

Berlin, 18 May 2011

**Comments of the German Federal Government on the
European Commission green paper on the
modernisation of public procurement policy**

- 1.1. The Government of the Federal Republic of Germany welcomes the initiative of the European Commission for reforming European public procurement law to make it more efficient and effective. The European Commission has invited stakeholders to take part in a wide-ranging exchange of opinion on all questions to do with procurement law and has not hesitated to also reconsider basic assumptions. The Federal Government emphatically welcomes this open approach.
2. Procurement law has now had an established tradition in Europe since 1971. At the beginning, strictly formalised procedures were needed to accustom European procurement agents to competition, transparency and non-discrimination, but these principles have now become common practice in Europe. The procurement coordination and remedies directives, supplemented by rulings of the European Court of Justice ensure transparency and non-discrimination in awarding public contracts.
3. To ensure efficient and cost-effective procurement and allow greater scope for the public sector, it is essential for public contracts to be awarded in competition and in assured compliance with the principles of procedural transparency and non-discrimination of bidders. There is a need here to thoroughly assess the prospects for improving procurement law and determine where contracting authorities and suppliers would benefit from greater flexibility. Amending the legal framework for public procurement should be guided by two central considerations: Cost-effective public procurement should be improved through simpler and more flexible legislation without detriment to the legal protection for suppliers already in place. Where supply-side or demand-side market power exerts a major influence on relations between contractors and contracting authorities, the limits and intervention scope of national and European competition law are sufficient in the estimation of the Federal Government.
4. The German Government recommends not submitting specific proposals for possible changes in the legal framework until after a detailed and careful evaluation has been

made of legal policy on procurement to date and/or current directives so as to be able to specifically address the weakpoints identified. This analysis should also include an investigation of possible price divergencies in public and private demand.

5. The legal framework should only be changed where the evaluation has revealed gaps or shortcomings with a view to efficient and cost-effective purchasing and the ongoing opening of the internal market, also accounting for the principles of proportionality and subsidiarity. Contractors and contracting authorities should not be burdened unnecessarily with permanently changing regulations and the costs entailed. They have a legitimate interest in a stable, transparent and non-discriminatory legal framework that affords them legal and planning certainty for as long as possible. Tried and tested practices should also be updated and/or institutionalised to ensure the most stable legal framework possible and legal certainty in future as well.
 6. This is why the Federal Government is of the view that the green paper should also include the issue of regulatory needs for service concessions. There is no discernible objective reason for service concessions to be regulated – where necessary - beforehand in a separate legislative process. For services carried out by court order (court-appointed counsel, insolvency administrator, supervisor, etc.) an exemption provision must clarify that such orders are not included either in procurement law or in a future regulation on service concessions.
- II.1. The German Federal Government also endorses the second major objective of the green paper to make greater use of public procurement to achieve the Europe 2020 Strategy objectives, provided this does not detract from the efficiency of procurement procedure and cost-effective purchasing, there is a link with the contract subject matter and compliance is assured with the principles of transparency and non-discrimination. At the same time, procurement law must remain understandable and practicable. It can and should not prescribe the pursuit of other policy goals, but only facilitate their implementation.
2. In large measure, many objectives of the Europe 2020 Strategy can already be promoted under current law: -
 - Extensive account can already be taken today of the environmental properties of goods or services to be purchased. However, far too little account is still taken, for example, of energy efficiency by calculating lifecycle costs when assessing cost effectiveness. To improve this, clear regulations are needed, possibly in conjunction with assistance from the Commission on calculation methods and instruments.

Better use could be made of public sector scope for environmental protection, if, where possible and economically viable, public procurement were obliged to comply with high environmental standards. In these cases, for example, contracting authorities should

- purchase products of the highest energy-efficiency class, where these meet the requisite capacity requirements,
- account for lifecycle costs when selecting the most economically advantageous tender and
- make greater use when tendering of the high-standard criteria of established environmental labels (such as the EU Ecolabel or Blue Angel).

Procedural simplifications could still be made to the latter, if, for example, a direct reference were to be made to the basic award criteria of so-called Type I ecolabels in the terms of reference.

The Federal Government would request the Commission to examine whether contracting authorities might also explicitly resort to regional products when procuring food to prevent unnecessary environmental pollution (e.g. seasonal purchase of fruit and vegetables). It would be helpful to clarify the legal position of the respective options here. -

- Innovations can also already be promoted under current public procurement law. However, additional possibilities should be sought for promoting research and innovation:
 - a) If instead of requiring explicit permission from contracting authorities, alternative tenders were generally permissible, this would provide a great incentive for industry to proffer innovative solutions.
 - b) Greater use of functional terms of reference would also stimulate the creativity and innovative potential of economic operators.
 - c) The present exemption for negotiating procedures without competitive tendering on the supply of goods for research purposes should also be generally enlarged to include R+D services (Article 31 No. 2a of current Directive 2004/18/EC).
 - d) The possibility of pre-commercial procurement can be seen as promoting innovation. This should be applied more broadly.
 - e) Competitive dialogue could also function as a procedure under procurement law in particularly complex innovation contracts.

- f) In particular, a general option for negotiations in all kinds of contract awards in research and innovation could enable performance requirements to be specified in more detail and/or upgraded, thus improving cost effectiveness.
- The Federal Government supports the consideration of social criteria in awarding contracts (such as accessibility), provided these are linked with the contract subject matter.
3. If the intention is to increasingly facilitate the pursuit of other policy goals in future, there needs to be an assurance in any event that these objectives are not misused to seal off markets or restrict competition. Account must also be taken of the additional bureaucratic burden (e.g. through time-consuming and costly certificates), particularly for SMEs. Promoting other policy goals also entails aspects of state aid, which must be appraised in detail.
 4. The Federal Government is of the opinion that procurement rules can also contribute to preventing corruption. Corrupt enterprises have to be excluded from procurement procedures due to lack of reliability. Each country has its own rules for this. However, the Federal Government would like to see standard EU-wide rules applied on corporate 'self-cleaning' as this has consequences for the scope of competition under procurement law. It is crucial here that an excluded enterprise has taken suitable measures to permanently restore its reliability. The final decision on proven reliability must, however, remain the prerogative of the procurement agent. When specifying 'self-cleaning' measures, the EU should also take international harmonisation efforts into account (e.g. as part of G20).
 5. Germany is sceptical about the other issue addressed of introducing a possible central partitioning of the European procurement markets from third countries that have not joined GPA, particularly where this would amount to binding regulations. In general, reciprocity is not an adequate response to possible problems with third countries, since this could set an adverse spiral of isolation in motion for European enterprises.

III. Based on the present state of affairs and subject to the above-mentioned evaluation findings, we comment on some individual aspects as follows:

1. The scope of application of the procurement directives should not be altered and continue to be confined to public procurement. The criterion of immediate economic benefit should be retained.
2. The distinction among works, supply and service contracts is considered to have been effective in practice so it would seem sensible to retain it.
3. The conventional distinction between 'A' and 'B' services conforms with the aspect of cross-border impact, which should continue to be taken into account.
4. The Federal Government sees raising thresholds as a threat to the internal market, since it would then only be accessible for a decreasing number of very large contracts, to the detriment of European enterprises, particularly SMEs. Nor does it consider raising thresholds practicable in any case, due to commitments under WTO/GPA.
5. The level of detail of the rules differs. In part, it would seem quite high (for example, time spans, dynamic electronic procedure), in part quite low (for example, cancellation of procedures). For the sake of subsidiarity, a rather low level of detail is generally preferable to allow regulatory leeway for the national legislator.
6. Excessive transaction costs are incurred where bureaucratic input is not offset by adequate benefit. The yardstick here is whether the costs are necessary to generate sufficient competition for public contracts and gain economic benefits. The question is whether transaction costs can be reduced by more flexible procedures. Under this aspect, consideration could be given to allowing for more negotiations.

Enlarging negotiating scope for procurement agents could, however, pose considerable problems, as pointed out by the contractor side in particular. Consideration must be given to the risk that negotiations could lead to arbitrary decision-making and intransparency and possibly increase the danger of corruption. There is also reason to fear a disregard for basic principles, such as the confidentiality of bidder information, and an ensuing disproportionate increase in pricing pressure on companies. More flexible negotiating procedure would therefore call in special measure for ensuring adequate transparent and non-discriminatory competition. Certain procedural principles for negotiations could also be made binding.

On the one hand, the contracting authority side favours negotiating procedures, because they afford additional flexibility, but point on the other to the greater risk of legal disputes.

7. The Federal Government welcomes a more adaptable approach to appraising selection and award criteria. The fundamental objectively warranted separation between suitability and award criteria must, however, be retained. However, more flexible arrangements are needed for the sequence of appraisal. Besides the suitability of the enterprise when awarding contracts for services, an important aspect can be the personal capabilities of the service provider (project team), which is why it should be possible to consider this in the award phase. Excessive flexibility always poses the risk of establishing a 'favoured supplier' to the detriment of newcomers and, with that, raising market barriers. Transparency and equal treatment must be assured.
8. Special EU rules for smaller public contracts fall under the purview of the member states. In the view of the Federal Government, it would, however, be useful if the Commission provided a suitable explanation of the notion of cross-border interest for determining internal market impact based on ECJ jurisprudence.
9. There is considerable uncertainty among contracting authorities in Germany about when and under what conditions their interrelations fall under the application scope of procurement law. Explanatory guidelines by the Commission would therefore be helpful here. There is a particular need to explicitly identify the delegation of functions as a separate option of public-public cooperation not subject to procurement law. By nature, a delegation of tasks by virtue of national self-government is fundamentally different to cooperation agreements based on a mutual performance relationship and must therefore be demarcated from a contractual award relationship through additional detailed criteria. For this reason, the preconditions developed by ECJ for the demarcation of cooperation agreements and contractual relationships cannot be applied to the delegation of competencies. In view of the above, it would therefore be useful to reassess the ECJ judgement in the case of Hamburg Municipal Sanitation by means of a clarification.

The Federal Government sees no need for an additional legal regulation.

10. Bundling demand and joint procurement by several agents may also result in a bundling of competencies, i.e. in more professionalisation, greater efficiency in procurement procedure and, with that, more cost-effective procurement. This is, however, limited by competition restraints due to excessive buying power in the public sector. There is also

a need here to take special account of SMEs (e.g. by dividing large contracts into smaller lots).

11. The directives should not make any provisions for contract execution beyond the regulation to date under Article 26 of Directive 2004/18/EC. This is a matter for national civil law. The directives could, however, well include a regulation requiring national law to make provision in suitable cases to enable the implementation of ECJ judgements on breaches of procurement law. The specific arrangements for this should be left to the national legislator.
12. In the view of the Federal Government, no additional quota regulations are necessary for the promotion of SMEs at EU level. The consistent application of the current legal framework is sufficient here. Germany has already standardised a very far-reaching commitment to the distribution of contracts in specialised and partial lots. Furthermore, SMEs are best served by a simple and manageable procurement law that keeps administrative costs to a minimum. This includes the instrument of self-declarations and a provision that only requires bidders on the short list to provide the requisite evidence.
13. The most economically advantageous tender must be retained as a criterion. Where goods and/or services can be definitively specified, the price alone can then also be decisive in exceptional cases. German procurement law already provides for awarding contracts to the most economically advantageous tender. Besides price, the criterion of cost-effectiveness also requires an appraisal of the quality of the tendered good/services. Wherever possible, the assessment of the cost-effectiveness of a service or product should also include an assessment of lifecycle costs. Besides procurement costs, German national law already specifies that federal procurement agents (General Administrative Regulation on the Procurement of Energy-efficient Products and Services of 17 January 2008) must take account of the anticipated operating costs over service life along with the depreciation and disposal costs when ascertaining the most economically advantageous tender.