



Socially responsible public procurement by the city and districts of Berlin: protecting workers in global supply chains¹

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Summary:

Workers in factories of global supply chains in the global South producing goods governments purchase often face poor working conditions. A governance tool to improve the situation is socially responsible public procurement. We assess this potential vis-à-vis the newly revised public procurement law in Berlin. While challenges include limited knowledge, resources and fragmented purchasing, there are opportunities for ensuring social criteria in procurement contracts of goods at risk of violating international labour standards and for fair trade, and through pooled procurement.

During the current Covid-19 crisis, governments face challenges of protecting workers from job losses and reduced incomes. This is even more difficult for factory workers in global supply chains (GSCs) – the global systems of outsourced and off-shored production that produce the majority of goods we consume – in the global South. Many of these workers already face poor working conditions and the Covid-19 crisis now threatens their economic resiliency with factory closures and unpaid wages due to the global economic slowdown. Yet, other factories producing essential goods under conditions of forced labour, for example rubber gloves in Malaysia, are increasing production to meet orders by governments. A critical question now is how can governments better safeguard such GSC workers? One important governance tool is socially responsible public procurement (SRPP), which is the inclusion of social conditions in the goods and services governments buy from companies. In 2014, European Union (EU) Directives on Public Procurement strengthened opportunities for SRPP by requiring governments to include the International Labour Organisation Core Labour Standards (ILO CLS), which apply to GSCs, in purchasing contracts while allowing national and sub-national regulations to go further with additional social standards. In this paper we discuss SRPP by the Berlin city government. We focus on the recently passed amended law on public procurement (BerlAVG), which coincided with the Covid-19 crisis (in April 2020), and its potential to improve working conditions in GSCs.

We focus on the sub-national level of government because progressive politics at local levels can be drivers of sustainable socio-ecological futures globally. Coined as ‘new municipalism’ examples like the ‘Fearless Cities’ movement show that cities are ‘spaces of political experimentation’ according to Russel (2009). This resonates with the current progressive red-red-green (SPD-Die Linke-Greens) government in Berlin and the discourse of social responsibility attached to the BerlAVG. For example, during parliamentary discussions on BerlAVG, Stefan Taschner of the Green Party stated, ‘The red-red-green state government want[ed] to do more than the federal government...’ with a separate law on public procurement and use Berlin’s ‘market power [with its] special responsibility to advance the socio-ecological transformation’.

¹ A shorter German version of this article can be found in the WZB Mitteilungen Heft 168 June 2020 at <https://www.wzb.eu/de/publikationen/wzb-mitteilungen>



In the EU, Germany has the largest public procurement market of around 500 Billion Euros (around 15% of GDP) and has one of the highest levels of public procurement at the sub-national level (over 75%). Over 50% of all public procurement in Germany is done by municipalities. The city of Berlin spends up to 5 billion Euros per year in purchasing goods and services. Public procurement by the city's twelve districts makes up around 60% of this amount. For example, Berlin purchases around 80,000 computers per year and 500,000 bananas for schools per month – products of GSCs. Hence, the city can have considerable 'buyer power' to influence working conditions in GSCs through SRPP. However, 'buyer power' of governments is only effective alongside effective regulatory capacities of rulemaking, monitoring and enforcement. In Berlin, the decentralization of government across districts means the buyer and regulator functions for public procurement are fragmented -- this creates certain challenges for SRPP.

According to our research, key existing challenges for the 'regulator' functions of conducting SRPP includes high workload of existing staff in contracting authorities who face new and additional responsibilities of assessing, implementing and enforcing social standards in public procurement procedures. They often lack experience and adequate training to do so. Moreover, in many agencies there are no staff responsible for SRPP. This is due to limited financial resources and a lack of prioritisation by agencies on SRPP. To help fill this gap, the Servicestelle Kommunen in der Einen Welt (SKEW), through funding from the BMZ, finances special coordinator positions (up to four years) to further Fair Trade and Fair Procurement in municipalities. In Berlin, such staff positions are currently active in five districts and the Senate. However, their temporary nature can pose difficulty for long-term planning and programmes. Also, municipalities may prioritise other sustainability issues (for example zero waste) for these positions. Finally, they tend to be housed in agencies responsible for development cooperation which can create a 'silo effect' vis-à-vis agencies responsible for procurement. Yet, these coordinators can help increase knowledge, raise awareness, and expand SRPP activity in Berlin. This has occurred especially through pilot projects, for example on child labour free natural stones, and procurement templates with Fair Trade standards for some school food items (rice, bananas and pineapples).

Another challenge is with monitoring compliance of the ILO CLS during the contract period. While the amended BerlAVG, in addition to fines and termination, sets out stronger sanctions for contract violations that include reduction of price and the exclusion of companies (through a public register) from public tenders for a period of time, however the ability to carry out monitoring of ILO CLS compliance is curtailed by a small centralised control group. Currently the control group in Berlin, which oversees around 2000 contracting authorities in the city, is understaffed with less than ten employees. Actual monitoring of contracts is done on a random basis and in response to third party reporting. Finally, there is a lack of guidelines and legal clarity (both perceived and real) on conducting SRPP beyond the minimum requirements of the ILO CLS (voluntarily) in procurement tenders and contracts.

Yet, the amended BerlAVG, from a regulator perspective, offers new opportunities for strengthening SRPP practices. In keeping with the EU Directive on Public Procurement, it reiterates the minimum requirement that public contract holders and their subcontractors (including in GSCs) comply with the ILO CLS. The first opportunity lies with a forthcoming updated list which designates products and groups of products and their predominant production countries as violating the ILO CLS. For these listed goods companies must, under the law, be able to show proof of compliance with the ILO CLS, for example through product



labels. Labels must be objective, non-discriminatory, accessible, and set up by a third party without strong influence by the bidding company. This means public contracts for these products can only be made to bidders who can fulfil these requirements. This can raise expectations for industry performance and be a market driver for firms to ensure proper working conditions in their production sites and GSCs. In this context, contracting authorities can have market dialogues with potential bidders on the ILO CLS, including other sustainability concerns. This list will also be defined by an administrative regulation by the Senate allowing for more legal certainty and flexibility to quickly adjust it to changes in the global market. This should expand the product list due to new discoveries of ILO CLS violations in production locations.

There are, however, limitations to such a product list and the use of labels. First, difficulties in administrative procedures over proof of standards compliance could lead to products being removed from the list. Second, product labels do not exist for all products at risk of violating the ILO CLS. For example, electronic products were removed from the existing product list because labels could not prove compliance to the ILO CLS throughout the industry's long GSCs. Moreover, labels vary in quality and credibility. As Raj-Reichert shows, often verification of company compliance social standards is conducted through audits or self-reporting which may not capture all labour rights violations in production locations, especially in the global South. Yet, there are other approaches to verifying compliance to the ILO CLS. For example, Electronics Watch (a nongovernmental organisation which organizes SRPP for contracting authorities) ensures compliance through worker-led monitoring of factories in the global South. Currently the Senate is debating the inclusion of alternative forms of proof (in addition to labels), such as multi-stakeholder initiatives, for which products can be included on the product list. Such expansion in the range of methods to prove compliance would result in a more comprehensive list of products at risk of violating the ILO CLS. Ideally, there should be quality standards on which proof of compliance, especially labels, are acceptable. The requirement for trustworthy and credible proof of ILO CLS compliance can replace the need to monitor contract performance thus compensating for the city's under-resourced control group.

The second opportunity the amended BerlAVG allows is for contracting authorities, on a voluntary basis, to include social conditions with 'more far-reaching aspects' in particular fair trade standards in award contracts. One standard for fair trade is the Fair Trade product label, which goes beyond the ILO CLS minimum requirements for example by including conditions on higher pricing and wages/incomes for workers in the global South. Berlin became a Fair Trade Town in 2018 and several districts earned the label before (Fair Trade Towns are required to purchase some products with the Fair Trade label), which has been used in the political discourse for supporting SRPP by civil society actors and the red-red-green government. Because fair trade conditions are voluntary, more progressive politics especially at the district levels could lead to stronger SRPP practices at lower levels of government. For example, districts can require products at high risk of labour rights violations to be procured with Fair Trade standards only. Such initiatives could in the longer term be pushed to become institutionalised across the city.

Finally, the legal text by including 'Weiterverarbeitung' or further processing of production seems to raise expectations for contract holders to ensure compliance of the ILO CLS by lower tier suppliers of parts and components in GSCs. While this can send a signal to industries on the reach of the ILO CLS in GSCs, operationalising this consideration would depend on contracting authorities.



We now link our assessment of the 'regulator' perspective to the limits and opportunities of 'buyer' power. First, the amended BerlAVG only applies to bids above certain thresholds (50,000 euros for construction services; 10,000 euros for all other contracts). This could mean small public contracts, below the threshold, are made without consideration of social conditions. However, contracting authorities can voluntarily procure in a socially responsible manner below the threshold values. In this regard, districts who may be purchasing more at smaller volumes can play an important role in pushing SRPP. Districts can also support, through its smaller contracts, local businesses who favour competition based on social standards compliance such as Fair Trade. Second, a limitation is a waiver clause on the ILO CLS conditions that contracting authorities can use when faced with no bidders who can fulfill these requirements. Third, fragmented purchasing practices by districts reduces buying power to make a difference in GSCs. To overcome this, pooled and centralised purchasing can send a stronger market signal influencing company behaviors on ensuring proper working conditions. In Berlin there is pooled purchasing such as Fair Trade footballs by the city government, police uniforms jointly procured with the state of Brandenburg, and centralised purchasing for example of electronics by ITDZ. The benefits of this is resource efficiency especially if accompanied with a sharing of administrative tasks of tendering, awarding, and contract management. Another way of achieving the same outcome is through procurement templates or "Musterausschreibungen" with social standards made available to all contracting authorities to use in their own tenders. In this regard, it is still important for autonomous local progressive politics to shape buying practices. For example, districts can respond to local political interests quickly and creatively such as through pilot projects that can be shared with and influence other districts and the city government and help mainstream stronger SRPP practices.

Coming back to the idea of 'new municipalism', 'spaces of political experimentation' for progressive policies depend on active civil society and public participation in shaping local politics, including SRPP. In addition to pushing progressive local policies (for example the FAIRgabe Bündnis lobbied and continues to push for improvements to BerlAVG including an action plan with targets and timelines for SRPP), CSOs are also essential for monitoring labour violations in GSCs, conducting credible third-party reporting, and providing trustworthy proof of compliance to social standards. As governments set out their long-term course to recover from the Covid-19 crisis, they must ensure that it is done sustainably and responsibly, and SRPP goes hand in hand with such a vision.

Literature

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