

REGIONALITY AS A CRITERION IN PUBLIC PROCUREMENT LAW IN GERMANY

Por

ANNETTE ROSENKÖTTER
Abogada FPS, Experta en contratación pública

Revistas@iustel.com

Revista General de Derecho Administrativo 64 (2023)

ABSTRACT: In Germany, „regionality“ as such, is considered inadmissible in principle. A restriction of competition to companies from certain regions may therefore not be undertaken. In addition, the criterion of proximity must not be taken into account in the award decisions of public contracting authorities, neither at the stage of the suitability test nor at the stage of the award decision¹.

Direct or indirect regionality requirements, however, might arise in the case of directly product-related aspects (e.g. food) or derive from specifications of certain maximum transport emissions (e.g. in the area of waste disposal). Here, however, the distance factor will play an increasingly minor role as the technical development towards more low-emission means of transport progresses.

It remains open which limits can result from the principle of proportionality with regard to the introduction of emission requirements.

The German government has initiated a process of a "transformation of public procurement law"². In addition to an increase in efficiency, procurement should be more strategically oriented, i.e. sustainable (especially environmental and climate-related, but also social and innovative) goals should be taken into account more strongly and more bindingly.³ This process is still ongoing. Against the background of the limits defined by the European legal framework, however, a relevant change in the legal framework for the consideration of regionality is not to be expected.

KEY WORD: regionalidad, criterion of proximity, Germany, public procurements.

LA REGIONALIDAD COMO CRITERIO EN LA LEGISLACIÓN ALEMANA SOBRE CONTRATACIÓN PÚBLICA

RESUMEN: En Alemania, la "regionalidad" se considera inadmisibles en principio. Por lo tanto, no se puede restringir la competencia a las empresas de determinadas regiones. Además, el criterio de proximidad no debe tenerse en cuenta en las decisiones de adjudicación de los poderes adjudicadores públicos, ni en la fase de la prueba de aptitud ni en la fase de la decisión de adjudicación.

¹ Bavarian Supreme Court, decision of 20 December 1999 - Verg 8/99.

² BMWK, Procurement Transformation Package 2023: A Look at the Workshop, available at: <https://www.bmwk.de/Redaktion/DE/Schlaglichter-der-Wirtschaftspolitik/2023/07/05-vergabetransformationspaket-2023.html>.

³ BMWK, Procurement Transformation Package 2023: A look into the workshop.

No obstante, pueden surgir requisitos de regionalidad directos o indirectos en el caso de aspectos directamente relacionados con el producto (por ejemplo, la alimentación) o derivados de especificaciones de determinadas emisiones máximas de transporte (por ejemplo, en el ámbito de la eliminación de residuos). En este caso, sin embargo, el factor distancia desempeñará un papel cada vez menor a medida que avance el desarrollo técnico hacia medios de transporte con menos emisiones.

Queda por determinar qué límites pueden derivarse del principio de proporcionalidad en lo que respecta a la introducción de requisitos en materia de emisiones.

El Gobierno alemán ha iniciado un proceso de "transformación de la legislación sobre contratación pública". Además de un aumento de la eficiencia, la contratación pública debe tener una orientación más estratégica, es decir, los objetivos sostenibles (especialmente los relacionados con el medio ambiente y el clima, pero también los sociales y de innovación) deben tenerse en cuenta de forma más firme y vinculante. Este proceso sigue su curso. En el contexto de los límites definidos por el marco jurídico europeo, sin embargo, no cabe esperar un cambio relevante en el marco jurídico para la consideración de la regionalidad.

PALABRAS CLAVE: regionalidad, criterio de proximidad, Alemania, contratos públicos.

A. INTRODUCTION

In recent years, "regionality" has established itself as an important criterion in more and more consumer decisions in Germany.⁴ The reasons for this are diverse and range from environmental and climate protection concerns⁵ to the associated higher quality⁶.

Furthermore, in light of the experience of the Covid 19 pandemic and the war in Ukraine, private and public buyers strive to reduce dependencies with regard to supply chains. Public sector clients are also focusing more on the consideration of regional companies, products and services.

However, "regional" criteria are in conflict with the principles of competition and equal treatment, which are basic principles of public procurement law under Section 97 (1) and (2) GWB (Act against Restraints of Competition).

This is still true, even though the paradigm shift that has taken place in recent years has led to a more established role for environmental and social aspects. This is also reflected in the new terminology, which now refers to aspects of "strategic procurement" instead of "criteria non – related to the award procedure".

⁴ For example, in the context of nutrition: BMEL, Ernährungsreport 2022, p. 12 f., 22 f., 28, available at: https://www.bmel.de/SharedDocs/Downloads/DE/Broschueren/ernaehrungsreport-2022.pdf?__blob=publicationFile&v=9.

⁵ BMEL, Ernährungsreport 2022, p. 28.

⁶ BMEL, Regionale Lebensmittel - transparent gekennzeichnet eine gute Wahl, available at: <https://www.bmel.de/DE/themen/ernaehrung/lebensmittel-kennzeichnung/freiwillige-angaben-und-label/kennzeichnung-regionale-lebensmittel.html>.

Legislators in Germany have also recently created various new regulations⁷ that contain provisions on green procurement.⁸

The following assessment describes the legal situation regarding the consideration of regionality in tenders in Germany referring to typical cases of application.

B. REGIONALITY IN PUBLIC PROCUREMENT IN GERMANY

I. Overview: Structure of public procurement law in Germany

1. Above threshold

The implementation of the EU Public Procurement Directives in Germany has been relatively complex in the form of a so-called „cascade- system“, consisting of several regulations.

The relevant regulation is Part 4 of the Act against Restraints of Competition (GWB), there §§ 97 et seq. GWB.

These provisions are specified in more detail by a number of regulations⁹: First of all, there is the Public Procurement Ordinance (VgV), which defines the award of contracts for supplies and services in more detail. The award of contracts for utilities is regulated - in relation to all types of services (supplies, construction and services) - in the Utilities Ordinance (SektVO). The Concessions Ordinance (KonzVgV) contains comprehensive provisions for construction and service concessions. Finally, the Public Procurement Ordinance for Defence and Security (Vergabeverordnung für Verteidigung und Sicherheit - VSVgV) takes into account the sector-specific characteristics of the procurement of defence and security-related services.

For the award of public works contracts, Section 2 of the „Vergabe- und Vertragsordnung für Bauleistungen - Teil A“ (VOB/A-EU) contains regulations for the award of public works contracts by contracting authorities. A corresponding set of rules exists for the award of defence and security-specific public works contracts in the 3rd section of the VOB/A (VOB/A-VS).

⁷ Among others in: Cycle Waste Management Act (KrWG), Federal Climate Protection Act (KSG) and the General Administrative Regulation on the Procurement of Climate-friendly Services (AVV Klima).

⁸ UBA, Rechtsgutachten umweltfreundliche öffentliche Beschaffung, p. 14 ff.

⁹ Pache in: Pünder/Schellenberg, BHO § 55 Rn. 64.

2. Sub-threshold

The regulatory landscape in Germany is- due to the federal structure- very divers: In the sub-threshold area, budgetary law applies in principle.¹⁰ References in the federal and state budget regulations and state procurement laws lead to the application of the following regulations:

The Regulation on the Award of Subthreshold Contracts (UVgO) applies to the award of contracts for the supply of goods and services by the Federal Government and its authorities. With regard to corresponding awards at state or municipal level, the UVgO shall apply in the version applicable in the respective state, provided that it has entered into force (all states except Saxony, where Section 1 of Part A of the Public Procurement and Contract Regulations for Services (Vergabe- und Vertragsordnung für Leistungen - VOL/A) still applies).

The award of construction works in the sub-threshold range is regulated by Section 1 of Part A of the German Construction Contract Procedures (VOB/A). In addition, in the majority of the federal states there are state procurement laws and state decrees that further specify the awarding of contracts, in part also with regard to the consideration of sustainability aspects.

3. Focus of the assessment

The following assessment focuses on the award of contracts for supplies and services within the scope of the VgV. However, the principles apply equally to the scope of application of the VOB/A -EU in the area of construction works.

II. "Regionality"

1. Concept

"Regionality" is neither explicitly mentioned in German public procurement law, nor is there a uniform definition.¹¹ In this respect, the term must be defined more precisely in order to assess admissibility.

¹⁰ Siegel in: MÜKo Wettbewerbsrecht, Vol. 4, Part 2, I. Haushaltsvergaberecht, marginal no. 4.

¹¹ Cf. on "organic regionality": Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 7, available at: <https://www.bundestag.de/resource/blob/852838/3a01bfb5f0c3dc8f42f564e9079f1742/WD-7-064-21-pdf-data.pdf>.

A "region" as a whole has at least one attribute to distinguish it from other regions, which is usually primarily geographically dominated¹², and thus acquires a certain status of uniqueness.¹³ Consequently, "region" can be understood in different ways in terms of size, often categorized below the national and above the municipal level.¹⁴ It is also conceivable to understand regionality in terms of a certain maximum kilometre-based radius.¹⁵

In a regional product origin label, a concrete geographical information is conveyed, with which certain expectations on the consumer side are linked.¹⁶ Consumers associate "regional" origin of products in particular with short transport distances (as a factor in the carbon footprint and environmental/climate protection), the support of local companies and a level of freshness, seasonality, product safety and thus ultimately quality.¹⁷

As to contracting authorities, the transparency requirement under Section 97 (1) ARC requires to make the modalities known to the bidders in such a way that they can understand and that it can itself verify the fulfilment of the criteria by the bidders' offers.¹⁸ Consequently, the contracting authority must define for the tender what "regional" means in the specific case.

Regionality as such, without ensuring that other accepted objectives/ contents are associated with it, is considered inadmissible. In addition, the criterion of local proximity may not be taken into account in award decisions of public contracting authorities, neither at the stage of the suitability assessment nor the award decision¹⁹.

In the context of the present study, we will therefore examine whether and under which special aspects local origin, production or service provision can nevertheless be taken into account under public procurement law.

2. Suitability criteria

Pursuant to Section 122 (1) GWB, public contracts are awarded to competent and efficient (suitable) companies that have not been excluded pursuant to Sections 123 or 124

¹² Stockebrand, *Regionalmarketing für Lebensmittel*, 2011, 131, 133.

¹³ Becker, *Regional Products from Germany*, 2019, p. 30.

¹⁴ Becker, *VuR* 2020, 15 (16).

¹⁵ Cf. Heinze et al., *Verbraucherpräferenzen gegenüber regionalen Produkten*, p. 5 m. w. N; OLG Stuttgart v. 26.06.2019, Ref. 2 U 145/18 and 2 U 152/18.

¹⁶ Schirrmann, *Local Product Origin and Consumer Behaviour*, 2005, p. 2.

¹⁷ Cf. Heinze et al., *Consumer preferences towards regional products*, p. 23.

¹⁸ St. Rspr., e.g. ECJ 14.01.2021 - C-387/19, ECLI:EU:C:2021:13 marginal no. 35 - RTS infra; BGH 22.07.2010 - VII ZR 213/08; OLG Celle 11.09.2018 - 13 Verg 4/18.

¹⁹ Bavarian Supreme Court, 20.12.1999 - Verg 8/99.

GWB. This implies an obligation for the contracting authority to conduct a suitability test.²⁰ Pursuant to Section 122 (2) sentence 1 GWB, a company is suitable if it fulfils the criteria (suitability criteria) defined in detail by the contracting authority for the proper execution of the public contract. Pursuant to Section 122 (2) sentence 2 GWB, the suitability criteria may only relate to the following:

1. qualification and authorisation to exercise the profession,
2. economic and financial capacity,
3. technical and professional capacity.

In addition, according to Section 122 (4) sentence 1 GWB, suitability criteria must be connected with the subject matter of the contract and be in reasonable proportion to it. In the case of suitability criteria, the connection with the subject-matter of the contract can be assumed if the criterion is objectively suitable to provide information on the bidder's capability with regard to the specific subject-matter of the contract.²¹

In the light of this catalogue, only the third subgroup (technical- and professional capacity) seems to be a possible starting point for regionality as a criterion.

Section 46 para. 3 VgV, however provides (in line with Dir. 2014/24/EU) for an exhaustive catalogue of criteria a public buyer can demand with regard to the technical and professional capacity. Thus, the contracting authority may only demand such evidence regarding the required technical and professional capacity of the candidate or tenderer that falls under the items listed there.

Section 46 par. 3 no. 4 VgV provides for "supply chain management" as a possible eligibility criterion. According to this, information on the supply structures (at all stages of the value chain) can be the subject of the query. However, as pointed out before, each criterion must be justified by the subject matter of the contract (Section 122 (4) sentence 1 GWB); also the principle of proportionality has to be adhered to. Consequently, this criterion might be only admissible in tender procedures for goods for which security of supply is a high priority, such as in the area of medical care. The criterion may also be relevant in the case of regular deliveries of permanently required goods. However, whether this suitability criterion would allow to require a certain (regional) place of manufacture is to be doubted: According to the prevailing view, this criteria covers only the quality of the organisation of the supply structures, irrespective of a certain distance.²²

²⁰ Opitz in: Beck VergabeR, 4th ed. 2022, GWB § 122 marginal no. 16.

²¹ ECJ, 18. 10. 2012 - C-218/11.

²² Goldbrunner in: Ziekow/Völlink, 4th ed. 2020, VgV § 46 no. 29; Tomerius in: Pünder/Schellenberg, 3rd ed. 2019, VgV § 46 no. 10.

There is no exhaustive catalogue for suitability under the SektVO and KonzVgV. However, since all suitability criteria need to refer to qualities of the company (not the services to be provided), it is hard to tell which requirements justified by the subject matter of the contract can exist at all with regard to the "regional" location of the company.

A selection criterion according to which a company must or may not have its registered office at a certain location is not permissible under public procurement law in Germany. The same applies in principle to a selection criterion according to which certain production locations are excluded or specified. According to Art. 25 of Directive 2014/24/EU, contracting authorities shall not apply less favourable conditions to services from signatory states of the General Procurement Agreement of the WTO and from signatory states of other agreements binding on the European Union than to services and economic operators from the EU.

In Germany, the procurement market is open beyond the members of the GPA – even more so than in EU law: the personal scope of application of the principle of equal treatment also extends to bidders from "third countries", so that unjustified unequal treatment is inadmissible (only for utilities, Section 55 of the SektVO provides a basis for a preference for goods of EU-/ GPA origin)²³.

3. Specification of goods or services

3.1. General

The specifications of the goods or services to be procured are the obvious starting point for involving environmental aspects. This approach is threefold: the authority's decision what to procure („Leistungsbestimmungsrecht“), its description in detail and, if applicable, also the performance requirements. These aspects often intertwine.

3.2. The decision what to procure („Leistungsbestimmungsrecht“)

As a consequence of contractual freedom, the contracting authority can determine to the greatest possible extent what goods or services it needs to procure to fulfil public tasks („Leistungsbestimmungsrecht“)²⁴ While the contracting authority is basically free to decide on the "what" of the procurement, public procurement law regulates the "how", i.e. the manner of procurement.²⁵ However, the freedom of the contracting authority is restricted

²³ VK Bund, 1.12.2020 - VK 1-90/20

²⁴ Seebo in: MüKo Wettbewerbsrecht, Band 3, 3. Teil, I. VgV - Vergabeordnung, 4. Aufl. 2022, VgV § 31 Rn. 51; OLG Düsseldorf, 31.05.2017 - VII-Verg 36/16.

²⁵ OLG Düsseldorf, 31.05.2017 - VII-Verg 36/16.

by public procurement law, as there are interdependencies between the determination of what to buy and the tender procedure itself.

In addition to the principles of Section 97 GWB, such as the principle of competition, transparency and equal treatment, as well as their manifestations, such as Section 31 (1) and (6) of the VgV, standards outside of public procurement law, such as those of the KrWG, can also have a restrictive effect.²⁶

With regard to the principle of competition and equal treatment, the contracting authority is free to decide what to buy, according to established case law²⁷, provided that

1. the provision is objectively justified by the subject matter of the contract,
2. comprehensible objective and order-related reasons have been given by the client for this,
3. the determination has therefore been made without arbitrariness,
4. such reasons actually exist (to be established and proven if necessary),
5. and the provision does not discriminate against other economic operators.

In particular, there is no obligation to align the subject matter of the tender in such a way that all market participants are able to offer or perform this goods or services.²⁸ Location advantages of individual bidders do not have to be compensated in every respect, as this would lead to a disadvantage of bidders who already have locations in the performance-relevant area.²⁹

But when could the requirement of a specific regional origin of goods or services be justified in the light of these prerequisites?

There may be certain natural materials that are linked to a particular place of origin by certain attributes such as density or appearance.³⁰ Exceptionally, for reasons of the aesthetically necessary use of the same material, such as for reasons of monument protection, it may be justified, as in the case of "Irish bluestone"³¹, to prescribe material

²⁶ OLG Frankfurt, 21.07.2020, 11 Verg 9/19.

²⁷ OLG Düsseldorf, 07.06.2017 - VII-Verg 53/16.

²⁸ OLG Düsseldorf, 13.05.2013, VII-Verg XX/13; OLG Düsseldorf, 01.08.2012, VII Verg 10/12.

²⁹ OLG Düsseldorf, 03.04.2008, ref. no. VII-Verg 54/07.

³⁰ World Economy, Ecology & Development, Procurement of natural stones taking into consideration

of transport distance, p. 6, available at: https://www2.weed-online.org/uploads/beschaffung_von_natursteinen_unter_beruecksichtigung_der_transportentfernung.pdf.

³¹ VK Münster, 24.06.2011 - VK 6/11.

from a specific place of origin.³² As a rule, however, such a specification is inadmissible.³³ In particular, it is problematic to determine (or negatively exclude) a place of origin in order to avoid countries of origin that have been identified as problematic with regard to social aspects, since the bidder's country of origin alone does not provide a guarantee of good working conditions with regard to the respective bidder.³⁴

According to an expert opinion commissioned by the Federal Environment Agency in Germany, however, the exercise of the right to determine performance is seen as justified from this point of view with regard to so-called regional electricity:

"According to case law, however, product-specific procurement is permissible if there is an objective justification. A wide variety of reasons (technical, economic, design, social, ecological or economic) have already been recognised as justifications. If there is a justification, the choice of the object of procurement is subject to the freedom of determination of the public-sector customer. However, according to case law, the public-sector customer is obliged to provide comprehensible reasons for the product-specific procurement and to document them precisely. Public procurement law has fundamentally changed in this respect. From a European perspective in particular, the instrumentalization of the procurement process in pursuit of "non-public procurement purposes" was considered inadmissible until a few years ago. Today, the pursuit of environmental and climate protection policy objectives within the framework of public procurement is recognised (so-called Green Public Procurement). Against this background, reference can be made to a climate protection concept of the public-sector customer in which it commits itself to the goal of regional climate neutrality as a justification for the procurement of regional electricity. This means that the public-sector customer takes measures to compensate for the emissions it generates through regional emission savings. Accordingly, the CO₂ emissions from electricity consumption are to be compensated by regional electricity from the public-sector customer's region. There are various indications in the legal system that the goal of regional climate neutrality is to be recognised as an objective interest: For instance, the principle of national

³² UM Baden-Württemberg, Produktwegweiser Natursteine, p. 3, available at: https://www.lubw.baden-wuerttemberg.de/documents/10184/144917/wegweiser_steine_2014_12.pdf/9e3eb714-633d-4375-931f-2be773f08dce; cf. VK Sachsen, 22.09.2014 - 1/SVK/029-14 and VK Münster, 24.06.2011 - VK 6/11.

³³ UM Baden-Württemberg, Produktwegweiser Natursteine, p. 3; VK Niedersachsen, 01.11.2017 - VgK 30/2017; VK Sachsen, 22.09.2014 - 1/SVK/029-14.

³⁴ Cf. OLG Düsseldorf, 01.12.2021 - Verg 54/20; also: Leinemann/Zoller, VergabeNews 2017, 82 (83).

(and thus de facto discriminatory) promotion of renewable energies is generally recognised and can also be found in European legal norms (cf. Article 5 (1) of the Renewable Energies Directive II - Directive (EU) 2018/2001). If national promotion of renewable energies is already legally permissible, this must apply a fortiori to national procurement of renewable energies. Furthermore, at the European level, there is the principle of origin enshrined in Article 191 (2) sentence 2 TFEU, according to which environmental damage is to be controlled at the point where it occurs. The principle of origin thus also contains a spatial-geographical component, according to which a distinction may be made as to where environmental damage is controlled (i.e. CO₂ emissions are reduced). According to the principle of origin, the public-sector customer's interest in offsetting its CO₂ emissions (from electricity consumption) with regional renewable energies may be recognised. In national law, corresponding indications can be found both in the Federal Climate Protection Act and in the Building Energy Act. For example, the public sector has a comprehensive role model function, according to which it should, for example, install photovoltaic systems on public buildings, i.e. in direct spatial relation to the generation of CO₂ emissions (cf. § 4 Building Energy Act). Last but not least, the regional certificates pursuant to § 79a EEG also prove that the legislator sees a legal interest to be recognised in the regional allocation of renewable energies. In conclusion, in the opinion of the authors, the procurement of regional electricity by public-sector customers is to be regarded as permissible under public procurement law as long as and to the extent that this restriction of the object of procurement demonstrably serves the regional climate neutrality. **However, legal risks remain until there exists final case law on this issue.**"³⁵

As the last phrase of the expert opinion's summary correctly stresses, there is, however, no case law confirming this approach.

3.3. Technical specifications of the goods or services

a. General

Pursuant to Section 121 (1) GWB, Section 31 (1) VgV, the requested good or service must be described clearly and exhaustively.

³⁵ Umweltbundesamt, Ausschreibung von Regionalstrom durch öffentliche Auftraggeber, https://www.umweltbundesamt.de/sites/default/files/medien/479/publikationen/cc_36-2022_ausschreibung_von_regionalstrom_durch_oeffentliche_auftraggeber.pdf

The general principle that the contracting authority may not unreasonably restrict competition or discriminate against certain suppliers by pre-determining the object of procurement to certain products, places of origin and sources of supply, etc. is regulated in German public procurement law (cf. Section 31(I) VgV) in implementation of the EU Public Procurement Directive³⁶. Art. 42 (II) of the EU Public Procurement Directive stipulates that the technical specifications "must grant all economic operators equal access to the award procedure and must not unjustifiably hinder the opening of public procurement markets to competition".

On the other hand, it is recognised - as described above - that there is quite a lot of leeway as to the decision what to buy as long as the decision is objectively justified, the stated reasons actually exist, and economic operators are not discriminated against.

With regard to product neutrality, the ECJ emphasises that "technical specifications may not refer to a particular production or origin or to a particular process [...] if this favours or excludes certain undertakings or certain products, unless this is justified by the subject-matter of the contract"³⁷. The requirement of Art. 42 of the Public Procurement Directive specifies the principle of equal treatment contained in Article 18(I)(1) of this Directive. According to this provision, contracting authorities shall treat all economic operators in an equal and non-discriminatory manner and shall act in a transparent and proportionate manner. The procurement procedure shall not be designed with the intention of artificially restricting competition or unduly favouring or disadvantaging certain economic operators. Section 97 (3) GWB, however, sets out the purposes of strategic procurement:

"(3) The award shall take into account aspects of quality and innovation as well as social and environmental aspects in accordance with this Part."

The paragraph functions as a general clause regarding the pursuit and consideration of social, non-monetary aspects in the award of public contracts.³⁸ With "social and environmental aspects" as well as those of "innovation", political goals³⁹ are addressed and their pursuit legitimised⁴⁰. Beyond these political goals, "quality aspects" are to be taken into account.

³⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, ABLEU year 2014 L issue 94 page 65).

³⁷ ECJ (Fourth Chamber), Judgment of 12.07.2018 - ECJ Case C-14/17

³⁸ Beck VergabeR/Opitz, 4th ed. 2022, GWB § 97 para. 3 marginal no. 10 f.

³⁹ Beck VergabeR/Opitz, 4th ed. 2022, GWB § 97 para. 3 marginal no. 10.

⁴⁰ Burgi, NZBau 2015, 597 (599).

The inclusion of "regionality" as an award criterion pursuant to Section 97 (3) GWB could be done either as "environmental aspects" (climate/environmental protection through short transport routes) or as "quality aspects" (increased quality through freshness and safety).⁴¹

The requirements of Section 97 (3) GWB are specified in Section 31 (2) sentence 1, (3) VgV⁴². According to Section 31 (2) sentence 1 VgV, the characteristics of the subject matter of the contract to be described in the specifications also include aspects of quality and innovation as well as social and environmental aspects. In addition, according to Section 31 (3) sentence 2 VgV, even if such factors are not material components of the product itself they may, under certain conditions, relate to the process or method of production or provision of the performance or to another stage in the life cycle of the product, including the production and supply chain.

Section 31 (3) sentence 2 VgV covers aspects of the production processes or methods that "do not constitute material components" of the goods or services, from which it follows in reverse that Section 31 (3) sentence 1 VgV only refers to features that are directly attached to the subject-matter of the contract (material features).⁴³ In the constellations according to p. 2, according to the provision, the inclusion of features in the specifications is only permissible if they are connected to the subject-matter of the contract and are proportionate to its value and procurement objectives.

Whether "regionality" is a characteristic under p. 1 or p. 2 depends on which aspect of the interpretation (climate/environmental protection through short transport routes on the one hand or increased quality through freshness and safety on the other) is relevant in the specific case:

b. (Alternative 1) Short transport distance as a criterion relevant to climate protection pursuant to Section 97 (3) Alt. 4 GWB

If the focus is on short transport distance and the associated protection of the climate and the environment (environmental aspects pursuant to Section 97 (3) Alt. 4 GWB), it appears to be correct that "regionality" is rather a part of the production and supply chains

⁴¹ Cf. Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 9.

⁴² Corresponding provisions in terms of content also in Section 28 (2) sentence 1, (3) SektVO and Section 15 (1) sentence 1, (2) KonzVgV; the following restrictions are also found accordingly in each case.

⁴³ Wagner-Cardenal, Dieckmann/Scharf/Wagner-Cardenal, 3rd ed. 2022, VgV § 31 marginal no. 77; Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 9.

connected with the subject matter of the contract and thus falls under the non-material components of the performance pursuant to Section 31 (3) sentence 2 VgV.

Pursuant to Section 31 (3) sentence 2 VgV, it is consequently necessary that the "regionality" feature, if it is to be included as an "environmental aspect", is related to the **subject-matter of the contract** and **proportionate to** its value and procurement objectives.

c. (Alternative 2) Quality aspects: regional food as a quality aspect in the supply concept (freshness),

"Regionality" could also be categorized under the aspect of "quality" pursuant to Section 97 (3) Alt. 4 GWB, § 31 para. 3 sentence 1 VgV.⁴⁴ Then the aspect of quality is not an aspect of strategic procurement, but rather, as a factor of the best price-performance ratio („best value for money“) and thus already inherent in the traditional award criteria.⁴⁵

As a factor of quality pursuant to Article 31 (3) sentence 1 VgV, there are lower hurdles, as described under 3.2.a, compared to the previously described inclusion as a non-material, environmental component via sentence 2 of the paragraph.⁴⁶ In particular, there is no need for a separate explanation of the proportionality of the measure.

d. Restrictions/requirements in detail

aa. Connection with the object of the contract or concession

In order to be included as an "environmentally related aspect" pursuant to section 31 para. 3 sentence 2 alt. 1 VgV, it is necessary, the required "regionality" needs to be related to the contract.⁴⁷ This is not the case if the use of "regional" products or services is a requirement for the business activities of the potential contractors in general, beyond the subject matter of the contract.⁴⁸

⁴⁴ Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 9, 13.

⁴⁵ Dreher, in: Immenga/Mestmäcker, Wettbewerbsrecht, 6th edition 2021, GWB § 97, marginal no. 131.

⁴⁶ Wagner-Cardenal in: Dieckmann/Scharf/Wagner-Cardenal, 3rd ed. 2022, VgV § 31 marginal no. 79.

⁴⁷ Justification of the VergModVO, BR-Drs. 87/16, 185; Krönke, VergabeR 2017, 101 (107).

⁴⁸ Cf. Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 10.

bb. Proportionality to the value of the subject matter of the contract and procurement objectives

The "regionality" feature - should it have the necessary connection to the subject-matter of the contract - would also have to be proportionate to the value of the contract and the procurement objectives pursuant to § 31 para. 2 VgV. When applying this principle, all relevant interests must be weighed and be documented.⁴⁹ It remains open how the strategic objectives in such a balancing are to be weight: Some argue that the pursuit of strategic objectives is not the primary purpose of procurement.⁵⁰ On the other hand, with reference to the Directive's provisions on award criteria⁵¹, political goals are seen as equal with the goal of covering the authority's needs.⁵²

In connection with the requirement of the most economically advantageous tender (MEAT) pursuant to Section 97 (1) sentence 2 alt. 1 GWB, the greater the contract volume as a whole, the more effort can be required to fulfil the strategic aspects related to the service.⁵³

The proportionality aspect has so far not been discussed in German case law with regard to regionality requirements. Proportionality, could, for example, speak against a demanding transport emissions requirement, if for a specific service transport emissions only occur to a very small extent at all (e.g. in the case of a consultancy service). Here it could be discussed whether the relatively low added value for the environment would align with a possible market restriction caused by the requirement. However, on the other hand, the necessary efforts for climate protection in all areas of life (and not only in relation to services with particularly high emissions) could be cited as a reason for a nevertheless permissible requirement.

cc. Equal treatment, Section 97 (2) GWB as well as manifestations in Section 31 (1), (6) VgV

In both variants, the principle of equal treatment or non-discrimination pursuant to Section 97 (2) GWB must be observed⁵⁴ :

⁴⁹ Lampert in: Beck VergabeR, 3rd ed. 2019, VgV § 31 marginal no. 81.

⁵⁰ Lampert in: Beck VergabeR, 3rd ed. 2019, VgV § 31 marginal no. 81.

⁵¹ Art. 67 Directive 2014/24/EU.

⁵² Opitz in: Beck VergabeR, 4th ed. 2022, GWB § 97 para. 3 marginal no. 11.

⁵³ Krönke, VergabeR 2017, 101 (105).

⁵⁴ Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 12, 13.

In the light of the EU law background, any discrimination, direct or indirect, against companies from other EU countries is prohibited.⁵⁵ All bidders must be treated equally and in a non-discriminatory manner, irrespective of non-discrimination in the internal market.⁵⁶ Again, direct and indirect discrimination are equally covered.⁵⁷

T

With regard to "regionality" as part of the tender specifications, there is a risk of indirect discrimination.⁵⁸ This is to be expected regularly in the case of requirements which are more difficult to fulfil by foreign bidders⁵⁹ or domestic bidders outside the required region compared to domestic bidders.

With regard to food, for example, which is used for a tendered catering service, the requirement of a regional origin must not lead to a preference for regional service providers or even to a restriction to such.⁶⁰ Nevertheless, the "regional" origin of the service providers as well as the "regional" origin of the products (in this case the food) could lead to a hidden preference of regional competitors.⁶¹

According to Section 31 (1) VgV the terms of reference must grant all enterprises equal access to the award procedure and the opening of the national procurement market to competition must not be impeded in an unjustified manner. In addition, specifications must be formulated in such a way that no unjustified hindrance, restriction or distortion of cross-border and domestic competition is involved.⁶²

Section 31 (6) VgV further specifies that the description of services must be neutral with regard to products and origin. In the sense of technical and commercial competition⁶³, access to the market is to be kept open for all interested parties and restrictions of competition through descriptions adapted to special products or bidders are to be

⁵⁵ Dörr in: Beck VergabeR, 4th ed. 2022, GWB § 97 para. 2 marginal no. 12.

⁵⁶ Dörr in: Beck VergabeR, 4th ed. 2022, GWB § 97 para. 2 marginal no. 13.

⁵⁷ Dörr in: Beck VergabeR, 4th ed. 2022, GWB § 97 para. 2 marginal no. 13.

⁵⁸ Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 12.

⁵⁹ See, inter alia, ECJ, Judgment of 27 October 2005 - Case C-234/03 Contse SA and others v Insalud.

⁶⁰ Grimm, LKV 2020, 549 (552).

⁶¹ Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 12.

⁶² Lampert in: Beck VergabeR, 3rd ed. 2019, VgV § 31 marginal no. 26.

⁶³ Lampert in: Beck VergabeR, 3rd ed. 2019, VgV § 31 marginal no. 92.

prevented.⁶⁴ In this context, subject to justification by the subject matter of the contract (Section 31 (6) a. E. VgV), technical requirements are prohibited, for example, which refer to a certain production or origin of a product or product (as well as to regions in which the production of goods or services takes place) or a special process, if this favours or excludes certain enterprises or certain products.⁶⁵

Consequently, the general requirement of a "regional" service is generally inadmissible contrary to the principle of equal treatment.⁶⁶ In exceptional cases, however, there may be a justification by the subject matter of the contract.⁶⁷

In particular, aspects of regional economic development do not justify a product-specific tender, which is why aspects such as revenue from business tax and the promotion of local economic activity or the labour market for local workers cannot be used as justification for favouring regional suppliers.⁶⁸

(1) Low transport emissions as a criterion relevant to climate protection

The OLG Rostock⁶⁹ already found in 2005 that the "transport costs to the waste disposal plant [...] in view of the considerable emissions of the transport vehicles have a sufficient link to the subject matter of the contract " and can therefore be a permissible criterion.

However, public contracting authorities cannot restrict procurement to regional products or service providers, despite the justification of the lower-emission delivery of regional products.⁷⁰ If the focus is on saving CO2 emissions as a result of short transport routes, the criterion should not be distance, but CO2 emissions generated in the context of the performance of the service.⁷¹

⁶⁴ Constant case law, inter alia: OLG Saarbrücken, order of 29 October 2003 - 1 Verg 2/03; OLG Karlsruhe, order of 14 September 2016 - 15 Verg 7/16.

⁶⁵ Lampert in: Beck VergabeR, 3rd ed. 2019, VgV § 31 Rn. 93; cf. also ECJ, Rt. v. 12.07.2018 - C-14/17- VARSrl, Azienda Trasporti Milanese SpA (ATM)/Iveco Orecchia SpA.

⁶⁶ Dreher, in: Immenga/Mestmäcker, Wettbewerbsrecht, 6th edition 2021, Section 97 GWB, marginal no. 107.

⁶⁷ Wissenschaftliche Dienste Deutscher Bundestag, "Bio-Regionalität" in der Gemeinschaftsverpflegung, p. 12.

⁶⁸ BayObLG, 20.12.1999 - Verg 8/99; VK Baden-Württemberg, 21.03.2003 - 1 VK 10/03; VK Bund, 12.11.2009, VK 3 - 208/09; UBA, Rechtsgutachten Ausschreibung von Regionalstrom durch öffentliche Auftraggeber, p. 23; expert opinion of the City of Munich <https://stadt.muenchen.de/dam/jcr:88612c25-2a76-471d-8978-84aff8f65029/vergaberecht.pdf>.

⁶⁹ OLG Rostock, 30.05.2005 - 17 Verg 4/05.

⁷⁰ UBA, Rechtsgutachten Ausschreibung von Regionalstrom durch öffentliche Auftraggeber, p. 23; Grimm, LKV 2020, 549 (552).

⁷¹ Grimm, LKV 2020, 549 (552).

With regard to requirements for the specification of local solutions for the reduction of transport emissions, also other decisions in Germany are mainly found in the area of waste disposal:

According to the OLG Koblenz, "there is nothing to prevent the client from primarily orienting himself to his own needs when determining the place of performance or", as in the present case, "the place where the performance of the service is to begin". If, in the context of waste disposal, the authority wishes to have a partial service carried out by handing over the waste to an external company, this is "in his legitimate interest to keep his own transport routes as short as possible". A "restriction of competition, in particular in the form of a potential disadvantage of 'external' companies" is "acceptable if the choice of location is objectively justified, the award conditions are suitable for achieving the legitimate purpose and the unequal treatment is limited to what is necessary [...], i.e. if it is proportionate".

In the case in question, however, the court found a violation of the competition principle (Section 97 (1) GWB): According to the specifications, the future contractor was to take over the green waste produced in the city area, which was either delivered directly by vehicles of the municipal waste disposal company or by gardening companies, and to recycle it. The corresponding takeover was to take place either at a transfer point located in the city area or at a recycling plant operated by the contractor, which either had to be located in the city area or at a maximum distance of five kilometres from the city boundary.

In this respect, in the opinion of the OLG Koblenz, the limits of what is necessary were exceeded and preference was given without objective reason to companies that either already operate locally and already have a suitable transshipment site there or are willing to cooperate with a local company.

(2) Food supply: regional food as a quality aspect in the supply concept (freshness)

In procurement procedures regarding catering for schools or other childcare facilities, regional (as well as fair trade and the use of seasonal products) often is wished for by parents and the general public. Often certain preparation methods are required or excluded, based on the expectation that this will foster regional providers' products.⁷²

For this, the preparation methods Cook & Freeze (frozen products) - as well as Cook & Chill, i.e. cooling down to approx. 3 degrees Celsius, depending on the desired extent of the transport restriction - would have to be excluded or the Cook & Hold method (transport

⁷² Cf. City of Regensburg, sample document "Sustainable allocation of food in lunchtime catering", p. 3.

of hot prepared food) as well as Cook & Serve method (immediate serving after preparation on site) - and possibly the Cook & Chill method - would have to be prescribed.

However, the contracting authority may not determine which catering system the caterer uses.⁷³ Something else can only arise if there is a comprehensible objective and contract-related factual reason, e.g. if the contracting authority proves that the spatial capacities only allow for a certain type of catering.⁷⁴ In the opinion of the VK Südbayern⁷⁵, a general reduction in food quality due to cook & freeze or cook & chill procedures does not exist, so that an exclusion of certain methods could not be justified.

On the other hand, the Public Procurement Review Body of Lower Saxony issued a decision in 2020⁷⁶ with regard to a procurement procedure for the construction and operation of a childcare facility. The Review Body did not object to the reference to the DGE quality standard⁷⁷ applicable there. The current DGE quality standard for catering in daycare centers mentions, as an example, the use of organically produced as well as "local" food as a positive criterion. In addition to environmental protection and resource conservation, this in both cases justified with lower residues and pollutants in food.⁷⁸

4. Award criteria

a. Introduction

Under German public procurement law, the award is made to "the most economically advantageous tender" (MEAT) pursuant to Section 127 (1) GWB, Section 58 VgV. In addition to price and qualitative aspects, award criteria related to the environment, for example, may also be taken into account (Section 58 (2) VgV). "Regionality" could be considered as an "environmental" aspect (Section 127 para. 1 sentence 4 alt. 4 GWB, Section 58 para. 2 sentence 2 alt. 4 VgV).

Award criteria must also be related to the subject matter of the contract (Section 127 (3) sentence 1 GWB).⁷⁹ Pursuant to Section 127 (4) sentence 1 GWB, their definition must at

⁷³ VK Karlsruhe, 04.05.2018 - 1 VK 8/18; VK Karlsruhe, decision dated 18.12.2017 - 1 VK 50/17; VK Südbayern, 23.08.2017 - Z 3-3-3194-1-24-05/17.

⁷⁴ Grimm, LKV 2020, 549 (552).

⁷⁵ VK Südbayern, decision . 23.08.2017 - Z 3-3-3194-1-24-05/17.

⁷⁶ Vergabekammer Niedersachsen, 27. 042020 – VgK-04/2020 –, rec. 6 and 70

⁷⁷ DGE, DGE-Qualitätsstandard für die Verpflegung in Kitas, 6. Auflage 2020, . p. 47 and p. 42, <https://www.dge.de/gv/dge-qualitaetsstandards/?L=0>.

⁷⁸

⁷⁹ Cf. under 3.

least ensure the possibility of effective competition, no arbitrary selection of the best offer must be possible and there must be an effective possibility of reviewing their fulfilment.

The local presence of a company (establishment or presence on site, proximity, experience with local conditions) as an award criterion regularly violates the principle of non-discriminatory competition and is only permissible in exceptional cases.⁸⁰ Such criteria, which lead to at least a de facto preference of local companies (or companies cooperating with such companies), are only permissible if they are suitable for achieving a legitimate purpose and are proportionate, i.e. limited to what is necessary.⁸¹

b. Short transport distance as a criterion relevant to climate protection

A possible starting point for the implementation of "regionality" as an award criteria is to evaluate low transport emissions as a criterion relevant to climate protection via the environmental costs being part of the life cycle costs.

Pursuant to Section 59 (1) VgV, the award criterion of costs may also be calculated on the basis of the life-cycle costs of the service, whereby the calculation method must be specified by the contracting authority pursuant to Section 59 (2) sentence 1 VgV. Pursuant to Section 59 (2) sentence 2 no. 5 VgV, they may also include costs arising from the external effects of environmental pollution. The method for calculating these costs must fulfil the following conditions pursuant to Section 59 (3) VgV:

1. it is based on objectively verifiable and non-discriminatory criteria; if the method has not been developed for repeated or permanent use, it must neither favour nor disadvantage certain undertakings,

2. it is accessible to all interested parties; and

3. the information required for the calculation can be provided with reasonable effort by undertakings that exercise their due diligence to the usual extent, including undertakings from third countries that are party to the Government Procurement Agreement 1994 (OJ C 256, 3.9.1996, p. 1), as amended by the Protocol amending the Government Procurement Agreement (OJ L 68, 7.3.2014, p. 2) or other international agreements binding on the European Union.

⁸⁰ Opitz in: Beck VergabeR, 4th ed. 2022, GWB § 127 marginal no. 112 with reference to inter alia: ECJ, 29. 5. 2013 - T-384/10; ECJ (3rd Chamber), 27. 10. 2005 - C-234/03 Contse SA and others v. Insalud.

⁸¹ Opitz in: Beck VergabeR, 4th ed. 2022, GWB § 127 marginal no. 112 with reference to inter alia: OLG Frankfurt a. M., 29.03.2018 - 11 Verg 16/17.

Case law has repeatedly recognised exceptions to the consideration of "regionality" in the form of transport distances in award procedures specifically for waste disposal services:

It should be noted however, that the decisions in the area of waste disposal, which were based only on the mere distance (without taking into account the emissions of the means of transport chosen by the bidder), were based on a situation in which trucks with a certain exhaust emission standard were uniformly used and no other means of transport with lower emissions could realistically be considered. With the further development of vehicle technology, also in the truck/machinery sector, such an approach is probably no longer permissible.

In detail:

The Higher Regional Court of Frankfurt a. M.⁸² considered it permissible, on the basis of the environmental goals of the city of Wiesbaden to reduce the emission of climate-relevant substances, to regard such waste disposal concepts as advantageous "in which the emissions from truck transports are reduced and the energy recoverable from the residual waste can be used energetically in the urban area". Accordingly, the "favouring of local disposal solutions [...] is an appropriate distinguishing criterion from an ecological point of view". With regard to the specific objective of disposing of residual waste in the city in the most environmentally friendly way possible and, in particular, to keep transport distances as short as possible, the contracting authority gave the bidders incentives to invest in the construction of a residual waste disposal facility in the city area without implementing this facility as the sole object of the tender.

Furthermore, the contracting authority was able to demonstrate its justification for making "transport emissions from an environmental point of view an award criterion (Section 127 I 4 GWB)". This criterion was "in a relevant relationship to the disposal contract". The overall evaluation was carried out according to a point system, whereby costs were taken into account with 70 % and environmental aspects with 30 %. As part of the environmental aspects, "transport emissions" were also evaluated during the contract period. These were based on the carbon dioxide emissions of class 6 trucks for the transport route from the landfill to the disposal plant, from the disposal plant to the slag processing plant and from there to the landfill.

According to the Higher Regional Court of Düsseldorf⁸³, sanctioning longer distances with surcharges also constitutes a "justifiable award criterion related to the subject matter of the contract" to take into account the environmental concerns associated with long transport routes (in the specific case for waste disposal).

⁸² OLG Frankfurt a. M., 29.03.2018 - 11 Verg 16/17.

⁸³ OLG Düsseldorf, 1.8.2012, Verg 105/11.

The OLG Rostock⁸⁴ already found in 2005 that the transport costs to the waste disposal plant [...] in view of the considerable emissions of the transport vehicles constitute a criterion that has a connection to the subject-matter of the contract and can therefore be a permissible criterion.

The "transport distance" as an award criterion with a weighting of 10 % was also assessed as permissible by the VK Ansbach⁸⁵. Depending on the means of transport, a flat-rate emission value per distance was taken as the basis for calculating the burden of emissions.

As already shown above, in the case of differently emission-intensive types of transport (such as e-mobility), a pure focus on distance (as nevertheless accepted by the Higher Regional Court of Düsseldorf and the Higher Regional Court of Frankfurt) is not sufficient. In order to properly reflect the environmental goal, the consideration must be based on the expected greenhouse gas emissions.⁸⁶

Accordingly, the VK Münster⁸⁷ (consideration of pollutant emissions and energy consumption with regard to the awarding of collection, transport and recycling of wastepaper) and VK Niedersachsen⁸⁸ (consideration of CO₂ emissions from transport, among other things, in the awarding of disposal and treatment of municipal waste) did not directly consider the assessment of transport distances to be permissible, but of emissions that can ultimately also result from transport.

c. Assessment of response time with on-site presence as an indirect regionality target

"Regionality"/ a certain local proximity could also be considered via reaction times and availability of the contractor (Section 58 (2) sentence 2 no. 3 VgV). In principle, it is inadmissible to use localness as an award criterion. However, the possibility of an exception to this was recognised if the presence of the performer on site is necessary for the execution of the contract.⁸⁹ In this context, the degree and extent of the local presence is to be measured against the necessity for the performance of the contract.⁹⁰

⁸⁴ OLG Rostock, 30.05.2005 - 17 Verg 4/05.

⁸⁵ VK Ansbach, decision of 19.08.2019 - RMF-SG21-3194-4-40.

⁸⁶ World Economy, Ecology & Development, Procurement of natural stones taking into account the transport distance, p. 9; Frenz, VergabeR 2013, 13 (19).

⁸⁷ VK Münster, 03.02.2015 - VK 1-1/15.

⁸⁸ VK Niedersachsen, 26.03.2019 - VgK-03/2019.

⁸⁹ VK Bad.-Württ., 10 Jan. 2011 - 1 VK 69/10.

⁹⁰ VK Bad.-Württ., 10 Jan. 2011 - 1 VK 69/10.

Insofar as the necessary on-site support and a very fast response time of the service provider is necessary, for example in the context of technical support, and no internal resources can be kept free for troubleshooting, the necessity is likely to be affirmed. Particularly in the case of enormous importance of the (service) performance for the functionality of the client, as is the case with IT-based services or equipment, the aspect of the availability of timely support can be essential for the continuous use of the procured delivery or service.⁹¹

However, the mere "assertion" of necessity is not sufficient. Rather, the reasons on the basis of which it can be assumed that the proximity is necessary must be explained and justified in a comprehensible manner.⁹²

The justification is subject to high requirements. In principle, the actual needs and necessities are to be taken as a basis for the required availability and response times.⁹³ In particular, such actual information is of importance which can exclude the possibility that a clarification of questions and problems by electronic means or by e-mail or by a short-term journey of the responsible persons to solve the problem, if necessary, would be equally possible.⁹⁴ If the factual reasons invoked by the contracting authority do not actually exist or cannot be substantiated, the severely competition-restricting performance provision constitutes a violation of procurement law.⁹⁵

d. Increased security of supply in the supply chain?

In the specific case⁹⁶, a public contracting authority (a health insurance fund) had made it an award criterion that the entire production takes place in the EU, in signatory states of the Agreement on Government Procurement (GPA) or in the EU free trade zone, i.e. that there is a closed supply chain in these states. The greater independence of supply from third countries should, among other things, reduce the risk of contract fulfilment being disrupted by trade barriers such as the export ban imposed by India at the beginning of the Covid 19 pandemic. Also, a higher guarantee for high environmental, social and labour standards should be achieved.

The contracting authority, as confirmed by the Düsseldorf Higher Regional Court, had violated the requirement of equal treatment and the use of objective tender criteria with this

⁹¹ Von Bechtolsheim in: BeckOK VergabeR, 28th Ed. 31.1.2022, VgV § 58 Rn. 10c.

⁹² OLG Munich, 21.11.2013 - Verg 9/13.

⁹³ Wagner in: jurisPK-Vergaberecht, 6th edition 2022, § 58 VgV marginal no. 91).

⁹⁴ OLG Munich, 21.11.2013 - Verg 9/13.

⁹⁵ VK Südbayern, 23.08.2017 - Z3-3-3194-1-24-05/17.

⁹⁶ VK Bund, 01.12.2020 - VK 1-90/20; OLG Düsseldorf, 01.12.2021 - Verg 54/20.

specification. The place of manufacture alone was not a suitable criterion for a secure supply chain and even states that are part of the GPA are very heterogeneous and cannot guarantee supply security under all circumstances.

Pursuant to Section 58 (2) sentence 2 no. 1 VgV, the design of the supply chain can be taken into account in the evaluation of the bid. Thus, within the framework of distribution and trading conditions, a distinction can be made in particular as to whether the bidder's distribution system operates with or without intermediaries. However, a pure link to a local production site would not be permissible per se, although this may lead to advantages in the assessment of a logistics concept in individual cases due to lower default risks.

However, by linking the differentiation according to the place of production to whether the respective state is a member of the EU or a signatory of a free trade agreement or the GPA, a differentiation is made that is not objectively justified: The agreements referred to do not guarantee uniform conditions with regard to security of supply. The GPA, for example, only obliges the contracting parties to grant each other unhindered access to their markets for public contracts and the FTAs, even if they are aimed at liberalising trade, do not primarily serve the objectives (high environmental, social and labour standards) pursued by the contracting authority. Against this background, bidders with a closed supply chain in these states would be privileged without the criterion taking into account the differences that actually exist.

5. Performance conditions

Pursuant to Section 128 (2) GWB, the contracting authority may lay down special conditions for the performance of a contract (performance conditions). In practice, the boundaries between the terms of reference and the conditions of performance are sometimes fluid.⁹⁷ Pursuant to Section 127 (3) GWB, the conditions of performance must be connected with the subject matter of the contract and must result from the contract notice or the award documents. Pursuant to Section 128 (2) sentence 3 GWB, environmental concerns can be taken into account in addition to economic concerns. These may relate to the entire life cycle of goods, i.e. from the extraction of raw materials to disposal, and need not be reflected in the nature of the material.⁹⁸ For example, conditions can be imposed on the delivery and disposal of goods or on the conservation of resources in the case of construction or service contracts.⁹⁹ In order to comply with the link to the

⁹⁷ Gerhardt, *Möglichkeiten und Grenzen einer strategischen Vergabe öffentlicher Aufträge*, 2020, p. 379; Krönke, *VergabeR* 2017, 101 (117).

⁹⁸ To be understood broadly in the light of recital 97 of Directive 2014/24/EU; cf. Gabriel/Krohn/Neun *VergabeR-HdB*, § 20 Award documents and contract terms marginal no. 51.

⁹⁹ Gabriel/Krohn/Neun *VergabeR-HdB*, § 20 Award documents and contract terms marginal no. 51.

subject matter of the contract, the conditions must not be directed at the company's actions on the market in general or in its internal company policy.¹⁰⁰

C. CONCLUSION AND OUTLOOK

A link to regionality per se, without ensuring that other legitimate objectives/contents are associated with it, is considered inadmissible. A restriction of competition to companies from certain regions (localness) may therefore not be undertaken. In addition, the criterion of proximity must not be taken into account in the award decisions of public contracting authorities, neither at the stage of the suitability test nor at the stage of the economic efficiency test or the award decision¹⁰¹.

Cases of application for the specification of direct and indirect regionality specifications can exceptionally arise in the case of directly product-related aspects (food) or derived from specifications of certain maximum transport emissions (e.g. in the area of waste disposal). Here, however, the distance factor will play an increasingly minor role as the technical development towards low-/no-emission means of transport progresses.

It has not yet been clarified which limits can result from the principle of proportionality for certain transport requirements.

The German government has initiated a process aiming at a "transformation of public procurement law"¹⁰². In addition to an increase in efficiency, procurement should be more strategically oriented, i.e. sustainable (especially environmental and climate-related, but also social and innovative) goals should be taken into account more strongly and more bindingly.¹⁰³ Against the background of the aforementioned binding nature of the European legal framework, however, a relevant change in the legal framework for the consideration of regionality is not to be expected.

List of sources

Becker, F. (2019). Regional Products from Germany, Peter Lang, ISBN 978-3-631-79195-0.

Becker, F. (2020). What is regional?, *Verbraucher und Recht (VuR) 2020*, pp. 15-18.

¹⁰⁰ Kühling/Huerkamp, *VergabeR* 2010, 545 (547).

¹⁰¹ Bavarian Supreme Court, 20.12.1999 - *Verg* 8/99.

¹⁰² BMWK, Procurement Transformation Package 2023: A Look at the Workshop, available at: <https://www.bmwk.de/Redaktion/DE/Schlaglichter-der-Wirtschaftspolitik/2023/07/05-vergabetransformationspaket-2023.html>.

¹⁰³ BMWK, Procurement Transformation Package 2023: A look into the workshop.

BMEL Federal Ministry of Food and Agriculture (2022). Ernährungsreport 2022 (BMEL, Nutrition Report 2022), available at: https://www.bmel.de/SharedDocs/Downloads/DE/Broschueren/ernaehrungsreport-2022.pdf?__blob=publicationFile&v=9, last accessed: 06.09.2023.

BMEL Federal Ministry of Food and Agriculture (2022). Regionale Lebensmittel - transparent gekennzeichnet eine gute Wahl (BMEL, Regionale Lebensmittel - transparent gekennzeichnet eine gute Wahl), available at: <https://www.bmel.de/DE/themen/ernaehrung/lebensmittel-kennzeichnung/freiwillige-angaben-und-label/kennzeichnung-regionale-lebensmittel.html>, last accessed: 06.09.2023.

BMWK Federal Ministry for Economic Affairs and Climate Protection (2023). Vergabetransformationspaket 2023: Ein Blick in die Werkstatt (BMWK, Vergabetransformationspaket 2023: Ein Blick in die Werkstatt), available at: <https://www.bmwk.de/Redaktion/DE/Schlaglichter-der-Wirtschaftspolitik/2023/07/05-vergabetransformationspaket-2023.html>, last accessed: 06.09.2023.

Burgi, M. (2015). Green and Social Procurement in Future Public Procurement Law: Competences, Content, Proportionality. *Neue Zeitschrift für Baurecht und Vergaberecht (NZBau)* 2015, pp. 597-602.

Burgi, M. et al. (2022). Beck'scher Vergaberechtskommentar (Beck VergabeR), 4th edition, C. H. Beck, ISBN 978-3-406-76934-4.

Byok, J./Jaeger, W. (2018). Vergaberecht (Byok/Jaeger), 4th edition, Fachmedien Recht und Wirtschaft, 978-3-8005-1662-9.

DGE (2022). DGE-Qualitätsstandard für die Verpflegung in Kitas, 6th edition, 1st corrected reprint, available at: https://www.fitkid-aktion.de/fileadmin/user_upload/medien/DGE-QST/DGE_Qualitaetsstandard_Kita.pdf, last accessed: 06.09.2023.

Dieckmann, M. et al. (2022). VgV - UVgO (Dieckmann/Scharf/Wagner-Cardenal), 3rd edition, C. H. Beck, ISBN 978-3-406-75664-1.

DLG (2011). Regionalität aus Verbrauchersicht, available at: https://www.dlg.org/fileadmin/downloads/ueber-uns/jahresberichte/Jahresbericht_2011.pdf, last accessed: 06.09.2023.

Fischer, K. (2004). Non-award purposes in public procurement: Admissibility under European Community Law. *European Journal of Commercial Law (EuZW)* 2004, pp. 492-496.

Frenz, W. (2013). Inclusion of transport distances in public tenders. *Vergaberecht (VergabeR)* 2013, pp. 13-20.

Gabriel, M. et al. (2022). Beck'scher Online-Kommentar Vergaberecht (BeckOK Vergaberecht), 28th Edition, C. H. Beck.

Gabriel, M. et al. (2021). Handbuch Vergaberecht (Gabriel/Krohn/Neun VergabeR-HdB), C. H. Beck, 978-3-406-80233-1.

Gerhardt, H. (2020). Möglichkeiten und Grenzen einer strategischen Vergabe öffentlicher Aufträge, Nomos, ISBN print: 978-3-8487-7935-2.

Grimm, B. (2020). Awarding catering services for municipal day-care centres and schools. *Landes- und Kommunalverwaltung (LKV) 2020*, pp. 549-553.

Heiermann, W. et al. (2022). juris PraxisKommentar Vergaberecht, 6th edition; juris, ISBN 9783863304140.

Heinze, K. et al. (2014). Consumer preferences towards regional products: A comparison of West and East Germany. *Berichte über Landwirtschaft - Zeitschrift für Agrarpolitik und Landwirtschaft 2014 Vol. 92/1*, pp. 1-32.

Immenga, U. et al. (2021). Competition Law (Immenga/Mestmäcker), 6th edition, C. H. Beck, ISBN 978-3-406-72484-8.

Krönke, C. (2017). Socially responsible procurement under the new public procurement law. *Vergaberecht (VergabeR) 2017*, pp. 101-119.

Kühling, J./Huerkamp, F. (2010). Vergaberechtsnovelle 2010/2011: Reformbedarf bei den vergabefremden Ausführungsbedingungen nach § 97 Abs. 4 Satz 2 GWB? *Vergaberecht (VergabeR) 2010*, pp. 545-554.

Leinemann, E./Zoller, A. (2017). Overview of the (new) requirements under procurement law with regard to the consideration of economic, ecological and social aspects. *Vergabenews 2017*, pp. 82-85.

Pünder, H./Schellenberg, M. (2019). Vergaberecht, 3rd edition, Nomos, ISBN 978-3-8487-3043-8.

Säcker, F. J. (2022). Münchener Kommentar zum Wettbewerbsrecht (MüKo Wettbewerbsrecht), 4th edition, C. H. Beck, ISBN 978-3-406-75870-6.

Schirrmann, E. (2005). Local product origin and consumer behaviour, Deutscher Universitätsverlag, ISBN 978-3-8244-0808-5.

City of Regensburg (2021). Musterunterlage "Nachhaltige Vergabe von Lebensmitteln in der Mittagsverpflegung" (Stadt Regensburg, Musterunterlage "Nachhaltige Vergabe von Lebensmitteln in der Mittagsverpflegung"), available at: https://www.kompass-nachhaltigkeit.de/fileadmin/user_upload/KK-Dokumente/Regensburg_Musterunterlage_Lebensmittelausschreibung_2022.pdf, last accessed: 06.09.2023.

Stockebrand, N. (2011). Regionalmarketing für Lebensmittel, Cuvillier Verlag, ISBN 978-3-86955-622-2.

UBA Umweltbundesamt (2022). Rechtsgutachten Ausschreibung von Regionalstrom durch öffentliche Auftraggeber (UBA, Legal Opinion on the Tendering of Regional Electricity by Public Contractors), available at: https://www.umweltbundesamt.de/sites/default/files/medien/479/publikationen/cc_36-2022_ausschreibung_von_regionalstrom_durch_oeffentliche_auftraggeber.pdf, last accessed: 06.09.2023.

UM Ministry of the Environment Baden-Württemberg (2014). Auf dem richtigen Weg sei - Produktwegweiser für eine nachhaltige Beschaffung von Steinen (UM Baden-Württemberg, Produktwegweiser Natursteine), available at: https://www.lubw.baden-wuerttemberg.de/documents/10184/144917/wegweiser_steine_2014_12.pdf/9e3eb714-633d-4375-931f-2be773f08dce, last accessed: 06.09.2023.

Verband Deutscher Papierfabriken (2016). Berücksichtigung ökologischer Aspekte bei der kommunalen Ausschreibung von Altpapierentsorgungsleistungen, available at: https://www.papierindustrie.de/fileadmin/0002-PAPIERINDUSTRIE/07_Dateien/7_Publikationen/Handlungsleitfaden.pdf, last accessed: 06.09.2023.

Wegener, B. W. (2010). Environmental protection in public procurement. *Neue Zeitschrift für Baurecht und Vergaberecht (NZBau)* 2010, pp. 273-279.

Wissenschaftliche Dienste Deutscher Bundestag (2021). "Bio-Regionalität" in der Gemeinschaftsverpflegung, available at: <https://www.bundestag.de/resource/blob/852838/3a01bfb5f0c3dc8f42f564e9079f1742/W-D-7-064-21-pdf-data.pdf>, last accessed: 06.09.2023.

World Economy, Ecology & Development (2020). Procurement of natural stones considering transport distance, available at: https://www2.weed-online.org/uploads/beschaffung_von_natursteinen_unter_beruecksichtigung_der_transporentfernung.pdf, last accessed: 06.09.2023.

Ziekow, J. (2019). Öffentliches Wirtschaftsrecht, 4th edition, C. H. Beck, ISBN print 978-3-406-70264-8.

Ziekow, J./Völlink, U-C. (2020). Vergaberecht (Ziekow/Völlink), 4th edition, C. H. Beck, ISBN 978-3-406-74711-3.