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Draft position on the upcoming reform of European public procurement law

The local government and utilitiy organizations from France, Austria and Germany advocate for the interests of cities, counties, municipalities and local undertakings of these member states at EU level.

Role of local authorities and public utilities in European public procurement

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

In the light of the guiding principle "Best value for taxpayers' money", public procurement primarily serves the efficient, economical and responsible use of public funds to fulfil local 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 associations have long been emphatically calling for a significant increase in the EU award thresholds. These have not been adjusted for over a decade, although 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 or cross-border interest or internal market relevance.

Raising the thresholds would comply with the principles of proportionality and subsidiarity and would ensure that EU requirements only apply where there is real 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 construction contracts should be raised from the current 5,404,000 euros to at least 10,000,000 euros, and for supplies and services from the current 216,000 euros to at least 750,000 euros. In addition, a special threshold for the award of planning services was to be set, comparable to the special regime of "social or special services" in the amount of 750,000 euros. 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 requirements

From the point of view of the signing associations, European public procurement law must be consistently simplified and made practicable so that it remains manageable for local authorities and public utilities of all sizes. The focus of the EU procurement directives must continue to be clearly on the procedural rules of procurement and thus regulate the "HOW" of procurement, not the "WHAT" of procurement. Flexibility is a central structural principle of public procurement law.

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

From the point of view of local authorities and public utilities, it is imperative that environmental, social, resilience and innovation clauses in EU public procurement law remain voluntary in the future. Binding requirements would restrict the necessary flexibility of public contracting authorities and would not do justice to the different regional, economic and structural conditions. In this context, it must be considered that ecological, social and innovation-related requirements are regularly integrated into service descriptions, suitability criteria, minimum requirements or contract execution conditions at an early stage in local procurement practice on the basis of national provisions. These requirements must be met by all bidders for a bid to be included in the evaluation at all. This procedure regularly has a much stronger and more effective steering effect than the mere consideration of corresponding aspects 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 higher social, ecological or qualitative standards are laid down in the specifications as binding minimum requirements, the more appropriate it is to dispense with additional award criteria. In these cases, it is logical and even appropriate under procurement law to award the contract based on the lowest price, since the comparability of the tenders is already at a high and uniform level of quality and the price is then the decisive criterion for determining the most economically advantageous tender (MEAT).

The concept of the most economically advantageous tender is also often used in a misleading way, although it explicitly includes the lowest price. Especially in the case of standardised services or clearly defined services, the price can be the most transparent, objective and proportionate award criterion. A mandatory use of complex valuation models in these cases would only create additional administrative burdens without improving the quality of the service.

In addition, there are significant differences in the respective Member States in areas such as sustainability, environmental standards or minimum wage. Countries with lower legal or de facto standards may tend to include more social or environmental award criteria in procurement procedures, while countries with already very high standards regularly enshrine these requirements as minimum requirements in the tender specifications. A blanket mandatory specification of additional award criteria at European level would not adequately take these differences into account and could even counteract existing high standards.

Additionally, in accordance with the principle of subsidiarity and the principle of local self-government, which is enshrined in primary law in Article 4(2) TFEU, it is the task of the 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, existing capacities and real market conditions. A mandatory superimposition of local procurement decisions by political objectives under EU law would contradict these principles and must therefore be strictly rejected. They would further complicate local practice and overload public procurement law from a procedural law to a control instrument with exaggerated expectations and significantly increase the administrative burden. This also contradicts the current overarching goal of reducing bureaucracy at EU level.

Concrete proposals for simplification and flexibility in procedures

In order to relieve the burden on the local level, the associations are in favour of a general simplification of procurement procedures in the sense of a "light regime" for local clients (including simplified procedures for SMA, small and medium-sized authorities). This involves general simplifications of procurement procedures with reduced requirements for contracting authorities, which are based on the requirements laid down in the Government Procurement Agreement (GPA) within the framework of the World Trade Organization, which, among other things, grant significantly greater flexibility in the choice of procurement procedures. The EU directives "over comply" with the GPA and thus set stricter standards. The starting point is the concept of sub-central government entities anchored in the GPA. For the European Union, this includes administrations that correspond to the NUTS 3 classification as well as smaller administrative units. These are all counties, cities and municipalities. In addition, all public contracting authorities that are institutions under public law within the meaning of the EU Public Procurement Directive, such as special-purpose associations, but also other local shareholdings, are included as sub-centralised contracting authorities.

The signing associations also see a considerable need for adaptation in the regulations on contract amendments and procedural flexibility, in particular in Article 72 of Directive 2014/24/EU. The aim of the reform must be to give contracting authorities and companies more legal certainty and room for manoeuvre in the implementation of procurement procedures and in the adaptation of current contracts, without the need for a new tender for every objectively justified change. In practice, it is often necessary to adapt contracts to changing circumstances, for example in the event of unforeseen disruptions to performance, the continuation of interrupted services or the specification of contractual conditions. The subsequent submission of missing documents during ongoing proceedings should also be facilitated in order to avoid unnecessary exclusions and a narrowing of competition. Contracting authorities should be able to designate a new operator more simply and more rapidly when the initial contractor fails to perform, provided that the original competitive procedure was conducted in full compliance with procurement obligations.

At the same time, the associations are calling for greater flexibility in the instrument of the framework agreement, especially in the area of IT procurement. In future, it must be possible to expand or supplement the group of contracting authorities entitled to call off at a later date, provided that a previously determined call quota is adhered to as an upper limit. The entities entitled to call should therefore not have to be conclusively determined at the time of the conclusion of the framework agreement. This would facilitate and increase the practical

usability of framework agreements as an instrument for joint and bundled procurement projects.

Finally, additional mandatory requirements for division into lots beyond the existing legal framework must be rejected, as they would unnecessarily complicate procurement, prolong procedures and impair the economic implementation of public contracts. In addition, it restricts the local freedom of decision. The associations therefore plead for the retention of Article 46 (1) of Directive 2014/24/EU, the division of contracts into lots and the principles laid down therein, which have proven themselves in procurement practice. Practice shows that many projects continue to be awarded in single lots where this makes sense. However, especially in the case of complex projects such as large construction projects, a coordinated overall award can significantly improve efficiency, quality and adherence to deadlines.

"Made in Europe": voluntary basis, coherence of objectives and a sense of proportion

The signing associations share the political goal of strengthening European competitiveness, resilience and strategic autonomy. Local authorities and public utilities depend on stable and reliable supply chains in critical areas such as health, energy, IT, water management, digital infrastructure or security services. Nevertheless, a mandatory "Made in Europe" approach would significantly increase procurement costs and place a financial burden on citizens.

It should be clarified that the burden of proof for the existence of a European company, product or service must under no circumstances be placed on the local authorities and must not be associated with any additional inspection and control obligations for public contracting authorities. Local authorities have neither the personnel nor the technical capacities to independently check or continuously monitor complex proofs of origin, value creation or production.

Rather, the EU Commission is called upon to define a clear, uniform and practical certification system. This must oblige bidders to certify themselves accordingly before participating in procurement procedures. This is the only way to ensure that inspection and control obligations are systematically carried out upstream and do not arise in the procurement procedure itself for the contracting authorities. They must be able to rely on such certificates without having to assume additional verification obligations.

In addition, clear and legally secure exceptions must be provided if corresponding products or services are not available on the European market or are not available in sufficient quantities. In such cases, local authorities may not be prevented from procuring appropriately, economically and functionally, either factually or legally. A Made-in-Europe approach must therefore not lead to supply bottlenecks, delays in investments or disproportionate additional costs.

In the design of the additional "Made in Europe" approach, it is also crucial to avoid conflicting goals. Optional resilience and sustainability criteria that strengthen European value creation are to be supported in principle. However, mandatory criteria carry the risk of colliding with each other or even thwarting existing political objectives. For example, a mandatory "Made in Europe" requirement to strengthen European competitiveness can hinder decarbonization goals if certain technologies or components are not available in sufficient quantities in Europe. At the same time, it can lead to noticeable price increases.

Practical examples already show that public utilities, such as distribution system operators, have difficulties in obtaining sufficient offers on the market at all. Additional mandatory requirements would further exacerbate this situation. Against this background, strengthening European value creation must focus primarily on generation and production and not on additional procurement requirements.

In addition, the anchoring of the mandatory criterion "Made in Europe" in public procurement law entails considerable competition risks for public utilities. In liberalised markets, especially in energy supply, public utilities are in direct competition 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. Local grid operators are already recording significant cost increases. Further requirements would further intensify this effect and impair both profitability and efficiency.

This is not justifiable, especially against the background of the enormous investment requirements for the energy transition. When it comes to creating European lead markets, general, cross-sectoral standards for certain services that do not apply exclusively to the public sector, flanked by targeted support for European production, would be much more effective than additional obligations under procurement law.

Strengthening public-public cooperation and in-house procurement

Public-public cooperation and in-house awards are indispensable instruments for local authorities and contracting authorities to ensure efficient, economical and resilient public services. However, the existing regulations, 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 local practice. In addition, they create legal uncertainty for many forms of inter-local cooperation that are necessary in practice.

Inter-local cooperation should be defined comprehensively and with legal certainty and cover both formal organisational structures and flexible forms of cooperation. Asymmetrical cooperation models must also be expressly permitted. Local clients must retain the democratically legitimised freedom to opt for cooperation or in-house solutions if they are more efficient, improve the quality of care or strengthen the ability of local rural authorities in particular to act.

The exempted public-to-public cooperation is particularly appropriate in situations where contracting authorities pursue a common objective.

To that end, the inhouse exemption equally represents an instrument capable of enhancing the efficiency of public action, in so far as it enables a contracting authority that has elected to organise the performance of its tasks through separate entities to draw upon the expertise and capacities available within those entities without adversely affecting competition.

Choosing the appropriate legal instrument: a key condition for an effective and legitimate reform of the 2014 Directives

Reforming the 2014 Directives requires careful consideration of the appropriate legal instrument, notably whether to opt for a directive rather than a regulation. This choice is crucial to ensure sufficient flexibility at national and local level, in full respect of the principle of subsidiarity. The significant diversity of legal and administrative systems across Europe argues strongly in favour of an instrument that allows Member States to adapt common objectives to their specific contexts. In this respect, national authorities are better placed to design and implement the most effective and appropriate measures, taking into account their legal traditions, institutional frameworks and local realities, thereby ensuring the success and legitimacy of this major reform.

Conclusion

The reform of European public procurement law must focus on the reality of local practice. Only simple and flexible public procurement law enables local authorities and public utilities to fulfil their tasks efficiently, with legal certainty and in a way that is close to the citizens. The signing associations therefore expect that the reform will not lead to additional burdens but will strengthen the local ability to act and secure public procurement as a central instrument of public services.