

Defence procurement in Germany - the direct way

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As [announced](#) mid-January, BLOMSTEIN is publishing a series of briefings introducing into European and German legal defence matters. In our last briefing, we discussed our take on [hot legal topics for the defence industry for the year 2024](#).

It is too early to say whether Hollywood's summer blockbusters [Barbie](#) or [Oppenheimer](#) will reign supreme in the coming film awards season. In German public procurement law, some of the most coveted awards are of a different kind: Under certain circumstances, public defence contracts can be awarded without a lengthy and complex tendering procedure – known among procurement lawyers as "direct awards". Since the *Zeitenwende*, Germany now largely favours this approach as it is perceived as being the "quickest" way. It is not only used to replenish stocks of already introduced munition or to replace equipment given. Rather, Germany now also relies on this approach to obtain new equipment. This briefing will provide a brief introduction to the various possibilities of the best way to obtain and negotiate them with the competent contracting authority, the Federal Office for Equipment, Information Technology and In-Service Support of the Bundeswehr (**BAAINBw**).

The Types of Direct Awards

German public procurement law provides for several cases in which contracting authorities may award contracts by a procedure that could be described as "direct award". The broader category of what is called "**direct award**" in practice most often takes one of the following two forms:

Negotiated procedures without a call for competition allow contracting authorities to invite only one company to submit a bid. There are several situations that allow choosing this approach. However, only one is really relevant in practice. It relates to contracts that only one undertaking can perform because of its particular technical specifications or because of exclusive rights of that undertaking, such as patents or copyrights. An example of this category is the re-procurement of depleted weapons stock or repair and maintenance contracts concerning military equipment. The [Bundeswehr Procurement Acceleration Act](#) has – at least temporarily – sought to expand this category, by declaring that a direct award under this provision is possible if a company provides the only technical solution that ensures compatibility with systems used by military allies.

The second form of a direct award can occur in cases that fall under the **exception of Article 346 TFEU**. If a competition procedure would endanger "*essential interests of*

(...) *security*” of a Member State public procurement law is not applicable and a contracting authority may award contracts directly. Despite this principle, a direct award under this provision will not easily be possible. First and foremost, the requirement of essential interests of national security being endangered will only rarely be met as ECJ case law has not once found that to be the case despite multiple attempts by EU Member States. Moreover, German authorities generally opt to nevertheless carry out competitive procedures with selected suppliers. These follow most of the principles of general procurement but are legally based on budgetary law considerations.

Although not an **option** for concluding a new contract with Germany, it is worth noting that Germany is now very open to including options for additional orders of the goods to be procured. The purpose of these options is to make it easier to reorder for own use at a later date or to enable procurement for other (EU) member states. However, these options are by no means a sure thing for the contractor. They do, however, allow for quick re-ordering and provide another reason for the contracting authority not to have to carry out a new procurement procedure.

How to be the “Chosen One” and Practical Advice for Negotiations

The decision to confer a direct award predates – by its nature – the announcement of a procurement procedure. Therefore, companies who seek direct awards will have to already be in contact with the BAAINBw, the MOD as well as political stakeholders beforehand and must have convinced them of their USPs. Only then, there is a real opportunity to be singled out as a potential contractor without a competitive procedure.

Within the subsequent negotiations, companies should be aware of a few key particularities of direct award procedures and dealings with the BAAINBw. First, the authority heavily makes use of contractual model templates. Deviations from these templates may result in prolonged procedures. Companies should therefore carefully consider which amendments are essential to them. Companies should further note that the BAAINBw will generally request an extensive grant of IP rights.

In addition, the BAAINBw might mandate that a certain percentage of the contract shall be carried out by subcontractors. These companies will have to meet the same strict security requirements foreseen for the main contractor. Additionally, given the lack of competition in direct award procedures, the law mandates that very strict pricing regulations must be followed. These oblige the authority to either follow the market price or – if a market price cannot be determined as is often the case with defence contracts – to set prices strictly aligned with the costs incurred by the contractor (“cost price”). Companies should therefore not expect a great deal of flexibility on pricing from the BAAINBw during negotiations.

Who to turn to

BLOMSTEIN is constantly advising its clients in the [defense industry](#) in all aspects of defense procurement. We will be happy to answer and share their insights regarding any general questions or in connection with a specific procurement process.

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Stay tuned: In our next defence briefing - to be published on 14 February - we will provide an introduction to legality of and possible ways to challenge direct awards.