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PUBLIC PROCUREMENT LAW

IN THE FEDERAL REPUBLIC OF GERMANY

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1. INTRODUCTION

Public procurement describes the sector in which government agencies act as contracting entities for either works, goods or other services. With a part of 17 % of the German gross domestic product, the public procurement sector has a high economic relevance. Given this information, it is up to the State to ensure that tender procedures follow the principles of transparency, competition and equal treatment.

In regard to the federal structure of Germany, there are contracting authorities on the level of the Bund and the Länder. Furthermore, the districts, communes or other self-governing bodies are important purchasers as well.

The main goal of German public procurement law is to secure the interests of the enterprises and bidders and to make sure that the three principles of public contracting, transparency, competition and equal treatment, are inherent in every tender procedure.

2. LEGAL BASES

German public procurement law has its roots in both national and European law. During the last years, the law of the European Union became more and more important. First and foremost the Procurement Directives had a remarkable impact on the public procurement sector in Germany.

2.1 European law

In fact, the influence of European law to the German system of public procurement law keeps on growing. National public procurement law transposes the EU Procurement Directives 2004/17 and 2004/18 (EU Procurement Directives) into German law and integrates these directives into the existing legal structure of national procurement law. The judicial review system is highly influenced by the EU Remedies Directive 2007/66.

The Directives 2004/17 and 2004/18 succeed the former generation of Procurement Directives (Directives 93/36, 93/37 and 93/38). Most importantly, these directives set the so-called threshold values for public procurement which directly decide about the law applicable for the award of public contracts. If the value of a public contract equals or exceeds these values, then the contract needs to be advertised Europe-wide and in line with the law of the Directives.

The Public Sector Directive 2004/18 and the Public Utilities Directive 2004/17 also set the basic principles to be followed when awarding a contract. It is Art. 2 of Directive 2004/18 enshrining the principles of equal treatment and transparency while the principle of competition underlies the different procurement provisions of the Directive. German contracting authorities need to act in line with these principles.

For the first time the EU Procurement Directives 2004/17 and 2004/18 also stipulate that environmental aspects and as well as issues of sustainability have to be considered by public contracting entities when purchasing goods, services or works.

2.2 National law

German public procurement law consists of a multi-layered structure of legal rules. The rules of public procurement divide into three different levels of regulation:

On the first level there are the rules of budgetary law (BHO and LHO – Federal and State Budgetary Regulations) and competition law (GWB – German Act Against Restraints on Competition). On the second stage there is the Procurement Ordinance (Vergabeverordnung – VgV) and (as a special rule concerning utilities) the Utilities Regulation (Sektorenverordnung – SektVO). The latter are both acts of delegated legislation. The third level consists of the so-called procurement regulations which basically contain the most important procedural provisions regarding the award of public works and service contracts (Vergabe- und Vertragsordnung für Bauleistungen – VOB/A, Vergabe- und Vertragsordnung für Leistungen – VOL/A) and regarding contracts having

professional services as their object (Vergabeordnung für freiberufliche Leistungen – VOF).

Having a closer look on the system, the GWB with its 4th part is the flagship in German procurement law. The §§ 97 - 129 GWB contain the most important rules of public procurement. The fundamental procurement principles are enshrined in § 97 I, II GWB, subjective rights are conferred pursuant to § 97 VII GWB whereas the details of judicial review are laid down in §§ 102 - 124 GWB. It is of utmost importance that the GWB is only applicable if the threshold values are reached.

Setting the threshold values, the VgV complements the rules of the GWB. But its most important task is to ensure that the procurement regulations are applicable. In fact, it is only because of the VgV that the rules of the procurement regulations enjoy the status of norms producing external effects and providing subjective and enforceable rights besides the rules of the GWB. The neuralgic point of the German procurement system, however, is that the reference by virtue of the VgV is not comprehensive. Only the provisions laid down in sections 2 of the regulations of VOL/A and VOB/A are applicable for contracts exceeding the thresholds as only these norms transpose the provisions of the European Procurement Directives. Plus, the VOF is in itself only applicable above the thresholds.

The procurement regulations (VOB/A, VOL/A, VOF) contain additional rules for the tendering procedure. More concrete, they include the actual procedural rules whereas the GWB follows a more or less principle-based approach. These regulations, each covering a different type of contract, are not issued by the legislative authorities themselves which is why they are not considered “law” under the German law regime. In fact, these regulations were created by so called procurement committees. Once again, only the second parts of the VOB/A and the VOL/A as well as all provisions of the VOF produce external effect for above the thresholds contracts exclusively due to §§ 4 - 7 VgV. Below the thresholds, the situation is markedly different. There, the so-called budgetary solution is dominant. This means that neither the GWB nor the VgV is applicable. Plus, only the first part of the procurement regulations are employable – meaning that subjective and enforceable rights are not granted.

A specific characteristic of German public procurement law is that the award is recognized as the acceptance of an offer. In fact, the award switches the law regime from public procurement law to 'ordinary' civil law.

3. APPLICATION OF PUBLIC PROCUREMENT LAW

3.1 Important terms

For an overview of German public procurement law it is essential to know some of the important terms regarding the tendering procedure.

Probably the most important terms are the terms "selection and award criteria". Contracts are awarded to operators that are suitable with regard to the subject of the contract (see § 97 para. 4 GWB). A bidder is considered suitable if he possesses reliability, technical knowledge and efficiency. Award procedures are won by the most economically advantageous tender (see § 97 para. 5 GWB). Therefore the price is not the only decisive criterion. But without doubt, the price is still the most crucial factor when deciding about the most economically advantageous tender.

In fact, other criteria are now admissible due to the substantial public procurement law reform in 2009. These so-called "secondary criteria" are only permitted if federal or state law provides for them. § 97 para. 4 GWB now explicitly provides for the permission to consider social, environmental and innovative aspects if they are related to the subject-matter or the performance of the contract and either indicated in the contract notice or in the specifications.

§ 97 para. 3 GWB declares an obligation to take small and medium-sized enterprises into serious consideration as another specific characteristic of German public procurement law.

3.2 The tendering procedure

Basically there are four different ways in German public procurement law to award a public contract:

- Open procedure: In this procedure all interested contractors may participate and submit a bid;
- Restricted procedure: This is a 2-step-procedure. As a first step the contract authority publishes an invitation to participate. Then a limited number of the interested economic operators are selected by the contract authority to submit a tender;
- Negotiated procedure: In this procedure the contracting authority consults the economic operators of its choice either with or without a contract notice. The contracting authority negotiates the terms of the contract with one or more of the chosen operators (in fact, this procedure is chosen in Germany quite often);
- Competitive dialogue: This procedure starts with the contracting authority issuing a contract notice and a descriptive document setting out the authority`s needs and requirements. Then the contracting authority conducts a dialogue with the chosen economic operators the aim of which is to identify and define the means and solutions best suited to meet the requirements and satisfy its needs. The competitive dialogue is normally used in case of particularly complex contracts (e. g. Public Private Partnerships).

In general, the open procedure enjoys priority over the other procedures. Restricted procedure, negotiated procedure and the competitive dialogue are exceptional procedures and only permissible if an explicit exception allows their use.

A 'usual' tendering procedure starts with the contract notice in which the contract authority declares its interest to award a contract. The contract notice needs to give every

interested party sufficient information about the subject-matter of the contract so that the potential bidders can make their decision whether to participate in the procedure or not. In order to ensure that every candidate interested in the award procedure is able to participate, the contract notice has to be published in daily newspapers, on websites or other official publications. The tendering procedure ends with the award (Zuschlag) which is won by the most economically advantageous bidder.

4. LEGAL PROTECTION

The German remedy mechanisms available in procurement law are integrated in a two-stage system relating to the fact that German procurement law differentiates between contracts above and below the thresholds.

4.1 Above the thresholds

Full legal protection is only granted for public contracts above the thresholds. More concrete, judicial review for contracts above the thresholds bases on a two-level system. The first instance of judicial review is granted by the so-called Judicial Review Chambers (Vergabekammer). They exist on the State and on the federal level. Judicial Review Chambers are not part of the jurisdiction in the strict sense though. Decisions made by the Judicial Review Chambers therefore do not appear as judgments but rather as administrative acts (Verwaltungsakt), see § 114 para. 1 GWB.

On the second instance, decisions made by the Judicial Review Chambers can be challenged in front of specialized and experienced Review Senates (Vergabesenate) situated at the Higher Regional Courts (Oberlandesgerichte). The Judicial Review Chambers' decisions need to be challenged with an immediate appeal (sofortige Beschwerde) within two weeks.

Legal protection in German public procurement law is only granted with the following conditions to be fulfilled:

- an interest in the award by the bidder (generally proven by the submission of an offer)
- a violation of individual rights provided for by the public procurement law (§ 107 para. 2 GWB)
- a harm as a consequence of the violation of public procurement provisions
- a prompt complain to the contracting authority with regard to the asserted violation (§ 107 para. 3 GWB)

An application for review has a suspensive effect. That means that with an ongoing review by the procurement review chamber the contract authority is not permitted to award a contract to any bidder. Contracts awarded during a review procedure are void.

4.2 Below the thresholds

In tendering procedures below the EU thresholds, the GWB is not applicable. Such tendering procedures are only guided by budgetary law and the first part of the procurement regulations. Due to these circumstances the Judicial Review Chambers are not competent for legal protection and the fully equipped review system by the GWB is not available either.

Until lately it was even uncertain which Courts were held competent for review below the thresholds. In the meantime, it became the prevailing opinion that the civil courts have jurisdiction.

The Federal Ministry of Economics started a public consultation in summer 2010 in order to improve the review situation below the thresholds. This will certainly shape the future of legal protection for bidders applying for contracts with a minor value and it will certainly give better attention to the pecularities of public procurement law below the value thresholds. Nonetheless, legal protection below the EU thresholds will remain a hot topic.

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