the large number of initial State reports submitted by Governments to the CRPD Committee that mention quotas.⁹¹ Countries have used various approaches: some have mandatory quotas while others are voluntary and the parameters for whom quotas apply differ by sector, industry, size of the company and other factors.⁹²

Governments have resorted to charging fines or levies to companies or public sector entities for not meeting quotas. This has reduced incentives to comply and thus the effectiveness of quotas as a viable mechanism, as the ILO has found that “many employers prefer to make the levy payment or avail of other options open to them, rather than employing people with disabilities either to the extent to which they are required, or at all.”⁹³ The ILO has also found that some countries have over-reported the extent to which the public and private sector have complied.⁹⁴

Quota systems may not prove to be effective in promoting decent work for persons with disabilities unless significant changes are introduced to strengthen monitoring and enforcement and to direct funds collected from non-compliant employers to provide training and employment opportunities for persons with disabilities to ensure their sustainable work in the general labour market. Other practices, while not sufficient by themselves, are needed. It is essential for all countries to have in place anti-discrimination legislation and protections for preferential contracting to be effective. Other approaches, such as ensuring the provision of reasonable accommodation or offering vocational training programmes, also need to continue and be strengthened.

IV. The Prospect of preferential contracting

a. What is preferential contracting in public procurement

Preferential contracting in public procurement is the practice of applying specific measures or actions that are necessary to accelerate or achieve de facto equality of persons who have been historically underserved or marginalized. Preferential contracting allows contracting agencies to address unequal conditions in the status quo and to provide opportunities for persons from disadvantaged backgrounds.

Contracting agencies have used preferential contracting to support racial and ethnic minorities, women, and persons with disabilities. Contracting agencies can take a variety of actions throughout the procurement process, as described below.

b. Overview of procurement processes and key phases

While various approaches and typologies exist for describing procurement processes, at a very general level, a contracting agency’s procurement process occurs over three broad phases.⁹⁵

⁹⁰ ILO (2015), *Decent Work for Persons with Disabilities: Promoting Rights in the Global Development Agenda*.

⁹¹ ILO (2019), *Promoting Employment Opportunities for Persons with Disabilities: Quota Schemes*, vol.1. p. 1.

⁹² ILO (2019), p. 3.

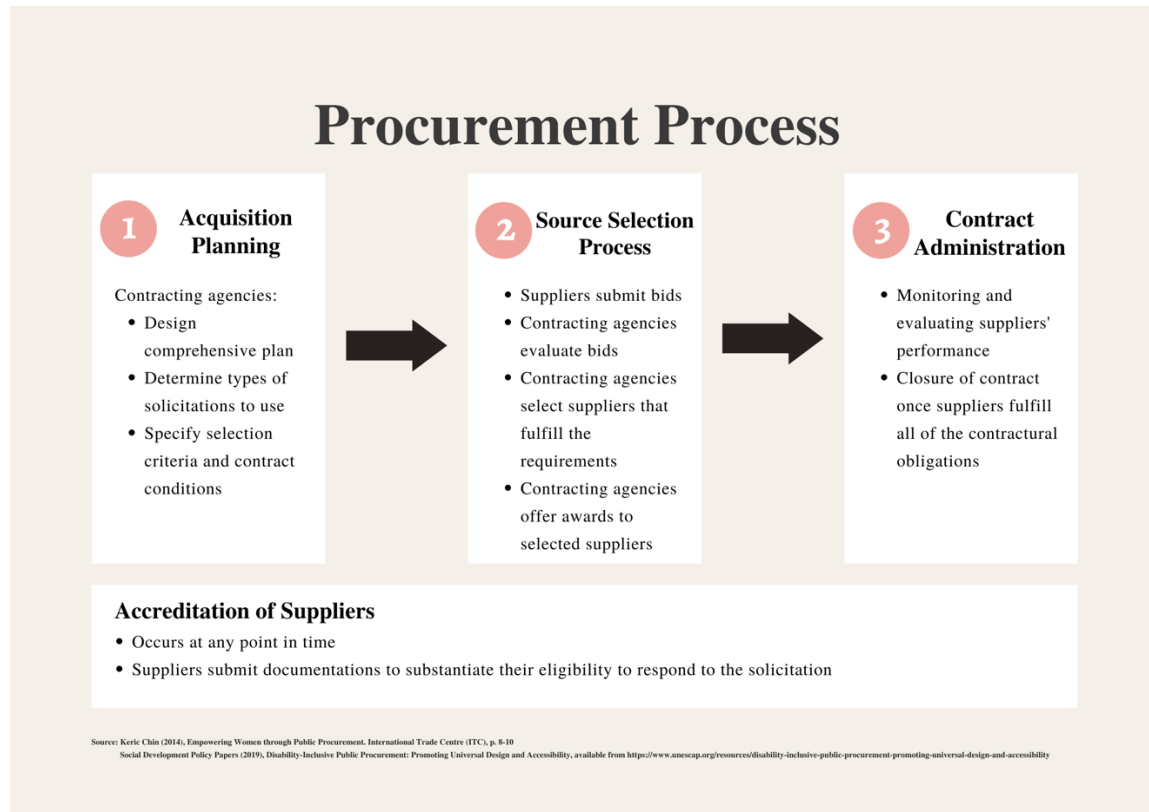
⁹³ ILO (2019), p. 7.

⁹⁴ ILO (2019), p. 8.

⁹⁵ Adapted from Keric Chin (2014), p. 8.

Any specific procurement process may deviate from the individual steps listed in the below table.

Figure 1. Phases in the procurement process



This study does not look at each of the above steps, as other resources provide such details.⁹⁶ Rather, it reviews some critical moments in the process that contracting agencies can use to provide opportunities for preferential contracting. This includes the accreditation of suppliers, using different types of solicitations, and the use of discretion in bid evaluation criteria and contract conditions. The accreditation of suppliers is ongoing and can happen at any time, i.e., it is independent of any solicitation. Decisions about types of solicitations, how to use selection criteria and defining contract conditions all happen during the first phase.

1. Accreditation of suppliers

Contracting agencies will require suppliers to submit paperwork regarding their business or organization status to verify their eligibility to respond to the solicitation. The precise paperwork requirements will vary from jurisdiction to jurisdiction, and even within jurisdictions will vary depending on the size of the contract, the size of the contractor, the sector(s) it is active in, the focus of the solicitation, and the extent to which the solicitation can be targeted to particular types of contractors.

⁹⁶ There is no universal consensus on the number of phases in the procurement process. Commonly used typologies identify between three and seven phases. For example, the Government of Canada's procurement website includes four phases: <https://buyandsell.gc.ca/for-government/buying-for-the-government-of-canada/the-procurement-rules-and-process/phases-of-the-procurement-process>.

The opportunity to register and the categories for which one can register will differ from jurisdiction to jurisdiction. Companies can register in some countries or states as minority owned or operated based on race, gender, indigenous or disability status. In other jurisdictions, there are no paths for or benefits to registering as such. Contracting agencies can provide technical support and training opportunities for particular types of small businesses, such as disability-owned companies, they are targeting, as a way to support their entry into the market.

2. Types of Solicitations

Contracting agencies use a variety of approaches to solicit bids for goods and services. These may include requests for quotations (RFQs) and requests for proposals (RFPs).⁹⁷ As with the issue of accreditation, there is no universal standard for these different designations.

Contracts for smaller dollar amounts may not require an open solicitation. Contracting agencies in some jurisdictions are given more flexibility when arranging solicitations for smaller dollar amounts and thus may be able to use no-bid or sole-source contracts, that could be used to target particular types of contractors. While the majority of set-aside contracts are through open bids, contracting authorities can sometimes make use of “sole-source” contracts.

In some cases, the contracting agency will require a receipt of a certain number of bids from eligible vendors for the process to be considered open and transparent. Certain types of contracts, notably in construction, tend to be for larger amounts and may come with different or additional requirements.

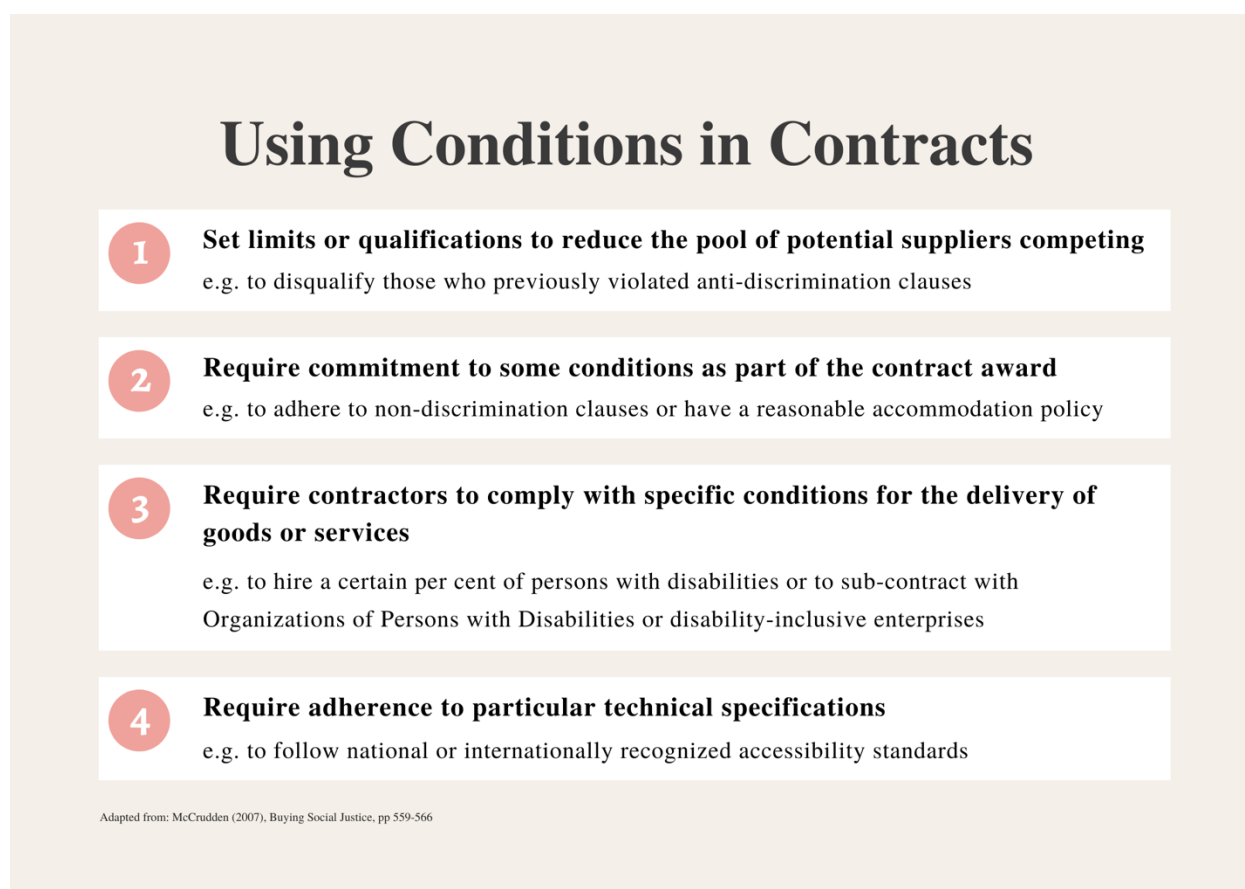
3. Discretion in selection criteria and contract conditions

Contracting agencies will specify in their solicitations the criteria that will be used to evaluate bids and any conditions for contractors that win awards. The specific criteria will vary depending on several factors: a) the contract amount and sector; b) whether the solicitation is an RFP or RFQ; c) the extent to which contracting agencies can define and require adherence to specific social objective elements; d) whether or not there is any inclusion of social criteria in comparison of bids (i.e., price and non-price elements that get scored); e) any flexibility afforded to contracting agencies regarding rules governing the use of sub-contractors; and f) the extent to which contracting agencies can limit the number of suppliers that can submit bids.

Contracting agencies can set certain conditions, as shown below, that can support targeted contractors to be more competitive.

⁹⁷ This paper uses RFP when referring to solicitations for services and works, and RFQ when referring to solicitations for goods.

Figure 2. Using Conditions in Contracts



c. Why preferential contracting is important

National governments invest significant resources to procure goods and services for a wide variety of purposes. As such, public procurement policies and practices can be powerful tools to influence the behavior of contractors, sub-contractors, and consumers for a variety of ends, including to promote social equality. Evidence has shown that two methods in particular, price preferences and set-asides, have a significant effect on markets.⁹⁸ Governments can use solicitations not only to influence the behavior of those contractors that receive awards but also the entire pool of bidders who respond to RFPs or RFQs.

Data shows not only that persons with disabilities are more likely to be unemployed or under-employed,⁹⁹ it also shows that they perform as well as or better than their non-disabled peers, and do not have higher rates of absenteeism and lateness.¹⁰⁰ Reducing gaps in unemployment between persons with and without disabilities not only benefits individuals with disabilities and their families, it also may benefit the state by lowering costs associated with welfare and support schemes.

⁹⁸ Asian Development Bank (2012), *SME Development: Government Procurement and Growth*, p.16

⁹⁹ United Nations *Department of Economic and Social Affairs, Disability and Employment, Fact Sheet I*. For more recent data specific to European countries only, see also, Geiger, Ben Baumberg, Kjetil A. van der Wel and Anne Grete Tøge (2017).

¹⁰⁰ Bonaccio and others (2020), pp.151-152. See also, Lindsay, S., Cagliostro, E., Albarico, M., Mortaji, N., & Karon, L. (2018), pp. 1-22.

Preferential contracting for persons with disabilities is important given the ratification of the CRPD by 184 States.¹⁰¹ The CRPD requires legislative and policy changes to enable persons with disabilities to realize their right to work in the open market. In addition, the CRPD permits the use of affirmative action to promote de facto equality. Thus, although not expressly required by the CRPD, preferential contracting was clearly intended by the drafters as a tool for States to achieve implementation of the CRPD's employment-related provisions. This point will be discussed in more detail later in the paper.

Finally, preferential contracting can provide governments with a way to advance the implementation of national development plans to realize the SDGs, and to mainstream disability in the development agenda. One goal (SDG 10) emphasizes a commitment to reduce inequalities, and two SDG targets (12.7 and 16.6) refer to public procurement and governmental expenditures. While the SDGs do not mention preferential contracting explicitly, the framing of SDG 10 implies that governments should be taking measures to promote income growth for those in poverty (SDG 10.1), facilitate social, economic and political inclusion (SDG 10.2), and provide opportunities and eliminate discriminatory practices (SDG 10.3). Moreover, recent reports on the SDGs indicate that the SDGs stand behind using procurement as a tool to advance sustainable development and achieve social and economic inclusion. The Sustainable Development Goals Report 2021 notes,

“As of December 2020, 40 countries had reported on sustainable public procurement policies or action plans (or equivalent legal dispositions), which encourage the procurement of environmentally sound, energy-efficient products, and promote more socially responsible purchasing practices and sustainable supply chains.”¹⁰²

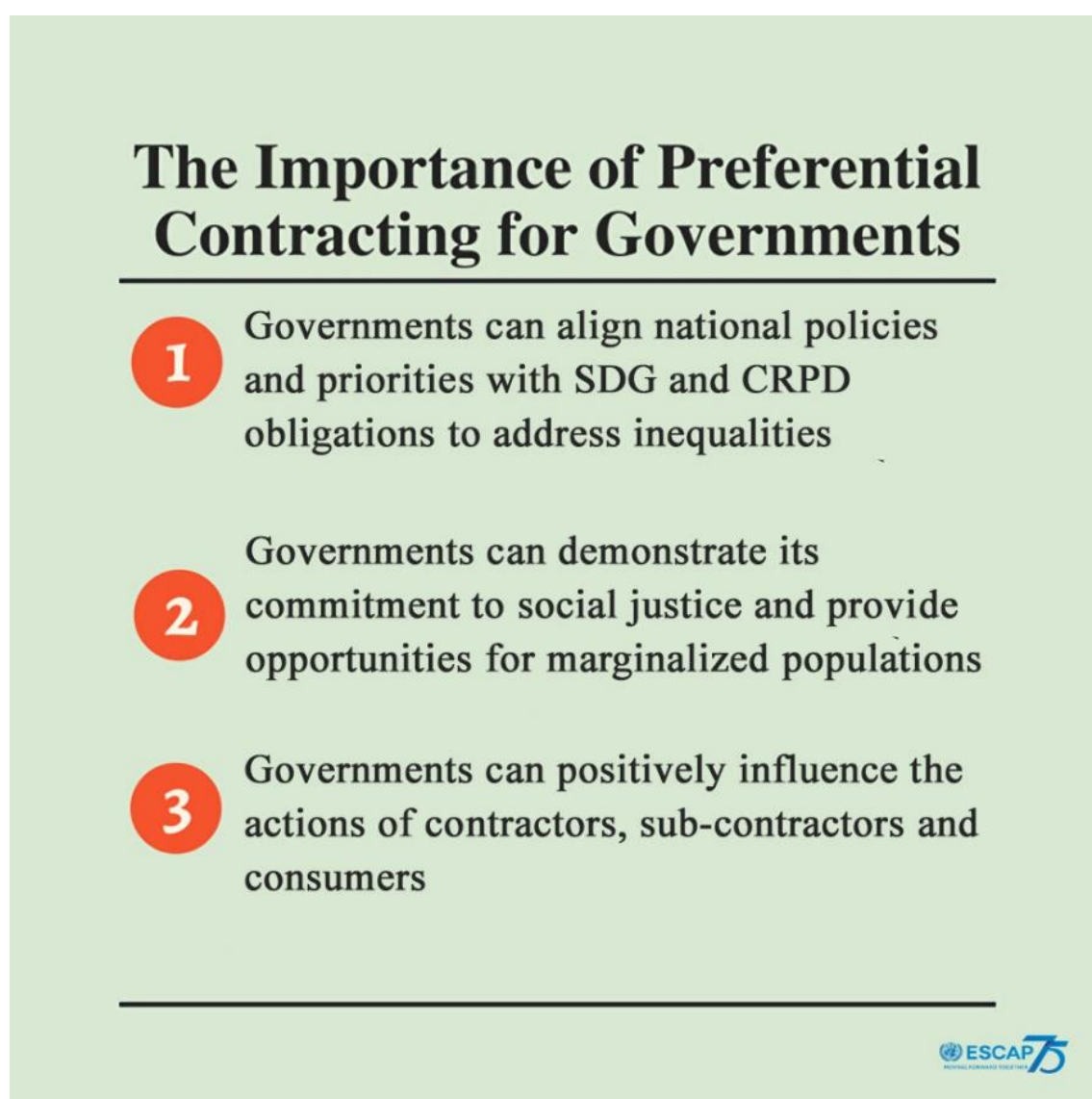
The United Nations Disability Inclusion Strategy (UNDIS) has recognized, through its High Level Committee on Management (HLCM), the importance of re-examining procurement processes, and a working group convened by the HLCM has begun to advance the concept of disability-inclusiveness as a criteria during the stage of the review of bids.¹⁰³ While the UNDIS pertains specifically to United Nations entities, its deliberations on the power and potential of public procurement and the development of criteria on disability-inclusive suppliers or contractors has run parallel to similar efforts undertaken by several governments, including the United Kingdom, Australia and New Zealand. This is discussed in more detail in section V.

¹⁰¹ Information on the number of States that have ratified the CRPD is available from <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

¹⁰² United Nations Statistics Division (2021), page 50.

¹⁰³ The United Nations procurement guidelines have been adopted and are discussed later in this paper.

Figure 3. Importance of Preferential Contracting for Governments



d. Size / value of public procurement budgets

Public procurement, worldwide, accounts for between 10 to 25 per cent of GDP.¹⁰⁴ The use of public procurement in countries has risen dramatically in the past 75 years, most significantly during the period between 1945-1980.¹⁰⁵ While public procurement is only one element of public spending, as noted earlier, given the significant rise in public spending over the past century it is safe to assume that spending on public procurement has also risen significantly.

Ortiz-Ospina notes that the rise in spending was largely attributed to the growth of social programmes, most notably spending in health and education.¹⁰⁶ The graph below illustrates the growth of public spending and indicates a growth in the amount of public spending.

¹⁰⁴ ESCAP (2019), p. 23; and World Bank (2019).

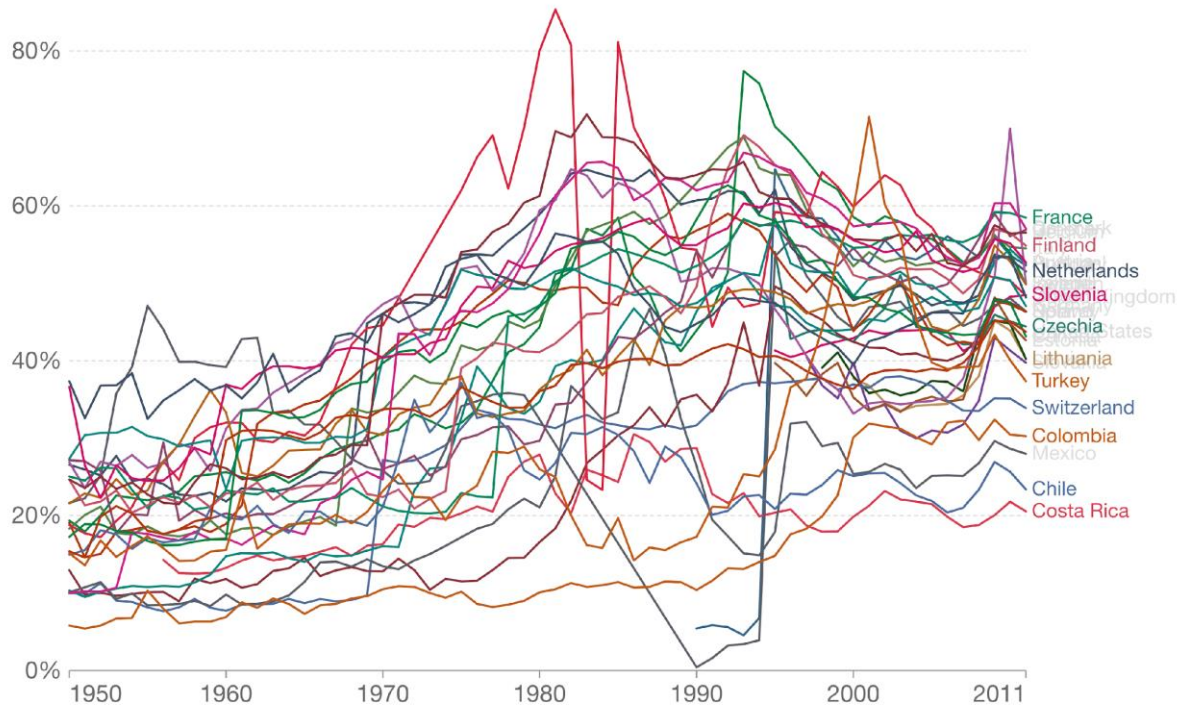
¹⁰⁵ Ortiz-Ospina, Esteban (2016)

¹⁰⁶ Ortiz-Ospina, Esteban (2016).

Graph 1: Rise of public spending as a share of GDP (OECD countries, aside from Asia)

Government spending, 1950 to 2011

Total government spending, including interest government expenditures, as share of national GDP



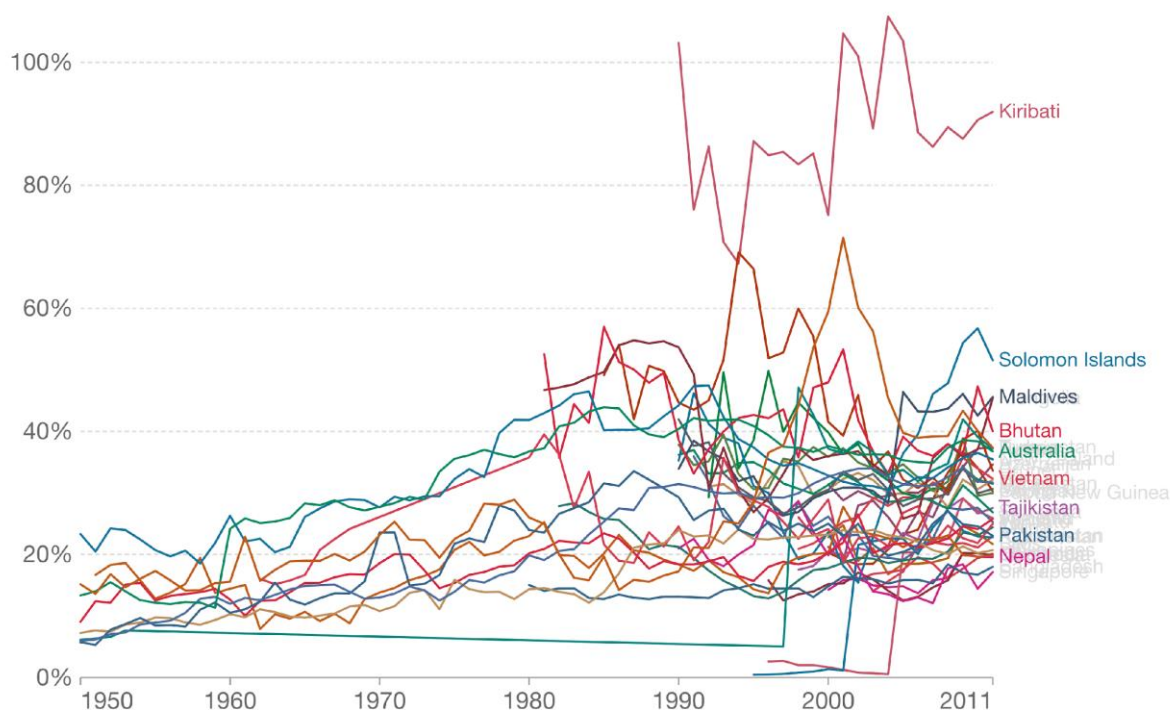
Source: IMF Fiscal Affairs Departmental Data, based on Mauro et al. (2015)

OurWorldInData.org/government-spending • CC BY

Graph 2: Rise of public spending as a share of GDP (ESCAP member countries in Asia)

Government spending, 1950 to 2011

Total government spending, including interest government expenditures, as share of national GDP



Source: IMF Fiscal Affairs Departmental Data, based on Mauro et al. (2015)

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Public procurement is a significant portion of Governments' spending. World Bank data from 2018 shows that public procurement amounts to \$11 trillion out of a global GDP of roughly \$90 trillion. This accounts for 12 per cent of global GDP.¹⁰⁷ The World Bank analysis shows that public procurement is "nearly identical" when looking across low-income, middle-income and high-income countries. The report notes, "Among the 190 countries that we have studied, low-income economies procure on average 13 per cent of GDP in public goods, services and works. Middle-income countries procure 13.2 per cent of GDP and high-income countries procure 14 per cent of GDP. These differences are statistically insignificant."¹⁰⁸

The analysis, however, shows significant variation within the different income-brackets. To highlight this point, they compare two middle-income countries and note Botswana procures 28 per cent of their GDP whereas Sri Lanka procures just 6 per cent; likewise, they compare two low-income countries and note Kenya procures 26 per cent of its GDP, compared with just 5 per cent for Madagascar.¹⁰⁹ The factors that would explain this divergence remain unclear – presumably a combination of the legal and political environment, economic structures, and historical influences.

In Asia and the Pacific, an overall estimate is not available, though some country-level data is available. Estimates for some developing countries range from 15 to 20 per cent of the

¹⁰⁷ Bosio and Djankov (2020).

¹⁰⁸ Bosio and Djankov (2020).

¹⁰⁹ Bosio and Djankov (2020).

country's GDP.¹¹⁰ In Australia there were 81,174 contracts published in 2019-2020 on AusTender with a combined value of AU\$53.9 billion. Given the 2019-2020 expenditures, this represented 10.9 per cent of GDP.¹¹¹ In 2013 New Zealand's spending on public procurement represented 36.3 per cent of its overall expenditures and 14. per cent of its GDP.¹¹² New Zealand's spending on public procurement in 2019-2020 was NZ\$42 billion per annum.¹¹³

Within the States of the European Union, it is estimated that governments spend approximately 14 per cent of their gross domestic product or approximately €2 trillion on the purchase of services and goods.¹¹⁴ Governments are identified as the principal buyers in "many sectors such as energy, transport, waste management, social protection and the provision of health or education services."¹¹⁵

In the United Kingdom, the largest component of government expenditure is procurement.¹¹⁶ The Institute for Government reported that expenditure reached £ 300 billion in 2017-2018 and noted "this means that roughly one in every three pounds that the public sector spends is spent on procurement."¹¹⁷ Over the past 40 years the total public sector expenditure as a share of GDP has fluctuated between a low of 30.6 per cent (1989-1990) to 40.8 per cent (2010-2011). In 2019-2020 the expenditure was 35.4 per cent¹¹⁸

In the United States, the federal government purchases approximately US\$400 billion United States dollars in goods and services from the private sector.¹¹⁹ In 2017 public procurement accounted for 9.3 per cent of the total GDP in the United States.¹²⁰

The United Nations public procurement volume in 2020 was US\$22.3 billion.¹²¹ This was roughly 12 per cent more than the previous year, and the bulk of that increase was in the procurement of goods, seen as primarily due to the COIVD-19 response.¹²²

Data on sub-national levels

There is considerable variation in the amount that governments expend at the central or federal level as opposed to the sub-national levels.¹²³ The most recent data available, from 2016, show Greece, Ireland, New Zealand and the Slovak Republic at one extreme, each of which have subnational expenditures that are 20 per cent or less of all expenditure on public

¹¹⁰ ESCAP (2019), p.47.

¹¹¹ Government of Australia, Department of Finance, *Procurement*.

¹¹² Organization for Economic Cooperation and Development [OECD], (2015), *Government at a Glance 2015: New Zealand Country Fact Sheet*. Data is from 2013. More recent comparative data on expenditures and GDP was unavailable.

¹¹³ Edmunds, Susan (2020), *Government To Change Rules So Spending Creates Jobs for Māori, Pasifika, and Women*.

¹¹⁴ European Union (2020), p. 4.

¹¹⁵ European Commission, *Public Procurement: Why Public Procurement Is Important*.

¹¹⁶ Davies, Nick and others (2018), *Government Procurement: The Scale and Nature of Contracting in the U.K*, p. 5.

¹¹⁷ Davies and others (2018), p. 5.

¹¹⁸ D. Clark (2021), *Total public sector current expenditure as a share of gross domestic product (GDP) in the United Kingdom from 1977/78 to 2020/21*.

¹¹⁹ OECD (2018), *SMEs in Public Procurement: Practices and Strategies for Shared Benefits*.

¹²⁰ OECD National Accounts Statistics (database). *StatLink*.

¹²¹ United Nations Office for Project Services (UNOPS) (2021), *Annual Statistical Report on United Nations Procurement*, p. 4.

¹²² UNOPS (2021), p. 6.

¹²³ Sub-national includes provincial, municipal or local procurement.

procurement.¹²⁴ At the other extreme, eight Organization for Economic Co-operation and Development (OECD) countries have subnational expenditures that are more than 165 per cent of their central expenditures.¹²⁵ The OECD averages are presented in the below tables for all members as well as the 8 largest economies.

Table 1: Ratio of sub-national and central expenditures (OECD)

Bodies/countries	Subnational government expenditure as per cent of all expenditure	Central government expenditure as per cent of all expenditure
OECD average for all 34 members	49.52 per cent	50.48 per cent
European Union members	44.30 per cent	55.70 per cent
OECD average for 8 largest economies	61.72 per cent	28.28 per cent
New Zealand	18.13 per cent	81.87 per cent
Japan	33.64 per cent	66.36 per cent
United Kingdom	36.32 per cent	63.68 per cent
Republic of Korea	37.81 per cent	62.19 per cent
United States	65.64 per cent	34.36 per cent

The size and relative significance of subnational expenditures are noteworthy, especially for the largest OECD economies. While the scope of this study is limited to national public procurement-related expenditures, this table shows, in light of the amount of funds allocated at sub-national levels, there may be value in a closer examination of policies and practices at those levels.

e. Preferential contracting to other disadvantaged groups

Several countries have used preferential contracting in public procurement to promote the employment of ethnic and racial minorities and women. The good practices and lessons learned from past experiences can inspire the use of preferential contracting to advance employment for persons with disabilities. This study highlights efforts in the United States and Canada as they are relatively well-documented and they followed similar trajectories, with an initial focus on ensuring non-discrimination protections were in place, followed by more proactive and targeted measures to address gaps specifically in employment.

1. Preferential contracting for racial minorities and indigenous populations

The United States and Canada have used procurement set-asides to promote preferential contracting for historically marginalized populations based on race and indigenous status. Set-asides are one of the options that most influence the market. Set-asides have been used to promote sustainable procurement or socially responsible public procurement. While set-asides have traditionally been used to support businesses owned by particular groups (women, ethnic or racial minorities, etc.), socially responsible procurement is a broader frame

¹²⁴ OECD (2018), *OECD Regions and Cities at a Glance 2018: Subnational government expenditure by category*.

¹²⁵ OECD (2018), *Subnational government expenditure by category*. The eight countries are Finland, Denmark, United States, Sweden, Switzerland, Italy, Spain and Canada.

that has been used to promote acceptable working conditions (such as minimum wages, health and safety standards), opportunities for different groups (including persons with disabilities), decent work and social inclusion, accessibility improvements, or to reduce gender disparities.¹²⁶

Importantly, Governments have used set-asides to support small and medium enterprises and, in particular, historically marginalized or disadvantaged groups.¹²⁷ Since minority-owned contractors, whether by gender, race, disability or indigenous status, are much more likely to be small or medium in size,¹²⁸ the policy options applicable for small and medium businesses (SMBs) are similar if not identical to the options applicable for minority-owned contractors.

In the United States the federal small business procurement goal is that at least 23 per cent of the total value of all federal government prime contracting dollars should be awarded to small businesses.¹²⁹ One of the main programs to achieve this was through the Small Business Act §8(a), from 1953, that required the provision of assistance to “socially and economically disadvantaged” small businesses.¹³⁰ Commonly known as the 8(a) program, the Small Business Administration (SBA) is given the discretion to give price-preferences and set-asides to businesses that meet the size and “economic disadvantage” criteria.¹³¹

To be eligible for the 8(a) program, businesses must be “small” based on the classification guide (this varies by industry),¹³² cannot have previously participated in the 8(a) program, be at least 51 per cent owned and controlled by United States citizens who are socially and economically disadvantaged, and, as of 15 July 2020, have a personal net worth of \$750,000 or less in assets, adjusted gross income of \$350,000 or less, and \$6 million or less in assets, and demonstrated potential to perform on contracts.¹³³

Eligible businesses can get sole-source contracts when the total value of the contract is \$4.5 million or less for non-manufacturing contracts and less than \$7.5 million for manufacturing contracts.¹³⁴ Businesses have opportunities to attend training and receive technical assistance from the SBA.

¹²⁶ Cravero, Carol (2017), *Socially Responsible Public Procurement and Set Asides: A Comparative Analysis of the US, Canada and the EU*.

¹²⁷ Asian Development Bank (2012), *SME Development: Government Procurement and Inclusive Growth*, pp. 9-10. ADB cites the United States and the Republic of South Africa as examples of countries that have used procurement to support historically disadvantaged groups.

¹²⁸ Per data from the United States. SBA, there are 1.1. million minority-owned businesses in the United States, of which 99.9 per cent are small businesses. See United States Small Business Administration Office of Advocacy, *Small Business Facts: Spotlight on Minority-Owned Employer Businesses*.

¹²⁹ Dilger, Robert J. (2021), *An Overview of Small Business Contracting*, Congressional Research Service, p 27.

¹³⁰ Minority-owned businesses include those owned by African-Americans, Asian Americans, Pacific Islanders, Hispanic / Latinx, or Native Americans (Indigenous people).

¹³¹ Dilger (2021), *An Overview of Small Business Contracting*, pp. 15-17.

¹³² Small businesses are for-profit, based in the United States, operate primarily in the United States, are independently owned and operate and are “not dominant in its field on a national basis.” There are size standards that also must be met, and these vary by the business’ classification. See Dilger (2021), *An Overview of Small Business Contracting*, pp. 4-5.

¹³³ United States Small Business Administration, 8(a) Business Development Program.

¹³⁴ Dilger (2021), *An Overview of Small Business Contracting*, p.16, and Levinson, Marc (2017), p.2. “The manufacturing sector, as defined by the U.S. government, ‘comprises establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products,’ as well as those engaged in ‘assembling of component parts of manufactured products’ for purposes other than construction.”

In addition, all other federal agencies, aside from SBA, are required to have an Office of Small and Disadvantaged Business Utilization (OSDBU) that exists to ensure that disadvantaged businesses are treated fairly and have an opportunity to compete and be selected. Each agency's OSDBU has, inter alia, the following statutory requirements: 1) to identify and reassess solicitations that have significant bundling of requirements to increase the probability that small businesses could compete as prime contractors ("primes"); 2) to assist small businesses to receive timely payments, and to obtain any late payment interest penalties; and 3) to provide technical advice, and training opportunities.¹³⁵

The Civil Rights Act (1964) and Executive Order No. 11246-19 (1965) reinforced non-discrimination provisions and introduced affirmative action requirements to ensure equal opportunity in all aspects of employment.

In the United States federal legislation has been challenged and weakened through litigation, leaving a somewhat fragmented system in place at the federal and state level. Decisions rendered by the court in two lawsuits (City of Richmond vs. J.A Croson Co., and Adarand Constructors Inc. vs. Peña) from 1989 and 1995 respectively have led to the adoption of standards regarding the use of tests to determine the legality of contracting with minority-owned businesses.¹³⁶

As a result, the following are now considered standard practice:

1. Programs to address racial disparities in contracting have to be linked to addressing past discrimination that is well-documented and constitutes a compelling governmental interest. Such programs should be narrow in scope and should be open to "strict scrutiny" from the courts. The "strict scrutiny" standard can be extended to apply to federal programs
2. Evidence needs to demonstrate that individual minority businesses enterprises (MBEs) had suffered discrimination
3. Programs must focus on businesses that are "ready, willing and able to bid on and perform contracts."¹³⁷
4. Anecdotal evidence can be used to complement statistical evidence. Key sources of evidence include: "Analysis of disparities in earnings, commercial loan denial rates, and declining participation of MBEs after removal of race-conscious programs."¹³⁸

A December 2016 report commissioned by the United States' Minority Business Development Agency (MBDA) reviewed and analyzed 100 studies that had looked at disparities in public sector contracting between minority and non-minority business enterprises over the previous ten years. The studies included in the review varied by sector, as well as by focus (some looked at primes only, while others looked at primes and sub-contracts).

The report summarized different types of barriers: some were more directly related to a specific process, such as explicit discrimination against minority business enterprises or

¹³⁵ Dilger (2021), An Overview of Small Business Contracting, pp 10-11. "Primes" are recipients of contracts entered into by a government to obtain supplies, materials, equipment or services.

¹³⁶ United States Department of Commerce, Minority Business Development Agency (MBDA) (2016), p. 7.

¹³⁷ MBDA (2016), Executive Summary, p. IV.

¹³⁸ MBDA (2016), Executive Summary, p. IV.

stigma experienced by minority or disadvantaged business enterprises (DBEs).¹³⁹ Other barriers were underlying or systemic and pervasive. As a result, minority businesses have less access to capital, less access to networks, and may experience marketplace-based discrimination. In part because of these barriers, the report concluded that “the needle has not moved” with respect to addressing or reducing barriers.¹⁴⁰ This suggests that any programs to address disparities, such as preferential contracting, need to attend to systemic barriers as well.

Finally, the report observed that recommendations from the disparity studies had called on the same or very similar remedies such as unbundling large contracts, improving payment processes, improving data collection, and improved goal setting and monitoring. The study keenly observed that “what is missing is the extent to which agencies have actually implemented and measured the success or failure of these recommendations.”¹⁴¹

McCrudden cites studies that showed that contractors were more likely to comply with affirmative action provisions if they knew they were going to be subjected to compliance reviews.¹⁴² A study by the Office of Federal Contract Compliance Programs found that employment gains by minorities and women far outpaced total employment growth, but McCrudden has cautioned against relying too much on the data due to incomplete data and difficulties, given various other factors, in attributing the gains in employment specifically to changes in legislation and policies.¹⁴³

Nonetheless, more recent studies have found that set-asides have made a difference for minority-owned businesses. One study from 2014 looked at set-asides directed toward businesses owned by African Americans and noted that rates of ownership increased significantly, the gap between black-owned and white-owned businesses decreased by roughly three per cent, and the gains were concentrated in the industries “heavily affected by the set-asides.”¹⁴⁴

A study from 2021 found that preferential procurement policies were successful in increasing market access and stimulating growth for certified MBEs. Nonetheless, the authors noted that “MBEs need additional support to compete and deliver services at the same level as businesses that have access to more financial resources, better technology to support their endeavour, and more bridging capital to support contract bids.”¹⁴⁵

A similar trajectory was experienced in Canada, where protections were put in place first to prevent discrimination, and later measures were introduced to give preferences to Indigenous populations. In Canada, the Human Rights Act of 1977 permitted the federal government to include provisions prohibiting discrimination in any contract or grant that it awarded.¹⁴⁶ This provision was reinforced in the Human Rights Act of 1985, which detailed the prohibition of

¹³⁹ MBDA (2016), Executive Summary, p. IX. The disadvantaged business enterprise program targets women and minorities but also recognizes persons with disabilities may be disadvantaged and thus are able to apply if they establish their “social” and “economic” disadvantage when applying.

¹⁴⁰ MBDA (2016), Executive Summary, p. IX.

¹⁴¹ MBDA (2016), Executive Summary, p. IX.

¹⁴² McCrudden (2007), p. 598.

¹⁴³ McCrudden (2007), p. 599, citing Gunderson (1989), p. 54.

¹⁴⁴ Chatterji, Aaron K., Kenneth Y. Chay, and Robert W. Fairlie (2014), pp. 507-561.

¹⁴⁵ Stacey Williams, JR Moller, & Jasmine Moore (2021), p.16.

¹⁴⁶ McCrudden (2007), page 157. Some Canadian laws and policies refer to “aboriginal populations”, however as the language has evolved, many no longer consider the term “aboriginal” to be acceptable. This paper replaces “aboriginal” with the preferred term “indigenous.”

types of discriminatory acts and permitted the Governor in Council to prohibit discrimination in “any contract, license or grant made or granted.”¹⁴⁷ The Employment Equity Act of 1995 permitted private sector employers to give preference in employment to Indigenous peoples.¹⁴⁸

The earliest example in Canada that linked social equity to procurement was the 1975 James Bay and Northern Quebec Agreement,¹⁴⁹ which included a provision authorizing a 10 per cent price preferential for companies owned by members of the Cree Indigenous community in contracts awarded by the La Grande Complex Remedial Works Corporation.¹⁵⁰

A second agreement, the Nunavut Land Claims Agreement, was adopted in 1993 and contained a provision that the Government of Canada would “develop procurement policies respecting Inuit firms for all federal government contracts required in support of its activities in the Nunavut Settlement Area.”¹⁵¹ This included a requirement to engage in close consultation with Designated Inuit Organizations in the development and maintaining of procurement policies, and legislative and administrative measures.

The Government of Canada developed procurement programmes through the Department of Indian Affairs and Northern Development: first, in 1996, they required all contracting authorities to restrict procurement to qualified Indigenous suppliers when the following two conditions were met: 1) Indigenous populations are the primary recipients and 2) the contract is valued in excess of Can\$ 5000.¹⁵²

Qualified Indigenous suppliers were obliged to meet requirements in their bids with respect to the per cent of Indigenous staff performing the work, adherence to requirements for any subcontractors, and the completion of a certification whereby the supplier affirms it meets the requirements, commits to comply throughout the life of the contract, and agrees to an audit at any time.¹⁵³

A “final” review of the Nunavut Land Claims Agreement in 2006 by Price Waterhouse Coopers identified several main challenges: 1) different key stakeholders had different interpretations of what their obligations were, including with respect to documentation, data collection, and responsibilities for monitoring; 2) insufficient trust had been built amongst stakeholders, and thus there was a lack of clarity regarding expectations and holding each other to account; 3) stakeholders were too reliant on positional negotiations, meaning inflexible in their demands, rather than effective dialogue. The review concluded that the lack of shared monitoring of implementation was a serious problem. Aside from facilitating better tracking, shared monitoring would have the benefit of ensuring parties to the agreement have similar objectives.¹⁵⁴

¹⁴⁷ Canadian Human Rights Act (1985), sect. 23(a) and sects 5 to 14.

¹⁴⁸ Employment Equity Act (1995), sect. 7.

¹⁴⁹ McCrudden (2007), p. 175.

¹⁵⁰ James Bay and Northern Québec Agreement and Complementary Agreements (1998 ed.), sect. 8, para. 8.9.2, p. 128.

¹⁵¹ McCrudden (2007), p. 175.

¹⁵² McCrudden (2007), p. 179.

¹⁵³ McCrudden (2007), pp. 179-181.

¹⁵⁴ Price Waterhouse Coopers (2006), p. 222. The Nunavut Implementation Panel is responsible for overseeing the implementation of the Nunavut Land Claims Agreement.

As with the programs in the United States, a challenge in Canada has been the lack of quality data on the economic outputs disaggregated by minority status and the lack of research on the effectiveness of contract compliance.¹⁵⁵

2. Preferential contracting to promote employment of women

Governments have used similar models for promoting preferential contracting of women-owned companies as they have for minority-owned companies. Governments have relied on two main methods: 1) price preferences and 2) set-asides for women-owned businesses prime contracts and/or sub-contracts.

Governments across the globe have introduced policies to provide support for women owned businesses, including through preferential contracting. The Beijing Declaration and Platform for Action signaled the need for governments to ensure non-discrimination against micro, small, and medium-scale enterprises owned by women in rural and urban areas.¹⁵⁶ The Beijing Declaration and Platform for Action called for governments to “promote greater involvement of women beneficiaries at the project planning and implementation stages to ensure access to jobs and contracts.”¹⁵⁷ It also called for the private sector, including transnational and national corporations, to “adopt policies and establish mechanisms to grant contracts on [a] nondiscriminatory basis.”¹⁵⁸

Despite these recommendations, women have encountered challenges similar to those encountered by persons with disabilities who want to access the labour market. One of the few global studies available noted the following challenges applicable in both developing as well as developed economies:

“[a] lack of information about tender opportunities, overly complex and burdensome tender procedures, unreasonable technical and financial qualification requirements, large contract sizes, insufficient time to assemble tenders, price competition, lack of feedback from procuring agencies, and failure by those agencies to promptly pay women-owned businesses.”¹⁵⁹

Two related challenges make it difficult to promote gender equality in employment. On one hand, women are under-represented in certain types of businesses, such as construction and the trades, that are likely to compete for public procurement contracts.¹⁶⁰ On the other hand, women are over-represented in social service provision.¹⁶¹

Price preferences increase the cost of bids from non-eligible firms or reduce the cost of bids from eligible firms. Though price preference policies exist in several countries, programmes to facilitate their implementation have faced legal or administrative difficulties that inhibit their effectiveness.¹⁶² There is a surprising lack of research on the effectiveness of price

¹⁵⁵ McCrudden (2007), p. 603.

¹⁵⁶ United Nations (1995), p. 70.

¹⁵⁷ United Nations (1995), sect. F.2. 167 (d), p. 71.

¹⁵⁸ United Nations (1995), sect. F.4. 177 (a), p. 75.

¹⁵⁹ Chin, Keric, (2014), page XIV.

¹⁶⁰ Nyeck, S.N., (2015), p.43

¹⁶¹ OECD (2017), Table 11.A1.1

¹⁶² Chin, Keric, (2014), p. 38, citing Businesswomen’s Association of South Africa (2013), *The Current Status of Policies, Practices, Measures and Barriers regarding Women-owned Businesses in Government Procurement*.

preferences, though the International Trade Centre, the joint agency of the World Trade Organization and the United Nations, has endorsed the use of price preferences for women-owned businesses.¹⁶³

Set-asides or reservations for women-owned businesses are permitted in a few countries, such as Kenya, Namibia, South Africa, and Zambia, although the United States is the only country that has a dedicated set-aside program targeting women-owned businesses.¹⁶⁴ In the United States, the Equity in Contracting for Women Act (2000) authorized the federal government to set-aside or reserve procurements for competition among women-owned small businesses (WOSBs). Set-asides were limited to industries where women-owned businesses were underrepresented, such as in manufacturing. Despite its adoption in 2000, implementation of the Act was delayed until February 2011. The two primary reasons for the delay include legal challenges¹⁶⁵ and the SBA's difficulty in "identifying an appropriate methodology to determine 'the industries in which WOSBs are underrepresented (and, by inference, substantially underrepresented) with respect to federal procurement contracting.'"¹⁶⁶

Under European procurement law, as defined in the 2014 Directive,¹⁶⁷ it is not possible to recommend or stipulate that tenderers put in general quotas for women and there are restrictions on preferential contracting and preferential promotion.¹⁶⁸ Nonetheless, the Directive permits the use of "contract performance conditions" intended to "favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and, to comply in substance with fundamental ILO Conventions, and to recruit more disadvantaged persons than are required under national legislation."¹⁶⁹ As Chin has noted, the implications of the 2014 Directive are unclear.¹⁷⁰ As a result, cases have been taken to court to understand what is required, permitted, and forbidden. Case law, in a decision by the European Court of Justice, has ruled that stipulations related to the employment of certain groups are permitted as long as they are directly related to the "subject matter" of the contract.¹⁷¹

Governments can also mandate or promote, as set-asides, sub-contracting to women-owned businesses. The Government of the United States has, through the Small Business Act, authorized the development of measures to encourage the use of sub-contracting to women-owned businesses. Federal prime contractors and sub-contractors are required to submit small business subcontracting plans for all contracts over a set threshold amount.¹⁷² Contracting agencies can use subcontracting plans as a non-price factor as they evaluate bids for contracts.

The Government of the United States has a set-aside target or sub-goal of having at least 5 per cent of the total value of prime contract and subcontract awards be awarded to businesses

¹⁶³ International Trade Centre, *SheTrades* (2020). pp. 14-15.

¹⁶⁴ Chin, Keric, (2014), pp. 40-41.

¹⁶⁵ Chin, Keric, (2017), p.37.

¹⁶⁶ Dilger, Robert J. (2021), *SBA Women-Owned Small Business Federal Contracting Program*, *Congressional Research Service*, p 14.

¹⁶⁷ European Union (2014), Directive 2014/24/EU, recital 114.

1. ¹⁶⁸ Sarter, Eva K. (2015), pp. 73-74. It is possible to have quotas for women or minorities among those involved directly in the execution or delivery of contracts.

¹⁶⁹ EU (2014), recital 98.

¹⁷⁰ Chin, Keric, (2014), pp.44-45.

¹⁷¹ Sarter (2015), p. 74.

¹⁷² United States Small Business Administration, *What Is a Small Business Set Aside*. The threshold amount is currently at US \$700,000.

owned and controlled by women each fiscal year.¹⁷³ That said, it has only achieved that goal in two of the last sixteen fiscal years.¹⁷⁴ In fiscal year 2020 women-owned businesses were awarded 4.85 per cent of prime contracts, and 5.62 per cent of subcontracts.¹⁷⁵

3. Discussion on the use of preferential contracting to promote disadvantaged groups

Preferential contracting on the basis of race and gender has led to some positive outcomes, but also reveals some challenges and provides lessons that are applicable for persons with disabilities.

1. As Stacy Williams and others noted, several studies have shown that set-asides have increased the number of contracts awarded to the businesses that have been targeted, minority ownership rates have increased, and employment rates have likewise increased. As one study noted, it leads to increasing equity in business ownership, business growth and viability.¹⁷⁶
2. In the United States, it was recognized that the vast majority of minority-owned businesses and women-owned businesses were small in size, and thus any programs to support small businesses could also be used to give preference to them. In other words, since small businesses, generally, improve market competition and local economic development, it may have been easier to first adopt an approach that would support small businesses, and as part of that approach to target, through set-asides, preferential contracting specifically to benefit minority-owned and women-owned businesses.¹⁷⁷
3. With regards to promoting the employment of racial minorities and indigenous persons, it is important to note that courtroom challenges narrowed the scope that contracting entities could use and led to the requirement to document past discrimination.
4. The examples in the United States and Canada, which had a focus on promoting the employment of indigenous persons, show the importance of collecting data on employment resulting from preferential contracting, agreements on terms, obligations of and responsibilities for data collection, and the need for effective compliance mechanisms.
5. Preferential contracting practices to promote the employment of women and support for women owned businesses, have also been beset with challenges. Some have been technical in nature, such as procedures and rules that fail to recognize that the “playing field” is not level due to past discrimination, while other challenges are related to the sectors in which women work.¹⁷⁸ As with race-based preferential contracting, there

¹⁷³ United States Small Business Act (rev 14, change 1), Sect. 15.G(1)(a)(v) Government wide goals, p. 212.

¹⁷⁴ Dilger, Robert J. (2021), SBA Women-Owned Small Business Federal Contracting Program, pp 8-9..

¹⁷⁵ United States Small Business Administration (2021), Small Business Procurement Scorecard Overview, p.1.

¹⁷⁶ Williams, Stacey, JR Moller, and Jasmine Moore (2021), pp.8-11.

¹⁷⁷ Dilger, Robert J. (2021), An Overview of Small Business Contracting, pp. 1-2.

¹⁷⁸ Women may be over-represented in service jobs and within certain sectors (health care and education, for example), and under-represented in other sectors. Given that dynamic, preferential contracting may not be the most effective solution where women are already over-represented. In areas where women are significantly under-represented, preferential contracting may be difficult due to low enrollment in technical

have been legal challenges that have hindered the implementation of programs in the United States to support WOSBs.

6. One important lesson learned from the practice of preferential contracting for women and minorities is that agencies need to find effective ways to monitor compliance. For example, the MBDA study found that primes would not have subcontracted with minority contractors had they thought agencies would not be monitoring their work. The MBDA study concluded that progress will not be made unless agencies are able to monitor and enforce.¹⁷⁹
7. The broader impact of preferential contracting needs to be studied more. A recent Congressional Research Service report affirmed that the United States Federal Government has, for the most part, met its goals of awarding 23 per cent of the total value of eligible prime contracts to small businesses, including disadvantaged businesses. While being recipients of contracts helps the bottom lines of minority and women businesses, as a limitation, the report notes the lack of comprehensive studies that would examine “the effect these contracts have on small businesses, industry competitiveness or the overall economy.”¹⁸⁰
8. One argument for preferential contracting as it pertains to women and racial minorities is that it is a way to promote social justice and equity while simultaneously reducing the amounts governments need to set aside for social payments (welfare and charity). The same advantage holds for preferential contracting for persons with disabilities. Supporting persons with disabilities to pursue decent work opportunities is a very efficient way to increase income for persons with disabilities and their families and reduce their reliance on the state.

V. The practice of preferential contracting to promote the employment of persons with disabilities and disability inclusion in business practices

There are several major benefits of preferential contracting for persons with disabilities. They are summarized in the below figure.

colleges and vocational training programmes. In such situations, a better longer-term approach may be to focus on educational reform and enforcement of non-discrimination legislation and policies (as a first step), followed by preferential contracting initiatives.

¹⁷⁹ MBDA (2016), Executive Summary, page IX.d.

¹⁸⁰ Dilger, Robert J. (2021), An Overview of Small Business Contracting, p 33.

Figure 4: The Benefits of Preferential Contracting for Persons with Disabilities



Countries use disability-specific or disability-inclusive preferential contracting approaches to promote the employment of persons with disabilities. In some countries, such as Japan, laws and policies focus specifically on this population, whereas in other countries, such as the United States or Kenya, laws and policies are broader but include provisions that are applied to businesses owned by persons with disabilities. This study finds that either approach, disability-specific or disability-inclusive, can work well and thus does not preference one approach over the other.

It is important for all preferential contracting methods to include reference to the right that persons with disabilities have to request reasonable accommodation. Information on the procedures to request reasonable accommodation should be readily available.¹⁸¹

In terms of specific practices, four methods have been used: set-asides, price preferences, affirmative action, and discretionary procurement solicitations and awards. A fifth, and emerging practice, is the provision of preferences to contractors that are “disability-inclusive.” The five methods should not be seen as mutually exclusive, but rather as a suite of options contracting agencies can choose based on the context and their specific socially responsible public procurement objectives.

Table 2 provides a summary of the benefits, drawbacks or challenges, and additional considerations about each of the main methods.

¹⁸¹ There are many resources on the administration of reasonable accommodation. The CRPD Committee’s General Comment 6 (CRPD/C/GC/6) from 2018 provides an excellent overview of the meaning of the term and underscores the necessity of providing reasonable accommodation as part of a broader effort to ensure non-discrimination and equality.

Table 2: Comparison of Preferential Contracting Methods to Promote Employment of Persons with Disabilities

	Benefits	Challenges and drawbacks	Considerations
Set-asides	<ul style="list-style-type: none"> • Easy to determine per cent of the value of contracts to be set-aside for eligible suppliers • Is a powerful tool for influencing the market 	<ul style="list-style-type: none"> • Contracting agencies need to determine eligibility criteria • If eligibility is limited to businesses owned by persons with disabilities, there is a risk, given discrimination and stigma, that people might feel they cannot self-identify to be eligible for set-aside support 	<ul style="list-style-type: none"> • If a country uses set-asides for social welfare enterprises or sheltered workshops, working conditions might not be in line with the CRPD • The definition of persons with disabilities needs to be consistent with the CRPD
Price and point preferences	<ul style="list-style-type: none"> • Easy to calculate the reduced cost of bids from eligible suppliers • Is a powerful tool for influencing the market • Does not take much time or effort on the part of the contracting agency 	<ul style="list-style-type: none"> • Contracting agencies need to determine eligibility criteria • If eligibility is limited to businesses owned by persons with disabilities, there is a risk, given discrimination and stigma, that people might feel they cannot self-identify to be eligible for set-aside support 	<ul style="list-style-type: none"> • The definition of persons with disabilities needs to be consistent with the CRPD
Affirmative action	<ul style="list-style-type: none"> • Easy to set hiring goal for suppliers that have been awarded a contract • Contractors may not need to be owned by persons with disabilities 	<ul style="list-style-type: none"> • Contractors might need significant technical assistance to provide working conditions in line with the CRPD • May encounter legal challenges • Risk of tokenism 	<ul style="list-style-type: none"> • In the United States, courts have required businesses to quantify past discrimination, and required the scope of action plans to be narrow
Discretionary solicitations	<ul style="list-style-type: none"> • Contracting agencies have the flexibility to adjust rules based on context (industry, size of contract, sub-contracting requirements, etc.) • It may be easier to use at sub-national levels 	<ul style="list-style-type: none"> • May be difficult for a national level entity to monitor implementation to ensure quality control 	<ul style="list-style-type: none"> • In the United Kingdom this method led the public to have a positive perception of the employment of persons with disabilities and the benefits to the local economy
Contracting with disability inclusive suppliers	<ul style="list-style-type: none"> • An inclusive contractor does not need to be owned by persons with disabilities • Could be used easily in tandem with other methods • An inclusive contractor is more likely to provide decent working conditions and opportunities for staff with disabilities • Promote disability-inclusive business practices 	<ul style="list-style-type: none"> • Difficult to formulate criteria by which to determine whether a supplier is inclusive or not • Risk of tokenism 	<ul style="list-style-type: none"> • An inclusive contractor is more likely to be attentive to ensure goods and services are fully accessible • This method has greater potential to influence conditions beyond individual contracts • Accreditation process will be needed • Technical assistance and training will be needed



This section reviews each method in more detail.

a. Practice and analysis of set-asides

As noted above, governments have used set-asides to support employment and economic development opportunities for other populations. Several governments have used set-asides specifically to benefit persons with disabilities.

Introduction to set-asides

Procurement set-asides refer to the practice of reserving a share of government contracts for a targeted category of bidders that have met certain criteria.¹⁸² This limits competition for those contracts to bidders who meet the preferential qualification criteria. In some cases, it may be necessary for contractors to reach a quota with regards to the composition of their workforce to be eligible for set-aside opportunities. For example, the European Union's 2014 procurement directive restricts competition for some contracts to those companies that have at least 30 per cent of their workforce as persons with disabilities or disadvantaged workers.¹⁸³ This clause has been used to promote sheltered workshops in different countries within the EU. Their use of sheltered workshops is problematic on a practical level as well as from a rights perspective. On a practical level there are no EU-wide definitions, standards or safeguards to ensure consistency of practice or decent working conditions in sheltered workshops.¹⁸⁴

In other cases, contracts may be reserved for companies that have a particular ownership structure or profile, such as those owned by disabled veterans.

Who uses set-asides

Set-asides are used by only a few OECD countries, including in Canada, the Republic of Korea, Japan, and the United States. The OECD report notes using set-asides to give preference to certain groups who have been excluded from the labour market can positively impact social cohesion and employment.¹⁸⁵ However, the United States is the only OECD country to use set-asides specifically to promote the employment of persons with disabilities. Some non-OECD countries, including China and Kenya also use set-asides to support the employment of persons with disabilities.

The United States has set-asides for four types of small companies: women-owned, small, disadvantaged businesses, Disabled Veteran Business Enterprises (DVBES), and businesses in Historically Underutilized Business zones. The Small Business Act has a sub-goal that three per cent of the total federal contracting dollars to be awarded to DVBES.¹⁸⁶ This study considers the use of set-asides to support DVBES in the United States as a case study – as

¹⁸² OECD (2018), *SMEs in Public Procurement*.

¹⁸³ European Union (2014), Directive 2014/24/EU, Clause 20.

¹⁸⁴ From a human rights perspective, even if those practical issues were resolved, the use of sheltered workshops does not meet the requirements as per the CRPD. More details on the problematic nature of sheltered workshops are provided in the discussion section.

¹⁸⁵ OECD (2018), *SMEs in Public Procurement*, chap. 1.

¹⁸⁶ United States Small Business Administration, *What Is a Small Business Set Aside*.



evidence of the impact on the local economy. It is important to emphasize that the set-asides for DVBEs fall under the broader Small Business Act, which at the same time identifies set-asides for the other populations mentioned above.

Box 1. Case Study: Set-Asides for disabled veteran business enterprises in the United States

In the United States companies can register as DVBEs.¹⁸⁷ Aligned with targets set at the Federal level, the state of California law has a goal of at least 3 per cent of the total overall annual State contracting dollars be awarded to DVBEs.¹⁸⁸ A 2009 study of DVBEs in California reported that there were 965 active DVBE firms, over three-quarters of whom were also registered as small businesses.¹⁸⁹ Though they were 0.2 per cent short of the goal in 2006-2007, the most recent year with data available at the time of the study, the DVBE firms received 23,241 contracts worth US\$186 million.

DVBEs were better than larger businesses at creating more jobs based on the dollars spent on goods and services. The study noted that every \$100 awarded to a DVBE led to direct incremental benefits of \$62.40 more than that for larger businesses in general.¹⁹⁰

The study provided a range of worst-to-best case scenarios when calculating the economic impacts of the shift from larger businesses to DVBEs and small businesses.¹⁹¹ The range in terms of direct incremental net new gross state product creation was determined to be between \$882.66 million and \$2.242 billion, with an average of \$1.484 billion. Of that amount, they note that \$1.408 billion would be for small businesses and \$76.86 million for DVBEs.¹⁹²

When factoring in multiplier effects, the \$1.484 billion average produces a net increase of gross state product by \$4.243 billion. It led to the creation of 25,617 net new full-time jobs, new labour income of \$1.784 billion and new indirect business taxes of \$134 million.¹⁹³ The study concluded, “the State created 68 per cent more value by awarding contracts to small businesses and DVBEs over large businesses under the best-case scenario, 27 per cent more value under the worst-case scenario, and on average produced new economic activity that is 50 per cent more than if awarding the contracts to large businesses.”¹⁹⁴

¹⁸⁷ To qualify as a DVBE, the business has to be a small business and has to be at least 51 per cent owned and controlled by one or more service veterans. See United States Small Business Administration, *Veteran Assistance Programs*.

¹⁸⁸ State Government of California (2019), sect. 2(b).

¹⁸⁹ Varshney, Sanja B. and Dennis H. Tootelian (2009), p. 15. Note, the numbers do not add to 965 as some businesses are active in more than one sector.

¹⁹⁰ Varshney, Sanja B. and Dennis H. Tootelian (2009), p. 23. The incremental benefit is manifested in different ways: increase in local employment, in wages, taxes paid, dollars spent in the community, etc. It also differs from community to community.

¹⁹¹ The study indicates that best case scenario refers to “maximum impact” and worst-case scenario refers to “minimum impact.” (p. 27). Tables on pages 37 to 42 provide details on maximum output, maximum employment, labour income and indirect taxes for fourteen types of industries, and present summaries for the maximum impact, minimum impact and expected impact.

¹⁹² Varshney, Sanja B. and Dennis H. Tootelian (2009), p. 27.

¹⁹³ Varshney, Sanja B. and Dennis H. Tootelian (2009), p. 31.

¹⁹⁴ Varshney, Sanja B. and Dennis H. Tootelian (2009), p. 35



Contracting agencies in the United States, within the rules for set-asides, can use sole-source contracts for disabled veterans' business enterprises "so long as the award can be made at a fair and reasonable price, and the anticipated total value of the contract, including any options, is \$4 million or less (\$7 million or less for manufacturing contracts."¹⁹⁵

While the program supporting disabled veterans has demonstrated positive economic impacts, the United States should expand the program to include set-asides for persons regardless of how or when they acquired their disabilities. Persons with disabilities are a very diverse community, and thus any businesses owned by persons with disabilities should have the opportunity to benefit from set-asides, not only those that are owned by service veterans.

In Japan, the Disability Priority Procurement Promotion Act (2013)¹⁹⁶ has more of a social welfare approach. It targets social welfare facilities and some companies for preferential contracts. Unlike the model in the United States, the law does not prescribe a specific set-aside amount, rather the Act encourages contracting agencies to use preferences in contracting with social welfare facilities. The Act encourages all ministries and local government units as well as independent administrative cooperation at the central and local levels to use preferential contracting. Preferential contracts have been awarded in the following industries: printing, cleaning, farming, labelling and packaging, and producing snacks and other foods.

Social welfare facilities are defined as those that provide persons with disabilities with a wide range of services including assistance in finding jobs in the labour market. Eligible companies are those that meet at least one of the following three conditions: a) employ more than five employees with psychosocial, intellectual, or physical disabilities; b) have persons with disabilities as more than 20 per cent of their work force; or c) have persons with severe disabilities as more than 30 per cent of their work force.¹⁹⁷ The eligible companies include subsidiary companies created specifically to employ persons with disabilities.¹⁹⁸

The preferential contracting law in Japan does not seem to rectify structural gaps in market participation by companies owned by persons with disabilities. However, it mainly seems to aim at developing the skills of persons with disabilities in social welfare facilities so that in the end, those persons with disabilities can obtain employment opportunities in the general labour market. Another Japanese law promotes the employment of persons with disabilities through a quota system, by which companies with more than 45.5 employees are obliged to have 2.2 per cent of their workforce be persons with disabilities. Forty-five per cent of companies have met that quota.¹⁹⁹ But the implementation of this preferential contract law does not increase the employment rate of persons with disabilities.

Every year, the Ministry of Health, Welfare and Labour publishes its monitoring sheet online with the absolute number of contracts, kinds of business contracts, as well as total value paid

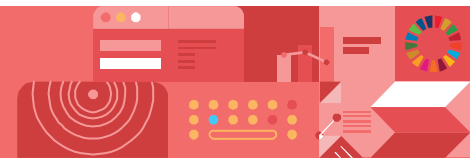
¹⁹⁵ Dilger, Robert J. (2021), *An Overview of Small Business Contracting*, p.18

¹⁹⁶ Japan, Ministry of Health, Labour and Welfare, *Act for Promotion of Priority Procurement of Employment Support Agencies for Persons with Disabilities*, (2012) (in Japanese).

¹⁹⁷ Though eligibility requires meeting just one of the three conditions, companies that meet the third condition will have already met the second condition.

¹⁹⁸ Japan, Ministry of Health, Labour, and Welfare (2012)

¹⁹⁹ Japan, Ministry of Health, Labour and Welfare, "Outline of Law for Promotion of Employment of Persons with Disabilities" (in Japanese) (2013).



for preferential contacts per type of contracting agency and type of services. The monitoring sheet provides an overview of what has been done by contracting agencies at the central and local levels but it does not provide the proportion of the budget size of the preferential contract against the total budget per contracting agency. The monitoring system also does not enable readers to know how many persons with disabilities at each contractor have gained or sustained employment as a result of preferential contracts.²⁰⁰

In China, the government has established set-asides for small and medium enterprises. The Government of China has classified all “welfare entities for persons with disabilities” as small and micro enterprises, regardless of their actual size.²⁰¹ Thus, welfare entities for persons with disabilities are eligible to access procurement policies that promote the development of small and medium enterprises such as reserved set-asides and price preferences.²⁰²

The Government of Kenya’s Public Procurement and Disposal Preference and Reservations Amendment Regulations Act, adopted in June 2013, allocated 30 per cent of the government’s procurement purchases to be reserved for the purposes of “procuring goods, works and services from micro and small enterprises owned by youth, women and persons with disability.”²⁰³ Firms were required to register to be eligible for the public procurement through the Access to Government Procurement Opportunities (AGPO) programme.²⁰⁴ Over two-thirds of all AGPO firms were registered in Nairobi county.²⁰⁵

A 2018 report on Kenya’s legislation and policies, undertaken by the Dutch non-governmental organization Hivos, focused on procurement contracted to youth, but they also looked at data on the registration of businesses owned by persons with disabilities. They reported that just under 5 per cent of registered companies were owned by persons with disabilities.²⁰⁶ Overall, just 7.71 per cent of all tenders worth 5 million Kenyan shillings and above (i.e. roughly US\$ 50,000) issued between 2013 – 2016 were awarded to AGPO registered firms. That per cent is significantly less than the 30 per cent target required by law. In terms of monetary value just 4.1 per cent of the total amount was provided to AGPO firms, showing that AGPO firms were only competitive for relatively low contracts. It was unclear how many disability-owned firms were awarded contracts.

Analysis of the set-asides method

²⁰⁰ Japan, Ministry of Health, Labour and Welfare, *About the procurement record of goods, etc. from each ministry, independent administrative agency, local public organization, local independent administrative agency, etc. from employment facilities for persons with disabilities in 2016* (in Japanese). (2016)

²⁰¹ China, Ministry of Finance, Ministry of Civil Affairs China Disabled Persons’ Federation, *Notice on the Government Procurement Policy for Promoting the Employment of Persons with Disabilities*, (in Chinese) (1 October 2017), para 3.

²⁰² China, State Taxation Administration, *Notice of the State Administration of Taxation on Implementing the Measures for the Administration of Government Procurement to Promote the Development of Small and Medium-Sized Enterprises* (2021).

²⁰³ Agarwal, Anjilee and Andre Steele (2016), p. 19.

²⁰⁴ Government of Kenya, Access to Government Procurement Opportunities.

²⁰⁵ Hivos People Unlimited (2018), p. 7.

²⁰⁶ Hivos People Unlimited (2018), p. 6.



Contracts for small businesses can have significant positive spill over benefits, as the United States' good practices case shows. The economic benefits are more likely not only to support persons with disabilities and their families directly, but also the local communities where they live.

However, there are some challenges. First, as noted above, set-asides are not used in many countries. Second, a contracting agency has to be reasonably confident that there are sufficient contractors that meet their preferential contracting criteria and that those contractors can carry out the work or deliver the service. If contractors do not meet the criteria, then the funds will remain unspent and there will be no benefit of having the set-aside. One of the recommendations from the use of set-asides for minority contractors was to supplement awards with actions to build business capacity. Third, as the examples from other preferential contracting efforts have shown, contracting agencies need to have mechanisms to track employment data to assess or evaluate the impact of the methods. Fourth, it may be necessary to require contractors that are awarded contracts to ensure they provide fair terms and conditions for their employees with disabilities and a work environment where they can thrive. This could include mechanisms for the provision of reasonable accommodation or protections against workplace discrimination. Sixth, while the approach used in Japan and China (and in some European countries) can extend employment for persons with disabilities who work for social welfare enterprises, there are concerns that this does not reach the standards set by the CRPD as it continues the pattern of segregated employment.

As highlighted in section III above, there are different types of contractors, and thus contracting agencies may want to adopt targeted policies to support their capacity to bring on board employees with disabilities. For example, contracting agencies may want to introduce requirements that larger companies must sub-contract with smaller disability-owned or disability-inclusive companies to fulfil award obligations. Likewise, contracting agencies could require that social welfare enterprises transition away from sheltered workshops, provide opportunities for persons with disabilities to develop skills, and provide equal pay for work of equal value.

b. Use of price or point preferences in bid evaluation

Introduction to price or point preferences

Price-preferences are the other option that most influences the market. This tool enables contracting authorities to give preference to businesses that meet designated preference criteria. Historically, the most common use of price preferences has been to protect national or local (small) businesses from competition from abroad. In more recent years there has been increasing interest in and acceptance of using price preferences to support sustainable development.²⁰⁷

Contracting authorities typically use one of two methods for calculating bid-price preferences. One method gives eligible contractors (that meet the criteria that the agency wants to support) a discount by a set per cent to make their bids more competitive. The second method adds a per cent to the bid price of those contractors that have not met the preference criteria.²⁰⁸

²⁰⁷ Keulemans, Shelena and Steven Van de Walle (2017). This study focused on countries in the EU only.

²⁰⁸ World Bank (2016), p. 4



Some contracting agencies use a system of points for evaluating competing bids. In those cases, the agencies can use point-preferences in the same way as mentioned above. Namely, they can add or subtract points depending on whether a contractor meets the preference criteria.

This tool has been used to support businesses owned by persons who have certain characteristics (owned by veterans, minority-owned, etc.), have particular employment practices (fair/living wages), or adhere to certain environmental practices, supplier requirements (sustainability standards), or business practices (local sourcing, manufacturing in state).²⁰⁹

Who uses price or point preferences

Only a few OECD countries, including the Republic of Korea and Mexico, use bid-price preferences in general.²¹⁰ Some countries have opposed these practices, arguing that they represent “a restriction of full and open competition.”²¹¹ In addition, the WTO’s Agreement on Subsidies and Countervailing Measures has prohibited “export subsidies and aid contingent on the use of domestic over imported goods, or the granting of special treatment to individual businesses.”²¹² The WTO’s opposition to the use of price preferences, it should be emphasized, is based on their desire to limit the practice of protecting domestic businesses from competition from foreign businesses.

The Republic of South Africa introduced, through their revised 1996 Constitution, preferential contracting. Section 217 of the Constitution led to the development of the Preferential Procurement Policy Framework Act No. 5 of 2000 (PPPFA or “Framework”). The Government of South Africa has used several different approaches to achieve an economic and social equality objective. This included preferences for local labour, preferences for labor-intensive projects, and complementary programmes designed to stimulate local economic growth. The Framework had a point system for grading bids and included additional points for social inclusion of Historically Disadvantaged Individuals, i.e., those who experienced discrimination on the basis of race, gender, or disability.

A 2012 evaluation of the construction sector, however, noted that “the third category of disability has not been reported in any consistent manner because of the ambiguous definitions regarding disability, and subsequent inconsistent application of preference points for disabled persons.”²¹³ The National Treasury had recorded no contracts awarded to businesses owned by persons with disabilities. The evaluation speculates, “This omission by Treasury was probably due to the fact that when the PPPFA was promulgated it lacked a clear and consistent definition of “disability”. While the South African legal context provides constitutional protection from discrimination for persons with disabilities in the form of the Bill of Rights and the Promotion of Equality and Prohibition of Unfair Discrimination Act, No.

²⁰⁹ Institute for Local Self-reliance (undated, website), Local Purchasing Preferences.

²¹⁰ OECD (2018), *SMEs in Public Procurement*.

²¹¹ OECD (2018), *SMEs in Public Procurement*.

²¹² OECD (2018), *SMEs in Public Procurement*.

²¹³ Letchmiah, Deenadayalan Ruthensamy (2012), p. 4.



4 of 2000, the government does not provide a precise definition of the term “disability” (Beck, 2011).”²¹⁴

The Preferential Procurement Regulations (2017) provide a schedule to support the implementation of the Preferential Procurement Policy Framework (2000). However, aside from assigning a definition for people with disabilities, that does not accord with the CRPD, per the Employment Equity Act of 1998 there are no measures to address the concerns noted in the 2012 evaluation report.²¹⁵

As mentioned above, all welfare entities for persons with disabilities in China are considered small and micro enterprises,²¹⁶ and thus are eligible for programmes and supports that benefit such enterprises. One of the benefits is that contracting agencies and purchasers give small and micro enterprises that meet all the administrative requirements a deduction of six to ten per cent (three to five per cent for engineering projects) when they submit their bids.²¹⁷

Analysis of price and point preference method

The Asian Development Bank (ADB) has categorized the types of strategies or interventions by the extent to which they influence the market for small and medium sized businesses and has indicated that set-asides and price preferences have had the largest impact on the market.²¹⁸ This implies that price and point preferences are effective in shifting to whom contracting agencies award contracts.

It is difficult to assess the effectiveness of price preferences for promoting the employment of persons with disabilities, due in part to deficiencies with the operational design and the lack of sufficient data.

The Republic of South Africa’s definition of persons with disabilities, per the Preferential Procurement Regulations does not comply with the CRPD, and the PPPFA has not tracked the number of contracts that have been awarded to businesses owned by persons with disabilities. In China, welfare entities are eligible for price preferences, but data has not been made available on the contracts awarded or the number of persons with disabilities employed as a result of those contracts.

c. Affirmative action

As mentioned above, affirmative action is a broad term used to describe policies and practices to support groups of persons who have been historically disadvantaged. In the context of preferential contracts, this study uses the term “affirmative action” to describe policies or practices that target the employment of a specific population once an award has been made.

²¹⁴ Letchmiah (2012), p. 10.

²¹⁵ Republic of South Africa (2017), p.21.

²¹⁶ China, State Taxation Administration, *Notice on the Government Procurement Policy for Promoting the Employment of Persons with Disabilities*, (2017), 1 Oct. para 3.

²¹⁷ China, State Taxation Administration, *Notice of the State Administration of Taxation on Implementing the Measures for the Administration of Government Procurement to Promote the Development of Small and Medium-Sized Enterprises* (2021).

²¹⁸ Asian Development Bank (2012), pp 15-16.



This study does not discuss affirmative action measures that indirectly support increased employment of persons with disabilities.²¹⁹

The United States Government's Federal Acquisition Regulation governs the government's procurement process. ILO notes, "the FAR stipulates affirmative action by the contractor to employ and advance in employment qualified persons with disabilities and applies this requirement also to subcontracting companies."²²⁰ There are two affirmative action programmes that specifically require contractors and subcontractors to hire persons with disabilities on a preferential basis. They are described in Section 503 of the Rehabilitation Act of 1973,²²¹ and in the 1974 Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).

Revisions to the rules governing the Rehabilitation Act, the so-called "Final Rule", went into effect in 2014.²²² The Final Rule aimed to strengthen regulations and aid contractors in their efforts to recruit, hire and improve conditions for persons with disabilities. The Final Rule established a utilization goal of seven per cent for individuals with disabilities, required contractors to invite applicants and employees to voluntarily self-identify, and required contractors to maintain data on the number of persons who apply and are hired.²²³ It prohibited federal contractors and subcontractors from discriminating against persons with disabilities.

Federal contractors and subcontractors with contracts over \$15,000 are required to hire and advance in employment individuals with disabilities on a preferential basis. In other words, to take affirmative action. Contractors with fifty or more employees and with contracts in excess of \$50,000 are required to have a written affirmative action policy.²²⁴

The United States requires contractors to "carry out an annual analysis and assessment of problem areas and adopt action plans to address problems identified. The aim of these regulations is to aid contractors in their efforts to recruit, hire and improve job opportunities for individuals with disabilities."²²⁵

²¹⁹ Contracting agencies could use other affirmative action measures through procurement to promote the employment of persons with disabilities: supporting entrepreneurship, offering trainings for disability inclusive enterprises, making available loans, microcredits, and technical assistance for business management.

²²⁰ International Labour Organization (ILO) (2014), *Business as Unusual: Making Workplaces Inclusive of People with Disabilities*, p. 12.

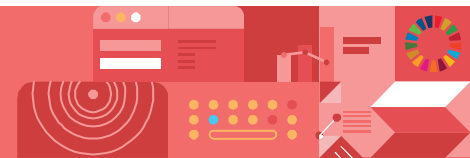
²²¹ United States Code of Federal Regulations, 41 C.F.R. Sect. 60-741.

²²² United States Social Security Administration, *Federal Hiring*.

²²³ United States Social Security Administration, *Federal Hiring*. Note that the Final Rule goal of a seven per cent utilization rate neither pertains to procurement nor to preferential contracting.

²²⁴ United States Code of Federal Regulations, 41 C.F.R Sect. 60-741.40. See 41 C.F.R. §60-741.44 for the specific requirements for affirmative action policies. They include periodic review of human resource procedures, job qualifications, reasonable accommodation, anti-harassment procedures, protections against retaliation, outreach and positive requirement efforts, distribution of policies, audit and reporting systems, training, and data collection and analysis, including compliance with the seven per cent utilization goal for qualified individuals with disabilities.

²²⁵ International Labour Organization (ILO) (2014), *Achieving Equal Employment Opportunities for People with Disabilities Through Legislation: Guidelines*, p. 94.



In addition, VEVRAA required contracts to contain a provision requiring contractors to take 'affirmative action' to employ and advance in employment qualified disabled veterans.²²⁶ The Act also applied to any sub-contracts entered into by a prime contractor.²²⁷ As with the Rehabilitation Act, contractors with fifty or more employees must comply with Affirmative Action requirements. While the target for affirmative action includes veterans with disabilities, it does not apply only to those veterans. It also includes veterans who have recently separated (i.e., released from service), veterans who have been awarded service medals, and active-duty wartime veterans.

The Office of Federal Contract Compliance Programs, under the Department of Labor, monitors progress and provides resources and tools for contractors.²²⁸ The Office of Federal Contract Compliance Programmes and the Office of Disability Employment Policy (ODEP) work together to provide training and technical assistance to enable contractors to recruit and hire persons with disabilities.²²⁹

This research has not uncovered any examples of States making decisions to exclude from public procurement those companies that have not complied with quotas in the past. That said, this could be a tool States use, especially for particularly egregious or repeat offenders.

Main findings regarding the use of affirmative action

The Rehabilitation Act and VEVRAA require contractors to adopt affirmative action policies and to report on an annual basis on actions that have been taken to implement those policies. One positive aspect regarding the structure of these programmes is that it focuses on the contractor as a whole, ensuring that they provide an inclusive work environment, offer reasonable accommodation, and various protections. This is a much broader framework and more likely to create a disability inclusive environment than requiring merely that an entity hire a certain number or per cent of staff with disabilities to fulfil specific contract requirements.²³⁰

Affirmative Action policies in the United States have encountered legal challenges and courts have ruled that businesses that develop and implement affirmative action policies have to present a firm basis of evidence of past discrimination that makes affirmative action policy essential (as a remedy). Moreover, courts have ruled that affirmative action should be seen as flexible, temporary in duration, and sufficiently specific so as to avoid becoming rigid quotas.

Given how courts in the United States have handled these cases, it is likely that each country will have to determine the parameters of affirmative action on a country-by-country and case-by-case basis.

²²⁶ Initially this provision was required for contracts valued at \$250,000 or more, but later it was reduced to \$150,000 or more.

²²⁷ McCrudden (2007), pp. 156-157.

²²⁸ United States Department of Labor, *Contractor Assessment Tools and Tracker*.

²²⁹ United States Department of Labor, *Federal Contractor Requirements*.

²³⁰ Evaluations of the effectiveness of either Section 503 of the Rehabilitation Act and VEVRAA have not been identified, so this should not be considered as a full endorsement of either programme.



d. Discretionary procurement solicitations and awards

Discretionary procurement solicitations and awards were introduced in the overview of procurement processes and phases (see section IV.b above). Discretionary procurement provides contracting agencies more autonomy at different points in the procurement process and thus enables them to target particular types of contractors or particular industries they want to channel more support to. The United Kingdom, China, New Zealand and Australia have developed approaches on the use of social criteria that give contracting authorities discretion to target solicitations. Recent developments in the United Kingdom and New Zealand, in particular, are worth noting.

Box 2. Good Practice: From Value for Money to a Social Value Model in the United Kingdom

Over the past ten years, the United Kingdom had used an approach known as Value for Money to assess and award contracts for international development. Initially the approach assessed bids per three criteria: economy, efficiency, and effectiveness. A fourth “e”, equity, was added around 2011, but an OECD publication noted its inconsistent application, stating that equity “is now also sometimes used to ensure that value-for-money analysis accounts for the importance of reaching different groups.”²³¹ The equity component reflected the need for development work to be responsive to the direction given by the SDG message of leaving no one behind.

In September 2020 the government launched Procurement Policy Note (PPN 06/20). The note identified five main themes: COVID-19 recovery, tackling economic inequality, fighting climate change, equal opportunity and wellbeing. Equal opportunity was the only theme that directly referenced persons with disabilities, with three objectives aiming to achieve the outcome of reducing the disability employment gap.²³² The third objective was to “influence staff, suppliers, customers and communities through the delivery of the contract to support disabled people.”

Unfortunately, the third objective was not included when the government introduced a new Social Value Model (SVM), the aim of which was to promote more generally social objectives through contracting. The United Kingdom Green Building Council described the value added from the SVM, developed in December 2020, in the following terms:

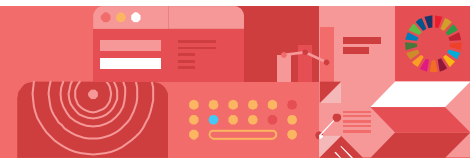
“The new model should be used in all central government procurement to maximize the additional societal benefits that can be achieved in the delivery of its contracts, using policy outcomes aligned with this government’s priorities.”²³³

The SVM set questions for contractors to consider and outlined sub-criteria for the government to assess their responses. To meet the SVM’s first objective, increasing the representation of persons with disabilities in the contract workforce, contractors were required to demonstrate the following:

²³¹ Jackson, Penny (2012), p. 1.

²³² Government of the United Kingdom (2020), Action Note PPN 06/20.

²³³ United Kingdom (2020), Green Building Council, *Government Publishes New Social Value Model*.



- “Understanding of the issues affecting the representation of persons with disabilities in the workforce in the market, industry or sector relevant to the contract, and in the tenderer’s own organization and those of its key sub-contractors.
- Collection of the views and expertise of disabled people and their representative organizations on successfully supporting disabled employees or applicants.
- Measures to reduce barriers to securing more jobs for disabled people in the contract workforce.”²³⁴

In terms of the second objective, supporting disabled people in developing new skills, contractors were to demonstrate:

- “Understanding of the issues affecting the development of new skills by disabled people in the workforce in the market, industry or sector relevant to the contract, and in the tenderer’s own organization and those of its key sub-contractors.
- Understanding of the underlying factors affecting improvements to reduce barriers to training schemes for disabled people in the contract workforce.
- Inclusive and accessible development practices, including those provided in the Guide for line managers on recruiting, managing and developing people with a disability or health condition.
- Other measures to offer development opportunities for disabled people in the contract workforce.”²³⁵

The World Bank has cited reports that point to the positive impacts of the United Kingdom’s efforts. They noted an overwhelming majority of the public had positive views on the effect on the local community and economy. Three-quarters of those surveyed identified one of the benefits as the employment of young and disadvantaged persons, while over 80 per cent saw as a benefit the opportunities for training and local employment.²³⁶ Finally, the World Bank reported on a Cabinet review highlighting the economic and social value of providing local communities discretion in the solicitation process.²³⁷

Over the past two years, the Government of New Zealand has expanded its focus to include social factors. The fourth edition of their procurement rules (2019) includes “fairness” as one of their procurement principles, and that guides contracting agencies to seek opportunities for all businesses, “including Māori, Pasifika and regional businesses and social enterprises.”²³⁸ A second principle, “get the best deal for everyone” asks agencies to “[m]ake balanced decisions – consider the possible social, environmental, economic and cultural outcomes that should be achieved.”²³⁹ Rule 16 promotes consideration of “broader outcomes,”

²³⁴ United Kingdom (2020), Commercial Function, *Social Value Model*, p. 19. Illustrative examples of actions include inclusive and accessible recruitment, activities focused on retention, transparency to pay and award processes, conditions that promote an inclusive working environment, and other measures to provide equality of opportunity.

²³⁵ Government of the United Kingdom (2020), Commercial Function, p. 20. Illustrative examples are opportunities with routes of progression, and conditions that promote an inclusive working environment.

²³⁶ World Bank (2016), p. 11.

²³⁷ World Bank (2016), p. 11.

²³⁸ Government of New Zealand (2019), *Procurement Rules, 4th Edition*, p. 12.

²³⁹ Government of New Zealand (2019), p. 12.



which it defines as “the secondary benefits that are generated from the procurement activity. They can be environmental, social, economic or cultural benefits.”²⁴⁰

The Government of New Zealand identified four new priority outcomes: 1) increased access for New Zealand businesses, including Māori and Pasifika businesses; 2) increased size and skill level of the domestic construction sector workforce; 3) improved conditions for workers in terms of safety and fairness; and 4) support transition to net zero emissions.²⁴¹ However, persons with disabilities were not mentioned as a priority.

On 21 October 2020, the Government of New Zealand announced that Cabinet had adopted two new rules governing procurement. Ostensibly the additional rules were adopted in response to COVID-19.²⁴² One of the rules, Rule 18A, obliged contracting agencies to consider employment outcomes, in particular, whether and how they “can create quality employment opportunities for New Zealanders, particularly displaced workers and groups with traditionally high rates of unemployment or low labour force participation (specifically women, Māori, Pacific peoples, disabled people and youth).”²⁴³ Rule 18A also appealed to contracting agencies to consult with guidance from MBIE on employment opportunities through procurement and to ensure monitoring was sufficient to report on the extent to which they delivered on employment commitments.²⁴⁴

In China, local governments can choose different methods of procurement aside from open or public bidding. They can have closed bidding (i.e. by invitation only), single source procurement and competitive negotiation. The Government Procurement Law, Article 27, states, “If a procurement method other than public bidding needs to be adopted due to special circumstances, the approval of the procurement supervision and management department of the people's government at or above the districted city or autonomous prefecture shall be obtained before the procurement activity starts.”²⁴⁵

In Australia, two exemptions to the Commonwealth Procurement Rules affect companies that provide services to persons with disabilities, i.e. by hiring them. One exemption (#15) allows businesses to be exempt from the rules for the procurement of goods and services if they “primarily exist” to provide employment for persons with disabilities.²⁴⁶ A second exemption (#17) allows contracting agencies to directly contract with small and medium enterprises for procurements under \$A 200,000 as long as “value for money can be demonstrated.”²⁴⁷ While Exemption 17 gives the first opportunity to bid to indigenous businesses, thereafter contracting agencies can engage non-indigenous small and medium enterprises, defined as Australian and New Zealand firms with fewer than 200 FTEs. Small and medium enterprises may be local businesses, social enterprises, veteran-owned businesses and Australian Disabled Enterprises.

²⁴⁰ Government of New Zealand (2019), p. 33.

²⁴¹ Government of New Zealand (2019), p. 33.

²⁴² Government of New Zealand (2020), *Consultation on Implementation of Changes, to Government Procurement Rules*.

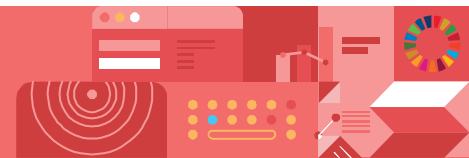
²⁴³ Government of New Zealand (2020), *Rule 18A(a) – Employment Outcomes*.

²⁴⁴ Government of New Zealand (2020), *Rule 18A(b)-(c)*.

²⁴⁵ Yijun, Liu, email dated 20 May 2021, on file with author.

²⁴⁶ Government of Australia (undated), Department of Finance, *Buying for the Australian Government, Exemptions from Division Two, Exemption 15*.

²⁴⁷ Government of Australia (undated), Department of Finance, *Commonwealth Procurement Rules Appendix A*.



Main findings: Discretionary solicitations

Different countries have pursued discretionary solicitations and awards with the aim of supporting, inter-alia, persons with disabilities and companies and social enterprises that employ them. To recall, one of the possible conditions for contracts per McCrudden (see figure 2, above) includes making it compulsory for the awardee to employ persons with disabilities. Many developments related to discretionary solicitations are very new. The United Kingdom, Australia and New Zealand are in the process of designing systems to allow for flexible approaches.

Nonetheless, the rationale for including social criteria appears to be grounded in the human rights approach to disability and shares the aim of the full inclusion of persons with disabilities.

It is worth keeping an eye on the evolution of these practices to see how they perform, bearing in mind the challenges that governments encountered when enacting legislation and policies to support minority-owned and women-owned companies, namely, issues around data collection, monitoring compliance and sanctioning non-compliance, and resolving legal challenges.

e. Support for disability-inclusive contractors

Set-asides, price-preferences, affirmative action and discretionary solicitations are measures that tend to provide targeted support to small contractors that are either owned by persons with disabilities or employ persons with disabilities. Those contractors, after all, can be reached through policies and programmes that support small and medium enterprises.

This last method, providing preference to disability-inclusive contractors, is more ambitious and thus can have a greater impact since any contractor, regardless of size, could make the necessary adaptations to become accredited as “disability-inclusive.” Right now, however, the development of this concept is still at a nascent stage.

Two countries, the United States and the United Kingdom, have set in place programmes to support disability-inclusive contractors. The United Nations, through the process of developing its United Nations Disability Inclusion Strategy, is also developing a practice for identifying and giving preference to disability-inclusive contractors.

In the United States, this designation is determined by the ownership status, i.e., if the business is owned by a disabled veteran. The federal government uses set-asides to support specific types of small businesses, including disabled veterans’ business enterprises (DVBES). There are different standards and eligibility procedures for three tiers of contracts: 1) \$3500-150,000, 2) above \$150,000, and 3) above \$700,000 or \$1.5 million if a construction contract. The government has set a target that DVBES should be awarded 3 per cent of the value of goods and services from public procurement contracts.



The United Kingdom, on the other hand, created a Disability Confidence Toolkit late in 2020 aimed at supporting the employment of persons with disabilities.²⁴⁸ As part of that toolkit, they indicated a company could be classified as a “disability-confident business” if it:

1. Understands that disability impacts all parts of the business, including customers, suppliers and communities
2. Identifies and removes barriers, for example, by providing accessible websites, communications and buildings
3. Provides reasonable accommodation/ adjustments
4. Does not make assumptions based on the label of disability
5. Recognizes that learning to adapt to human reality is a benefit to the business and for persons with disabilities and their families²⁴⁹

The United Kingdom’s Department for Work and Pensions (DWP) described two initiatives that included measures to engage persons with disabilities. One initiative focused on supporting localized employment, including through the work of social enterprises targeting the employment of persons with disabilities. The DWP noted:

“Many Social Enterprises already use trading income to cross-subsidize employment for people with disabilities. We are working with Social Enterprises and other progressive employers to co-design ways of scaling this practice up; for example, by developing a new contracting route where DWP might co-fund one year of high quality supported employment placements for people who are further from the labour market. We are also working with funders to see what more we can do to help open up public procurement opportunities and leverage in social investment to help grow this important sector.”²⁵⁰

The DWP has expressed a commitment to “work with its suppliers to encourage them to become Disability Confident to recruit, retain and develop disabled people. In doing so, it will also encourage other government departments to do the same.”²⁵¹ In addition, they accepted a recommendation “to follow the core standards for employers improving the mental health and wellbeing of their staff employed on public sector contracts” and recognized the important role suppliers can play “in improving the mental health and wellbeing of staff employed on public sector contracts.”²⁵²

²⁴⁸ Brown, Simon., and Susan Scott-Parker (2020), *The Disability-Confident Employers Toolkit*.

²⁴⁹ Brown, Simon., and Susan Scott-Parker (2020), *The Disability-Confident Employers Toolkit*.

²⁵⁰ Government of the United Kingdom (2017), Department for Work & Pensions and Department of Health (DWP), p. 57.

²⁵¹ DWP (2017), para. 107.

²⁵² DWP (2017), para. 108.



Box 3. Emerging Good Practice: HLCM Working Group on Procurement and the Concept of Disability-Inclusive Suppliers

Following the United Nations adoption of the UNDIS, the procurement network of the High-Level Committee on Management (HLCM) held discussions on the elaboration of the UNDIS indicator on procurement (indicator 8). As a result of those discussions the United Nations adopted the following definition for a disability-inclusive supplier:

“[a] supplier which makes a dedicated, consistent, and measurable effort to implement disability-inclusive practices. Suppliers can show that they are disability-inclusive through a variety of means such as having an organizational policy on disability inclusion, recruiting and hiring people with disabilities, offering reasonable accommodation to candidates and personnel with disabilities, providing accessible premises, ensuring that their supply chains are disability-inclusive, manufacturing accessible products following Universal Design principles or others.”²⁵³

They reached an agreement on the use of six yes-no questions²⁵⁴ to determine whether or not a supplier meets the requirements to be considered inclusive:

- Do you have a general disability-inclusion policy? If yes, please provide details.
- Do you have a policy that promotes the employment of persons with disabilities (this does not need to be specific and could be part of the general human resources policy)? If yes, please provide details.
- Do you employ persons with disabilities? If yes, please provide details.
- Do you have a policy that foresees the provision of reasonable adjustments to persons with disabilities (e.g. applicants, employees, suppliers, visitors) who so require? If yes, please provide details such as, for instance, a registry of requests for adjustments made and their status.
- Do you require your suppliers to be disability-inclusive? If yes, please provide details such as a respective policy or written agreements you may have.
- Do you engage or consult persons with disabilities in the development of your products or services? If yes, how?

The United Nations has created eleven sustainable procurement indicators to allow for monitoring, and this includes the indicator “human rights and labour issues.” Within that indicator there is a sub-indicator requirement “for vendors to employ a certain per cent of people with disabilities or people coming from other disadvantaged groups,” and a second

²⁵³ United Nations High Level Committee on Management (HLCM) Procurement Network Secretariat (2020), p. 26.

²⁵⁴ HLCM Procurement Network Secretariat (2020), p. 29.



sub-indicator requires accessibility considerations in product design and production.²⁵⁵ The first sub-indicator fits this study's definition of affirmative action.

Assessment of targeting disability-inclusive contractors

The CRPD, SDGs, Incheon Strategy and the UNDIS have raised awareness of governments' obligations viz-a-viz persons with disabilities, namely that they are rights holders and as such governments need to take proactive measures to ensure their full inclusion. The full inclusion of persons with disabilities requires that all contractors in the private and not-for-profit sectors are, individually, also fully inclusive. As such, it is important to reflect on and develop more comprehensively the concept of disability-inclusive contractors. The United Kingdom, the United States, and the HLCM have developed different approaches to identify disability-inclusive contractors.

VI. Discussion

The central question at the start of this research project was narrowly construed: **how can governments use public procurement processes to promote more effectively the employment of persons with disabilities?** While the question appeared to be straightforward, a broader look at the conditions for employment was needed, both in terms of identifying discriminatory practices that need to be curtailed and identifying proactive and positive measures to support the full economic and social inclusion of persons with disabilities.

In the introduction, this study posed five questions that underscore the importance of using procurement more strategically to advance social and economic justice.

- Could preferential contracting for persons with disabilities in public procurement contribute to efforts to mainstream disability in development and support progress toward SDGs?
- What are the comparative advantages of the preferential contracting system compared to other initiatives and systems to promote employment of persons with disabilities?
- What are the weaknesses of present preferential contracting laws and practices?
- How can governments use preferential contracting initiatives to promote the employment of persons with disabilities in the labour market?
- What criteria should be used to determine whether a contractor is disability-inclusive?

Each question is discussed in turn.

1. Disability Mainstreaming

Many countries have non-discrimination clauses in their Constitutions and/or in other legislation governing the civil, political, economic, social and cultural rights of their citizens. Some countries include persons with disabilities as a protected class within those non-discrimination clauses. Despite that formal legal protection, persons with disabilities still

²⁵⁵ HLCM Procurement Network Secretariat (2020), p. 30.



experience discrimination throughout the whole employment cycle, from outreach and recruitment to benefits, promotions, dismissals, and retirement. Non-discrimination protections, while necessary, are insufficient by themselves to correct social and economic disparities for persons with disabilities.

The vast majority of countries across the globe have ratified the CRPD, thereby showing a commitment to protect, respect and promote the rights of persons with disabilities. Even prior to the adoption of the CRPD the United Nations had recognized the necessity of mainstreaming disability, i.e., ensuring that persons with disabilities are included in all aspects of community, political, and economic life on an equal basis with others. McCrudden argues:

“The increasing adoption of ‘mainstreaming’ equality issues into governmental policy increases the likelihood that public procurement becomes subject to equality disciplines. The argument is simply put: one area of government policy (procurement) should not cut across, and should where possible assist...the pursuit of other government policies (equality). An organization can hardly be said to be mainstreaming equality if it neglects to do so in its procurement functions, often leading to the adoption of procurement linkages.”²⁵⁶

International actors have long recognized the need to mainstream disability. Shortly after the drafting of the CRPD in 2006 the United Nations began a series of discussions and began to draft concept notes and reports from conferences on the importance of disability mainstreaming.²⁵⁷ The United Nations understood that the CRPD was not only a human rights treaty but also a tool with an explicit social and economic development dimension.²⁵⁸

When the period for the Millennium Development Goals ended in 2015 it became clear that the new development agenda, the SDGs, would have to integrate or incorporate fully the principles and obligations carried by the CRPD. The SDGs have provided points of entry for the realization of disability rights through goals related to poverty reduction, health, education, employment, urban development and improved data collection. In addition, public procurement can be used, per SDG target 12.7, to achieve national policies and priorities, including as they pertain to reducing inequalities. Importantly the SDG framework and the UNDIS Working Group on Sustainable Procurement recognize the need to contract with suppliers that are disability-inclusive, to require suppliers to hire persons with disabilities, and to require the design and production of accessible goods and services.

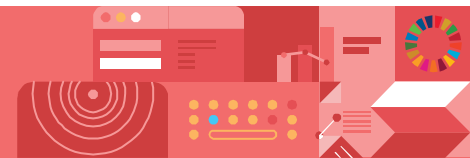
That relatively new development signals the recognition that public procurement needs to be used as a tool to mainstream disability. Preferential contracting for persons with disabilities is a necessary step that governments need to take to make progress toward not only disability inclusion but also the realization of their national development plans under the SDG framework.

2. Reconceptualizing preferential contracting to provide a comparative advantage

²⁵⁶ McCrudden (2017), p. 125.

²⁵⁷ See for example, E/CN.5/2008/6.

²⁵⁸ E/CN.5/2008/6, page 6.



Public procurement constitutes a significant per cent of national and local expenditures. As such, it follows logically that adjusting procurement practices to facilitate more equitable employment and conditions will have a significant positive social and economic impact on persons with disabilities and their families.

Governments have used set-asides and price-preferences to promote the employment of other populations that have been under-served or marginalized. While such efforts have experienced some legal challenges and issues related to inadequate data collection and reporting, set-asides and price-preferences are understood to be useful in shifting market choices and promoting the social and economic objectives of the government and the broader public value. Though the data collected thus far is quite limited, the impact of set-asides for DVBEs has shown the value added of using preferential contracting.

Governments will want to consider, as complementary measures to the use of procurement, conditions for the individual employee, in terms of fair wages, a safe and healthy work environment, the availability of reasonable accommodation, and an accessible work environment.

In the review of preferential contracting for employment of minorities, indigenous persons and women, one issue that stands out is that a multi-tiered approach is needed. Any policy or programme in isolation, including a preferential contracting policy, is unlikely to have a significant impact unless it is complemented by other measures that can address systemic barriers that have contributed to the unequal position that under-represented populations find themselves in. For this reason, it is necessary to consider measures that will remove those underlying barriers and promote new ways of thinking about contracting.

An emerging approach, taken by the United Nations (through UNDIS) and several individual countries, has been developing and promoting the concept of a disability-inclusive contractor. This study finds there are elements within each of those efforts that are very valuable and recommends the further development or elaboration of the concept. This means consideration of the value-added of disability-inclusive contractors, especially bearing in mind alignment with the SDGs, the CRPD and UNDIS.

In their review of recent studies, S. Bonaccio and others concluded that persons with disabilities are as or more productive employees than non-disabled employees as long as they are given appropriate reasonable accommodations and did not experience discrimination in the workplace.²⁵⁹ They also found no evidence of increased absenteeism or lateness for employees with disabilities, while also finding that employees with disabilities had significantly lower turnover rates.²⁶⁰ The findings suggest that employees with disabilities are valuable assets for their employers, in the public and private sectors.

3. Weaknesses of preferential contracting laws and practices

One of the main ways governments have used preferential contracting for persons with disabilities in the past has been through social enterprises and companies that operate sheltered workshops. However, sheltered employment is inherently problematic. Sheltered

²⁵⁹ S. Bonaccio and others (2020), pp. 149-152.

²⁶⁰ S. Bonaccio and others (2020), p.152.



workshops have not shown that they facilitate social or economic inclusion for persons with disabilities, a precondition necessary for meeting standards set by the CRPD. Furthermore, in many, if not all cases, some aspect of the work environment does not meet the ILO standard of providing decent work.

As noted earlier in this study, work is “decent” if the rights of workers are protected, workers generate an adequate income, have protections in place, and have access to opportunities. Study after study has shown that sheltered workshops have fallen short of these standards. Moreover, the CRPD Committee and the Special Rapporteur have noted, repeatedly, the need to transition from sheltered to supported employment.²⁶¹

The implementation of other preferential contracting methods has experienced legal challenges and setbacks, not only regarding persons with disabilities but also for other disadvantaged populations. The main legal argument has been that such methods do not comply with fair trade principles and agreements that require cost as the sole criterion for decisions by contracting agencies.

However, through the CRPD, regional mandates, and some national legislation, international law permits exceptions to those trade agreements and principles. It is worth exploring the use of such exceptions more robustly. Aside from using set-asides and price-preferences, it would be beneficial to consider broader affirmative action policies and find ways to encourage the participation of disability-inclusive contractors in the procurement process and permit contracting agencies to use more discretion when publishing solicitations.

Finally, this study has shown that while some countries have set policies and procedures for preferential contracting to support the employment of persons with disabilities, their efforts have been difficult to assess due to the lack of data. Looking forward, it will be important for governments to strengthen their capacity to collect data that can be disaggregated by disability, gender and age, as foreseen by the CRPD and SDGs.

4. How can governments better use preferential contracting to promote employment and disability inclusion in the economy?

The main preferential contracting methods for promoting employment and disability inclusion in the economy have been set-asides, price and point preferences, affirmative action, the use of discretionary solicitations, and support (most likely through point preferences, but this is still evolving conceptually) to disability-inclusive contractors.²⁶² The last method listed is an emerging practice, informed in part by the adoption of the CRPD, SDGs and UNDIS.

To increase employment of persons with disabilities and disability inclusion in business practices, governments will need to see public procurement strategies as opportunities for advancing inclusive equality, as defined by the CRPD Committee. This foresees a

²⁶¹ There is consensus amongst the CRPD Committee and the United Nations Special Rapporteur that the model for sheltered employment, first introduced one hundred years ago, is not aligned with the advancement of rights of persons with disabilities as outlined in the CRPD, nor is it consistent with the aspirations of the SDGs and the UNDIS. Therefore, efforts need to be made to transform places of sheltered employment into contractors that meet minimum standards of disability inclusiveness, a concept that is evolving, as noted in this study.

²⁶² Sheltered workshops are not included in this list as they are not aligned with a rights-based approach.



“redistributive” dimension that can be achieved through affirmative action measures including but not limited to preferential contracting; a “recognition” dimension that requires actions to place persons with disabilities as equals in the human family; a “participative” dimension that has as its aim the full social inclusion of persons with disabilities; and an “accommodating” dimension premised on the principle of human dignity of all persons who are in any way different.

Preferential contracting alone cannot significantly promote the employment of persons with disabilities. Governments also need to take measures to create an enabling environment. For example, anti-discrimination legislation and protections from discrimination specifically for persons with disabilities are needed. Legislation needs to define the term reasonable accommodation and prohibit the denial of reasonable accommodation unless its provision would constitute an undue burden. Governments can and should provide technical assistance to companies who want to become disability-inclusive and disability confident.

In addition, Governments should consider broad affirmative action measures, to facilitate employment in both the public and private sectors. Affirmative action policies and practices should pay specific attention to individuals who may experience more stigma due to their particular disability as well as to those who may experience multiple discrimination due to other characteristics, such as gender, race, ethnicity, or sexual identity.

Other actions to promote employment include: 1) accessibility audits and barrier removal plans; 2) training on the obligation to have accessible work environments, the concept of supported employment and measures to realize it, and on the provision of reasonable accommodation; and 3) instituting a requirement to provide equal pay for work of equal value.

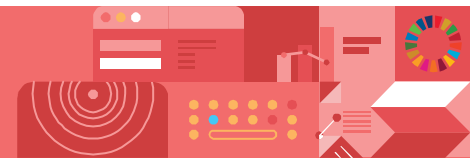
5. Criteria for disability inclusion

It is more difficult to define the concept of a disability-inclusive contractor than it is to identify minority-owned or women-owned contractors. A disability-inclusive contractor needs to accord with all aspects of the CRPD and cannot act in a way that discriminates against or disadvantages persons with disabilities who are staff or customers. As mentioned earlier several governments and the United Nations have developed frames that will allow them to identify and certify disability-inclusive contractors. Those efforts are at a nascent stage and the approaches emphasize different elements.

It is possible to piece together the various attempts to describe the elements of a disability-inclusive contractor and in doing so lay out a more comprehensive blueprint for governments to consider. This study presents seven elements of disability inclusion, as summarized along three main clusters, in the below table.

Table 3: Seven Elements of Disability-Inclusive Suppliers

Organizational Capacity	Processes	Deliverables
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<ul style="list-style-type: none"> ● Leadership commitment ● Staff capacity ● Accessible infrastructure and communication 	<ul style="list-style-type: none"> ● Human resources management ● Strategic planning ● Budgeting 	<ul style="list-style-type: none"> ● Accessible products and services
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I. Organizational Capacity

The first three elements refer to the suppliers' capacity to be inclusive.

Leadership Commitment and representation

The disability confident toolkit recognizes that is important for companies to have an understanding that all parts of a business need to be sensitive to and inclusive of persons with disabilities, including relations with customers, suppliers and the community.²⁶³ The United Nations HLCM recognizes the need for an organizational policy on disability inclusion.²⁶⁴

It is imperative, whether in the private or not-for-profit sector, for leaders to play a guiding role in designing and developing policy and ensuring that a contractor's culture is inclusive, i.e. engages in proactive and disability-positive communications and public relations practices under the direction of senior management.

Staff capacity and motivation, and opportunity

The United Kingdom's SVM includes an objective on supporting persons with disabilities to develop new skills. They request that tenderers demonstrate:

- An understanding of issues affecting the development of new skills by disabled persons in the market, in the tenderer's organization, and in any sub-contractors
- An understanding of ways to reduce barriers that inhibit the inclusion of persons with disabilities in training programmes
- Inclusive practices on recruiting, managing and developing employees with disabilities
- The provision of other opportunities for disabled employees in the contract workforce²⁶⁵

²⁶³ Brown, Simon., and Susan Scott-Parker (2020), The Disability-Confident Employers Toolkit, p. 26.

²⁶⁴ HLCM Procurement Network Secretariat (2020), p. 26.

²⁶⁵ United Kingdom Government Commercial Function (2020), Social Value Model, p. 20. Illustrative examples are opportunities with routes of progression, and conditions that promote an inclusive working environment.



Any training and skill development programmes need to cover the whole range of the employment cycle including internships, onboarding, job coaches, mentoring and promotions. This may also include the development of policies and programmes for return-to-work policies for persons who acquire disabilities on the job. Training should not be limited to employees with disabilities. Personnel, regardless of disability status, could or should be afforded opportunities to learn about some or all of the following topics:

- The human rights approach to disability and the CRPD
- National disability law, especially employment law, including hiring practices, the provision of reasonable accommodation, and accessibility regulations
- Accessibility and universal design
- The business case for inclusion²⁶⁶

Accessibility in physical infrastructure, information and communication

The disability-confident toolkit states that contractors should be engaged in identifying and removing barriers, including the provision of accessible websites, communication practices and physical infrastructure.²⁶⁷ HLCM also notes the importance of providing accessible premises.²⁶⁸ Any accessibility transition plans should have a clear timeline and a budget to cover the costs of removing barriers.

II. Processes

Suppliers also need to make sure that ongoing processes that support the development of products and services are carried out in a way that is conducive to and supportive of employees with disabilities.

Human resource management

Multiple sources have focused on the important function that human resources policies and practices play in creating a disability-inclusive environment or culture. One of the SVM's objectives is to increase the representation of disabled people in the contract workforce. That objective has three main actions:

- Understanding “issues affecting the representation of disabled people”
- Learning from disabled people about successful approaches for “supporting disabled employees or applicants”
- “Measures to reduce barriers to securing more jobs for disabled people in the contract workforce”²⁶⁹

²⁶⁶ This is an illustrative, not an exhaustive list.

²⁶⁷ Brown, Simon., and Susan Scott-Parker (2020), *The Disability-Confident Employers Toolkit*.

²⁶⁸ HLCM Procurement Network Secretariat (2020), p. 26.

²⁶⁹ United Kingdom Government Commercial Function (2020), *Social Value Model*, p. 19. Illustrative examples of actions include inclusive and accessible recruitment, activities focused on retention, transparency in pay and award processes, conditions that promote an inclusive working environment, and other measures to provide equality of opportunity.



Other actions are needed to complement these three to ensure a disability-inclusive workplace. The disability confident toolkit and the HLCM note the need to have a system for the provision of reasonable accommodation for applicants as well as staff and the need for personnel to not make assumptions based on the “disability” label.²⁷⁰ The HLCM also notes the importance of recruitment, for which outreach to OPDs may be a precondition, and hiring of persons with disabilities.²⁷¹ This reinforces the SVM’s action of learning from persons with disabilities.

The United Kingdom’s DWP noted its commitment to building the capacity of suppliers so they can “recruit, retain and develop disabled people.”²⁷² Further, it recognized the role government can play in ensuring and “improving the mental health and wellbeing of staff employed on public sector contracts.”²⁷³

In addition to the guidance from governments and United Nations entities, Human Resource departments should ensure they collect data on recruitment and hiring that can be disaggregated by disability. There should be a policy to offer equal pay and conditions to persons with disabilities for work of equal value, and adherence to that policy in practice. Finally, there should be accessible procedures to file complaints regarding discrimination, abuse and harassment, and decisions made in response to complaints need to be made fairly and transparently.

Human resource management will also want to make sure that staff and customers alike do not experience intersectional discrimination. As has been noted above, many persons with disabilities experience multiple discrimination based on other identity markers such as gender and race, and persons with some kinds of disabilities can be in particularly vulnerable work environments.²⁷⁴ Disability inclusive contractors should reflect the diversity of the disability community and be supportive of persons who may be disadvantaged due to other structural discriminatory practices.

Strategic direction and planning

The disability confident toolkit emphasizes the importance of adapting to market conditions and learning, including understanding the benefits of disability inclusion.²⁷⁵ At their core, strategic plans are paths to reach or realize a goal, in this case, the internal goal of full disability inclusion. The steps to reach that goal require an understanding of the rationale for the goal and an emphasis on the need to adapt behaviours and learn.

Budgeting

Contractors should provide budgets for the provision of reasonable accommodation, both for their recruits and employees. Ideally, and especially for larger contractors, reasonable

²⁷⁰ Brown, Simon., and Susan Scott-Parker (2020), *The Disability-Confident Employers Toolkit*, p. 26.

²⁷¹ HLCM Procurement Network Secretariat (2020), page 26.

²⁷² DWP (2017), para 107.

²⁷³ DWP (2017), para 108.

²⁷⁴ While no group of persons with disabilities are inherently vulnerable, persons with psychosocial disabilities and persons with intellectual disabilities may have fewer employment options and may be working in more vulnerable conditions.

²⁷⁵ Brown, Simon., and Susan Scott-Parker (2020), *The Disability-Confident Employers Toolkit*.



accommodation should be centrally funded, and there should be appeals and complaint mechanisms in place.

Contractors should also budget for inclusion in the programmes and services it provides to enable full participation and engagement by all members of the community.

III. Products and services

Finally, the end products, whether goods or services, need to be available and accessible as widely as possible. HLCM recognized that by noting the importance of ensuring disability-inclusive supply chains²⁷⁶ and adherence to Universal Design principles in manufacturing.²⁷⁷ HLCM also noted that contractors should demonstrate how they “engage or consult with persons with disabilities in the development” of products or services.²⁷⁸

VII. Recommendations

There is no one “right” approach to using preferential contracting to promote the employment of persons with disabilities and disability inclusion in business practice. A variety of methods are useful and the balance will vary depending on legal frameworks and context-specific factors including the strength of individual economic sectors, the supply and demands for labour, and the skills and capacities of job-seekers with disabilities.

Given that variance, this study recommends using a variety of methods, including 1) amending the legislative and policy framework to permit preferential contracting for persons with disabilities; 2) improving current practices to address weaknesses and facilitate disability mainstreaming; and 3) advancing the concept of a disability-inclusive supplier in practice.

a. Amend legal and policy frameworks

Anti-discrimination laws are a necessary precondition to ensure that persons with disabilities are protected and are able to exercise the same rights and access to opportunities as others.

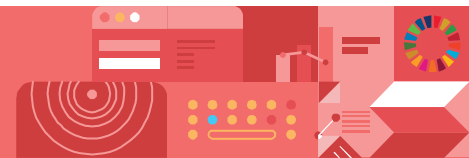
While necessary, anti-discrimination laws need to be accompanied by laws, regulations and policies that permit contracting agencies to develop and use tools to achieve social and economic objectives through set-asides, price preferences, affirmative action and discretionary solicitations. Policies will want to encourage businesses to become disability inclusive. As noted earlier, the CRPD, through the article on non-discrimination, permits affirmative action.²⁷⁹ States should recognize that affirmative action is necessary to help them reach their SDGs, including SDGs 1, 8, 10 and 16 that pertain to poverty alleviation, employment, the reduction of inequalities, and the development of effective, accountable and transparent institutions, respectively.

²⁷⁶ HLCM Procurement Network Secretariat (2020), p. 26.

²⁷⁷ HLCM Procurement Network Secretariat (2020), p. 26.

²⁷⁸ HLCM Procurement Network Secretariat (2020), p. 26.

²⁷⁹ CRPD, Article 5(4): “Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”



Preferential contracting laws should require participating businesses to accord with the standards set by the CRPD. This means their human resource departments should ensure that recruits and employees are aware of procedures to request reasonable accommodation, that reasonable accommodation is provided to all who request it unless it constitutes an undue burden, that equal pay is provided for work of equal value, and that working conditions for employees are safe and healthy.

Contracting agencies will need to be empowered (staff, financial resources and strong mandates) to support and monitor the implementation of the laws and policies. The setting of specific targets and methods will need to be decided on a case-by-case and country-by-country basis. This includes decisions regarding whether it is mandatory for contracting agencies or merely encouraged, the extent to which technical support and training are provided, etc. For these questions, no single or universal answer is right for all.

b. Improve current practices

One of the big challenges is that governments need to find ways to improve current preferential contracting practices, not only to promote the employment of persons with disabilities but also for other disadvantaged populations. As legal and policy changes allow for preferential procurement policies and practices to be developed and implemented, it will be important to complement those changes with capacity building, technical support, and systems to collect data on changes in outputs and impact.

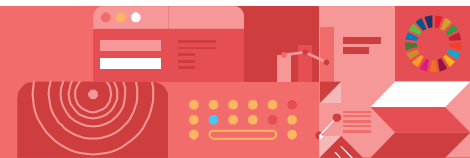
1. Set - asides and price and point preferences

Set-asides and price preferences have been used in several countries, not only to support the employment of persons with disabilities but also to support minorities and women. The limited data available has shown that such measures can be very effective. However, several main shortcomings need to be addressed: 1) inadequate collection of employment data; 2) lack of clarity about roles and responsibilities in situations where there are primes and sub-primes; 3) lack of governmental monitoring and lack of sanctions for non-compliance; and 4) need to establish minimum standards for the designation of disability-inclusive contractors.

Data-collection inadequacies can be remedied by standardizing methods at the national level, tighter regulations regarding reporting, and the provision of technical assistance to contractors that receive contract awards. Contracting agencies could amend the procurement process to include a requirement regarding agreements between primes and sub-primes to ensure the roles and responsibilities are clearer for each. Contracting agencies can increase funding for outreach and technical support, strengthen monitoring measures, and penalties for non-compliance.

2. Discretionary solicitations

In the above discussion section, this paper highlighted seven elements of disability-inclusive suppliers or contractors. Contracting agencies should be permitted to have more discretion in their procurement processes to identify and support disability-inclusive contractors. Preferencing disability-inclusive contractors would have a significant positive impact, not just



at the individual level for the employee with a disability, but even more importantly for everyone in the work environment as well as partners and customers who interact with the disability-inclusive contractors.

Numerous measures could be considered during the procurement process (holding information sessions for disability-inclusive contractors and offering technical support). In addition, the requests for bids could be targeted to contractors that have been accredited as disability-inclusive.

3. Reassess all employment schemes that promote sheltered employment

Sheltered workshops are inherently problematic, placing employees with disabilities in positions where they are vulnerable to abuse, exploitation, and physical and emotional risk. Often working conditions are sub-optimal from a health and safety standpoint and employees are in segregated stations and do not earn a living wage. Several countries, including the United States and the United Kingdom, have de-emphasized sheltered workshops and transitioned some employees to the open market.

Nonetheless, sheltered workshops remain in use in Europe and Asia and procurement policies have been used to give preference to contractors that operate sheltered workshops. Australia and New Zealand have recently undertaken measures to improve conditions in workshops. Australia had used Australian Disabled Enterprises for particular contracts but are phasing them out this year. In their place they have developed Supported Employment Services that work with persons who meet the following criteria: 1) individuals who are unlikely to attain competitive employment at or above the relevant award wage; and 2) individuals who need substantial ongoing support to obtain or retain paid employment.”²⁸⁰

Procurement policy and solicitations could be designed in such a way as to require or encourage bidders to have in place policies and programmes to provide supported employment. This could include linking internships to paid positions, job coaches, mentoring, networking and technical assistance for setting up reasonable accommodation provisions.

4. Mainstream disability through public procurement

Mainstreaming disability through procurement can happen at different phases in the process and should be pursued in a variety of ways. This study recommends that contracting agencies should undertake the following actions in the three procurement phases:

Acquisition planning phase

- 1) Develop and pilot registration or certification requirements whereby contractors are designated as “disability-inclusive”
- 2) Hire OPDs to help with the development of accessible communications and information technology

²⁸⁰ Scrase, Simon, email dated 28 March 2021, on file with author. For more information on supported employment also see Government of Australia, Department of Social Services, Buyability. *What Is Supported Employment*.



- 3) Convene meetings with suppliers and representatives of organizations of persons with disabilities to ensure that as they develop RFPs or RFQs: a) sufficient attention is given to universal design and accessibility considerations; and b) links are facilitated between a range of suppliers and OPDs (that could provide technical assistance as potential subcontractors)
- 4) Targeted skills development to OPDs and small businesses that employ persons with disabilities to support their competitiveness when responding to solicitations and support their business development and entrepreneurship
- 5) Target OPDs and, in places where such designations exist, contractors that are owned or operated by persons with disabilities, in outreach efforts to ensure a broader set of potential suppliers are aware of RFQs and RFPs
- 6) Explore whether solicitations for larger contracts can be sub-divided in such a way as to incentivize partnerships between larger companies and smaller contractors that are disability-inclusive or are OPDs
- 7) Consider how to use contract conditions to promote the employment of persons with disabilities. This could mean, as an example, a requirement that contractors employ a certain number or per cent of staff to fulfil the contract terms
- 8) Provide sufficient time and opportunities for bidders to ask questions and to incorporate answers in their bids
- 9) Emphasize the importance of disability inclusion in solicitations and indicate an expectation that suppliers should demonstrate their capacity to deliver goods or services in a way that promotes disability inclusion

Selection (sourcing) phase

- 1) Develop evaluation criteria that awards additional points for contractors that are “disability-inclusive” or can demonstrate they have met a threshold for the per cent of employees or senior management or boards who are persons with disabilities
- 2) Award additional points to contractors that can demonstrate commitment to the employment of persons with disabilities through various policies or programmes and can provide data in support of such claims. This could include the provision of reasonable accommodation, vocational and professional rehabilitation, return to work programmes for persons who acquire a disability while employed, etc.
- 3) Award additional points to contractors that have an established track record of hiring and mentoring persons with disabilities, and/or have effective return to work programmes for persons who have acquired disabilities while employed
- 4) Use set-asides and/or price preferences for bids from disability-inclusive contractors that commit to hiring and retaining persons with disabilities
- 5) Simplify tender documents, contractual terms and conditions, and procurement processes for smaller contracts. Ensure tender documents do not unintentionally exclude persons with disabilities
- 6) Perform due diligence to ensure any OPDs that have responded to RFPs and RFQs are in fact OPDs
- 7) Simplify selection and evaluation criteria, making sure that a social equity component (including but not limited to the issue of disability) is a significant criterion in decision-making. Also, make it clear in the solicitation that bids will be evaluated on that basis.

Contract management phase



1. Make available some limited technical assistance support for targeted contractors as part of monitoring and compliance oversight
2. Monitor to ensure compliance with contract conditions
3. Require or encourage prime contractors to pay subcontractors in a timely manner

c. Advance the concept of a disability-inclusive contractor

In the discussion section, this study brought together an initial overview of the different efforts to develop the concept of a disability-inclusive contractor. It is essential for contracting agencies to recognize that achievement of the SDGs and accordance with the CRPD will not be possible unless further work is done to identify and support disability-inclusive contractors, including through public procurement and other actions.

Aside from developing laws, policies and practices to allow for affirmative action, legislative branches will need to define the term “disability-inclusive contractor” in their laws and regulations and identify accreditation and monitoring processes. Additional policies may need to be in place to incentivize contractors to become disability-inclusive.

Contracting agencies can take a number of actions to facilitate the participation of disability-inclusive contractors in solicitation processes. Some or all of the following may be appropriate: 1) ensure that all documents and communication about solicitations are provided in accessible formats; 2) outreach to OPDs to inform them about solicitations; 3) provide opportunities for OPDs and disability-inclusive contractors to learn about solicitations; 4) engage a point-person on staff who can liaise with organizations with expertise in supported employment; 5) encourage or require larger contractors to subcontract with disability-inclusive contractors; 6) provide support to larger contractors to become disability-inclusive contractors; 7) support efforts to collect better data; and 8) provide more funding for monitoring compliance and increase consequences for non-compliance.



VIII. Conclusion

The international community has long recognized the need for a twin-track approach, meaning a combination of specific projects targeting persons with disabilities and inclusive projects where attention is paid in the design and implementation to ensure persons with disabilities can participate on an equal basis with others.

The entry of force of the CRPD made it clear that States are obliged to make significant changes to end discrimination in law, policies and practices, and to enact positive measures to promote equality for persons with disabilities. While the CRPD is silent on the specific issue of procurement policy and practice, the CRPD clearly permits measures to give preference to persons with disabilities to address past injustice and reduce economic and social disparities.

Preferential contracting can be a powerful tool but its potential has not been realized with respect to promoting the employment of persons with disabilities. Preferential contracting has been limited in scope, either regarding the population targeted, such as disabled veterans, or in terms of employment choice, such as the use of sheltered workshops. This study finds the need to broaden the population of persons eligible for employment through preferential contracting methods and to reset expectations for all contractors, namely to hold as an ambition that all contractors should become disability-inclusive.

This study has reviewed five main methods for preferential contracting: set-asides, price preferences, affirmative action, discretionary solicitations, and the use of disability-inclusive contractors. The first four methods have been used across the globe, albeit on a fairly limited basis, and with few in-depth evaluations. Set-asides, price preferences and affirmative action have targeted small businesses, including disability-owned, minority-owned, and women-owned businesses. Contracting agencies have been able to use a range of discretionary solicitations to support particular types of businesses or industries.

The most innovative method, using preferential contracting to support disability-inclusive contractors, is still at an emergent stage. The first question to answer is “what is a disability-inclusive contractor?” The United Nations, as part of the discussions following the UNDIS, has discussed this and drafted guidance for contracting agencies. Likewise, the governments of the United Kingdom, and to a lesser extent the United States, have attempted to answer this question. This study synthesizes some main points from the approaches of these entities and presents a sketch of seven elements that need to be in place for contractors to be disability-inclusive. This study does not present a scorecard or definitive criteria by which determinations of inclusiveness should be made. Nonetheless, the next step to advance this discourse may be the development of scorecards and criteria.

Quite simply, to advance the development agenda and realize the SDG targets, countries will need a range of measures. One important and hitherto untapped intervention is the use of preferential contracting to promote the employment of persons with disabilities, including by providing preference in awards to disability-inclusive contractors.



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The “Notice on the Government Procurement Policy for Promoting the Employment of Persons with Disabilities” sets the conditions by which welfare entities can benefit this policy. Persons with disabilities must be at least 25 per cent of the workforce, and there must be at least ten employees with disabilities. Other requirements concern length of the contract, the provision of insurance, guarantee of payment of minimum wages, and the production of goods and services for persons with disabilities. From [关于促进残疾人就业政府采购政策的通知, www.ccg.gov.cn/zcfg/mof/201709/t201709048787205.htm

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