

Public procurement contracting in Germany

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I. German law implementation of tenders under EU law

Step 1: "Budgetary solution"

German legislator initially only adapts budgetary regulations

Objective: Prevention of subjective rights of losing bidders

Consequence: Tender supervisory committees are responsible for reviewing tender procedures against which objections have been raised without this preventing the respective public-sector body from awarding the respective contract.

ECJ declares "budgetary solution" to be unlawful in Case C-433/93

Step 2: "Competition law solution"

- Legal protection: Introduction of new 4th section of German Act Against Restraints On Competition in 1999 (GWB, Sections 97 ff.)
Objective: Creation of subjective rights for losing bidders and effective supervision of tender procedures without excessively rapid award of contract
- Tender and Contract Regulations for Construction Services, Part A, Sections 2-4 (VOB/A)
- Regulations for the Award of Services other than Construction Services, Part A, Sections 2-4 (VOL/A)
- Regulations for the Award of Freelance Services (VOF)

Public tender law below the EC thresholds

- No formal legal protection in accordance with the provisions of the GWB; only informal opportunity to raise objections and possible legal protection via courts of law and/or administrative courts
- Not formally clarified whether the material provisions of Section 1 of VOB/A and VOL/A have external effect
- Legal mechanisms below the EC thresholds are questionable in terms of EU law

II. Requirements of bids and applications in German public-sector tender procedures

Formal approach, including with regard to:

- Prices
A range of specific (unit) prices must be disclosed in the bid documents; "mixed calculation" not permitted
- Signatures
A number of signatures is required on various individual documents (in some cases hidden)
- Subcontractors (name/address and parts of contract to be implemented) must be precisely specified in the bid documents
- Completeness of bid – including details – is vital

Wide range of formal requirements leads to a significant number of tender review procedures

- ➔ Even relatively minor errors in bids with no relevance from a competition perspective can constitute grounds for exclusion

Consequence:

- Around 1,300 tender review procedures p.a. (largest number in the EU)

Conclusion:

- Formal requirements greatly exceed the requirements of EU law (e.g. transparency, fair competition)
- Fundamentally different approach in the UK (no formalized approach, only 5-6 tender review procedures every year)

III. Parties involved in review procedures

First instance: Contract Award Chamber

- Lawyers not required for representation, as administrative review rather than formal court proceedings

Second instance: Higher Regional Court

- Every lawyer admitted to practice in Germany may act in an advisory and representative capacity in tender review procedures at the second instance (Higher Regional Court) (Section 117 (3) of the German Act Against Restraints On Competition)

However:

- In all other areas of law, lawyers must demonstrate practical experience in order to be admitted to the court of second instance

Technical and commercial staff at the principal

- No specific requirements in terms of qualifications
- Advisors “advertise” based on their specific experience
- Technical/commercial staff are subject to legal influence due to formal requirements and high number of tender review procedures
- Consequence:
 - If public-sector bodies wish to prevent the successful contestation of tenders, the respective teams must include highly specialized legal, technical and commercial staff