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## LOCAL GOVERNMENT SERVICING UNITS AS A CENTRAL CONTRACTING AUTHORITY

## SAMORZĄDOWE JEDNOSTKI OBSŁUGUJĄCE JAKO CENTRALNY ZAMAWIAJĄCY

**Summary:** The scope of tasks entrusted to the servicing units, the so-called shared services centres, as part of the joint service results from the resolution of the decision-making body of the local government unit or from an agreement concluded between units, with restrictions resulting from the local government laws. By means of a special provision of the public procurement law, the legislator granted the competence to indicate or appoint an entity performing central contracting tasks or to specify the method of appointing such entities to the decision-making body of the local government unit. The competences of the commune council also include determining the scope of activities of these entities in accordance with Art. 15c of the Public Procurement Law. The perspective of providing by the commune of the joint service of the commune's organisational units may therefore include joint activities in the scope of the procurement procedures, but then it is necessary to apply both the provisions of the law on commune government and the public procurement law. The indication or appointment of a central contracting authority by the decision-making body of the local government unit must be the activity preceding the transfer of specific tasks in the field of public procurement to this entity.

**Keywords:** joint service centre, shared service, servicing unit, serviced unit, central contracting authority

**Streszczenie:** Zakres powierzonych jednostce obsługującej, tzw. centrum usług wspólnych, zadań w ramach wspólnej obsługi wynika z uchwały organu stanowiącego jednostki samorządu terytorialnego bądź z porozumienia zawartego pomiędzy jednostkami, z ograniczeniami wynikającymi z ustaw samorządowych. Przepisem szczególnym ustawy prawo za-

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mówień publicznych ustawodawca przyznał organowi stanowiącemu jednostki samorządu terytorialnego kompetencję do wskazania albo powołania podmiotu wykonującego zadania centralnego zamawiającego albo określenie sposobu powoływania takich podmiotów. Do kompetencji rady gminy należy nadto także określenie zakresu działania tych właśnie podmiotów zgodnie z art. 15c ustawy prawo zamówień publicznych. Perspektywa zapewnienia przez gminę wspólnej obsługi jednostek organizacyjnych gminy może zatem obejmować wspólne działania z zakresu postępowania o udzielenie zamówienia, ale wówczas konieczne jest zastosowanie zarówno postanowień ustawy o samorządzie gminy, jak i ustawy prawo zamówień publicznych. Wskazanie lub powołanie centralnego zamawiającego przez organ stanowiący jednostki samorządu terytorialnego musi być czynnością poprzedzającą przekazanie temu podmiotowi określonych zadań z zakresu zamówień publicznych.

**Słowa kluczowe:** centrum usług wspólnych; obsługa wspólna, jednostka obsługująca, jednostka obsługiwana, centralny zamawiający

## INTRODUCTION

In accordance with Art. 10 a of the Law of 8 March 1990 on commune government<sup>1</sup> the commune (gmina) may provide joint services, in particular administrative, financial and organisational ones: to organisational units of the commune included in the public finance sector, commune cultural institutions and other, included in the public finance sector, communal legal persons established on the basis of separate laws for the purpose of performing public tasks, excluding enterprises, research institutes, banks and commercial law companies- hereinafter referred to as “serviced units”. Similar provisions can be found in the Law of 5 June 1998 on district (powiat) government<sup>2</sup> and in the Law of 5 June 1998 on province (voivodeship) government<sup>3</sup>. Due to the analogy of the solutions used in all types of local government units, this article will refer in particular to communal servicing units, while the considerations will also apply to other local government units.

The phrase *in particular* used by the legislator indicates that local government units and local government legal entities may freely adjust the scope of the joint service<sup>4</sup>. Joint service may be provided by the commune office, another organisa-

<sup>1</sup> Law of 8 March 1990 on communal government (i.e., Journal of Laws of 2019, item 506, as later amended). On 1 January 2016, together with the entry into force of the amendments to the Law on communal government introduced by the Law of 25 June 2015 on the amendment to the Law on communal government and some other acts, communes were given the option of introducing joint service and creating so-called shared service centres.

<sup>2</sup> Article 6a of the Act of 5 June 1998 on district government (i.e., Journal of Laws of 2019, item 511, as later amended).

<sup>3</sup> Art. 8 c of the Law of 5 June 1998 on provincial government (i.e. Journal of Laws 2019, item 512 as later amended).

<sup>4</sup> Justification of the government draft Law amending the Law on communal government and amending some other acts of 25 June 2015 (Journal of Laws of 2015, item 1045), print No. 2656, page 5; com-

tional unit of the commune, the organisational unit of the inter-commune association or the organisational unit of the district -communal association, hereinafter referred to as “servicing units”. In terms of organisational units of the commune, the commune council shall determine, by way of a resolution, in particular: servicing units, serviced units and the scope of duties entrusted to servicing units as part of the joint operation. Communal cultural institutions and other communal legal entities included in the public finance sector established on the basis of separate laws to perform public tasks, excluding enterprises, research institutes, banks and commercial law companies, may, on the basis of agreements concluded by these units with the servicing unit, join the joint service after prior notification of this intention to the commune head. The scope of the joint service is specified in the agreement<sup>5</sup>.

Both the catalogue of entities indicated as possible servicing entities and the catalogue of entities authorised to use the joint service provided by the servicing unit – strictly refer to the catalogue of entities included in Art. 9 of the Law of 27 August 2009 on public finances<sup>6</sup>, defining entities constituting the public finance sector<sup>7</sup>. In accordance with the provisions of Art. 10 of the Public Finance Law, entities included in the public finance sector are obliged to apply the principles of financial management specified in the above-mentioned Public Finance Law, either directly or accordingly<sup>8</sup>. Principles of managing public funds, resulting inter alia from Chapter 5 of the Public Finance Law, concern the collection of public funds as well as incurring and making expenses (Articles 42-47 of the Public Finance Law). In terms of the rules of making expenses, Art. 44 section 4 of the Public Finance Law provides that these entities conclude contracts, the subject of which are services, supplies or construction works, on the principles set out in the provisions on public procurement, unless separate provisions provide otherwise. Units of the public finance sector within the meaning of the provisions of the Public Finance Law, in accordance with Art. 3 section 1 of the Law – public procurement law<sup>9</sup>, were obliged to apply the above Public Procurement Law.

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pare A. Andruszkiewicz, *Błędy prawne w uchwałach dotyczących organizacji usług wspólnych w gminie na przykładzie wybranych rozstrzygnięć nadzorczych wojewodów*, [in:] B. Dolnicki (ed.), *Źródła prawa w samorządzie terytorialnym*, Warszawa 2018, p. 24.

<sup>5</sup> Article 10b of the Law on Commune Government (i.e., Journal of Laws of 2019, item 506, as later amended), Article 6 b of the Powiat Government Law (i.e., Journal of Laws of 2019, item 511, as later amended), Art. 8d of the Law on province government (i.e. Journal of Laws of 2019, item 512 as later amended).

<sup>6</sup> Law of 27 August 2009 on public finances (i.e., Journal of Laws of 2019, item 869, as later amended).

<sup>7</sup> K. Żmuda-Matan, *Odpowiedzialność kierowników jednostek obsługujących i obsługiwanych prowadzonych w oparciu o przepisy ustawy o samorządzie gminnym*, „Finanse Komunalne” 2018, No. 11, p. 63-64.

<sup>8</sup> Public Finance Law. Commentary by prof. dr hab. Paweł Smoleń 2014, 2nd edition, commentary on art. 10, source: Legalis.

<sup>9</sup> Article 3 section 1 of the Law of 29 January 2004 Public Procurement Law (i.e. Journal of Laws 2019, item 1843).

The purpose of this publication is to analyse the principles of entrusting a local government servicing unit the tasks of a central contracting authority operating in the field of purchasing supplies or services for the purchasers who are also serviced units, awarding contracts or concluding framework agreements covering construction works, supplies or services intended for contracting entities – serviced units as well as ancillary purchasing activities.

## THE SCOPE OF ACTIVITIES OF LOCAL GOVERNMENT SERVICING UNITS

The creation of a local government servicing unit is not obligatory. The purpose of the regulation is to increase the flexibility of local government units. The phrase “in particular” used in Art. 10a of the Law on commune government means that local government units can freely adjust the scope of the joint service depending on their needs. An exemplary catalogue of the type of tasks that can be covered by the joint service enables ongoing forming of solutions that respond to new phenomena and needs emerging in the local government administration, including technical solutions.

Pursuant to art. 10 b section 2 of the Law on commune government, determining the scope of duties entrusted to servicing units under the joint service belongs to the competence of the commune council. This regulation leaves high flexibility to local governments in the scope of the possibility of using a new legal instrument, which are servicing units, often called in practice shared service centres. The creation or scope of the joint service in both the subjective and objective dimensions constitutes an independent decision of each of the local government units. Local governments have the right to choose both the specialisation of the centre (e.g. human resources management, computerisation, accounting, public procurement) and the area of their activity (e.g. cultural institutions)<sup>10</sup>, as well as a large space, with only some restrictions, in terms of shaping mutual relations, including tasks, rights and obligations.

The scope of the joint service provided by local government servicing units, as defined in Art. 10 a of the law on commune government is open. The legislator’s use of the phrase “in particular” does not exclude the possibility of entrusting this entity with public procurement tasks, including those of the central contracting authority. It is worth emphasizing, however, that the Law on commune government excludes

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<sup>10</sup> Legal aspects of formation of the shared service centres in the local government, „Eksperytyzy i opracowania” 2016/14, p. 8; source: nist.gov.pl; M. Krajewski, *Prawne aspekty tworzenia centrów usług wspólnych w samorządzie terytorialnym*, [in:] I. Wieczorek (ed.), *Zarządzanie w jednostkach samorządu terytorialnego. Wybrane aspekty*, Wrocław 2016, pp. 35-36; compare R. Grobelny, M. Klupczyński, *Centralizacja działalności w jednostkach samorządu terytorialnego z wykorzystaniem centrum usług wspólnych*, [in:] I. Wieczorek (ed.), *Zarządzanie w jednostkach...*, pp. 21-22; compare K. Świetła, M. Wójcik-Jurkiewicz, *Centrum Usług Wspólnych współczesną koncepcją adaptacji rozwiązań biznesowych na poziomie samorządów*, [in:] K. Świetła (ed.), *Współczesne koncepcje adaptacji rozwiązań rachunkowości i rewizji finansowej w kontekście gospodarki opartej na usługach*, Warszawa 2017, p. 128.

taking over the competence of managers of public finance units to dispose of public funds and incur liabilities, as well as to draw up and approve a financial plan and to transfer expenses in this plan<sup>11</sup>.

## CENTRAL CONTRACTING AUTHORITY AND ITS TASKS

The issue of public procurement by the central contracting authority is governed by Article 37 Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement<sup>12</sup>. It contains similar solutions as the Public Procurement Law in the discussed scope, clearly indicating that making orders via the central contracting authority or purchasing supplies and services from the central contracting authority means fulfilling the obligations arising from the directive.

Although the rule is, according to Art. 15 section 1 of the Public Procurement Law, that the procurement procedure is prepared and conducted by the contracting authority, the decision-making body of the local government unit has the competence to designate or appoint a central contracting authority.

The central contracting authority is the contracting authority, in accordance with Art. 15 b of the public procurement law, conducting activity in the field of:

- 1) purchasing supplies or services for purchasers;
- 2) awarding contracts or concluding framework agreements, the subject of which are works, supplies or services intended for contracting entities;
- 3) ancillary purchasing activities.

It follows from the above that this entity is appointed for the purpose of professional and comprehensive preparation and conduct of public procurement or framework contract proceedings.

The central contracting entity may be a newly established unit as well as an existing one. In both cases, the decision-making body must complete the entire delegation contained in Art. 15c of the Public Procurement Law, including, *inter alia*, determining the scope of activities of this entity, designating contracting entities obliged to perform specific activities, determining the manner of cooperation with the central contracting entity. It should be emphasized that the provision for local government units is autonomous and independently defines the role of the central contracting authority and the manner of its functioning. Adoption of a resolution by the body deciding on the designation or appointment of a central contracting authority is intended to increase efficiency, professionalization of order management and safeguarding the principles of fair competition, which should find adequate expression in the content of the resolution itself. Centralised procurement should

<sup>11</sup> Art. 10c section 1 of commune government law.

<sup>12</sup> Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18 / EC (Journal of Laws EU.L 2014 No. 94, p. 65).

rely, among others, on the concentration of purchases in terms of the number of contracting authorities involved or the quantity and value in time<sup>13</sup>.

## A LOCAL GOVERNMENT SERVICING UNIT AS A CENTRAL CONTRACTING AUTHORITY

As already indicated above, the decision-making body of local government units is entitled to designate or appoint a central contracting authority. The creation of a central contracting authority must be ahead of the delegation of specific tasks to this entity<sup>14</sup>.

Pursuant to the Law on commune government, the commune council, in relation to serviced units, being organisational units of the commune included in the public finance sector, defines, by way of resolution, in particular: servicing units, serviced units and the scope of duties entrusted to servicing units as part of joint service. The resolution of the commune council regarding the organisation of joint service by the servicing entity is not an act of local law within the meaning of Art. 87 section 2 of the Polish Constitution and Art. 40 of the Local Government Law, but it is an act of internal management<sup>15</sup>. Serviced units, which are communal cultural institutions and other communal legal entities included in the public finance sector, established on the basis of separate laws to perform public tasks (excluding enterprises, research institutes, banks and commercial law companies), may, however, on the basis of agreements concluded by these units with a servicing unit, participate in the joint service, after prior notification of this intention to the head of the commune, mayor, city president. In this case, the scope of joint service is specified in the agreement. A self-governing organisational unit operating as a servicing unit that is to act as the central contracting authority should therefore be created by way of a resolution of the commune authority, specifying in particular: the servicing unit, serviced units and the scope of responsibilities entrusted to the servicing unit, as part of the joint service, based on the provisions of Art. 10 b section 2 of the Law on commune government and at the same time appointing the servicing unit as the central contracting authority pursuant to Art. 15 c of the public procurement law.

The public procurement law grants the decision-making body the competences to indicate or appoint an entity performing central contracting authority's tasks or to specify the method of appointing such entities. The competences of the commune council also include determining the scope of activities of these entities in accordance with art. 15c of the Public Procurement Law.

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<sup>13</sup> M. Jaworska, D. Grześkowiak-Stojek, J. Jarnicka, A. Matusiak, *Prawo zamówień publicznych. Komentarz*, 2019, commentary to Art. 15c, source: Legalis.

<sup>14</sup> Provincial Administrative Court in Gliwice in the judgment of 18 October 2018 reference number IV SA / Gl 508/17.

<sup>15</sup> Provincial Administrative Court in Opole in the judgment of 10 October 2019, file reference number II SA / Op 238/19.

The extension of the tasks of the existing servicing unit operating on the basis of a resolution on its creation in accordance with Art. 10 b section 2 of the Law on commune government may be made by resolution of a decision-making body, amending the statute of an organisational unit, including in the scope of the catalogue of tasks entrusted to it, only if it was previously a resolution of the decision-making body indicated pursuant to Art. 15c of the Public Procurement Law, as the central contracting authority. However, unless the servicing entity is indicated as an entity performing the tasks of the central contracting authority, it is not possible for it to be delegated by the decision-making body with specific competences arising from the provisions of the Public Procurement Law.

It can be concluded from the above that Art. 10b section 2 point 3 of the Law on commune government is not a sufficient, independent legal basis to entrust any type of duties, in this case, the obligations arising from the provisions of the Public Procurement Law. In the scope of the discussed issue, two statutory regulations are applicable, i.e. the Law on commune government and the public procurement law, which contain solutions for joint service of commune organisational units, and solutions regulating the principles of joint action of contracting entities in public procurement proceedings. Whereas, considering that an organisational unit of a commune may be at the same time a contracting authority, determining the relations between the solutions contained in these laws is a basic issue. It should be clarified that Art. 10a, Art. 10b of the Law on commune government introducing the possibility of joint service of organisational units of the commune shall apply from 1 January 2016<sup>16</sup>, while Art. 15c of the Public Procurement Law, according to which the decision-making body of local government units may, by means of a resolution: indicate or appoint an entity performing central contracting authority's tasks, or specify the method of appointing such entities, define the scope of activities of these entities, was added by the amending act of 22 June 2016<sup>17</sup> and has been in force since 28 July 2016. Also since 28 July 2016, Art. 15 section 4 of the public procurement law has been in force, which contains a definition of ancillary purchasing activities, which were and are referred to in Art. 15 section 2 of the public procurement law, which were not previously defined statutorily. According to the cited Art. 15 section 4 of the public procurement law – ancillary purchasing activities consist in providing support for purchasing activities, in particular by: providing technical infrastructure enabling the contracting entity to award contracts or conclude framework agreements; advice on carrying out or planning procurement procedures; preparing and awarding procedures on behalf of and for the contracting

<sup>16</sup> Law amending the law on communal government and some other laws of 25 June 2015 (Journal of Laws of 2015, item 1045).

<sup>17</sup> Law amending the Law – Public Procurement Law and some other laws (Journal of Laws of 2016, item 1020).

authority. The indicated provision of Art. 15c of the public procurement law directly applies to local government units and contains the legal basis for adopting a resolution on the designation or appointment of an entity performing the tasks of a central contracting authority and the scope of activities of such an entity. To determine the scope of activity, it is not enough to refer to the concept of “ancillary purchasing activities”, because as it results from the statutory definition of this concept, it covers a wide variety of factual and legal activities, and the catalogue of the activities listed is not closed. The above changes in the legal status indicate that, introduced in the Law on commune government, the legal possibility for a commune to provide joint service for commune organisational units may also include joint activities in the field of procurement, but then both the provisions of the Law on commune government and the provisions of the Public Procurement Law<sup>18</sup>. The introduction of these provisions should have rational legal effects. At the time of making the above-mentioned changes in the Public Procurement Law, the regulation of Art. 10 b of the law on commune government was already in force. The legislator knew the content of this provision yet introduced changes to the Public Procurement Law – in particular regarding local government units. By adding new provisions to the Public Procurement Law, the legislator not only expanded the catalogue of situations in which tasks related to public procurement will be performed by entities other than the contracting authority itself, but also specified the procedure in which the performance of these tasks may be entrusted to entities other than the contracting authority, in particular he indicated the mode for local government units. Therefore, if the specific provisions of the Public Procurement Law provide specific regulations regarding the designation of an entity to perform public procurement tasks other than the contracting authority, it is not possible only on the basis of general competence standards (Article 10 (b) of the law on commune government) to transfer this task to another organisational unit of communes<sup>19</sup>.

The central activities of the contracting authority may therefore be limited to the preparation and conduct of the procurement procedure. In this case, after the final selection of the best bid, the contract with the selected contractor will be concluded by the contracting authority, on whose behalf the procedure was prepared and carried out. The activities of the central contracting authority may also include the award of a contract. In this case, the central contracting authority concludes the works contract by becoming a party to it, or purchases a supply or service for its own benefit. Then it can pass them on to the contracting entities whose needs are to meet the purchased orders<sup>20</sup>.

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<sup>18</sup> The Supreme Administrative Court in the judgment of 12 June 2018, file reference number I OSK 865/18.

<sup>19</sup> Provincial Administrative Court based in Gliwice in the judgment of October 30, 2017, file reference number IV SA / GI 507/17.

<sup>20</sup> District Court in Warsaw – V Civil Appeal Division in the decision of 19 March 2013 reference number V Ca 3341/12.



It can be concluded from the above, the central contracting authority operates in two ways. First, it can act as a wholesaler by buying, storing and forwarding deliveries and services, secondly, it can act as an intermediary, awarding contracts, operating dynamic purchasing systems or concluding framework contracts that will be used by other contracting authorities<sup>21</sup>.

The provision of Art. 15 section 6 of the public procurement law sets out the principles of liability of the central contracting authority, according to which the central contracting authority is responsible for fulfilling the obligations arising from the law in respect of parts of the procedure that it conducts itself, in particular: for the award of contracts covered by a dynamic purchasing system operated by the central contracting authority and for the award of contracts based on a framework agreement concluded by a central contracting authority. It follows from the provision that the central contracting authority is responsible for its actions under the same conditions as any contracting authority. And the awarding entities using the activities of the central awarding entity are liable to the extent that they themselves carry out certain activities<sup>22</sup>.

The procurement procedure carried out by the central contracting authority takes place exclusively using electronic means of communication<sup>23</sup>.

The discussed solution should not be seen as limiting the ways in which organisational units of the public finance sector delegate the implementation of public procurement tasks to another unit. Undoubtedly, however, it is a solution aimed at favouring the centralisation of public procurement<sup>24</sup>. Notwithstanding the above, it should be emphasized that the local government servicing unit, as an organizational unit or even a third party, may be entrusted by the contracting authority with auxiliary purchasing activities pursuant to Art. 15 section 2 of the Public Finance Law. In this mode, the servicing unit will act as the client's representative. Ancillary purchasing activities consist in providing support for purchasing activities, in particular by: providing technical infrastructure enabling the contracting authority to award contracts or conclude framework agreements; advice on carrying out or planning procurement procedures; preparing and awarding procedures on behalf of and for the contracting authority.

In addition, the servicing unit may be designated by the executive body of the local government unit as a subordinate local government organisational unit, to conduct the procedure and award the contract to other subordinate units pursuant to Art. 16 section 4 of the Public Procurement Law. The decision of the executive

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<sup>21</sup> J. Pieróg, *Prawo zamówień publicznych. Komentarz*, Warszawa 2019, commentary to art. 15 b, source: Legalis.

<sup>22</sup> P. Szustakiewicz, *Prawo zamówień publicznych. Komentarz*, ed. M. Sieradzka, C.H. Beck, commentary to art. 15b, source: Legalis.

<sup>23</sup> Art. 15 b section 2 of the public procurement law.

<sup>24</sup> The Provincial Administrative Court in Gliwice in the judgment of 18 October 2018 file ref. No. IV SA/Gl 508/17.

body indicating the organisational unit competent to conduct the procedure and award the contract to other subordinate units should be made in writing. In the case of collective bodies, the appropriate form will be a resolution, while in the case of a single-person body, the form of the order will be appropriate. Considering the fact that the conduct of the procedure and award of the contract involves incurring financial obligations, joint contracting entities should regulate in a transparent manner all the matters related to their participation in the proceedings and the award of the contract, including financial settlements between the parties<sup>25</sup>.

## CONCLUSION

In conclusion, it should be noted that Art. 10b section 2 point 3 of the law on commune government does not constitute an independent legal basis for entrusting any type of duties to a servicing unit. In the scope of the discussed issue related to entrusting obligations arising from the provisions of the Public Procurement Law, two statutory regulations must be applicable, i.e. the Law on commune government and the Public Procurement Law, which contain solutions for joint service of organisational units of the commune and solutions regulating the principles of joint actions of contracting entities in public procurement proceedings. The provisions of the law on public procurement constitute in this relation the *lex specialis* norms in relation to the provisions of the Law on commune government. They provide for specific regulations regarding the designation of another entity to perform public procurement tasks than the contracting authority, so it is not possible only on the basis of general competence norms (Article 10b of the Law on commune government) to transfer this task to another organisational unit of the commune.

Pursuant to the special provisions of the public procurement law, the legislator included an indication or appointment of an entity performing central contracting tasks or a method of appointing such entities in the competences of the decision-making body of local government units. The competences of the commune council also include determining the scope of activities of these entities. A local governing organizational unit operating as a servicing unit to that is to act as the central contracting authority should therefore be created by way of a resolution of the commune authority, specifying in particular: the servicing unit, serviced units and the scope of responsibilities entrusted to the servicing unit under the joint service pursuant to the provisions of Art. 10 b section 2 of the Law on commune government and at the same time appointing the servicing unit as the central contracting authority pursuant to Art. 15 c of the public procurement law.

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<sup>25</sup> P. Granecki, *Prawo zamówień publicznych. Komentarz*, Warszawa 2016, commentary to art. 16 section 4; source: Legalis.

The extension of the tasks of the existing servicing unit operating on the basis of a resolution on its creation in accordance with Art. 10 b section 2 of the law on commune government, can be made by resolution of a decision-making body, amending the statute of an organisational unit, including in the scope of the catalogue of tasks entrusted to it, only if this unit was previously indicated pursuant to Art. 15c of the public procurement law as the central contracting authority.

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