Public Procurement World - Germany

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# 1. The Laws

## a. What is the applicable legislation?

German procurement law is guided by rules contained in three different levels of regulation: first, in budgetary (Federal and State Budgetary Regulations – "BHO" and "LHO") and competition law (German Act Against Restraints on Competition – "GWB"); second, in delegated legislation (Procurement Ordinance, *Vergabeverordnung* – "VgV", Procurement Ordinance for the sectors of water, energy and transports (utility sectors), *Sektorenverordnung* - "SektVO", Procurement Ordinance for the sector of defense and security, *Vergabeverordnung Verteidigung und Sicherheit -* "VSVgV", Procurement ordinance for concessions, *Konzessionsvergabeverordnung* - "KonzVgV") and third, in the German Procurement Regulations for Works – "VOB/A". The provisions contained in the GWB are elaborated in the VgV, SektVO, VSVgV, KonzVgV and in the VOB/A (part 2 and 3).

Public procurement law under the GWB and the Procurement Ordinances as well as – for public works– under the VOB/A (part 2 and 3) only applies if the thresholds regarding the contract values contained in the European Directives are equalled or exceeded. Current values are €209,000 for supplies and services and €5,225,000 for works. The threshold value for all kinds of contracts in the sectors of water, energy and transport (utility sectors) is €418,000. Specific other threshold values apply for Federal authorities and specific contracts regarding the military area.

Below these threshold values the VOB/A part 1 applies for the award of works contracts. As for supplies and services the Procurement Ordinance for the procurement of supplies and service contracts which do not equal the threshold values (*Unterschwellenvergabeordnung*-"UVgO") which entered into force in early 2017 applies. The UVgO replaced the old Procurement Ordinance for supplies and services (*Vergabe- und Vertragsordnung für Leistungen* – "VOL/A").

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

German procurement law is based largely on the EU Directives on public procurement. These in turn are influenced by the WTO Government Procurement Agreement (GPA) as the European Union and each of its 28 Member States are signatories to the GPA. The scope of the GPA covers any law, regulation, procedure or practice regarding any procurement by any contractual means as soon as the procuring entity and the type of contract are listed in Appendix I to the GPA and the thresholds stated there are exceeded.

## c. What are the basic underlying principles of the legal framework?

As German procurement law aims largely at implementing the EU Directives on public procurement, it concentrates on principles resulting from European primary law. Thus, public contracts may only be awarded on the basis of a competitive award procedure, which must be transparent and non-discriminatory and respect the principles of economic procurement and proportionality. Additionally, the promotion of small business' interests must be considered. Aspects of quality and innovation as well as social and environmental aspects have to be taken into account, too. These principles have to be observed during every step of the procurement process and are further detailed in German procurement regulation.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

While, in principle, government procurement in the field of defense and security falls under the general EU procurement rules (Directive 2014/24/EU), these general rules do not accommodate the specificities of defense-related procurement contracts. Consequently, in the past, most EU Member States have opted to derogate from the general EU procurement rules for practically all defense and security related contracts by invoking Art. 346 TFEU (former Art. 296 EC Treaty), which allows for a derogation for national security reasons. The respective contracts were awarded to national rules which in many cases do not reflect European principles. Against that background EU Directive 2009/81/EC was introduced which offers tailor-made procurement rules for contracts in the defense sector and aimed at preventing derogation from procurement law based on Art. 346 TFEU. Consequently, under the regime of EU Directive 2009/81/EC derogation is only possible in very exceptional cases.

In Germany the procurement in the defense and security sector is guided by the Defense Procurement Ordinance (*Verteidigungsvergabeverordnung –* "VSVgV") that transposes Directive 2009/81/EC. The VSVgV sets forth procurement rules specifically tailored to the defense market. Thus, the VSVgV applies to sensitive public supply contracts and public service contracts, in the fields of defense and security and stipulates a number of specific procedural features tailored to the characteristics of sensitive public defense and security supply contracts. The applicable threshold value for this sector is € 418,000.

As for works contracts in the defense area, the regulations of the VOB/A (part 3; VOB/A-VS) apply to contracts that equal or excels the threshold value of €5,225,000.

However, reflecting Art. 346 TFEU German procurement law does not apply to the procurement of hard military equipment, civil goods and dual-use goods that are related to interests of national security.

In contrast, there are no special regulations applicable to aerospace procurement. The award of contracts in this field is governed by general German procurement laws (see above under a).

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

Contracting authorities that have to observe the procurement provisions include all classic public authorities (bound to budgetary law), especially the Federal Government, the State Governments and municipalities, as well as co-operations thereof.

Additionally, other legal entities under public law which are established for the specific purpose of meeting non-commercial needs in the general interest are subject to German procurement law if they are controlled by the aforementioned classic public authorities. Control in this sense is executed if the entity is mainly financed or supervised by a public authority or associations of such. An entity is mainly financed by a public authority if it is for the most part individually or jointly through participation or in some other way financed by classic public authorities and their special funds or associations of such authorities. Supervisory control is executed if public authorities supervise the management or appoint more than half of the members of one of the management or supervisory boards of the entity. Examples of entities covered by the procurement laws are universities and public insurance funds.

## b. Which private entities are covered by the laws?

Procurement provisions also apply to legal entities under private law which are established for the specific purpose of meeting non-commercial needs in the general interest if they are controlled by classic public authorities. Control in this context has the same meaning as described under a. above.

Furthermore, other private entities have to observe public procurement law if their activities are funded by a public authority by more than 50 percent. Covered activities are e.g. construction and operation of hospitals, construction and operation of sport facilities sports, schools, leisure facilities, universities, waste management or regional development.

Additionally, public procurement law applies to any natural or legal person which executes activities in the sectors of water, energy and transports (utility sectors) if the execution of this activity is based on special or exclusive rights granted by a competent public authority or if a public contracting entity individually or together with others may exercise a dominant influence over the private entity.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Co-operations between contracting authorities are exempted from public procurement law if certain legally defined conditions are met. That is the case if the contract is awarded to an entity that is predominantly controlled by the contracting authority awarding the contract (or controls the contracting authority), the contractor carries out the essential part of its activities for the controlling contracting authority and no private equity investment in the contractor's entity exists.

Furthermore, the procurement law does not apply to public-public co-operation on provision of public services governed solely by considerations relating to the public interest.

## d. Which types of contracts are covered?

German procurement law only covers public contracts which are defined as contracts for pecuniary interest concluded between contracting authorities and undertakings regarding supplies, works or services. Thus, German law distinguishes between supply, works and service contracts, specified in paragraphs 2 to 4 of section 103 GWB:

Supply contracts are contracts for the procurement of goods involving in particular a purchase or hire purchase or leasing, or a lease with or without a purchase option. The contracts may also include ancillary services.

Works contracts are contracts either for the execution or the simultaneous design and execution of works or a work which is the result of civil engineering or building construction work and is to fulfil a commercial or technical function, or for the execution of a work by a third party corresponding to the requirements specified by the contracting entity.

Service contracts are contracts for performances which do not fall under supply or works contracts.

Transposing the EU Directives 2014/24/EU and 2014/25/EU, framework agreements and design contests are now included in the scope of public procurement law. Design contests are procedures which enable the contracting public authority to acquire a plan or a design selected by a jury after being put out to competition with or without the award of prizes.

For framework agreements please refer to f. below.

For concession contracts please refer to h. below.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

Section 132 GWB that transposes Art. 72 of the Directive 2014/24/EU differentiates between changes which require a new procurement procedure and those which do not.

According to paragraph 1 of section 132 GWB a new procurement procedure is required if the change to the contract is substantial. This is the case if new conditions are introduced under which:

different bidders could have been admitted to the procurement procedure; or

a different bid could have been accepted; or

if the new conditions could have attracted more bidders.

A new procurement procedure is further required if:

the change modifies the contractual economic balance in favour of the bidder; or

the contract is substantially extended; or

the contractor is replaced.

However, the transfer to a new contractor does not require a new procurement procedure where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of:

an unequivocal review clause or option; or

universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established and it is provided that the transfer does not entail other substantial modifications to the contract; or

in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors.

Additionally, a new procurement procedure is not required under paragraph 2 of section 132 GWB if:

the original procurement documents contain unequivocal review clauses or options which provide information regarding the conditions, the scope and the type of admissible changes and do not modify the overall economic characteristics of the contract; or

unforeseen additional supplies, works or services become necessary and the current contractor cannot be replaced for economic or technical reasons and if the costs of the original procurement are not increased by more than 50%; or

the change becomes necessary due to unforeseeable events, the overall characteristics of the contract are not modified and the costs of the original procurement are not increased by more than 50%;

Under paragraph 3 of section 132 GWB a change in the existing contract does not require a new procurement procedure if the overall characteristics of the contract are not modified and the value of the contractual change:

does not equal the threshold values contained in the European Directives; and

does not exceed 10% of the original supplies and services, or – in case of works – does not exceed 15% margin.

The contracting authorities has the right to terminate the contract with immediate effect in case a contractual change has been made without a new procurement procedure in violation of section 132 GWB.

## f. What is the applicable regime for framework agreements?

Framework agreements are contracts designed to set out the general conditions for future procurements during a given period of time and especially the cost of those procurements. According to paragraph 5 of section 103 GWB, framework agreements are subject to public procurement law. The contracting authority has to conduct a competitive award procedure to award a framework agreement. The contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified. As a general rule, the length of a framework agreement is limited to four years. Framework agreements with multiple suppliers are admissible. Contracts based on a framework agreement can only be awarded under the conditions laid down in the framework agreement. The contracting authority may conduct a competitive procedure for the award of single orders under the framework agreement with multiple suppliers if this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement. The award decision should be based on objective reasons that have been set out in the procurement documents for the framework agreement.

## g. What is the applicable regime for public-private partnerships (PPPs)?

Public procurement law applies if a PPP is conducted based on an operating or a concession agreement. As a general rule, operating agreements will be considered as services contracts, which are subjected to public procurement law. Consequently, the selection of the private partner for the PPP requires a bid procedure in order to prevent avoidance of the public procurement laws according to German public procurement law or in case of a concession pursuant to specific rules under KonzVgV (for further details on concessions please see under h. below).

As a general rule, a PPP is awarded in a negotiated procedure under the conditions set out by the contracting authority in the procurement documents. Usually, the contracts are awarded based on price and quality criteria. An award based solely on the price criterion is uncommon.

In case of an institutional PPP, i.e. the formation of a separate legal entity in which the contracting authority holds shares, procurement law applies on the formation of the legal entity if from an economic perspective with the formation the contracting authority simultaneously awards the procurement contract e.g. by providing the newly formed company the right to provide certain works on the property of the contracting authority. Accordingly, the award of the actual works or service contract does not require a second award procedure if the formation of the legal entity was conducted pursuant to procurement law and the scope of the contract to be awarded to this legal entity was disclosed in said procedure.

## h. How are concessions dealt with?

On 26 February 2014 the European Parliament and the Council adopted an all new directive creating specialized procurement law provisions on the award of concessions (Directive 2014/23/EU). This directive has been transposed into national German law on 12 April 2016. Concessions are now submitted to the separate regime of the KonzVgV if the estimated contract value equals or exceeds EUR 5,225,000. Accordingly, contracting authorities are obliged to address the award of a concession by way of publication of a concession notice (which is an equivalent to a contract notice) in the Official Journal of the European Union and have to comply with a differentiated procurement regulation. However, the contracting authority has some discretion regarding the organization of the procedure leading to the choice of concessionaire as far as this procedure is transparent, non-discriminatory and proportionate. For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The awarding of contracts is also subject to the provisions of antitrust law which prohibits agreements between competing enterprises that would effect the prevention, restriction or distortion of competition. Consequently, bidders are excluded from procurement procedures who are party to anti-competitive agreements regarding bidding. Anti-competitive agreements in this context are all practices capable of restricting or distorting competition. The term anti-competitive agreement is therefor not restricted to illegal practices, but also includes any other agreements and practices which do not comply with the principles of competition.

Furthermore, bid rigging (including taking and giving bribes in the context of public procurement) may also result in criminal charges according to German criminal laws.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

German public procurement law offers several different ways to award a contract. Contracting authorities may employ the following procedures:

open procedure, in which all interested contractors may submit a bid;

restricted procedure (two-step-procedure), in which, first, a call for competition is published and the contracting authority selects a limited number of the interested economic operators to submit a bid subsequently;

negotiated procedure with call for competition, in which, first, a call for competition is published and the contracting authority selects a limited number of the interested economic operators to submit a first bid and subsequently negotiates the terms of the contract based on the first bids with a call for final bids when negotiations have been concluded;

competitive dialogue, in which a contract notice is published and the contracting authority conducts a dialogue with the candidates admitted to that procedure with the aim of developing one or more suitable alternatives capable of meeting its requirements and on the basis of which the chosen candidates are invited to bid;

innovation partnership, in which the procedure is structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works; and

in exceptional cases: direct awards, i.e. award of a contract without publishing a contract notice and/or without conducting a formal competitive procedure (also called: negotiated procedure without call for competition)

As a general rule, the open procedure as well as the restricted procedure are always permissible. Circumstances which permit the negotiated procedure, the competitive dialogue or the innovation partnership are determined in the procurement provisions. Direct awards, as the only non-competitive option, are only admissible in very exceptional cases (please refer to 7. below).

## b. What status do electronic means/procedures have?

According to paragraph 5 of section 97 GWB and paragraph 1 of section 9 VgV, which transpose Art. 22 of the Directive 2014/24/EU, contracting authorities are required to use electronic means for the entire procurement procedure by 18 October 2018 if the threshold values contained in the European Directives are equalled or exceeded.

Additionally, section 120 GWB lists the following electronic methods and tools for procurement procedures which are at present already available for use:

dynamic purchasing systems which are operated as a completely electronic process and are open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria. They may be used by contracting authorities for commonly used purchases the characteristics of which, like being generally available on the market, meet the requirements of the contracting authorities;

electronic auctions in which contracting authorities structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the bids, enabling to rank the submitted bids using automatic evaluation methods set out by contracting authorities;

electronic catalogues which allow bidders to submit bids in accordance with the technical specifications and formats established by the contracting authority. They may be used especially for framework agreements and may contain images, price information and product descriptions.

For public procurements below the threshold values, the use of electronic means is also mandatory according to the UVgO which applies for the procurement of supplies and services which do not equal the threshold values enters into force in the beginning of 2017. The UVgO provides that public authorities are required to use electronic means. Furthermore, the contracting authorities may apply dynamic purchasing systems, electronic auctions and electronic catalogues.

## c. Where are contract notices, i.e. calls for bid, published?

EU-wide calls for bids are published on the website Bids Electronic Daily (TED):

<http://ted.europa.eu/>

TED is the online version of the Supplement to the Official Journal of the EU, dedicated to European public procurement.

In Germany, procurement procedures with the Federal Government can be viewed on the website: [www.evergabe-online.de](http://www.evergabe-online.de/). Calls for bid are also published on the website: [www.bund.de](http://www.bund.de/).

## c. Can certain prospective bidders be excluded from the competition?

The exclusion of certain prospective bidders is regulated in sections 123 and 124 GWB as well as in identical regulations in the procurement ordinances. According to these provisions, bidders who have been convicted of any of the offences listed therein have to be excluded from the competition. The relevant offences include, e.g., forming criminal organizations, money laundering, fraud and giving bribes as an incentive to the recipient's violating his official duties.

The contracting authority may furthermore exclude a bidder in cases of anticompetitive behaviour (e.g. if the respective bidder has entered into an agreement with other bidders aimed at distorting competition or if the respective bidder has made attempts to unduly influence the contracting authority), bankruptcy or upcoming insolvency, a negative contracting track-record, a grave professional misconduct, a conflict of interest, a prior involvement in the preparation of the bid which grants the respective bidder a competitive advantage which cannot be balanced otherwise (see also below under e.), or supplying misleading information during the procurement procedure. The exclusion has to be proportionate.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Contracts are awarded to economic operators that are suitable with regard to the subject-matter of the contract. A bidder or an applicant respectively is suitable if he possesses technical knowledge, efficiency and reliability. Economic operators possess the required technical knowledge if they have the knowledge and experience to accomplish the task subject of the contract. Specific experience in similar tasks will be considered. Efficiency requires the economic operator to possess the technical, personal and financial resources to guarantee appropriate performance of the contract. An economic operator qualifies as reliable if he guarantees contract performance in due form and, in particular, in line with applicable provisions of law (tax, social, criminal, etc.). Additionally, he has to provide the ability to carry out the contract within the time limits set by the contracting authorities and follow the instructions given by them.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Prequalification is an option according to paragraph 3 of section 122 GWB for the procurement of supplies, services and works. In order to prequalify, the applicant has to provide proof that he possesses general technical knowledge, efficiency and reliability for a certain type of contract/performance. In this perspective, the economic operator has to submit all of the necessary documents to the competent prequalification authority (so called "*PQ-Stelle*") once a year. If the provided information withstands the authority's examination, a prequalification certificate containing a certificate number is issued to the company. The economic operator is then listed in the prequalification database of the competent authority and can be tracked via the certificate number. The company can apply for a public procurement by simply providing the certificate number to the contracting authority.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

Bidders are enlisted in a so-called "blacklist" if they have been convicted of an offence that leads to a mandatory exclusion from the procurement procedure (see under c. above). Blacklists for bidders exist in several states (e.g. Northrhein-Westphalia, Hessen). A blacklist on the federal level is planned.

Following Art. 57 of Directive 2014/24/EU, section 125 GWB provides that a bidder can self-clean in order to un-list. In this perspective, evidence has to be provided that:

the bidder has compensated all damages caused by the law infringement or has engaged itself to do so;

the bidder has actively helped to solve the committed offense; and

the bidder has taken adequate technical, organisational and personnel-wise measures to prevent future law infringements.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

In order to prevent conflicts of interest, a company that was involved in the set-up of a procurement procedure (i.e. drafting of or advising on the specifications) can be excluded from said procedure pursuant to paragraph 1 no. 6 of section 124 GWB if the involvement of the company in the set-up has led to a competitive distortion that cannot be remediated by other, less incisive measures (e.g. longer deadlines to submit a bid).

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

As a general rule, bidders may combine to submit a bid and form a bidder consortium. Under national procurement law a bidder consortium is treated as one individual bidder. Consequently, individual members of bidding consortia do not have standing to file an appeal for review on behalf of the consortium. As detailed in paragraph 3 of section 160 GWB, only the consortium itself can have a legitimate "interest in the contract", but not individual members who did not submit an offer and therefore could not be awarded the contract. Members of a bidder consortium are free in their choice of legal form for the purpose of the competitive procedure. As a general rule, bidders prefer to establish a consortium in the form of a civil partnership (*Gesellschaft des Bürgerlichen Rechts*). After the award of the contract, the contracting authority may require that the bidder consortium assumes a specific legal form if this is required for the proper execution of the contract.

Bidder consortia have to name all of their members in the submitted bid and nominate one member as the authorised representative for the conclusion and the execution of the procurement contract.

The bidding consortium as a whole has to possess the required technical knowledge and efficiency as well as the necessary capacities to execute the contract. Every member of the consortium has to prove individually that they do not fulfil the grounds for an exclusion from the competitive procedure (cf. under 4 c.). If deemed necessary, the contracting authority may set up specific requirements as to how a bidder consortium provides the proof of capability and how the contract should be executed by the bidder consortium. Such requirements have to be justified by objective grounds, e.g. the contractual subject-matter, as well as be proportionate.

Bidder consortia may be excluded from the competitive procedure if the formation of the bidder consortium itself is considered anti-competitive und thus could potentially distort free competition. This is the case if the participating companies are competitors on the same market. However, a bidder consortium cannot be excluded on such grounds if the combined bidding is justified because:

the individual members of the consortium are not able to submit a bid on their own because they lack the required capabilities; or

the members of the consortium are otherwise engaged in a way that prevents them to make use of their capacities; or

only the association of the companies enables them to submit a promising bid, i.e. they would not have been able to submit a bid with a chance of receiving the award on their own.

It is up to the participants of a bidding consortium to convince the contracting authority that their association does not present grounds for exclusion.

In contrast, companies which are not competitors on the same market may form a bidder consortium without raising the general suspicion of a competitive distortion.

## g. Can members of a bidder consortium be changed during a procurement procedure?

For contract awards in open procedures it is commonly accepted judicial practice that the establishment of bidding consortia or a change in their composition is generally prohibited between bid submission and bid award. However, the contracting authority may not exclude the newly composed bidder consortium from the competition if it is suitable, i.e. it possesses technical knowledge, efficiency and reliability with regard to the subject matter of the contract (for selection criteria see above under 4 a.).

For restricted procedures as well as negotiated procedure with call for competition, a change of the composition or the establishment of a new bidding consortia is generally prohibited after invitation to bid. However, the exclusion of the newly composed bidder consortium is at the contracting authority's discretion. Accordingly, the contracting authority may

in the case of a restricted procedure allow the newly composed bidder consortium to submit a bid;

in the case of a negotiated procedure with call for competition negotiate with the newly composed bidder consortium.

Please note that pursuant to the MT Højgaard und Züblin decision of the European Court of Justice dated 24 May 2016 the contracting authorities may allow the bidder to submit a bid even if the original bidder consortium does not exist anymore. This decision has not been reflected by the national case law, yet.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Related bidders are those which belong to the same group or holding or are otherwise related by corporate means. It is refutably assumed that the participation of related bidders in the same procurement procedure with competitive bids is an anti-trust law violation because it is assumed that information relevant for drafting the bids is exchanged between entities of the same group or holding. However, this assumption can be reversed if the bidders succeed to prove that they have taken appropriate measures to ensure that their bids are drafted independent and confidential. Therefore, the bidders have to disclose:

if and to what extent the parent company or affiliates may have influenced their bidding;

if the bidding companies are subjected to a certain group structure/policy which may have influence on their bidding;

if and on what company level coordination agreements exist;

if and to what extent technical, organisational and personnel-wise interrelations exist between the companies; and

if the companies operate spatially divided.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

There are no special statutory regulations for foreign companies to participate in a procurement procedure as this would violate the EU procurement law. There are also no special requirements under German Public Procurement law for the legal representative of a foreign company as this would also lead to a restriction of competition.

However, the contracting authorities may require (and regularly do so) that the whole procurement procedure is held in German language which means in particular that

suitability proofs (e.g. certificates regarding a quality system) which are in a foreign language have to be translated into German,

the bid (i.e. description of services offered) including all annexes (e.g. handbooks, brochures) have to be submitted in German,

in case of negotiated procedures negotiations are conducted in German.

# 5. Specifications

## a. Are there any rules on the specifications?

Under paragraph 4 of section 122 GWB and paragraph 3 section 127 GWB specifications have to be proportionate and relate to the subject-matter of the procurement procedure. Accordingly, unduly burdensome or risky requirements are not permissible if they are considered disproportionate.

The contracting authority may formulate technical specifications following the hierarchy from national standards implementing European standards to European and international standards, certifications and specifications derived from national standards, certifications and specifications. Alternatively, the contracting authority can set forth performance or functional requirements for the required works, services or supplies instead of specific technical specifications. Additionally, the contracting authority may combine technical specifications with performance and functional requirements as far as the subject-matter of the procured contract requires that.

The bid has to comply with technical requirements set forth by the contracting authority. This rule applies for open and restricted procedure. In case of a negotiated procedure bidders are expected to deliver, develop and negotiate technical specification with the contracting authority.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

Bidders are not allowed to change the specifications. In case of violation, the contracting authority has to exclude them from the procedure. Against that background, the submission of own standard terms of business results in exclusion from the procurement procedure because it is considered a change of the specifications.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

As the protection of Small and Medium Enterprises is one of the main objectives of the Directive 2014/24/EU, paragraph 4 of section 97 GWB also provides that the interests of Small and Medium Enterprises (SMEs) shall be considered in procurement procedures. As a main consequence of this requirement, the contracting authority shall divide all contracts into lots in order to guarantee an award chance for SMEs. A deviation from the principle of lot division requires an economic or technical justification resulting form the subject-matter of the contract that has to be documented by the contracting authority in writing. However, the contracting authority may reserve the right to award several lots to one bidder. This has to be reflected in the contract notice.

Additionally, following article 58 of the Directive 2014/14/EU, under national procurement law the contracting authority can as a suitability criterion only request a minimum annual turnover twice as high as the value of the bid, except if the risks of the bid require a higher amount. This limitation is also aimed at guaranteeing a reasonable chance to participate for SMEs.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

The contract has to be awarded to the most economic bid or offer. This includes the consideration of the price because the award criterion of the most economic bid/offer is aiming at an optimum price-performance ratio. According to case law the price can be the only criteria for awarding a contract if the contracting authority failed to define other criteria in the procurement documents. Following Directive 2014/24/EU, paragraph 3 of section 97 GWB provides that the aspects of quality, innovation as well as social and environmental aspects have to be taken into account when awarding a contract. However, under paragraph 1 of section 127 GWB the consideration of those aspects for the determination of the most economic offer is not mandatory. In fact, contracting authorities can establish award criteria at their discretion provided that they are linked to the subject-matter of the procurement contract. The award criteria and their weighting have to be set out in the contract notice or in the procurement documents.

## b. Are there any limitations regarding the offered bid price?

The contracting authority has to request clarification from a bidder if his bid appears to be abnormally low. If this clarification does not lead to a satisfactory result, i.e. an economic explanation for the offered low price, the contracting authority can exclude the bid, following paragraph 3 of section 60 VgV.

## c. Are there any rules on alternative bids?

If the contracting authority does not declare the submission of alternative bids as required or permitted, their submission is not admissible. If they are admitted, an alternative bid has to be linked to the subject-matter of the procurement contract. In any case, submitted alternative bids have to be assessed in the same way as main bids. In this perspective, award criteria have to be established in a manner that they are applicable to both main bids and alternative bids. Additionally, the contracting authority has to set out minimum requirements for alternative bids in the procurement documents and establish in what manner they have to be submitted.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

As mentioned above under 3 a., German public procurement regulations permits direct awards, i.e. negotiated procedure without call for competition. This procedure differs from all other awards procedure as it generally does not provide for any competition. The use of this procedure is limited to certain determined cases which are enlisted – for service and supply contracts - in paragraph 4 of section 14 VgV following article 32 of the Directive 2014/24/EU. For works as well as contracts in the utilities sector types of public contracts the same rules apply under the respective procurement regulations. Accordingly, direct awards are permissible

where no bids or no suitable bids or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests.

where the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs.

where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.

insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years.

for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services, when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities or when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion. However, the aggregate value of contracts awarded for additional works or services may not exceed 50 % of the amount of the original contract.

for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure. As soon as the first project is put up for bid, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7. This procedure may be used only during the three years following the conclusion of the original contract.

for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotiations.

for supplies quoted and purchased on a commodity market.

for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations.

## b. What are the consequences for violation of the competitive bidding requirement?

Public contracts which are awarded without any kind of bid procedure, i.e. directly awarded to one entity without meeting the conditions for such a direct award set forth in the procurement regulations, are deemed void. However, the voidance of the contract has to be declared in a judicial review procedure (*Nachprüfungsverfahren*). A frustrated bidder or a company interested in the contract has to initiate such a review procedure within certain time limits (see 8 d below). If those time limits expire and no review procedure has been initiated, the directly awarded contract cannot be challenged as void anymore.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

Originally, in Germany, public procurement law did not contain remedies or an enforcement mechanism. Only in 2001 the German legislator introduced a legal protection system in order to comply with the European Directives calling for an effective remedies system. According to the legal protection system a bidder may file a petition for judicial review (*Nachprüfungsantrag*) claiming a violation of the provisions on public procurement procedures. The aim of the judicial review procedure is to remediate any violations of the procurement procedure laws during the procedure, i.e. before the award of the contract. In consequence, as a general rule, once a contract has been awarded, legal protection pursuant to public procurement law is not available anymore. Post award a violation of procedural provisions can only be reviewed in exceptional cases. The most common one is an unlawful direct award. As mentioned above (see under 7b), a contract which has been directly awarded in violation of public procurement law provisions can be challenged as void (ex tunc).

Against that background, in order to guarantee an effective remedies system, the contracting authorities are obliged to notify via electronic communication all participants of a procurement procedure on their intention to award the contract to a competitor at least 10 days prior to the award. This shall enable bidders to file a petition for judicial review before the award. Contracts which are awarded without this so-called preliminary information (*Vorabinformation*) are void. However, such voidance has to be declared by the review bodies (please refer to c below) upon a petition of a frustrated bidder.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

In case of an infringement of procurement rules bidders can claim damages according to general civil law provisions. This may include not only reimbursement of the costs for preparation of the bid and participation in the procurement procedure but also consequential damages caused by the unlawful award. In addition, procurement provisions also provide a specific right to bring forward an action for damages against a competing bidder who abused its right of judicial review by a claim obviously unjustified or based on false statements or on a misrepresentation of facts. However, it has to be noted that any claims for damages are very rare and almost never successful as the claimant can almost never prove for certain that without the violation he would have received the award or that the claim of the competitor was actually *obviously* unjustified.

The procurement law legal protection system detailed above only applies to procurement procedures for contracts equalling or exceeding the European threshold values (see 1a above). In this case it precedes any other remedies potentially available. In contrast, in case of contracts below the applicable threshold values, bidders and applicants have no standing for filing a petition for judicial review pursuant to public procurement law provisions. However, German higher administrative courts have ruled that below the thresholds unsuccessful bidders have access to civil or administrative courts to review the legality of the contracting authority's decision. This also includes the assertion of a claim for damages.

In addition, there are remedies available outside German procurement regulations under trade agreements, and under contract law.

## c. Is there a specific forum before which procurement disputes are heard?

Judicial review according to public procurement law in Germany is guaranteed on a two-level basis: First instance review is granted by Judicial Review Chambers (*Vergabekammern*) which are part of the administrative authority. Judicial Review Chambers exist on a federal and on a state level. Appeals against decisions of the Judicial Review Chambers are dealt with by specialized Review Senates at the Higher Regional Courts (*Vergabesenate der Oberlandesgerichte*).

*Review by Judicial Review Chamber*

Petitions for judicial review of federal procurement procedures have to be filed with the Federal Judicial Review Chambers which are constituted within the Federal Cartel Office (*Bundeskartellamt*). Procurement procedures initiated by state authorities are reviewed by the Judicial Review Chambers of the respective state. The Judicial Review Chambers work and decide independently.

Judicial Review Chambers may review the award procedure with regard to all aspects of public procurement law. Accordingly, Judicial Review Chambers may grant a wide range of remedies such as execution of lawful measures and declaration of the unlawfulness of the award. Judicial Review Chambers are obligated to rule within a period of five weeks and give reasons for its findings in writing, although in exceptional cases this period might be extended.

*Review by Review Senates*

The final decision of a Judicial Review Chamber which constitutes an administrative act can be challenged with an immediate appeal (*sofortige Beschwerde*) to the Review Senate of the Higher Regional Courts. An immediate appeal must include a statement of the grounds for appeal and must be filed within two weeks after the Judicial Review Chamber has served its decision to the respective party.

The Review Senate acting as court of appeal can either replace the Judicial Review Chamber's decision by its own or annul the decision of the Judicial Review Chamber and recommit the contracting authority to remedy any procurement law violation under the condition to consider the reasons given by the Review Senate.

## d. Are there any timing requirements for the review?

For obtaining legal protection, the German legislator has stipulated certain. If a bidder recognizes an infringement of procurement law provisions during the procurement procedure, he must file an objection vis-à-vis the contracting authority before filing a petition for judicial review. This objection with the contracting authority has to be filed within:

10 days since the bidder gained knowledge of the alleged violation; or

the time limit set for bids in the call for bids if the alleged violations are noticeable in this call; or

the time limit set for bids in the procurement specifications if the alleged violations are noticed only after the specifications have been issued.

Following the objection, the petition for judicial review has to be filed within 15 days after the bidder has received the dismissal of his objection by the contracting authority.

As mentioned above, it is also possible to challenge an award as void from the outset even after the conclusion of the contract. Such a challenge has to be filed with a Judicial Review Chamber before the expiry of at least 30 calendar days with effect from the day following the date on which:

the contracting authority published a contract award notice in the Supplement of the Official Journal of the European Union; or

the contracting authority informed the bidders and candidates concerned on the conclusion of the contract.

In any case, the petition for judicial review regarding the voidance of a contract has to be filed before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

As mentioned above (please refer to c above), an immediate appeal against a decision of a Judicial Review Chamber must be filed within two weeks after the Judicial Review Chamber has served its decision to the respective party.

## e. What are the main preconditions for review?

Besides filing an objection with the contracting authority as detailed above, a bidder only has standing to file a petition for review if he can claim 1) an interest to receive the award, 2) a violation of his individual rights resulting from public procurement law provisions and 3) demonstrate that as a consequence of such violation he suffered damages.

## f. What are admissible grounds for starting a review proceeding?

According to paragraph 2 of section 160 GWB, a review proceeding can be started if a bidder claims that its rights under GWB were violated by non-compliance with the provisions governing the awarding of public contracts. Inadmissible direct awards are the most drastic violations of procedural rules and are therefor an admissible ground for initiating review proceedings.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

A petition for judicial review filed with a Judicial Review Chamber suspends the award procedure, i.e. award of the contract is banned as soon as the petition for judicial review has been served on the contracting authority and at least until two weeks after the Review Chamber has issued its decision. A contract awarded despite of the suspension is void. Contracting authorities may apply for a lift of the suspension at any time during the procedure claiming that the general public interest requires premature award of the contract. However, the Review Chambers does not grant such a lift very often.

Filing of an appeal extends the suspension of the procurement procedure for at least another two weeks. In addition, the applicant can apply for a further extension of the suspension which – as a general rule – happens together with the appeal and is generally granted at least until the oral hearings has taken place.

With regard to the suspension of the award procedure the contracting authority may apply for an immediate lift and the court may render preliminary decisions on this issue (*Vorabentscheidung über den Zuschlag*). In its assessment as to whether the award shall be allowed prematurely, the Review Senate shall take account of the interests of the general public in the contracting entity carrying out its tasks efficiently. In its decision, the court shall also consider the prospects of success of the immediate appeal, the overall prospects of the applicant of winning the award in the award procedure and the interest of the general public in the quick conclusion of the award procedure.

Under paragraph 2 of section 168 GWB, once a contract has been awarded, the award cannot be reversed even if procurement rules have been violated. By way of exception, contracts awarded directly without meeting the criteria for such direct awards are void and can be subject to the judicial review.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

Under paragraph 1 of section 168 GWB the Judicial Review Chamber can undertake "adequate measures" to eliminate the violation of rights in the affected bid procedure and prevent the infliction of damage if the review proceeding is successful. In the legal practice of the Awards Senates and Judicial Review Chambers "adequate measures" within the meaning of paragraph 1 of section 168 GWB include:

the prohibition of the award of the contract by continuing the current procedure;

the obligation for the contracting authority to continue the current procurement procedure or to start a new procurement procedure in accordance with the Judicial Review Chamber's decision if the contracting authority is still willing to undertake a public procurement; or

the obligation for the contracting authority to suspend the procurement procedure if the infringement cannot be remedied. In this case, the contracting authority may publish a new call for bid in accordance with public procurement law.

In the rare and exceptional cases when the award of the contract to a certain bidder is the only rightful option due to the special circumstances of the individual case (e.g. if a bidder solely owns a required intellectual property right such as a patent or a utility model for the procured good) and the contracting authority is still willing to undertake the public procurement, the Judicial Review Chamber may directly award the contract to this bidder.

As mentioned above, a contract award cannot be reversed by judicial review proceedings. However, if the Judicial Review Chamber has found that the contract has been unlawfully awarded without a prior publication of a call for bids (direct award), the contract can to be declared void.

## i. How long does a judicial proceeding for review take?

First instance judicial proceedings for review take 5 weeks. However, the Judicial Review Chamber can extend the time due to the factual or legal complexity of the case in question.

For second instance judicial proceedings, the procurement legislation does not set a specific time frame in which a decision on an immediate appeal has to be rendered. In practice a second instance proceeding usually takes between 3-6 months.

## j. Must unsuccessful bidders be notified before the award? If so, when?

Yes, in order to enable frustrated bidders to seek legal protection within the applicable time limits, bidders must be notified before the award (*Vorabinformation*) "without undue delay". The procurement contract can only be concluded 15 days after the notification has been issued. In case of electronic transmission of the notification the contract may be concluded 10 days after the notification has been issued.

## k. Are review proceedings common?

Yes. According to statistics published by the Federal Ministry for Economic Affairs and Energy, in 2015 864 review proceedings have been conducted by the Judicial review Chambers, of which only 134 were successful. 159 review proceedings have been conducted by the Review senates of the Higher Regional Courts, of which only 34 were successful.

## l. Are damage claims in relation with procurement procedures common?

No. Although procurement law grants a specific claim for damages, it is uncommon for frustrated bidders to file such a damage claim (please refer to b above). The same is true for damage claims in accordance with the German Civil Code.

## m. What are the leading court decisions involving procurement disputes?

The number of decisions regarding public procurement issues is vast. National review entities alone issue about 1.000 decisions annually. The following recent decisions should be highlighted:

European Court of Justice (ECJ), Falk Pharma dated 2 June 2016 (Case C-410/14)

The ECJ's decision concerns the question if procurement law applies to the so called "open-house" contract scheme. Under this scheme a contracting authority procures goods or services from any economic operator who undertakes to provide the goods or services concerned in accordance with predetermined conditions. Instead of choosing one or a limited number of bids for award the contracting authority commits itself to enter into an agreement with every company that is willing to meet the predetermined conditions. The ECJ ruled that such a contract scheme shall not constitute a public contract within the meaning of Directive 2004/18 so that procurement law does not apply to this contract scheme. The decisive criterion for the ECJ was that the contracting authority does not make the essential choice between the economic operators from whom it will acquire the works, supplies or services that are subject matter of that contract but allows everyone to accede to that contract scheme throughout its validity at any time according to equal conditions.

Federal Supreme Court (BGH), decision dated 31 January 2017 (Case X ZB 10/16)

The BGH's decision concerns the question if a bidder has a right to require a price review of the prices offered by another bidder. The court ruled that as a general rule a bidder may require a price review of the concurrent bid if it seems unfairly low.

Higher Regional Court Duesseldorf (OLG Düsseldorf), decision dated 17 February 2016 (Case VII-Verg 41/15)

The OLG Duesseldorf's decision concerns the question of a potential distortion of competition due to the fact that the members of bidder consortium are active in the same market. The court allowed the cooperation of such bidders in a consortium if

the companies could not have successfully participate in the procurement procedure individually because they are not able to submit a bid on their own due to the lack of capabilities required for contract performance; or

the members of the consortium are otherwise engaged in a way that prevents them to make use of their capacities for the contract at hand; or

only the cooperation of the companies enables them to submit a bid with the chance of success, i.e. they would not have been able to submit a bid with a chance of receiving the award on their own.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Regulation PR No. 30/53 on Pricing in Public Contracts, which is often referred to in bid documents, is aimed at ensuring stricter observance of market principles in public contracts. The regulation dates from 1953 when market pricing was not common but the determination of prices was made by official authorities. Despite of its age, it is still common in Germany to refer to this regulation in public contracts. The regulation PR No. 30/53 is a tool to guarantee a fair market value for contracting authorities. As a basic rule, contracting authorities are supposed to pay market prices unless a market price does not exist for the requested services or goods. In the latter case, the regulation sets forth rules on how to determine what price the contracting authority has to pay. The most important factor to determine prices are the costs of the supplier of goods or the provider of services, respectively. Costs in this context also include a certain share of profit. If possible, cost prices are to be determined on a standardized basis, i.e. consistent for similar types of goods or services. Only if standardization is not possible, individual costs of suppliers and providers are the relevant basis for cost determination. Accordingly, the aforementioned regulation PR No. 30/53 is only relevant if market pricing does not exist for the respective services/goods.

## b. Does a specific contract law apply for public contracts?

No, in general, general civil law applies to public contracts in the same way as to any private contract.

However, some specific rules apply concerning the termination of the contract. According to public procurement law requirements the contracting authority has the right to terminate the contract under the following circumstances:

there has been made a significant change to an existing public contract that would have required a new procurement procedure according to section 132 GWB, however such re-tender did not take place (see above under 2 e.).

a reason for mandatory exclusion according to paragraph 1 to 4 of section 123 GWB existed at the time of the contract award.

the public contract should not have been awarded to the contractor as this has led to a serious violation of the obligations out of the TFEU or out of the provisions of part 4 of the GWB, which has been determined by the ECJ in a proceeding following section 258 TFEU.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

No.

## b. Are there any specific laws or practices that apply in the defense sector?

In the defense sector, the Defense Procurement Ordinance (*Verteidigungsvergabeverordnung* – "VSVgV"), which transposes the European Directive 2009/81/EC, applies. Public contracts in the defense sector may only be awarded on the basis of a competitive award procedure, which must be transparent and non-discriminatory. The VSVgV also takes special requirements of the defense sector into account, such as the confidentiality of sensitive information and the security of supply.

## c. Are there any specific laws or practices that apply in the health care sector?

The directives of the EU prescribe only very few specific regulations for the procurement of works, supplies and services in the healthcare sector. According to section 130 GWB in the health care sector, more lenient procurement rules apply for some specific services, e.g. supply services for domestic help or nursing personnel, if the threshold of 750.000,00 € is equalled or exceeded. For such specific services in the health care sector, the contracting authority can freely choose the procedure as long as it grants a certain level of competition.

Apart from section 130 GWB, only the German Social Security Code Book V ("SGB V") contains some special provisions for the procurement of auxiliary devices (section 127 SGB V), drug discount agreements (paragraph 8 of section 130a SGB V) and supply services of family doctors (paragraph 4 section 73b SGB V).

Besides, the general procurement regime applies.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

The German Energy Industry Act (*Energiewirtschaftsgesetz*-"EnWG") contains special provisions for concessions regarding gas and electricity supply. More specifically, section 46 EnWG contains provisions for easement agreements used in the context of public rights of energy supply.

The Law on the Carriage of Persons *(Personenbeförderungsgesetz*-"PbfG") contains special provisions for the transport sector.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

The European Directives make the use of electronic communications in the procurement procedure progressively mandatory. In this perspective, electronic means of communication are already mandatory since April 2016 for certain phases of the procurement process including the electronic notification of bid opportunities and the electronic availability of bid documents. The progression of the use of electronic communications will happen by:

obliging central purchasing authorities to full e-tendering by April 2017, i.e. electronic means of communication, electronic submission of bids; and

making e-submission of bids mandatory for all contracting authorities and all procurement procedures by October 2018; and

adopting more detailed provisions to encourage interoperability and standardisation of e-procurement processes.

According to the directives, Member States and contracting authorities should remain free to adopt further measures regarding e-biding.

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