

Equipping the German Armed Forces in light of the “Zeitenwende”

3 May 2022

The Russian invasion of Ukraine has led to a rethink in Germany. Suddenly, extensive funds are to be made available with which the urgently needed equipping of the German Armed Forces can finally be realised. The equipment is now to be provided as quickly as possible. The first procurement actions have already been initiated.

But how can the funds be utilized quickly? Reflexively, reference is again made to public procurement law, which would supposedly stand in the way of timely procurement. This has always been wrong. A legally compliant and secure procurement is possible and, against the background of the best possible utilisation of funds in terms of an optimal price-performance ratio, also urgently required. The German Armed Forces have various options at their disposal, whereby the legal requirements are sometimes very strict:

- In principle, call-offs from framework agreements are possible without conducting a new award procedure. It should be noted, however, that the maximum quantity specified in the contract and or in the award procedure may not be exceeded. Moreover, framework agreements – just like any other contract concluded within the framework of an award procedure according to the German Act against Restraints of Competition (**ARC**) – may only be amended during their term within the narrow limits of Section 132 ARC. Accordingly, changes to the subject matter of the contract, the scope of the service(s) and the remuneration are only possible to a very limited extent.
- Pursuant to Section 132 (2) sentence 1 no. 1 ARC, it is also possible under public procurement law to draw options provided for in contracts already concluded. Accordingly, options can be exercised without the obligation to conduct a new award procedure if they are formulated clearly, precisely and unequivocal and contain information on the nature, scope and conditions of the option.
- Furthermore, it is in principle also conceivable that existing contracts are amended, in particular regarding their scope, on the basis of Section 132 (2) sentence 1 no. 3 ARC. For it is plausible that in individual cases, against the background of the war in Ukraine, amendments to contracts may become necessary due to circumstances which the Federal Government could not foresee. It is clear that the Federal Government did not and could not foresee the war in Ukraine. However, it is then up to the federal government to (also) prove that this war (or developments resulting from it, such as the transfer of weapons to third parties)

and not a different circumstance leads to the necessity of the contract amendment. In any case, the contract amendment must not change the overall character of the contract.

- In the opinion of the German Federal Ministry for Economic Affairs and Climate Action, the war in Ukraine and the threat posed by Russia to NATO members and the consequences and short-term procurement needs triggered by it were and are unforeseeable for the procuring entities as a whole and in detail (Federal Ministry for Economic Affairs circular of 13 April 2022). For this reason, procurement projects directly related to this should regularly meet the requirements to conduct so-called urgency awards – negotiated procedures without prior publication – pursuant to Section 12 (1) no. 1 lit. b) Defence Procurement Regulation (*VSVgV*) / Section 14 (4) no. 3 Supply and Service Procurement Regulation (*VgV*). However, the Federal Ministry for Economic Affairs itself points out that this procedure is not available if *"a procurement need has arisen at very short notice, but only has to be satisfied at some point in the future"*. If the requirements for an urgency award are met, it should be noted that such an award still constitutes an ARC award procedure and that the applicable public procurement law provisions must be observed accordingly.

In this regard, the Rostock Higher Regional Court recently stated that *"contracting authorities must ensure as much competition as possible in each case even in cases of so-called urgency awards pursuant to Section 14 (4) no. 3 VgV[...]; it must therefore regularly solicit several offers and thus initiate at least "competition light" (Rostock Higher Regional Court, decision of 11 November 2021 – 17 Verg 4/21)*. The Federal Ministry for Economic Affairs and Climate Action has explicitly endorsed this in the above-mentioned letter. The ruling can also be applied to the *VSVgV* because the provisions have the same regulatory purpose and are identical in content. In contrast to the *VgV*, the *VSVgV* only contains additional case examples of when urgent reasons can generally exist.

BLOMSTEIN will examine this group of cases in more detail in a further briefing.

- In contrast, in our opinion, Art. 346 TFEU only provides a basis for the "acceleration" of a procurement project in exceptional cases. In a more recent decision (decision of 18 August 2021 – VII-Verg 51/20), the Higher Regional Court of Düsseldorf once again emphasised the narrow factual prerequisites for an award outside the ARC procurement law on the basis of Art. 346 TFEU.

In its decision, the Higher Regional Court reiterated that an assertion of this exemption provision is only permissible if the German Armed Forces can prove in an individual case that a waiver of an award procedure is necessary to protect essential security interests. In particular, it must be addressed that the relevant interests could not be protected within the framework of an award procedure. It is not sufficient to define an abstract security interest. Rather, it has to be proven

which security interests would be affected by the procurement project, what connection existed between them and that the security interest affected are also essential. However, purely economic considerations are not an essential security interest within the meaning of the provision. In addition, the Higher Regional Court requires that the procurement concerns a *"technology with high innovation potential and a scope of application that goes beyond the defence sector"*. Such proof will only succeed in rare cases.

Irrespective of the ways proposed here of quickly equipping the German Armed Forces in accordance with procurement law, we believe that the following should not be disregarded:

- The interest in European sovereignty and independence from non-European arms manufacturers, which has been brought into sharper focus during the Trump administration, should be carefully considered and weighed for every concrete procurement project, despite the need for rapid equipment. In particular, when it comes to the – indisputably desirable – goal of purchasing products *off-the-shelf* and IT, we believe that the resulting long-term commitment to the respective supplier should be taken into consideration.
- In our opinion, time savings can be made not so much in the execution of award procedures, but rather in the run-up to and in the follow-up to them. In particular, the drafting of – sometimes extremely complex – "gold-plated" performance specifications not only costs an enormous amount of time in the drafting phase, but also in the preparation of the bids by the bidders. Finally, the obligation to have procurement projects with a value of at least EUR 25 million approved by the Budget Committee of the German Bundestag also stands in the way of efficient and expert procurement.

BLOMSTEIN is always available for discussions related to procurement in the security and defence sector.