

The International Comparative Legal Guide to: Public Procurement 2010

A practical insight to cross-border Public Procurement



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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

As a Member State of the European Community (EC) Germany is subject to EC law. The EC has adopted the public procurement Directives 2004/17/EC and 2004/18/EC, which has meanwhile been fully implemented into German law by the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen - GWB*), the German Ordinance on the Award of Public Contracts (*Vergabeverordnung - VgV*), both having been revised in April 2009, as well as the new Ordinance on the Award of Public Contracts by Utilities, in force since September 2009 and the newly revised Procurement Regulations (*Vergabe- und Vertragsordnungen*).

However, German procurement law is characterised by its dichotomy. If the value of a contract equals or exceeds the relevant EU-threshold values, then pan-European invitations to tender must be issued pursuant to sections 2 of the Procurement Regulation for Public Works (*Vergabe- und Vertragsordnung für Bauleistungen - VOB/A*), the Procurement Regulation for Public Supplies and Services (*Vergabe- und Vertragsordnung für Leistungen - VOL/A*), and, as far as independent contract services are concerned, pursuant to the Procurement Regulations for the Award of Independent Contractor Services (*Verdingungsordnung für freiberufliche Leistungen - VOF*).

For public contracts below the EU-threshold values, the pertinent budgetary laws of the federal, state and local governments as well as the first sections of the VOB/A and the VOL/A respectively, are to be applied by the contracting entities bound by such laws. Tender notices merely have to be published on a national basis in this case. Threshold values (without VAT) as of January 1, 2010 according to EC Regulation No. 1177/2009 of 30 November 2009 are:

- for works contracts: EUR 4,845,000.00;
- for supply and service contracts: EUR 193,000.00;
- for supply and service contracts in the sectors of water, energy and transport (utilities): EUR 387,000.00; and
- for supply and service contracts entered into by supreme and superior level federal agencies: EUR 125,000.00.

Above the aforementioned EU-threshold values, the German procurement regulations have substantial statutory character: effective legal protection for candidates and bidders with respect to pan-European contract awards is ensured by an independent legal review procedure pursuant to §§107 *et seq.* GWB. Below the EU-threshold values, the procurement regulations are internal

administrative instructions, which in principle do not grant any actionable rights in favour of the candidates or bidders to ensure compliance with the regulations of sections 1 of the VOB/A and the VOL/A.

1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

Through the implementation of the EC Directives into national law, the public procurement regime also applies to the EC Member States, but also to a number of other countries due to the Government Procurement Agreement (GPA), if there is an obligation to award tenders on a pan-European basis. In addition, the German rules also apply to other European countries, which are not Members of the EC, but are parties to the European Economic Area (EEA) Agreement. The German procurement law comply with Germany's obligations under GPA and the EEA Agreement.

1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic principles of German public procurement law, which are highly relevant to its interpretation are the same, which are underlying the EC public procurement Directives applying throughout the EC. These principles arising out of the EC Treaty are competition, transparency, non-discrimination and the right to legal review. As noted above, there is a difference in Germany as regards legal review, depending on the fact, whether a contract is awarded above or below the EU-threshold values.

1.4 Are there special rules in relation to military equipment or any other area?

When procuring military equipment, the German Ministry of Defence (*Bundesministerium der Verteidigung*) is in general subject to the entire German public procurement regime. However, according to the EC Treaty or the EC procurement Directives there may be exemptions under the following circumstances:

- pursuant to Art. 296, an exemption applies for the procurement of arms, munitions and war material; and
- moreover, the award of a contract is exempted from public procurement rules, if the contract is classified as secret or its performance must be accompanied by special security measures or if protection of the Federal States' essential security interests require this.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

Above the EU threshold values, German procurement law implement the EC Directives 2004/17/EC and 2004/18/EC and thus provides coverage as required by EC law. The obligation to award contracts on a pan-European basis, applies to state, regional or local authorities, and associations formed by one or several of such authorities of bodies governed by public or private law, if a public task is fulfilled by such bodies while being substantially financed and/or governed by public authorities. In addition, utilities are covered according to EC Directive 2004/17/EC.

Under German law it is possible to obtain a ruling on this issue by German award review bodies.

Below the EU-threshold values, only state, regional or local authorities are subject to the public procurement rules applying there.

2.2 Which private entities are covered by the law (as purchasers)?

As mentioned under question 2.1, the EC public procurement Directives are fully implemented into German law and thus cover those private entities, which are subject to EC procurement law under the Directives. It is possible to obtain a ruling on this issue by German award review bodies.

Private entities, which are covered by the German procurement legal regime above the EU-threshold values are:

- works concessionaires (except for utilities);
- private entities, operating in the utilities sector, having been granted “special or exclusive” rights by a competent authority; and
- private entities awarding works contracts or independent contractor services for works being subsidised with more than 50% by public authorities.

Regardless of threshold values, all private entities have to observe public procurement law, if a grant is awarded with regard to the subsidised money.

2.3 Which types of contracts are covered?

Under German public procurement law, contracts coverage extends to the coverage as required by the EC procurement Directives:

- works contracts for general building and civil engineering works, including concession contracts;
- supply contracts for the purchase or hire and for siting and installation of goods; and
- service contracts for services as lined out by “Part A” and “Part B” contracts in accordance with Annex II according to EC public procurement Directive.

2.4 Are there threshold values for determining individual contract coverage?

As noted above, the relevant threshold values (without VAT), which are subject to revision every 2 years, as of January 1, 2010 are as follows:

- for works contracts: EUR 4,845,000.00;

- for supply and service contracts: EUR 193,000.00;
- for supply and service contracts in the sectors of water, energy and transport (utilities): EUR 387,000.00; and
- for supply and service contracts entered into by supreme and superior level federal agencies: EUR 125,000.00.

2.5 Are there aggregation and/or anti-avoidance rules?

Germany has implemented the rules concerning aggregation and anti-avoidance as outlined by the EC public procurement Directives. It is thus ensured, that avoidance of pan-European awards by using multiple contracts which fall - in each single case - below the threshold values, is prevented.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

In accordance with the EC procurement Directives, works concession contracts are subject to the German public procurement regime (except for utilities), while service concession contracts are not. Pursuant to the EC Directives, works concession contracts are defined as “works contracts between a contracting entity and a contractor (works concessionaire), in which the consideration for the construction work shall consist of the right to use the building works - instead of a remuneration - together with the payment or a fixed price, if necessary”. These types of contracts specifically apply to PPP-infrastructure projects such as the so-called “A-models” for German motorways and “F-models” for toll bridges and roads.

Works concessions are subject to specific rules under the VOB/A, stating that the award of such contract is subject to only a limited number of rules of the VOB/A.

However, the award of works concessions as well as service concessions are subject to the general principles of the EC Treaty (see above question 1.3), which requires sufficient transparency in particular, which is usually ensured by a pan-European tender notice.

3 Procedures

3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

In accordance with the EC public procurement Directives, German public procurement law provides for 4 types of award procedures for tender awards above the threshold values:

- the open procedure;
- the restricted procedure;
- the negotiated procedure; and
- the competitive dialogue (except for utilities).

An awarding authority subject to the Federal Ordinance on the Award of Public Contracts by Utilities (*SektVO*) can choose freely among the procedures, if a prior pan-European tender notice has been published. All other awarding entities have to use the open procedure, as a rule, and are only permitted to use the restricted procedure or the negotiated procedure (or a competitive dialogue) under the circumstances as outlined in the Directives. Below the EC threshold values, German procurement law provides for 3 types of tender procedures which correspond to the open procedure, the restricted procedure and the negotiated procedure.

In contrast to other European countries, very little experience exists

with award procedures under the competitive dialogue. Even with PPP/PFI-structures, it is common in Germany, to use the negotiated procedure.

3.2 What are the rules on specifications?

Under German procurement law, technical specifications serve the purpose to describe the work, supply or service to be performed under the contract, which is being awarded. All descriptions have to be “complete” and “exhaustive” in order to ensure, that each competitor bidding for the contract has the same understanding of the description of performance. If “European specifications” are used, the awarding authorities have to accept equivalent products or services. However, in this case, it is the bidder’s task to prove the equivalence. Brand names can only be used to describe the work, supply or service, if a sufficient description is not possible by using technical terms only. When using a brand name, the awarding authority has to add the words “or equivalent”, as a rule.

3.3 What are the rules on excluding tenderers?

German public procurement law provides for a catalogue, specifying rules according to which a tender may or must not be considered by the awarding entity. Under EC public procurement rules this includes the compulsory exclusion of tenderers, which have been convicted of the following offences: participation in a criminal organisation; corruption; bribery; and fraud.

3.4 What are the rules on short-listing tenderers?

In so-called “two-staged” award procedures, i.e. procedures with a prior prequalification such as the restricted procedure, suitable competitors, being allowed to submit bids, are selected on the basis of the best economic and financial standing and technical and/or professional ability. After having submitted the bids, the bidders to be shortlisted are selected on the basis of the award criteria. Usually, 2 to 4 bidders having submitted tenders with the best chances for winning the contract, are selected for further evaluation of the bids. In open procedures, after the suitability of the tenderers has been confirmed, a short-list may be drawn up in accordance with the published award criteria.

3.5 What are the rules on awarding the contract?

In accordance with the requirements of the EC public procurement Directives, contracts must be awarded on basis of the award criteria, which are specified at the beginning of the procedure. The awarding authorities can choose between awarding the contract on the basis of the most economically advantageous offer or on the basis of the lowest price only. The criteria used have to be objectively linked to the subject matter of the contract. It is common to use a mixture of price and quality criteria to determine the most economically advantageous offer. If quality is an award criteria, German judicial rulings call for further specification with regard to the required transparency. While the majority of the contracts are awarded on the basis of the most economically advantageous offer, there are a number of supply and service contracts, where the lowest price is the sole award criteria (e.g. public transport services, waste disposal services). Social, environmental and similar issues may be taken into account in accordance with the EC public procurement Directives, if they are relevant to the subject of the contract and are used as technical specifications. It should be noted, that a better economic, financial,

technical or professional ability of a bidder is not relevant for the award of the contract on the basis of the award criteria, as a rule.

3.6 What methods are available for joint procurements?

Joint procurements, which are quite rare in Germany, can be managed through a collaboration of two or more awarding authorities using one award procedure for the works, services or supplies needed, or, alternatively, a corporate model is used, in which an entity with separate legal personality is founded by the two or more awarding authorities being used as an “intermediary” to supply the works, supplies or services to awarding authorities. In theory, it is also possible to use a Central Purchasing Body or a framework agreement. A Central Purchasing Body is a public purchaser from or through which other awarding authorities can acquire works, supplies or services without commencing an own award procedure on a regular basis. This model is very rare in Germany except for the health care sector.

3.7 What are the rules on alternative bids?

While formerly common in particular for works contracts, the use of alternative bids has steeply declined after the ECJ’s “Traunfellner” ruling of 2003, pursuant to which German public procurement law has been revised accordingly. Since the awarding authority must provide further details of the minimum requirements to be met by an alternative bid or secondary tender, the potential for gaining efficiency either with regard to quality or with regard to the pricing is considered relatively low by German awarding authorities. Anyway, awarding authorities can permit alternative bids. But if they choose to do so, this must be indicated in the tender notice. It is not allowed in Germany to change the requirements for the tenders after the bids have been submitted, even if an attractive different solution is shown by an alternative bid, in general, unless the contract is awarded in a negotiated procedure.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

Since the EC public procurement Directives are fully implemented into German public procurement law, the rule for exclusion/exemptions from the procurement regime are as required by the Directives. In general, it is up to each awarding authority to decide, whether the preconditions for an exclusion/exemptions are given. However, as regards decisions pursuant to Art. 30 of Directive 2004/17 as to whether an entire utility sector is exempted from the rules, because competition is considered sufficient in this area, the European Commission is competent for this decision.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

German public procurement law does not specifically provide for rules on “in-house” arrangements. However, the “Teckal” line of the ECJ is fully recognised by German award review bodies and the courts. “In-house” awards without an award procedure are thus admissible, if and to the extent of which the principles as set out by the ECJ are observed. If contracts are awarded within a single

entity or within groups, it is decisive whether or not the parties to the contract are separate legal entities or not. If not, then the procurement regime does not apply.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

Since the revision of the Act against Restraints of Competition (GWB) which came into effect on July 1, 1999, primary legal protection with regard to award procedures has been fully established in Germany with regard to pan-European contract awards. The bodies in charge of the surveillance of tender procedures are the so-called “award chambers” and the “award senates” at the Higher Regional Courts (*Oberlandesgerichte* - OLG). Several hundred award review procedures are conducted each year under the GWB-regime.

Until a contract is awarded, in the first instance every tenderer with an interest in the contract and able to assert a violation of subjective (award) rights is entitled to file an application with the competent awards chamber, which comprises of three members. One member must be qualified to judicial office. The awards chamber of the Federal Government at the Federal Cartel Office (*Bundeskartellamt*) has jurisdiction over the review of public contracts awarded by the Federal Government, while the awards chambers to be formed by the Federal States (*Bundesländer*) have jurisdiction over the contracts attributable to the individual states. It must be noted that the award review procedure is only admissible if a tenderer has challenged a decision of the awarding authority on the grounds of an asserted violation of procurement regulations, in a timely fashion, in principle. After implementation of the EC remedies Directive the awarding authorities have to inform participants in an award procedure at least 15 days prior to the award, if the contract is not awarded to them.

The suspending effect of the motion for award review in the form of an automatic prohibition of the award by law is essential for award review procedure under German law: after service of the motion for award review by the awards chamber upon the contracting entity, the contracting entity must not grant the award for the duration of the proceeding before the chamber. Any award made in spite of this is null and void. After an obligatory oral hearing, the awards chamber concludes the procedure with an administrative decision. The body may give orders to the contracting entities to conduct the award procedure in a certain manner (or even to cancel the procedure) or to revise decisions taken (e.g. the exclusion of a tender). Thus, it can be concluded that an independent legal procedure has been established for primary legal protection in contract award matters.

In the second instance, the parties involved may file an immediate complaint with the competent Higher Regional Court within an emergency period of 2 weeks against the decision of the awards chamber. Special award senates at the Higher Regional Court have jurisdiction. The court has the power to take decision in the matter itself, if the complaint is well-founded. The decision of the Higher Regional Court is by means of a court order. While the review procedure with the awards chamber is limited to 5 weeks, as a rule, the court procedure in the second instance at the Higher Regional Courts has no time limit by law. An exceptional case is, if one Higher Regional Court wants to deviate from the ruling of another Higher Regional Court, the matter has referred to the Federal Supreme Court of Justice (*Bundesgerichtshof*).

It must be emphasised that primary legal protection pursuant to the 4th part of the GWB only exists in case of pan-European contract awards. Below the EU-threshold values, bidders do not have any actionable rights to enforce compliance with the regulation of sec. 1 of the VOB/A and the VOL/A, as a rule. Here, the candidates or tenderers are generally restricted to administrative complaints limited to supervising the legality of administrative activities or petitions for administrative reviews. However, some German (civil and/or administrative) courts have provided legal protection in rare cases below the thresholds.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

As outlined above, outside the system of primary legal protection established by the GWB for pan-European contract awards, there is a limited type of proceedings available for legal remedies. However, if the matter falls into this scope of application of the GWB, it is mandatory for the tenderer to use this type of proceeding. It should be noted as well, that, in addition, claims for compensation are always possible against the awarding authority.

5.3 Before which body or bodies can remedies/enforcement be sought?

As outlined under question 5.1, German award review bodies are the so-called “awards chambers” and the “awards senates” at the Higher Regional Courts.

5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

While it is not necessary to file for award review promptly or immediately, this is not true for the bidders’ obligation to challenge a decision of the awarding authority. According to §107 sec. 3 GWB such challenges (*Rügen*) must be placed in due course, meaning “immediately” (*unverzüglich*) with the awarding authority, in principle. However, if the objection is rejected by the awarding authority for lack of grounds, then the bidder has to file for award review within 15 days. “Immediate” challenge of a decision of the awarding authority is interpreted by the German award review bodies as an obligation to raise the objection within 1 to 3 working days after having obtained knowledge of the asserted violation of award rights.

5.5 What remedies are available after contract signature?

The most common remedy available after contract signature under German law is a claim for compensation against the awarding authority, either under §126 GWB or pursuant to §311 sec. 2 BGB. According to the new EC remedies Directive, which has been implemented into German law, it is however possible for contracts to be ruled ineffective in specific circumstances even after closing. There is a statutory deadline for such an award procedure of 6 months after the contract signature date at the latest.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

As noted above, the awards chamber has to make its decision within 5 weeks after filing of the complaint by law (with a two-week extension period in exceptional cases). However, for the second-instance-proceeding before the Higher Regional Courts no time

limit applies as a rule. In practice, proceedings before the Higher Regional Courts take 3 to 6 months on average.

5.7 Is there a culture of enforcement either by public or private bodies?

With regard to the roughly 2,000 rulings of the German award review bodies over the last 10 years, one may come to the conclusion, that a “culture of enforcement” has been well established in Germany for pan-European contract awards. The main reason for this appears to be the fact that such procedures are relatively cheap: the relevant value for determining the fees of the award review bodies or the parties’ expenses formerly was 5% and now has been raised to 10% of the contract value only.

In contrast, claims for compensation are quite rare, due to the fact, that the chances of winning such a procedure are considered below average since the burden of proof is fully on the bidders’ side.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

As outlined above, there have been roughly 2,000 rulings in award review procedures over the last 10 years in Germany. Thus, it is not possible to identify real “leading cases”. However, in the early years of primary legal protection under the GWB (1999-2003), the decisions of the award senate at the Higher Regional Court of Düsseldorf have been - and still are - highly regarded among German procurement experts.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

German public procurement law does not specifically deal with these issues prior to the contract award. Award procedures are based on the expectation that no material changes occur between the outset of the process and the award of the contract. This is underlined by a prohibition under German law according to which offers must not be changed, as a rule, after being submitted to the awarding authority. An exception to this rule applies in negotiated procedures. Therefore, if a necessity for changes occur during a procedure, each situation has to be considered thoroughly. Decisions to be made have to particularly be measured with regard to the principles of non-discrimination, fair competition and transparency.

As regards changes to contract terms post-signature, German law provides for certain rules under the General Terms and Conditions for Works Contracts (VOB/B) and the General Terms and Conditions for Supply and Service Contracts (VOL/B). These standardised terms have to be used by awarding authorities as a rule. However, even if post-signature changes may be possible under these regulations, it may be necessary to check a possible relevance with regard to the procurement regime (again).

6.2 In practice, how do purchasers and providers deal with these issues?

Awarding authorities deal with these issues in different ways: if no

clear solution can be worked out by using the principles as outlined under the EC Treaty, those awarding authorities which are risk-adverse tend to a cancellation of the award procedure with a following new procedure under the changed conditions. Other awarding authorities calculate the remaining risks more aggressively with regard to the availability and possibilities of remedies for the likelihood of an award review procedure filed by one or more of the bidders. Also considered in this situation can be a “change” of the award procedure, i.e. a cancellation of an open or restricted procedure and an initiation of a negotiated procedure with the same bidders without prior tender notice. While risk assessment is also mandatory in this situation, the likelihood of an award review procedure is considerably lower, if all the bidders of the former procedure are being invited to take part in the new procedure.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

German public procurement law does not provide for specific rules with regard to privatisations. However, in accordance with rulings of the ECJ (“City of Mödling”) and of German award review bodies, in particular privatisations, where only parts of the shares of a publicly held company are being transferred to a private party, in particular the procurement of services or goods are often connected with the purchase of the shares and the public procurement regime thus apply. This is not true in cases, where all the shares of a formerly publicly held company are sold.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

German public procurement law does not specifically provide for rules in relation to PPP. Most PPP arrangements fall within the scope of procurement law nevertheless, because in particular construction work as well as services and/or goods are procured by the awarding authorities through PPP-models. The threshold values are usually exceeded by PPP-structures. Thus, the contract award is subject to a pan-European tender notice.

For PPPs, the negotiated procedure is the most commonly used procurement procedure, since in particular alterations of the bids, after having been submitted and evaluated are necessary on a regular basis. Moreover, a structured approach is used for the negotiated procedure, consisting of successive steps in order to select the winning bidder consortium. Although the competitive dialogue is fully implemented into German public procurement law, there is no prerogative by law in favour of the competitive dialogue in relation to a negotiated procedure.

8 Other Relevant Rules of Law

8.1 Are there any related bodies of law of relevance to procurement by public and other bodies, such as freedom of information or general contract law?

Beside from the fact that EC Treaty principles apply to all procurements by awarding authorities, regardless whether the procurement falls within the scope of application of the EC public procurement Directives or not, or whether the threshold values are

exceeded or not, there are a number of other legislative provisions of relevance to contract award procedures in Germany. Foremost to be mentioned are the relevant budgetary laws on the federal, state and municipal level. In addition, civil contract law applies to all contract award procedures, because the contracts awarded are subject to German civil law, as a rule. Although a Freedom of Information Act has been enacted in Germany, its particular relevance to public procurement law has yet to be established.

9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

2010 will - as with 2009 - again be marked by major changes of the legal framework for public procurement in Germany. While in 2009 the Act against Restraints of Competition was newly released with major alterations due to the EC-Directives EC/2004/18 and EC/2004/17 and also the Ordinance on the Award of Public Contracts ("*Vergabeverordnung*") underwent major changes, in 2010 the entire rules below the Federal law level will be completely exchanged. It is expected, that after the newly elected German Government has firmly taken office in autumn 2009, the required acts for implementation of the Regulations for Awarding Works Contracts (VOB/A 2009), the Regulation for Awarding Supply and Service Contracts (VOL/A 2009) and the Regulation for the Award of Independent Contractor Services (VOF 2009) will be launched in spring 2010. It is expected to come into force in March 2010. However, although these regulations, which apply for awards below and above the threshold values for pan-European awards, will present itself in a more modern fashion with fewer paragraphs from the outside, the law itself will materially not change by much from a general point of view. What is new, however, is that the rules for the pan-European awards of contracts by utilities were moved from chapters 3 and 4 of the VOB/A and the VOL/A to the federal legal Ordinance on the Award of Contracts by Utilities ("*Sektorenverordnung*"-*SektVO*) in autumn 2009.



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Lutz Horn is considered one of the leading attorneys for procurement law in Germany. He focuses on advising and structuring PPP/PFI-projects. Lutz Horn participated in many major PPP projects in Germany to date, either acting for the awarding agency or advising bidders. He published numerous articles and delivered speeches on procurement law.

In 1999, he was appointed an honorable judge of the Awards Chamber Hessen. Since 2008 Lutz Horn teaches Procurement Law at the Deutsche Hochschule für Verwaltungswissenschaften (DHV) Speyer.



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