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Public Procurement in Germany: Overview

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Public Procurement in Germany: Overview

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1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036
tel +1 202.293.4103
fax +1 202.293.4107
www.acc.com

This InfoPAKSM provides practical analysis of topical cross-border issues and country-specific Q&A guides on public procurement law and practice worldwide. The Q&A guide aims to give a structured overview of the key practical issues including, for example, the applicable legislation, entities and contracts covered (and thresholds), procurement procedures, the regulation of concessions and PPPs and recent trends.

The country-specific Q&A gives a high level overview of applicable legislation, scope of rules, procurement procedures and enforcement, recent trends and proposals for reform. In particular, it examines entities and contracts covered, concessions, privatisations and PPPs, contract award criteria, alternative bids, and changes to an existing contract.

To compare answers across multiple jurisdictions, visit the Public Procurement Country Q&A tool at <http://uk.practicallaw.com/0-521-3360> and the Public Procurement EU Country Q&A tool at <http://uk.practicallaw.com/7-521-3187>.

This Q&A is part of the Practical Law multi-jurisdictional guide to public procurement. For a full list of jurisdictional Q&As visit www.practicallaw.com/publicprocurement-mjg.

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I. Legal Framework

A. What Is the Principal Legislation that Regulates Public Procurement?

I. General Legislation

The German public procurement regime is regulated in:

- Part IV of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (GWB).
- Regulation on the Award of Public Contracts (*Vergabeverordnung*) (VgV).

2. Sector-Specific Legislation

The details of the procurement procedures are laid down by delegated legislation in various procurement regulations:

- For public works: *Vergabe- und Vertragsordnung für Bauleistungen* (VOB/A).
- For public supplies and services: *Vergabe- und Vertragsordnung für Leistungen* (VOL/A).
- For professional services: *Vergabeordnung für freiberufliche Dienstleistungen* (VOF).

A separate Sector Regulation (*Sektorenverordnung*) (SektVO) regulates public procurement contracts concluded by a contracting authority in the water, energy and transport services sectors.

In addition, the Procurement Regulation on Defence and Security (*Vergabeverordnung Verteidigung und Sicherheit*) (VSVgV) regulates the public procurement of contracts in the fields of defence and security. The VSVgV is supplemented by provisions of the GWB that define such contracts (*section 99, paragraph 7, GWB*) and contain exemptions from the applicability of public procurement legislation (*section 100, paragraph 3 to 6 and section 100c, GWB*). For public works in the fields of defence and security, the VSVgV is supplemented by the regulations of section 3 of the VOB/A.

Below the EU thresholds, the GWB and the VgV do not apply. Instead, the relevant budget law of the federal, state and local governments must be observed. In addition, the administrative regulations of the single states (*Bundesländer*) must be observed. In most of the states the respective administrative regulations provide for the application of the first chapters of the VOB/A and of the VOL/A for public contracts by the contracting entities. It

is also important to keep in mind the applicability of the primary law of the EU (for example, the principles of non-discrimination, transparency and competition) if the contract in question has an Internal Market relevance.

Almost all of the states passed their own public procurement laws in the recent past, which make the decision on awarding a public contract dependent on extraneous criteria. These public procurement laws of the states apply to procurement procedures above and below the EU thresholds. Extraneous criteria are, for example:

- Observance of collective labour agreements.
- Observance of family-friendly working conditions.
- Integration of employees from various backgrounds and cultures as well as minority groups.
- Gender equality.

Single provisions of these public procurement laws of the states have been the subject of court decisions. In this context it is worth mentioning that on 26 September 2013, the public procurement tribunal (*Vergabekammer*) of Arnsberg submitted to the European Court of Justice some questions regarding the compatibility of the Law on Collective Bargaining and Public Procurement of the state of Nordrhein-Westfalen with the EU law. The decision of the European Court of Justice will be of great importance for all states with co-extensive regulations.

II. Recent Trends

A. What Have Been the Recent Trends in the Public Procurement Sector?

According to statistics published by the Federal Ministry of Economics (*Bundeswirtschaftsministerium*) (BMWi), 817 applications for review proceedings were filed with the public procurement tribunals (*Vergabekammern*) in the first instance and 189 appeals were filed with the Courts of Appeal (*Oberlandesgerichte*) in 2013.

Statistics about the number of applications for an ineffectiveness order are not available. More general statistics indicate that 13.8% of the applications were successful before the public procurement tribunals.

The most significant key issues that emerged from national public procurement case law in 2013 included:

- Increasing demands on awarding bodies to make sure that there is a procurement need (*Beschaffungsbedarf*) and that the procurement project is ready to go to tender (*Ausschreibungsreife*).
- Wide scope of the awarding body's right to determine the subject-matter of supplies and services.
- Further clarification of the requirements on clear-cut and complete specifications (*Leistungsbeschreibung*).
- Further differentiation with regard to the reasonableness of the performance requirements, in particular in respect of calculation rules.
- High demands on the transparency of the scheme of evaluation.

III. Use of Procurement Procedures

A. How Are the Four EU Procurement Procedures Used by Contracting Authorities?

Contracting entities must apply the open procedure unless otherwise allowed by the GWB (*section 101, paragraph 7, GWB*). However, there are no available statistics about the choice of procurement procedure and the relevance of the incorrect choice of procurement procedure for legal proceedings.

An incorrect choice of procurement procedure does not necessarily lead to an infringement of the award rights of an unsuccessful bidder. The chosen procurement procedure must diminish the chances to get the award (causality criterion) for a bidder's rights to have been infringed and for litigation to be possible. For example, if the unsuccessful bidder is unreliable so that it is banned from the procurement procedure in any case, there is no causality between the incorrect procurement procedure and the failure of the bid.

IV. Review Procedures

A. Which Body Is Responsible for Dealing with Procurement Law Breaches?

The review system in Germany only applies to contracts above the EU thresholds. The bodies in charge of monitoring tender procedures are the public procurement tribunals (*Vergabekammern*) in the first instance and the award senates at the Courts of Appeal (*Oberlandesgerichte*) as appellate bodies. On federal level, the public procurement tribunal function lies with the Federal Cartel Office (*Bundeskartellamt*). In the case of a contract awarded by a federal state, the public procurement tribunal of this state is the review body in charge.

Below the EU thresholds, bidders are generally restricted to administrative complaints. Civil claims for compensation against the awarding body are also possible.

B. Does the Aggrieved Party Have to Seek Review First with the Awarding Body?

Generally, an aggrieved party must seek review first with the awarding body. The respective objection (*Rüge*) must be raised without undue delay (*section 107, paragraph 3, GWB*) (see Section IV.F). If the objection is rejected by the awarding body, the bidder must start court proceedings within 15 days.

C. Is There a Requirement to Notify the Awarding Body Before Starting Court Proceedings?

There is no requirement to notify the awarding body before starting court proceedings.

D. Which Parties Have Standing to Launch Proceedings for Breach of Procurement Legislation?

Every undertaking with an interest in the contract can file an application with the public procurement tribunal in charge provided that it can show there has been a violation of subjective award rights through non-compliance with the applicable provisions governing the awarding of public contracts (*section 107, paragraph 2, GWB*).

E. What Conditions Must an Applicant Meet Before a Claim Can Be Brought?

There are three key conditions that an applicant must meet before bringing a claim:

- **Immediate objection** (*section 107, paragraph 3, GWB*). See Section IV.F. Before a claim can be brought the aggrieved party must immediately (*unverzüglich*) contact the awarding body and raise an objection. The application is inadmissible if:
 - the applicant became aware of the violation of provisions governing the awarding of public contracts during the award procedure and did not object to the contracting entity without undue delay;
 - violations of provisions governing the awarding of public contracts which become apparent from the tender notice are not notified to the contracting entity by the end of the period specified in the notice for the submission of a tender or application;
 - violations of provisions governing the awarding of public contracts which only become apparent from the award documents are not notified to the contracting entity by the end of the period specified in the notice for the submission of a tender or application;
 - more than 15 calendar days have expired since receipt of notification from the contracting entity that it is unwilling to redress the complaint.
 - These conditions do not apply to an application under section 101b, paragraph 1, no. 2 of the GWB (that is, if the contract was awarded directly to an undertaking without inviting other undertakings to participate in the award procedure and without this being expressly permissible in accordance with the law (*de facto- Vergabe*)) (see Section IV.F).
- **Advanced payment.** Costs (fees and expenses) to cover the administrative expense are charged for official acts of the public procurement tribunals. Generally, the fee is at least EUR2,500 and does not exceed EUR50,000. Fees up to EUR100,000 are only applicable to particular cases in which the commercial relevance or the effort are exceptionally high. The public procurement tribunal usually asks for an advanced payment of EUR2,500 in order to handle the application.
- **Form of the application.** The application must be submitted in writing to the public procurement tribunal. The application must include:
 - the remedy the applicant is requesting;
 - the name of the respondent;

- a description of the alleged violation of rights with a description of the facts as well as the designation of the available evidence;
- evidence that an objection was made to the awarding body;
- the names of the other parties, if known.

F. What Are the Applicable Statutes of Limitation?

It is not necessary to file the application with the public procurement tribunal promptly. However, the decision of the awarding body must be challenged without undue delay (*unverzüglich*) after the applicant became aware of the violation of provisions governing the awarding of public contracts during the award procedure by raising an objection under section 107, paragraph 3 of the GWB. According to the better part of the case law of the award review bodies, without undue delay generally means one to three working days after having obtained knowledge of the asserted violation of award rights. However, depending on the complexity of the violation and on the facts of the case, as well as on the necessity for the involvement of a lawyer, the acceptable time frame for the objection (*Rüge*) may be one week or even longer. The maximum time limit seems to be two weeks after the applicant became aware of the violation.

Where the awarding body has violated its duties to inform rejected bidders and to wait for the conclusion of a contract or where the contract was awarded directly to an undertaking without inviting other undertakings to participate in the award procedure and without this being expressly permissible in accordance with the law (*de facto- Vergabe*), the contract may be deemed ineffective by the public procurement court. Ineffectiveness can only be established if this is claimed in review proceedings within 30 calendar days after knowledge of the infringement, or at the latest six months after the conclusion of the contract. If the contracting entity has published the award of the contract in the *Official Journal of the European Union*, the time limit for claiming ineffectiveness ends 30 calendar days after publication of this notice.

V. Remedies

A. What Remedies Are Available to an Aggrieved Contractor? Can a Breach of Procurement Legislation by a Regulated Body Lead to Criminal Liability?

I. Remedies

The public procurement tribunal decides whether the applicant's rights were violated, and takes suitable measures to remedy a violation of rights, and to prevent any impairment of the interests affected. The public procurement tribunal is not bound by the applications and can also independently investigate the lawfulness of the award procedure. The public procurement tribunal has the competence to issue an order to stop the awarding procedure or to alter the status of the proceedings.

Once an award has been made, it cannot be cancelled. However, the tribunal can rule that a contract is ineffective if the awarding body violated its duties to inform rejected bidders and to wait for the conclusion of a contract or if the contract was awarded directly to an undertaking without inviting other undertakings to participate in the award procedure and without this being expressly permissible in accordance with the law (*section 101b, GWB*). In other cases, the most common remedy available after the conclusion of the contract is a claim for compensation against the awarding body.

2. Criminal Liability

Section 298 of the German Criminal Code (*Strafgesetzbuch*) (StGB) regulates criminal liability for restricting competition through agreements in the context of public bids. The provision primarily applies to bidders who make an offer based on an unlawful agreement in order to influence the decision of the awarding body. The provisions regulating criminal liability for bribery in the public sector (that is, section 331 and following of the German Criminal Code) are of particular importance for the awarding body.

B. Does an Ineffectiveness Order Have a Prospective or Retrospective Effect?

An ineffectiveness order has retrospective effect (*section 101b, paragraph 1, GWB*).

VI. Transparency

A. What Systems Are in Place in Relation to the Publication of Details/Copies of Completed Tender and Contract Documentation, Which Include Pricing and Other Potentially Sensitive Information?

There is a variety of online platforms which publish information on completed tenders (for example, www.bund.de). However, the information is usually limited to basic data such as:

- Contract body.
- Successful bidder.
- Procurement procedure.
- Subject and scope of the services.
- Contract period.

VII. Contracts Outside the Scope of the Consolidated Public Sector Directive

A. Is the Award of Contracts Which Are Fully or Partly Outside the Scope of the Consolidated Public Sector Directive Regulated Under National Legislation?

Below the EU thresholds, the GWB and the VgV do not apply. Budget law and administrative regulations of the single states (*Bundesländer*) must be observed. In most of the states the respective administrative regulations provide for the application of the first chapters of the VOB/A and of the VOL/A for public contracts by the contracting entities (see Section I.A).

B. What Remedies Are Available in Relation to the Award of Contracts Which are Fully or Partly Outside the Scope of the Consolidated Public Sector Directive?

Below the EU thresholds, the system of protection for the bidders is weaker than if above the EU thresholds (see Section IV.A). Remedies are restricted to claims of compensation for damages if a legal provision was not met in the procurement procedure so that the public contract was not awarded to the claimant.

VIII. Implementation of EU Reforms

A. What Decisions Have Been Taken to Date with Regard to the Transposition of the Revised Public Procurement Directives Where There Is Flexibility for the Member State as to How the Directives Are Implemented?

The three new EU Procurement Directives were published in the Official Journal of the EU on 28 March 2014 and came into force on 17 April 2014. Germany as well as the other EU member states will have two years to implement them into national legislation. Some few regulations, in particular with regard to the electronic communication, have a longer implementation period (up to 60 months).

In Germany, the Federal Ministry for Economic Affairs and Energy is primarily in charge of the implementation of the new EU Procurement Directives in German public procurement law.

According to the Federal Government, Germany will take the opportunity to make public procurement procedures in Germany more simple, more flexible and more user-friendly. At the same time, legal certainty for contracting authorities and bidders will be increased. In addition, according to the Federal Government, the possibility to align social and ecological aspects with the principle of economic viability is going to be strengthened.

It appears that the new EU Procurement Directives are likely to be implemented 1:1 into German public procurement law. This means, for example, that regulations will not be stricter in German public procurement law even if there is flexibility for the member states in certain areas. This has been declared by the German legislator several times.

IX. Online Resources

A. Federal Ministry of Justice and Consumer Protection

W www.gesetze-im-internet.de

Description. The website contains the current version of GWB. An English translation provided by the Federal Cartel Office (Bundeskartellamt) is also available. However, the translation is not up-to-date. In addition, the translation is intended solely as a convenience to the non-German-reading public and it is not binding. The website also contains the current version of VgV, of the SektVO and of the VSVgV. An English translation of these three regulations is not available.

B. Federal Ministry for Economic Affairs and Energy

W www.bmwi.de

Description. The website contains the current as well as the previous version of the VOL/A and of the VOF. The current versions are available in English. Both translations are not binding and only for guidance purposes.

C. Federal Ministry for Transport and for Digital Infrastructure

W www.bmvi.de

The website contains the current as well as the previous version of the VOB/A. An English translation is not available.

X. About the Authors

A. Maria Brakalova, Senior Associate

Dentons

T +49 30 2647 3305

F +49 30 2647 3133

E maria.brakalova@dentons.com

W www.dentons.com

Professional qualifications. Germany, Lawyer, 2007

Areas of practice. Public procurement; European and German regulatory matters; foreign trade law.

Non-professional qualifications. Dr. iur., Freie Universität Berlin, Germany, 2007

Recent transactions

- Representing a leading German provider of social security software in several significant public procurement procedures.
- Advising a leading international company in the nuclear sector in EU public procurement and regulatory matters.
- Providing foreign trade law advice to a global leader in specific technology for specialty chemicals and specialty materials.

Languages. Bulgarian, German, English, French, Spanish

Professional associations/memberships. Member of the forum vergabe (a non-profit co-operation which offers a forum for discussion and knowledge-sharing to public authorities, tenderers, lawyers, judges and other parties related to public procurement); Member of the DVNW Deutsches Vergabenetzwerk (a network/platform for the public sector).

Publications

- *Kritische Exporte – neues Außenwirtschaftsrecht, in: AUSSSEN WIRTSCHAFT 6/2013, 6 December 2013.*
- *Vergaberechtliche Behandlung interkommunaler Zusammenarbeit – Anmerkung zum EuGH-Urteil vom 13. Juni 2013, C-386/11 – Piepenbrock, in: EuZW 2013, page 593 ff, 1 August 2013.*
- *Aktuelle vergaberechtliche Entwicklungen im Gesundheitssektor, in: NZBau 2013, page 19 ff, 27 December 2012.*

B. Jörg Karenfort, Partner, European Head of the Competition Regulatory and Trade practice group

Dentons

T +49 30 2647 3305

F +49 30 2647 3133

E joerg.karenfort@dentons.com

W www.dentons.com

Professional qualifications. Germany, Lawyer, 1999

Areas of practice. European and German competition law; public procurement law; regulatory matters.

Non-professional qualifications. Dr. iur., Philips University, Germany, 1998; LLM, London School of Economics and Political Science, UK, 1996

Recent transactions

- Representing a leading international energy company in complex anti-trust proceedings before the European Commission.
- Advising the Association of German Savings Banks (DSGV ö.K.) on merger control and anti-trust matters in connection with the acquisition of DekaBank, a leading German fund provider.
- Representing a leading international company in the nuclear sector on various EU competition matters, including an anti-trust proceeding before the EU Commission.
- Advising an international standardisation organisation in the context of a European Commission abuse of dominance proceeding against a leading US company and on compliance matters.

Languages. German, English, French

Professional associations/memberships. Member of the Studienvereinigung Kartellrecht and member of the Constitution and Public Law section of DAJV; Member of the Steering Committee for Telecoms, Internet and Media of the AmCham in Germany.

Publications

- *Hoffnung auf Schadenersatz von den "Schienenfreunden"*, in: *Der Neue Kämmerer*, 26 February 2013.
- *Permanent im Spannungsfeld*, in: *Finance Magazine*, pages 20-21, 10 February 2013.
- *Competitor-Cooperation. Der schmale Grat zwischen Kooperation und Wettbewerb*, in: *Deutscher AnwaltSpiegel*, 19 October 2011.

- *Informationsaustausch zwischen Wettbewerbern, in: Markenartikel 4/2011, Europäische Kommission, pages 72-73, 14 April 2011.*