Position Paper by the Federal Association of German Local Authority Associations and the German Association of Local Public Utilities on the upcoming reform of European public procurement law

The Federal Association of German Local Authority Associations and the German Association of Local Public Utilities represent the interests of cities, districts and municipalities as well as local public utilities in Germany and at EU level. They expressly welcome the opportunity to participate in the European Commission's second public consultation on the revision of the public procurement directives.

Role of local authorities in European procurement

Cities, counties and municipalities, as well as local public utilities, are the main public contracting authorities at local and regional level. They play a key role in European public procurement, as they are the largest public investors and contracting entities in Germany in terms of both the number of contracts awarded and the volume of contracts.

In light of the guiding principle of "best value for taxpayers' money", public procurement primarily serves the efficient, economical and responsible use of public funds to fulfil tasks of general interest. The reform of European public procurement law must therefore be geared towards practicability, proportionality and feasibility at the local level.

Raising EU thresholds

The Federal Association of German Local Authority Associations and the German Association of Local Public Utilities have long been calling for a significant increase in EU procurement thresholds. These have not been adjusted for over a decade, even though inflation and construction, personnel and service costs have risen significantly. As a result, everyday and routine procurements are increasingly subject to the full EU procurement regime, without any additional benefit, cross-border interest or internal market relevance being apparent.

Raising the thresholds would be in line with the principles of proportionality and subsidiarity and would therefore ensure that EU requirements only apply where there is genuine European added value. In addition, an automatic indexation mechanism should be introduced to ensure regular and transparent adjustment to economic developments that go beyond mere inflation compensation.

Specifically, the threshold for public works contracts should be raised from the current €5,404,000 to at least €10,000,000, and for supplies and services from the current €216,000 to at least €750,000. In addition, a special threshold of €750,000 should be set for the award of planning services, comparable to the special regime for "social and other specific services". The Commission is therefore called upon to initiate a corresponding adjustment of the thresholds at WTO level.

Simplification of the regulatory framework and rejection of new strategic guidelines

From the perspective of the Federal Association of German Local Authority Associations and the German Association of Local Public Utilities, European public procurement law must be consistently simplified and made more practical so that it remains manageable for local

authorities and local public utilities of all sizes. The focus of the EU procurement directives must continue to be clearly on the procedural rules for procurement, thus regulating the "HOW" to procure, not "WHAT" to procure. In doing so, flexibility is a central structural principle of procurement law.

The reform goals pursued by the Commission, in particular strengthening economic security and sovereignty as well as aligning public procurement more closely with strategic social and sustainability goals, must not be pursued in isolation from the actual function of public procurement mentioned above. It is neither primarily an instrument of industrial, trade or security policy, nor of social, environmental or research policy.

From a municipal perspective, it is imperative that environmental, social, resilience and innovation clauses in EU public procurement law remain voluntary in the future. Mandatory requirements would restrict the necessary flexibility of contracting authorities and would not do justice to the different regional, economic and structural conditions. It should be noted that, in municipal procurement practice in Germany, environmental, social and innovation-related requirements are regularly integrated at an early stage into service specifications, suitability criteria, minimum requirements or contract performance conditions based on national regulations. These requirements must be met by all bidders in order for a bid to be included in the evaluation at all. This approach regularly has a significantly stronger and more effective steering effect than simply taking relevant aspects into account as award criteria. The reform of public procurement law should explicitly recognise and strengthen this practice instead of focusing one-sidedly on the design of award criteria.

The more ambitious social, environmental or quality standards are specified as binding minimum requirements in the service description, the more appropriate it is to refrain from additional award criteria. In such cases, it is logical and even appropriate under public procurement law to award the contract on the basis of the lowest price, as the comparability of the tenders is based on an already high and uniform level of quality and the price then represents the decisive criterion for determining the most economically advantageous tender (MEAT).

The concept of the most economically advantageous tender is often used in a misleading way, even though it explicitly includes the lowest price. Particularly in the case of standardised services or clearly defined services, the price can be the most transparent, objective and proportionate award criterion. Mandatory application of complex evaluation models would in these cases merely create additional administrative work without improving the quality of the service.

Furthermore, there are considerable differences between European Member States in areas such as sustainability, environmental standards and minimum wages. Countries with lower legal or de facto standards can potentially include more social or environmental award criteria in procurement procedures, while countries with already very high standards – such as Germany – regularly anchor these requirements as minimum requirements in the service description. A general mandatory requirement for additional award criteria at European level would not adequately take these differences into account and could even undermine existing high standards.

Furthermore, in accordance with the principle of subsidiarity and the principle of local self-government enshrined in Article 4(2) TFEU, it is the responsibility of local authorities themselves to decide whether and to what extent they wish to pursue strategic objectives through their procurement practices. These decisions must be based on specific local needs, political priorities, available capacities and real market conditions. Mandatory overriding of local procurement decisions by political objectives under Union law would contradict these principles and must therefore be strictly rejected. They would further complicate municipal practice and overload procurement law, transforming it from procedural law into a control

instrument with excessive expectations, while also significantly increasing the administrative burden. This also contradicts the current overarching goal of reducing bureaucracy at EU level.

Specific proposals for simplification and flexibility in procedures

To ease the burden on the municipal level, the associations advocate a general simplification of procurement procedures in the sense of a "light regime" for municipal and local contracting entities (including for small and medium-sized contracting entities). This involves general simplifications of procurement procedures with reduced requirements for contracting authorities, which are based on the provisions laid down in the Government Procurement Agreement (GPA) within the framework of the World Trade Organisation, which, among other things, allow for significantly greater flexibility in the choice of procurement procedures. The EU directives "overfulfil" the GPA and thus set stricter standards. The starting point is the concept of sub-central contracting entities ("sub-central government entities") enshrined in the GPA. For the European Union, this includes administrations that correspond to the NUTS 3 classification and smaller administrative units. In Germany, this includes all counties, cities and municipalities. In addition, all contracting entities that are public law institutions within the meaning of the EU Procurement Directive, such as special-purpose associations, but also other municipal holdings, are covered as sub-central contracting entities.

The Federal Association of German Local Authority Associations and the German Association of Local Public Utilities also see a considerable need for adjustment in the regulations on contract amendments and procedural flexibility, particularly in Article 72 of Directive 2014/24/EU. The aim of the reform must be to give contracting authorities and companies greater legal certainty and leeway in carrying out procurement procedures and in the adaptation of ongoing contracts, without making a new tender mandatory for every objectively justified change. In practice, it is often necessary to adapt contracts to changed circumstances, for example in the event of unforeseen disruptions to performance, the continuation of interrupted services or the clarification of contractual terms. The submission of missing documents during an ongoing procedure should also be made easier to avoid unnecessary exclusions and a restriction of competition.

Similarly, the associations are calling for greater flexibility in the use of framework agreements, particularly in the area of IT procurement. In the future, it must be possible to expand or supplement the group of contracting authorities entitled to make call-offs retrospectively, provided that a call-off quota set in advance is adhered to as an upper limit. Those entitled to make call-offs should therefore not have to be definitively determined at the time the framework agreement is concluded. This would facilitate and increase the practical usability of framework agreements as an instrument for joint and bundled procurement projects ("joint procurement").

Finally, additional mandatory requirements for the division into lots beyond the existing legal framework should be rejected, as these would unnecessarily complicate procurement, prolong procedures and impair the economic execution of public contracts. In addition, it restricts municipal freedom of decision-making. The associations therefore advocate to maintain Article 46(1) of Directive 2014/24/EU, the division of contracts into lots and the principles laid down therein, which have proven their worth in procurement practice. Practice shows that many projects continue to be awarded in individual lots where this makes sense. However, particularly in the case of complex projects such as large construction projects, a single collective lot can significantly improve efficiency, quality and adherence to deadlines.

"Made in Europe": Voluntary application, consistency of objectives and a sense of proportion

The Federal Association of German Local Authority Associations and the German Association of Local Public Utilities share the political goal of strengthening European competitiveness, resilience and strategic autonomy. Local authorities and local public utilities depend on stable

and reliable supply chains in critical areas such as health, energy, IT, water management, digital infrastructure and security services. At the same time, a mandatory "Made in Europe" approach would significantly increase procurement costs and place a financial burden on citizens.

It should be made clear that the burden of proof for the existence of a European company, product or service must not be placed on local authorities and must not be associated with additional testing and control obligations for contracting authorities. Local authorities neither have the human resources nor the technical capacity to independently verify or continuously monitor complex proofs of origin, value chain or production.

Instead, the Commission is called upon to establish a clear, uniform and practical certification system which requires bidders to obtain the relevant certification before participating in procurement procedures. This is the only way to ensure that verification and control obligations are systematically carried out upstream and do not fall to the contracting authorities themselves during the procurement procedure. The latter must be able to rely on such certificates without having to assume additional verification obligations.

In addition, clear and legally certain exceptions must be provided in case the relevant products or services are not available on the European market or are not available in sufficient quantities. In such cases, local authorities must not be prevented, either de facto or de jure, from making appropriate, economical and functional purchases. A “Made in Europe” approach must therefore not lead to supply bottlenecks, delays in investment or disproportionate additional costs.

When designing the additional "Made in Europe" approach, it is also crucial to avoid conflicting objectives. Optional resilience and sustainability criteria that strengthen European value creation are generally to be welcomed. However, mandatory criteria carry the risk of conflicting with each other or even counteracting existing political objectives. For example, a mandatory "Made in Europe" requirement to strengthen European competitiveness could hinder decarbonisation targets if certain technologies or components are not available in sufficient quantities in Europe. At the same time, it could lead to significant price increases.

Practical examples already show that local public utilities, such as distribution network operators, are finding it difficult to obtain sufficient offers on the market. Additional mandatory requirements would further exacerbate this situation. Against this background, strengthening European value creation should focus primarily on generation and production rather than on additional procurement requirements.

In addition, enshrining the mandatory criterion of "Made in Europe" in public procurement law poses considerable competitive risks for local public utilities. In liberalised markets, particularly in energy supply, municipal companies compete directly with private providers who are not bound by public procurement law. Binding strategic requirements, such as the sustainability criteria under the Net Zero Industry Act (NZIA), lead to additional costs, a limited product selection, fewer bidders and additional administrative requirements. Municipal grid operators are already experiencing significant cost increases. Further requirements would further exacerbate this effect and impair both economic viability and efficiency.

This is particularly unacceptable given the enormous investment required for the energy transition. In Germany alone, investments of around €721 billion will be required by 2030. When it comes to creating European lead markets, general, cross-sectoral standards for certain services that do not apply exclusively to the public sector, accompanied by targeted promotion of European production, would be much more effective than additional procurement law obligations.

Strengthening public-public cooperation and in-house procurement

Public-public cooperation and in-house procurement are indispensable tools for local authorities to ensure efficient, economical and resilient public services. However, the existing rules, in particular Article 12 of Directive 2014/24/EU in conjunction with Recital 33, are too restrictive and in some cases linked to conditions (such as the so-called cooperative concept) that cannot be implemented in municipal practice. They also create legal uncertainty for many forms of inter-municipal cooperation that are necessary in practice.

Public-public cooperation should be defined comprehensively and with legal certainty, covering both formal organisational structures and flexible forms of cooperation. Asymmetric cooperation models should also be expressly permitted. Local contracting entities must retain the democratically legitimised freedom to opt for cooperation or in-house solutions if these are more efficient, improve the quality of services or strengthen the capacity to act, particularly in rural municipalities.

Final remark

The reform of European public procurement law must focus on the reality of municipal practice. Only simple and flexible public procurement law will enable municipalities and local public utilities to perform their tasks efficiently, in a legally secure manner and in the interests of citizens. The Federal Association of German Local Authority Associations and the German Association of Local Public Utilities therefore expect that the reform will not lead to additional burdens but will strengthen local authorities' ability to act and secure public procurement as a central instrument to provide services of general interest.

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