PUBLIC PROCUREMENT

Germany

LEXOLOGY
Getting The Deal Through

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Public Procurement

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Quick reference guide enabling side-by-side comparison of local processes, including legislative framework, applicability of EU directives and the Agreement on Government Procurement; contracting authorities, contract value thresholds, contract amendment considerations, privatisation and public-private partnerships; advertisement and selection; procurement procedures, including independence, impartiality and conflicts of interest; negotiations with bidders; framework agreements; participation by small and medium-sized enterprises; award criteria and treatment of low tenders; competitive, administrative and judicial review; access to the procurement file; appeals, including typical costs; and recent trends.

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LEGISLATIVE FRAMEWORK

Relevant legislation

What is the relevant legislation regulating the award of public contracts?

The relevant legislation regulating the award of public contracts differs depending on a certain threshold of the contract value being met.

If the applicable threshold is met, Part 4 of the Act Against Restraints of Competition (ARC) serves as the main statutory act on public procurement containing the general and most important rules. Supplementing the ARC, additional laws provide more specific rules on public procurement procedures as well as on sector-specific public procurements. Among those, the Regulation on the Award of Public Contracts (VgV) is of particular importance as it contains the rules for awarding public supply and service contracts, unless a more specific public procurement law regime applies. Regarding the award of public works contracts, Part A, Chapter 2 of the Contracting Rules for the Award of Public Works Contracts also applies.

In Germany, public procurement law below EU thresholds is considered as budgetary law, which, in general, is less stringent and more flexible. In addition, legal protection of aggrieved bidders is rather limited. Nevertheless, Part A, Chapter 1 of the Contracting Rules for the Award of Public Works Contracts and the Rules on the Award of Public Supply and Service Contracts below EU thresholds contain rather detailed rules on public procurement law and are similar to the rules above the thresholds. Applicable legislation may differ between the various German federal states.

Law stated - 30 April 2022

Sector-specific legislation

Is there any sector-specific procurement legislation supplementing the general regime?

There are several sector-specific procurement laws supplementing the ARC:

- Procurement in the public sectors of traffic, drinking water and energy supply is regulated by the Regulation on the Award of Public Contracts in the Field of Transport, Drinking Water Supply, and Energy Supply.
- Considering the public transportation sector, the general provisions stipulated in the ARC are supplemented by provisions of the German Public Transport Act. The corresponding Regulation on Public Passenger Transport and Services by Rail and Road (EC) No 1370/2007 is directly applicable.
- In the field of defence and security, public procurement is regulated on the basis of section 104 ARC and either the Regulation in the Field of Defence and Security for the Implementation of the Directive 2009/81/EC (VSVgV) or Part 1, Chapter 3 of the Contracting Rules for the Award of Public Works Contracts (VOB/A-VS). Which legal regime supplements the ARC depends on whether the contract awarded is a public works contract (VOB/A-VS applicable) or a public supply or service contract (VSVgV).
- There are specific regulations for the pharmaceutical sector, which are contained in certain provision of the various volumes of the Social Securities Act.
- Lastly, the Regulation on the Award of Concessions regulates the awarding of concessions.

Law stated - 30 April 2022

International legislation

In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

German national law on public procurement implements the respective EU directives, which correspond to international treatises such as the GPA. If legal provisions are constructed and applied in compliance with EU law, international treaties serve as the guiding principle of interpretation.

Law stated - 30 April 2022

Proposed amendments

Are there proposals to amend the legislation?

The Act on Corporate Due Diligence in Supply Chains will come into force on 1 January 2023 and obliges German companies to ensure respect for human rights throughout their supply chain. The obligations must be implemented by the companies themselves as well as their direct suppliers. Indirect suppliers' actions are included in the company's obligations as soon as the company receives substantiated knowledge of human rights violations at this level. The law provides the companies with a legal framework for fulfilling human rights due diligence obligations. Environmental protection is also covered, insofar as environmental risks can lead to human rights violations. In addition, environment-related duties are established. A breach of these environment-related obligations constitutes an optional reason for exclusion from procurement procedures.

Regarding national procurement legislation, the coalition agreement of the Federal German Government, which was formed at the end of 2021, contains some propositions for amendments. The proposed amendments intend to simplify, professionalise, digitise and accelerate the entire procurement process, and they aim to strengthen the participation of small and medium-sized enterprises. For now, these plans are limited to mere statements of intent, there are no concrete proposals.

In the wake of the Russian invasion of Ukraine, the EU has implemented far-reaching rules aimed at excluding Russian companies and individuals from most public procurement procedures conducted by EU member states. One of the new rules, the newly added article 5k of Regulation (EU) No. 833/2014 raises several questions for the German legislature. Particularly, it remains unclear how to enforce sanctions efficiently. To this end, the German legislature will have to consider implementing rules that allow the demanding of fines in the case of violations. In addition, it remains to be seen how article 5k can be implemented regarding the awarding of contracts below the applicable thresholds.

Lastly, the European legislator is considering additional legislation: the International Procurement Instrument, for one, aims at creating a level playing field with non-EU countries, which are reluctant to open their public procurement markets. Secondly, the Foreign Subsidies Regulation aims at neutralising unfair advantages of tenderers received from subsidies of non-EU governments. However, it is difficult to predict whether it will be necessary to implement any of these rules into national law.

Law stated - 30 April 2022

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

Which, or what kinds of, entities are subject to procurement regulation?

Whether a legal entity must adhere to public procurement law depends on different requirements. If the potential

contract reaches the applicable thresholds, each entity is subject to procurement regulations if it is the state, a regional or local authority, a body governed by public law or an association formed by one or more such authorities or one or more such bodies governed by public law.

An entity is a body governed by public law if it has all the following characteristics:

- they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- they have legal personality; and
- they are financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law; are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or other bodies governed by public law.

Utilities, including energy, water or transportation, are subject to public procurement regulation according to section 100 of the Act Against Restraints of Competition (ARC). This includes utility entities carrying out activities based on special or exclusive rights that have been conferred by a competent authority, or where public contracting authorities in the above-mentioned sense can individually or jointly exercise a controlling influence on these persons.

For example, Deutsche Postbank AG is not considered a contracting authority as it does not pursue a non-commercial goal in the general interest and all of its services are subject to well-developed competition. Also, certain transmission system operators active in Germany are considered contracting authorities (eg, Tennet) while others are not (eg, Amprion: OLG München – Verg 15/19).

Other examples of public or private bodies that are currently considered not to be contracting authorities are religious orders and savings and loans associations. Regarding a diocese, this understanding has been confirmed in a recent decision of a higher regional court. Furthermore, German medical chambers (bodies of self-governed German physicians) have a great degree of autonomy in determining their financing and were consequently found by the Court of Justice of the European Union not to constitute a contracting authority within the scope of the Procurement Directives (case C-526/11, Ärztekammer Westfalen-Lippe).

Additionally, the Commission has published several exemption decisions according to article 34 of Regulation 2014/25/EU, exempting certain utility activities from procurement regulation. A list can be found on the EU Commissions website .

Below the applicable thresholds, entities are subject only to procurement regulations if they have to adhere to budgetary law, and the applicability of a certain below-threshold procurement regulation is stipulated by law. Normally, this only applies to public entities.

Legal entities neither falling under one of the above definitions stipulated by the ARC nor having to adhere to a certain below-threshold procurement regulation due to statutory law provisions only become subject to procurement regulations by administrative act as a condition to receive public funding for a certain project.

For further details, see sections 99 and 100 ARC.

Law stated - 30 April 2022

Contract value

Are contracts under a certain value outside the scope of procurement regulation? What are these threshold values?

The thresholds are set and regularly updated by EU law and implemented through a dynamic reference in section 106 ARC, for example:

- all public works contracts: €5,382,000;
- public supply and service contracts awarded by central government authorities and design contests organised by such authorities: €140,000;
- most other public service and supply contracts: €215,000; and
- all concessions: €5,186,000.

Different thresholds, however, may apply to central government actors and subcentral contracting authorities.

For further thresholds, see the Official Journal of the EU (OJ L 398, 19 ff).

Law stated - 30 April 2022

Amendment of concluded contracts

Does the legislation permit the amendment of a concluded contract without a new contract award procedure?

In general, significant changes to a public contract during its term are not permitted but would require a new award procedure. The relevant provision is section 132, subsection 1, sentence 2 of the ARC, which defines such 'material modification' as differing substantially from the public contract originally awarded. In particular, a contract is significantly modified if:

- the modification introduces conditions that would have made it possible to admit other candidates or tenderers, introduces conditions to accept a different tenderer, or would have drawn the interest of further participants;
- the modification shifts the economic balance in favour of the contractors; or
- the modification significantly extends the scope of the public contract.

Subsections 2 and 3 of section 132 of the ARC, however, permit certain modifications within narrow limits:

- initial tender documents provide clear, precise and unequivocal review clauses or options that contain statements on the scope and nature of and requirements for possible contract modifications, and the overall nature of the contract is not altered by the modification;
- additional supplies, works or services become necessary that were not provided for in the initial tender documents, a change in the contractor is not feasible and the price is not increased by more than 50 per cent;
- the need for modification has been brought about by circumstances that a diligent public contracting authority could not have foreseen, the overall nature of the contract is not altered by the modification and the price is not increased by more than 50 per cent; or
- the overall nature of the contract is not altered, and the value of the modification does not exceed the applicable EU thresholds and does not amount to more than 10 per cent for supplies and services or 15 per cent for works contracts of the original contract value.

For further details, see section 132 ARC.

Law stated - 30 April 2022

Has case law clarified the extent to which it is permissible to amend a concluded contract without a new contract award procedure?

The case law on this subject is limited. Some review chambers have considered that a minor change in the location where the services should be rendered could be permissible.

Other case law has also evolved around the question of whether, or under what conditions, the failure to terminate a contract may constitute a 'material modification'. Failure to terminate a contract, as such, does not suffice a material modification as in cases where the prolongation is already a possibility provided for in the original contract. Rather, a failure of termination is only considered a material modification if it leads to a contract period that violates procurement law provisions regarding the maximum length of a contract (eg, four years for framework contracts according to section 21 (6) of the Regulation on the Award of Public Contracts). Besides this, German case law has considered a failure to terminate a contract a material modification in the exceptional case that an automatic prolongation for a year without long stop date – subject to the contracting authority's termination with two months' notice – was added to a contract after its award.

Law stated - 30 April 2022

Privatisation

In what circumstances do privatisations require the carrying out of a contract award procedure?

The sale of public assets is not covered by the ARC as such a sale does not constitute the procurement of goods or services. Rather, in this case, the state offers them.

Nonetheless, the sale of public assets is generally subject to the provisions of EU primary law, EU state aid law or national budget law. EU primary law is applicable as soon as there is a cross-border interest in the contract. EU state aid law may necessitate the creation of some form of competition for a certain project in turn for public funding. National budget law, on the other hand, requires that privatisation must observe the principle of using state-owned capital as efficiently as possible. This obliges the national authority concerned to accept only the most economically advantageous offer. Consequently, basic rules must be observed so that, in substance, these rules equate to the provisions of primary EU law (ie, transparency and equal treatment). The individual steps leading to privatisation, such as the formation of a separate legal entity, do not have to be put out to tender. The sale of shares is, however, subject to basic principles, such as transparency and equal treatment. Specifically, the principle of transparency requires that third parties can access information concerning the privatisation and can express an interest or submit an offer.

However, the ARC does apply if a procurement element is involved in the overall business transaction (eg, the sale of shares is combined with, or closely followed by, the award of a public contract to the company; or the partially privatised entity holds a public contract that was awarded before the privatisation). Whenever a private party acquires access to a public contract because of the privatisation, it should be carefully considered whether an obligation to carry out a procurement procedure arises. This due diligence should establish inter alia whether and under what circumstances a contract was awarded according to section 108 ARC, which exempts certain forms of collaboration between contracting authorities from the applicability of ARC-procurement law. An obligation to conduct procurement procedures always arises if the privatisation is used to circumvent the rules on public procurement law.

Law stated - 30 April 2022

Public-private partnership

In which circumstances does the setting up of a public-private partnership (PPP) require the carrying out of a contract award procedure?

There are no specific procurement rules regarding PPPs. Whether a procurement procedure is required depends on the content, structure and financing of the PPP – in particular, the possible remuneration of the private party. Public authorities usually use PPPs to outsource the provision of works or services to a private third party. This generally involves the award of contracts and, if so, requires a procurement procedure. This has been confirmed by the CJEU in Acoset SpA (case C-196/08) and the case law of German courts and procurement review chambers.

Law stated - 30 April 2022

ADVERTISEMENT AND SELECTION

Publications

In which publications are calls for the expression of interest in regulated contract awards advertised?

For contract awards above EU thresholds, publication must be made in the Supplement to the Official Journal of the EU .

Contract awards below EU thresholds must be published in the Federal Gazette.

Law stated - 30 April 2022

Participation criteria

Are there any limits on the ability of contracting authorities to determine the basis on which to assess whether an interested party is qualified to participate in a contract award procedure?

Yes. Contracting authorities assess whether an interested party is qualified to participate in a contract award procedure based on selection criteria. When defining selection criteria, contracting authorities must adhere to the legal framework set forth in section 122 of the Act Against Restraints of Competition (ARC). Accordingly, selection criteria may exclusively relate to:

- qualification and authorisation to pursue the professional activity;
- economic and financial standing; and
- technical and professional ability.

In addition, the selection criteria must be related and proportionate to the subject matter of the contract. If a tenderer does not meet established selection criteria, he or she is considered not to be eligible and must be excluded.

These selection criteria are supplemented by the mandatory and facultative exclusion grounds provided for in sections 123 and 124 ARC. Summarised in substance, those exclusion grounds are associated with breaches of competition law, criminal law or previous failure to perform a contract. However, self-cleaning measures (section 125 ARC) may allow actors to demonstrate that they regained their reliability to perform a public contract.

Section 122 ARC is further substantiated in different substantiating legislative acts. For public supply and service

contracts, sections 44 seq are relevant. The Regulation on the Award of Public Contracts (VgV) provides further details. The Procurement Regulations, such as the VgV, the Regulation in the Field of Defence and Security for the Implementation of the Directive 2009/81/EC (VSVgV) and the Contracting Rules for the Award of Public Works Contracts, particularly contain additional requirements, on which selection criteria may be established and which kinds of documents and information can be requested from the tenderers to proof meeting the respective criterion.

With regard to the selection criteria of economic and financial standing and technical and professional ability, the tenderers may – under certain preconditions established by the ARC and substantiating legislative acts such as the VgV – rely on the capacity of third parties. Particularly, if a third company is relied on to prove a specific technical and professional ability, that third company must be able and willing to perform the respective part of the public contract.

For further details, see sections 122–126 ARC.

Law stated - 30 April 2022

Is it possible to limit the number of bidders that can participate in a contract award procedure?

Except for in open procedures, in any other public procurement procedures, the number of tenderers may be limited. In general, the minimum number of tenderers a procurement procedure can be limited to is three with at least five tenderers in restricted procedures. Limitation may only be conducted if the number of eligible tenderers exceeds the limit set, it must be based on objective and non-discriminatory criteria. In practice, contracting authorities often use the eligibility criteria to base their decision on to limit the number of tenderers.

For further details, see section 51 VgV, section 45 of the Regulation on the Award of Public Contracts in the Field of Transport, Drinking Water Supply, and Energy Supply, and section 21 VSVgV.

Law stated - 30 April 2022

Regaining status following exclusion

How can a bidder that could be excluded from a contract award procedure because of past irregularities regain the status of a suitable and reliable bidder?

The concept of 'self-cleaning' is recognised as a means of re-establishing suitability and reliability. Therefore, compulsory, and facultative exclusions grounds (sections 123 and 124 ARC) may not preclude the tenderer from participating in an awarding procedure if it has demonstrated that it:

- has paid or undertaken to pay compensation for any damage caused by the criminal offence or misconduct;
- has comprehensively clarified the facts and circumstances associated with the criminal offence or misconduct and the damage caused by actively collaborating with the investigating authorities and the public contracting authority; and
- has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

For further details see sections 125 and 126 ARC.

Law stated - 30 April 2022

THE PROCUREMENT PROCEDURES

Fundamental principles

Does the relevant legislation require compliance with certain fundamental principles when designing and carrying out a contract award procedure?

Section 97, subsection 1 of the Act Against Restraints of Competition (ARC) establishes the principles of competition, transparency, proportionality and cost-effectiveness. Moreover, section 97, subsection 2 ARC requests an equal treatment of the tenderers by the public contracting authorities. Lastly, section 97, subsection 3 ARC stipulates the protection of the interests of small and medium-enterprises.

Law stated - 30 April 2022

Independence and impartiality

Does the relevant legislation or case law require that a contracting authority is independent and impartial?

The neutrality and impartiality of the contracting authority is required by German public procurement law and is safeguarded by section 97, subsection 2 ARC.

Law stated - 30 April 2022

Conflicts of interest

Does the legislation address expressly the issue of conflicts of interest?

Yes. The personnel entrusted with executing an awarding procedure must be independent and impartial. They may not participate in the procedure if a conflict of interest exists. A conflict of interest is understood broadly as any personal interest, including indirect or non-material interests.

Several provisions of German procurement law require the withdrawal of persons working for a contracting authority from a certain procurement procedure who might have a conflict of interest in relation to a tenderer (eg, section 6 of the Regulation on the Award of Public Contracts (VgV)). These persons are not allowed to participate in the respective procurement procedures.

Under section 124, No. 5 ARC, an undertaking may be excluded if its participation could compromise the impartiality and independence of a person working for the contracting authority in a position affecting a fair procurement procedure. Owing to proportionality considerations, this exclusion ground may be applied only if there are no other measures to remedy the conflict of interest. Other measures, for example, may be to exclude the conflicted person at the contracting authority from taking part in the procurement procedure.

Law stated - 30 April 2022

Bidder involvement in preparation

Are there any restrictions on the ability of a bidder to be involved in the preparation of a contract award procedure?

No. However, the contracting authority is required to take all necessary and appropriate measures to prevent distortion

of competition (eg, section 7 VgV). Therefore, it must consider whether and how it can compensate the undertaking's advantages (eg, by providing respective information to other undertakings in the course of the procurement procedure and, thus, levelling the playing field).

Section 124, subsection 1, No. 6 ARC allows an exclusion of an undertaking that has been involved in the preparation of the procurement awarding procedure. The objective behind this exclusion ground is to remedy unfair competition advantages an undertaking may gain when being involved in the preparation of a procurement procedure. However, owing to the principle of proportionality, the contracting authority may only exclude the respective undertaking if no other measure is available to remedy the distortion of competition.

Law stated - 30 April 2022

Procedure

Which procurement procedure is primarily used for the award of regulated contracts?

Public contracts may be awarded in the form of:

- open procedures;
- restricted procedures;
- negotiated procedures;
- competitive dialogues; or
- innovation partnerships.

As a general rule, contracting authorities abide by the hierarchy of procurement procedures from the open procedure to the restricted procedure. the negotiated procedure and the competitive dialogue. The open procedure is used in most standard tender procedures. Similar to the open procedure, contracting authorities may generally choose the restricted procedure without any requirements having to be met. For more complex projects, there is a strong tendency to use the negotiated procedure. It is commonly felt that a flexible procedure is more suitable for complex projects, as the detailed elements of these projects (services to be provided, risk allocation, etc) generally cannot be defined in advance.

For further details see section 119 ARC.

Law stated - 30 April 2022

Separate bids in one procedure

Can related bidders submit separate bids in the same procurement procedure?

Following CJEU decisions in cases C-144/17, Lloyd's of London , and C-531/16, Specializuotas transportas , German case law mainly distinguishes between three situations of simultaneous and competing participation in the same tendering procedure. Under the general legal principle of 'secret competition', a bidder may not submit a tender if he or she has detailed knowledge of another bidder's tender, because such knowledge implies restrictive conduct, which in turn leads to exclusion from the procedure on the grounds of unfair competition. The first and most delicate situation involves simultaneous participation of a bidder consortium and one of its member companies. As German courts presume mutual knowledge of the tenders in this case, exclusion can only be avoided under extraordinary and very narrow circumstances. The second scenario where the competing entities are linked by a relationship of control is less of a concern. Even though courts still presume mutual knowledge in this case, linked bidders are given the opportunity to prove the absence of such knowledge. To do so, it is crucial to demonstrate that all necessary organisational measures, such as Chinese walls and confidentiality duties, have been taken to preserve secret competition and

prevent the flow of critical information. Finally, the practice of one bidder also at the same time acting as subcontractor of another bidder does not by itself imply restrictive conduct and is thus generally permitted. In this case, additional indications of undue flow of critical information between the bidders need to be present to presume restrictive conduct. The Bavarian High Court has just submitted several questions to the CJEU regarding the admissibility of the submission of separate bids by separate legal entities that form an economic.

Law stated - 30 April 2022

Negotiations with bidders

Is the use of procedures involving negotiations with bidders subject to any special conditions?

Negotiations with tenderers are only permissible if the awarding procedure is executed either as

- competitive procedure with negotiation;
- competitive dialogue; or
- innovation partnership.

The contracting authority may only carry out these procedures if explicitly permitted by law. For example, a competitive procedure with negotiation particularly can be conducted if (1) the contract requires design or innovative solutions or (2) the needs of the contracting authority cannot be met without adaptation of readily available solutions (section 14, subsection 3, nos. 1 and 2 VgV). However, if available, the contracting authority may choose freely by which process it wants to execute the procurement procedure.

The negotiation may not impair the principles of transparency, equal treatment and competition. Furthermore, the subject matter of the public contract must not be altered because of such negotiations. To prevent discrimination, no further negotiation may be conducted after the final bid has been submitted. Then, the contracting authority may ask only for clarifications, which must not materially change the final offer.

Law stated - 30 April 2022

If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

In German practice, the competitive procedure with negotiation is used almost exclusively. This is because this procedure is the easiest to handle for contracting authorities.

Law stated - 30 April 2022

Framework agreements

What are the requirements for the conclusion of a framework agreement?

In general, framework agreements are subject to the same regulations as usual public contracts. However, if a framework agreement is tendered, the tender documents have to pre-establish certain key figures with respect to the conclusion of single contracts based on the framework agreement. In particular, owing to the principles of transparency and equality, the framework agreement must at least fulfil the following requirements:

- The public authority must inform of the maximum volume for the delivery of goods or the execution of works.

Once the volume laid down in the framework agreement is reached, any exceeding goods and works need to be procured anew.

- Contracting authorities are required to provide tenderers with an estimated volume that is as precise as feasible and ideally based on prior needs of the respective good to enable tenderers to perform a sound calculation.
- The duration of the framework agreement needs to be given by the public authority. Certain German procurement law regimes stipulate a maximum contract duration. For example, for standard public service and supply contracts, a framework agreement may not have a longer duration than four years unless special circumstances apply (section 21, subsection 6 VgV).
- Lastly, framework agreements may not be used by contracting authorities to hinder competition or circumvent procurement law.

Owing to the principles of competition and transparency, the aspects stated above must be published in the tender document.

Framework agreements may be concluded between one or more contracting authorities and one or more undertakings. If the framework agreement does not provide for the need of subsequent competitive procedures, the undertakings are obliged to perform the contract upon request under the agreed conditions, without a corresponding obligation by the contracting authorities to make use of the contract performance.

For further details, see section 103, subsection 5 ARC.

Law stated - 30 April 2022

Is it possible to conclude a framework agreement with several suppliers?

Framework agreements may be concluded with more than one undertaking (see, for example, section 21, subsection 4 VgV). In such cases, three types of solutions have evolved on how to distribute any call under the agreement:

- A competitive procedure is not required if all the terms for the contracts to be awarded are governed by the framework agreement.
- On the contrary, a competitive procedure is required if the framework agreement does not establish all the terms for a contract to be awarded. The additional competitive procedure is then based on the same and, if necessary, more precisely formulated terms than those applicable to the award of the framework agreement, and, where appropriate, other terms referred to in the framework agreement itself.
- There is a hybrid solution possible, in which the contracting authority can decide if it wishes to conduct another competitive procedure. However, this requires the framework agreement to contain objective criteria the contracting authority has adhered to when deciding whether to conduct a (second) competitive procedure in addition to the terms for the contracts to be awarded.

Law stated - 30 April 2022

Changing members of a bidding consortium

Is it possible to change the members of a bidding consortium during the course of a contract award procedure?

Changes in the configuration of a consortium can be divided into different groups. For the legal assessment, it is decisive whether the change occurs during an ongoing procurement procedure or after its conclusion. It is also relevant how the bidding consortium changes. The following constellations are conceivable: withdrawal of a company, addition

of a company and replacement of a company. With a recent decision (C-144/17), the CJEU goes beyond what German case law has so far recognised as the limit for changes in a bidding consortium in an ongoing procurement procedure. Instead of referring to the formal aspect emphasised by German case law, namely that a change in the bid owing to the removal of a member of the bidding consortium is admissible at least in the negotiated procedure, the CJEU focused on the following substantive conditions in its assessment of the admissibility of the change of bidder: (1) the remaining bidder must be able to fulfil the requirements set by the contracting authority on its own, and (2) its continued participation in the procedure must not lead to an impairment of the competitive situation of the other bidders. However, the CJEU has put the above findings in question in a recent decision.

Law stated - 30 April 2022

Participation of small and medium-sized enterprises

Are there specific rules that seek to encourage the participation of small and medium-sized enterprises in contract award procedures?

Section 97(4) ARC generally requires contracting authorities to consider the interests of small and medium-sized enterprises (SMEs) when awarding contracts. To this end, contracts shall be divided into lots unless economic or technical reasons require that the contracts are awarded jointly. According to established case law, a contracting authority cannot decline to divide a contract into lots on the grounds that it would require additional effort regarding the tender specifications, the assessment of the bids or the coordination of the procurement procedure. Where a contracting authority does not comply with this requirement, an entity that can show that it would be interested in a lot by putting in a claim for the contract's division.

However, the Düsseldorf Higher Regional Court found that a decision to abstain from a division into lots by the contracting authority is only partially subject to judicial review. The only matter that the courts can review is whether the decision is based on the correct facts and follows reasonable consideration. When dividing a procurement into lots, the contracting authority must avoid lots that can only be carried out effectively by one or a few companies. Contracting authorities may limit the number of lots that can be awarded to a single bidder to achieve this (eg, section 30(1) VgV). The selection criteria, for example, the financial capabilities, may not relate to the entirety of the lots but must be in relation to the individual lots. Each individual lot should have its own selection criteria, as opposed to general criteria equally applicable to all lots.

Another tool for facilitating the participation of SMEs in large-scale projects is the admission of bidding consortia. Additionally, SMEs can – for proof of their qualification – rely on other companies' capacities and abilities if they can show that these will be at their disposal.

For further details, see section 97(4) ARC.

Law stated - 30 April 2022

Variant tenders

What are the requirements for the admissibility of variant tenders? Are bidders free to decide whether to submit a variant tender or is this subject to the contracting authority expressly permitting it in the tender documentation?

Variant tenders are only admissible if explicitly allowed or requested in the contract notice (eg, section 35(1) VgV). Variant tenders must be linked to the subject matter of the contract. The Federal Procurement Review Chamber has held that in the case of a prohibition of variant tenders in the contract notice, the subsequent permission of variant tenders in the request to submit an offer is irrelevant. However, if variant tenders were submitted in such a case,

contracting authorities may not just disregard the variant tenders during the evaluation and award the contract upon a regular bid. Rather, the procurement procedure must be reset to the stage before the publication of the tender notice (and, if allowance of variant tenders is desired, the tender notice would need to be corrected accordingly).

According to most of the German procurement regulations (eg, section 35(2) VgV), contracting authorities authorising or requiring variants must state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation; in particular, whether variants may be submitted only where a tender, which is not a variant, has also been submitted. Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration. They must also ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders that are not variants. It is possible to allow variant tenders even if the (lowest) price is the only award criterium (eg, section 35(2) VgV).

Law stated - 30 April 2022

Is a contracting authority obliged to consider any variant tenders that might have been submitted?

Variants tenders must only be considered if admissible (eg, section 35 (1) VgV). If so, the contracting authority is under an obligation to examine variant tenders in the same manner as it would the main offers.

Law stated - 30 April 2022

Tender specifications

What are the consequences if a tender does not comply with the tender specifications?

Offers are excluded from the procurement procedure if they contain changes or amendments to the tender documents. This does not apply to tender documents that explicitly allow changes (eg, in negotiated procedures) or variant tenders. Variant tenders and tenders in negotiated procedures, in general, only have to fulfil the mandatory requirements. If a bidder submits its own standard terms of business, the majority view of the courts is that this is an impermissible change of the tender specifications, and the bid should be excluded. However, recent case law established by the Federal Court of Justice and the Bavarian High Court indicate a shift away from such a rather formulaic approach. Particularly, the Federal Court of Justice has decided that the submission of a tenderer's TACs does not allow an exclusion of a tenderer if he or she has also declared that he or she wishes to adhere to the terms of the procurement documentation of the contracting authority. Rather, the bid must be interpreted along the line that the submission of the tenderer's terms and conditions was not done purposely and, therefore, has to be disregarded. It remains to be seen if this less formalistic and more interpretation-oriented approach – as also established by the Bavarian High Court – will become the new standard.

For further details, see section 57 VgV.

Law stated - 30 April 2022

Award criteria

Does the relevant legislation specify the criteria that must be used for the evaluation of submitted tenders?

According to section 127 ARC, contracting authorities must base the award of public contracts on the most economically advantageous tender. The contracting authority has broad discretion when setting up specific award

criteria to identify the most economically advantageous tender. The award criteria must be based on the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and social aspects, linked to the subject matter of the public contract in question. Such criteria may comprise, for instance:

- quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, and trading and its conditions;
- organisation and the qualifications and the experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- after-sales service and technical assistance, and delivery conditions such as delivery date, delivery process and delivery period or period of completion.

Furthermore, award criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They must ensure the possibility of effective competition and must be accompanied by specifications that allow the information provided by the tenderers to be effectively verified to assess how well the tenders meet the award criteria. In the case of doubt, contracting authorities must verify effectively the accuracy of the information and proof provided by the tenderers.

For further details, see section 127 ARC.

Law stated - 30 April 2022

Abnormally low tenders

Does the relevant legislation specify what constitutes an ‘abnormally low’ tender?

Though addressed in the procurement Regulations and the Contracting Rules for the Award of Public Works Contracts (except for the Regulation on the Award of Concessions), there is no legal definition of an ‘abnormally low tender’. In general, however, bids are considered to be abnormally low if the prices or costs contained are significantly below the competing offers, the contracting authority's own estimate of the contract price or its experience from earlier procurement procedures. As a general rule, courts have established that such a significant difference exists as soon as a bid deviates by 20 per cent or more from one of the above points of reference.

To exclude a bidder on these grounds, the contracting authority must also show that the bidder will not be able to (reliably) fulfil the contract.

For further details, see section 35(1) VgV.

Law stated - 30 April 2022

Does the relevant legislation specify how to deal with abnormally low tenders?

The process for dealing with abnormally low tenders is conducted in three steps. First, the contracting authority checks whether the price offered by a specific bidder is abnormally low at first glance. If this appears to be the case, the second step for the contracting authority is to consider the bid more thoroughly to determine whether the price is sufficient for the proper fulfilment of the contract. According to most German procurement regulations (eg, section 60 VgV), this requires informing the bidder of the authority’s doubts concerning the adequacy of the submitted price and giving the bidder the opportunity to explain the price and to show that it is adequate. To assess the abnormally low tender, the contracting authority is obliged to ask the tenderer for the basis of calculation and review the received documents. The authority checks if the bid is cost-sufficient and, if not, if compliance with competition law and a

proper performance of the procured services is ensured. Third, if after this inquiry the contracting authority is still not convinced that the price offered is justified, it must exclude the offer from the tender procedure. In addition, it must also exclude the bid if the low price or costs results from violations of any legal obligations mentioned in section 128(1) ARC, such as the obligation to pay taxes or comply with labour laws. If the low price or costs are related to the tenderer receiving state aid, the contracting authority must also exclude the bid if the tenderer is unable to prove in due time that it has received the aid lawfully.

Law stated - 30 April 2022

REVIEW PROCEEDINGS

Competent review bodies

Which bodies are competent to review alleged breaches of procurement legislation? Is it possible to appeal against a review body's decisions?

For public contracts and concessions above the relevant thresholds, review applications have to be filed with the competent procurement review chamber in the relevant federal state or with the Federal Review Chamber (for awards by federal authorities). This includes the analysis of decisions regarding contracts that do not fall within the scope of the Act Against Restraints of Competition (ARC). The decisions of these bodies can be appealed before the competent courts of appeal (in general higher regional courts).

In all other cases, aggrieved bidders would generally have to turn to the civil courts (or, in special circumstances, the administrative courts) to obtain injunctions, specific performance or damages. The procedural requirements for obtaining an interim injunction are typically higher and will not be further described in the following answers.

Law stated - 30 April 2022

Do the powers of competent review bodies to grant a remedy for a breach of procurement legislation differ?

No.

Law stated - 30 April 2022

Time frame and admissibility requirements

How long do administrative or judicial review procedures generally take?

Under regular circumstances, the public procurement review chamber must make its ruling within a period of five weeks of receiving an application for review (section 167, paragraph 1 ARC). In the case of exceptional factual or legal complexity, the time period may be extended by notice.

An admissible legal action against the ruling of the public procurement review chambers is the immediate appeal to the higher regional courts. There are no legal stipulations concerning the time frame proceedings in the second instance should be concluded in.

In practice, the time frame for a decision greatly depends on the respective review body and their procedural habits or capacities. Legal actions before the public procurement review chambers may take anywhere from the legal maximum period of five weeks up to half a year or even longer. At the higher regional courts, the appeal can take half a year to a full year.

For further details, see section 160 et seq and section 171 et seq ARC.

Law stated - 30 April 2022

What are the admissibility requirements for an application to review a contracting authority decision?

The admissibility requirements for a review application under the ARC (ie, review procedures above the thresholds) are as follows:

- The applicant must have an interest in the awarded contract, which is generally proven by the submission of an offer. However, the submission of a bid is not a requirement if the alleged violation of public procurement law that is subject to review prevents the applicant from submitting a promising offer.
- The applicant must claim that its rights were violated by non-compliance with public procurement provisions – possible infringement is sufficient.
- The applicant has to show that it has suffered a loss, or might be about to suffer a loss, as a consequence of the alleged violation of public procurement provisions. This condition is interpreted broadly, but an application will be rejected if the applicant's offer ranks so low among all offers that it has no realistic chance of winning the award, even without the breach.
- Usually, the tenderer has to file a complaint to the contracting authority (to enable them to remedy any violations themselves) before applying for a review of the procurement procedure. Both filing of complaint and subsequent application for review have strict deadlines that have to be adhered for them to be admissible.

For further details see section 160 subsection 2 ARC.

Law stated - 30 April 2022

What are the time limits within which applications for the review of contracting authority decisions must be made?

A review application becomes inadmissible, if:

- the applicant becomes aware of the claimed violation of public procurement provisions but does not submit a respective complain to the contracting authority within 10 calendar days;
- violations of public procurement provisions apparent in the tender notice are not communicated to the contracting authority by the expiry of the application or tender submission deadline;
- violations of public procurement provisions that only become apparent from the tender documents are not communicated to the contracting authority by the expiry of the application or tender submission deadline; or
- more than 15 calendar days have elapsed since receipt of notification from the contracting entity that it is unwilling to redress an objection.

Section 134 ARC sets out certain information and standstill obligations for the contracting authorities. According to this provision, a contract may only be concluded at the earliest 15 calendar days (10 days if the information is sent by fax or electronically) after the information has been sent to other tenderers that their tenders were rejected. The standstill period shall begin on the day after which the contracting entity dispatches the information. A review application after the expiry of this period is only possible in exceptional cases. For example, in an isolated case, a court

ruled that it is an abuse of rights if the authorities choose to send a rejection information during the Easter holidays and by doing so to de facto reduce the given period of time for the applicant to react to a few working days. Once the contract has been concluded, a challenge of the award is, in general, no longer possible. However, an aggrieved bidder can claim that the contract was invalid from the beginning if the contracting authority has failed to inform or has not correctly informed the unsuccessful bidders or has made an illegal de facto award. Such a claim has to be brought within 30 days of knowledge of the respective breach of law or 30 days after the contracting authority has published the contract award in the Official Journal of the EU, and, in any event, at the latest, six months after conclusion of the contract. The contracting authority can prevent an award being declared void retroactively by publishing a respective notice on the planned award at least 10 days before the conclusion of the respective contract. In this case, the planned award can only become subject to procurement litigation in this period.

For further details see sections 160, subsections 3, 134 and 135 ARC.

Law stated - 30 April 2022

Suspensive effect

Does an application for the review of a contracting authority decision have an automatic suspensive effect on the contract award procedure?

If the contracting authority is informed in writing by the procurement review chamber of an application for review, this will generally have a suspensory effect. However, the procurement review chamber is obliged to examine whether the application is evidently inadmissible or unfounded. If this is the case, the procurement review chamber should not inform the contracting authority and there will be no suspensive effect.

Where there is a suspensive effect, the contracting authority will not be permitted to award the contract before the procurement review chamber makes a decision and until after an additional two-week period has elapsed to allow for potential appeals. Contracts concluded during the suspension period are void.

If the tenderer wins the proceedings of first instance, the suspensive effect will automatically continue if the contracting authority files an appeal. If the contracting authority wins the proceedings of first instance, the tenderer must apply for an extension of the suspensive effect together with the appeal.

The contracting authority can appeal for a lifting of the suspensive effect in both instances. The competent review body will grant the appeal, generally speaking, if the negative effects resulting from the prolongation of the award outweigh the negative effects of the lack primary legal protection.

For procurement procedures conducted under the Regulation in the Field of Defence and Security for the Implementation of the Directive 2009/81/EC, special rules have been established that highlight that competent review body particularly must consider certain enumerated circumstances in connection with the respective procurement procedure that require a fastened award, such as a crisis.

For further details, see sections 169, 173 and 176 ARC.

Law stated - 30 April 2022

Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

Although section 176 ARC allows for preliminary awarding of contracts, this procedure is rarely used in practice in Germany. In 2021, in the first instance, only in 2 per cent of review proceedings (21 of 958) did the contracting authority apply for a lifting of the automatic suspensions. Only 20 per cent of these applications (four in total) were successful.

In the second instance in 2021, tenderers successfully applied for an extension of the suspension in 57 per cent of the cases (42 of 74), whereas contracting authorities applied only in six cases for a lifting of the suspension, of which only two were granted (33 per cent).

Law stated - 30 April 2022

Notification of unsuccessful bidders

Is the contracting authority required to notify unsuccessful bidders of its intention to conclude the contract with the successful bidder and, if so, when does that obligation arise?

The contracting authority has a duty to inform all unsuccessful bidders of the name of the successful bidder, the reasons for the rejection of their respective offers and the earliest possible date of the conclusion of the contracts. It may only conclude the contract at least 15 (or, where informed electronically, 10) calendar days after the day that the information was sent to the bidders. The period begins one day after dispatch (section 134 ARC). If this obligation is not observed, the contract is provisionally ineffective for as long as it can be challenged in court.

Exceptions from these obligatory waiting periods may apply in cases of urgency, expected damage of justified business interests, or, for instance, with respect to public interest in defence and security awarding procedures.

For further details, see section 134 ARC.

Law stated - 30 April 2022

Access to procurement file

Is it possible for an applicant seeking the review of a contracting authority's decision to have access to that authority's procurement file?

Yes, except if there are significant reasons to deny access to the file; in particular, where the review application is clearly inadmissible or unfounded. Access to procurement files in these cases is guaranteed under section 165 ARC. The applicant may either review obtained copies, excerpts or transcripts by the clerk's office at their own expense. In practice, it became customary for the review bodies to send the relevant parts of the procurement files by email or fax. The accessibility of documents may be restricted with respect to sensitive business information and trade secrets. The parties who hold the respective sensitive information need to mark the information as such in the procurement files. In addition, access is, in practice, limited to the parts of the procurement file that are relevant to the supposed breach of procurement regulations.

Law stated - 30 April 2022

Challenges to contracting authority decisions

How customary is it for contracting authority decisions to be challenged?

The number of review applications filed with the review chambers in 2021 decreased to 865 applications compared to 2020 (2020: 988) and is still above the figures of the previous years (2019: 799, 2018: 745, 2017: 824, 2016: 880). Higher than in 2020, the number of applications received was only 989 in 2021.

On the other hand, the number of decisions of the higher regional courts remains largely stable at 171 appeal proceedings (in 2021) and increased by nine appeals from 2020 (for comparison: 2020: 162, 2019: 154, 2018: 166, 2017: 153, 2016: 180).

Law stated - 30 April 2022

Violations of procurement law

If a violation of procurement law is established in review proceedings, can this lead to the award of damages?

Disadvantaged bidders have the option of claiming damages in German courts. The main provisions that govern such claims are section 181 ARC and sections 311(2), 241(2) and 280 of the German Civil Code.

Section 181 ARC requires that the contracting authority has violated a regulation that is designed to protect the bidders and that the claimant would have had a realistic chance of being awarded the contract if no such violation had occurred. The CJEU ruled in the Strabag judgment (case C-314/09) that the Remedies Directives preclude national legislation that seeks to make the possibility of damages being awarded in the event of infringement of the public procurement rules dependent on a finding that the contracting authority is at fault. Therefore, it is not necessary for the contracting authority to be at fault for the damages claim in section 181 ARC. Furthermore, it is sufficient if the aggrieved tenderer establishes that an infringement deprived it of a 'real chance' of winning the contract (ie, the tenderer is under no obligation to show that it would have positively been awarded the contract if the contracting authority had acted lawfully).

According to section 181 ARC, the applicant may demand compensation for the costs of preparing the tender or of participating in a procurement procedure.

According to sections 311(2) and 241(2) GCC, a person can seek damages if he or she was a participant in the procurement procedure in question. However, the bidder is required to show that the contracting authority breached an obligation to take account of the rights, legal interests and other interests of the bidder. Sections 311(2) and 241(2) GCC require the contracting authority to be at fault. Furthermore, and in contrast to the situation under section 181 ARC, the bidder is under an obligation to show that there is a strong likelihood that it would have been awarded the contract if the contracting authority had acted lawfully, according to settled case law.

When estimating the damage claimed by the applicant according to sections 311(2) and 241(2) GCC, contributory negligence by the applicant can be taken into account. According to case law, a tenderer generally can be guilty of contributory negligence if, despite its knowledge of a violation of procurement law, he or she fails to submit a respective compliant to the contracting authority in question. Usually, claims of damages according to sections 311(2) and 241(2) GCC also only cover the costs of preparing the tender or of participating in a procurement procedure. However, in contrast to section 181 ARC, an applicant may claim expectation damages if it would have been awarded the contract under a lawful procurement procedure.

Law stated - 30 April 2022

Is it possible for a concluded contract to be set aside following successful review proceedings?

It is an established principle of German procurement law that, generally, an award already granted cannot be cancelled or terminated by the procurement review chamber, even if it was awarded in breach of procurement law. However, subject to new section 135 ARC, a contract is ineffective from the beginning if the contracting authority:

- violated its duty to inform bidders before concluding the contract or its duty not to award the contract before the expiry of the standstill period; or
- concluded the contract with a company without prior contract notice even though it was required to do so by law; and

- this violation has been established in a review procedure.

Generally, a contract could also be void for other reasons under civil law; for example, if the contracting authority and a tenderer deliberately worked hand-in-hand to circumvent procurement law.

Law stated - 30 April 2022

Legal protection

Is legal protection afforded to parties interested in a contract that might have been awarded without an advertised contract award procedure?

Yes. German review bodies will order the contracting authorities to refrain from continuing the de facto illegal procurement and not to award the contract without a proper procurement procedure. However, an applicant must demonstrate that it has a direct interest in the contract award that usually exists if the applicant is generally suitable to perform the contract.

For further details, see section 135 ARC.

Law stated - 30 April 2022

Typical costs

What are the typical costs involved in making an application for the review of a contracting authority decision?

In general, the minimum cost (fees and expenses) for the review of a procurement procedure before the public procurement review chambers is €2,500, while the maximum cost must not extend €50,000. For reasons of fairness, however, the minimum amount may be reduced to €250; in exceptional circumstances, for example, if the expense involved or the economic significance is unusually high, the maximum costs may be increased up to €100,000.

The unsuccessful party in the review proceedings must bear the costs. It must also assume the costs of the necessary expenses of the respondent for the appropriate legal prosecution or legal defence, but only the statutory fees. Statutory law specifies that the fees must be reimbursed based on the contract value.

The costs for proceedings in the second instance depend upon the contract value and are calculated according to the German Court Costs Act and the cost table published therein.

For further details, see section 182 ARC.

Law stated - 30 April 2022

UPDATE AND TRENDS

Emerging trends

Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or, on the contrary, been restricted?

The Russian aggression against Ukraine has led to massive economic disruptions in various branches of the national economy. In consequence, prices have risen. For already awarded contracts, this may mean a significant change in the

basis of the contract as the tenderers had done calculations with lower costs. Therefore, the German government has released a circular note on how to deal with these irregularities. Regarding new procurements, the government has loosened its rules for price adjustment clauses.

Another hot topic within procurement law is the admissibility of IT solutions that rely on cloud services rendered by non-EU entities or European subsidiaries of non-EU entities. The main point of dispute is the questions whether using their services violates data protection law (which has to be adhered to when performing services for a contracting authority). However, it can be fairly assumed that when an EU subsidiary adheres to European data protection law, relying on the services of such an entity will generally not face substantial risks in the course of a public procurement procedure.

The beginning of the Russian aggression also has led to a severe change in the German federal government's defence policies towards the equipment of the German armed forces. The Ministry of Defence plans to procure much needed new and additional equipment quickly. According to the applicable Regulation in the Field of Defence and Security for the Implementation of the Directive 2009/81/EC, a quicker procurement in the form of a negotiated procedure without competition can be possible if there is an urgent need for the equipment that was not foreseeable. Therefore, the main issue will be whether the contracting authority will be able to prove the urgency of the procurements in each case. In addition, recent case law suggests that even if the requirements for a negotiated procedure without competition owing to urgency are met, this does not allow for a complete absence of competition. Rather, contracting authorities will have to enable as much competition as possible.

Since December 2021, the contracting authorities are allowed to use the competition register when the value of the respecting contract exceeds €30,000. Starting from 1 June 2022, the query is mandatory for the respecting contract authorities if applicable.

Law stated - 30 April 2022

Jurisdictions

Bulgaria	Sabev & Partners
Ecuador	Dentons Paz Horowitz
European Union	Pinsent Masons
Germany	BLOMSTEIN
Ghana	AB & David Law Affiliates
Greece	Sagias & Partners Law Firm
Israel	S Horowitz & Co
Italy	Satta Romano & Associati Studio Legale
Nigeria	TRLPLAW
Norway	Advokatfirmaet Thommessen AS
Panama	Patton Moreno & Asvat
Portugal	PLMJ
Romania	Suciu Popa & Asociatii
Singapore	CMS Holborn Asia
Sweden	Schjødt
Switzerland	BianchiSchwald LLC
United Kingdom	Pinsent Masons