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1 Relevant Legislation

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

The legal core of the German public procurement regime for European public contracts, i.e. public contracts reaching or exceeding the applicable EU threshold (see question 2.5), is regulated in Part IV of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*). The GWB is complemented by the German Regulation on the Award of Public Contracts (*Vergabeverordnung – VgV*). The details of the procurement procedures are laid down by delegated legislation in various procurement regulations:

- Procurement Regulation for Public Works (*Vergabe- und Vertragsordnung für Bauleistungen – VOB/A*);
- Procurement Regulation for Public Supplies and Services (*Vergabe- und Vertragsordnung für Leistungen – VOL/A*); and
- Procurement Regulation for Professional Services (*Vergabeordnung für freiberufliche Dienstleistungen – VOF*).

Public procurement contracts concluded by regulated firms and entities operating in the sectors of transport, water and energy ("utilities") are regulated by a separate Sector Regulation (*Sektorenverordnung – SektVO*). In addition, the Public Procurement Regulation on Defence and Security (*Vergabeverordnung Verteidigung und Sicherheit – VSVgV*) regulates the public procurement of contracts in the fields of defence and security pursuant to section 99 para. 7 GWB (e.g. the supply of military equipment). For public works in the fields of defence and security, the VSVgV is supplemented by the regulations of section 3 of the VOB/A.

The above-described multi-layered structure of legal rules transposes the prevailing EU Procurement Directives (2004/18/EC, 2004/17/EC and 2009/81/EC). With regard to the new EU Procurement Directives and their future transposition in Germany, see question 9.1.

For national public procurement contracts, i.e. public contracts below the applicable EU threshold (see question 2.5), the GWB and the VgV do not apply. Instead, the relevant budget law of the federal, state (*Bundesland*) and local governments must be observed. Usually, state and local budgetary legislation refers to the first chapter of the VOB/A and of the VOL/A. It is also important to keep in mind the applicability of the primary law of the EU (for example, the principles of non-discrimination, transparency and competition) if the contract in question has Internal Market relevance.

Almost all of the states (*Bundesländer*) have their own public procurement laws which make the decision on awarding a public contract dependent on extraneous criteria. These public procurement laws of the states apply to procurement procedures above and below the EU thresholds. Extraneous criteria are, for example, the observance of collective labour agreements and family-friendly working conditions as well as gender equality.

The following explanations and descriptions of German public procurement law focus on public contracts above the EU thresholds as it is assumed that this meets the demands of this *International Comparative Legal Guide*.

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The principle of transparency which is fundamental for tender procedures entails that the contracting entities are obliged to provide for reasonable documentation of the procedures. Except for § 111 GWB, which regulates the right to access records used by the public procurement tribunals during the legal review (*Vergabekammern*), there are no specific provisions setting out conditions for access to the records. Consequently, access of the general public to the records kept by the contracting entity is subject to the general provisions of public and regulatory law. The Federal Government and several German states have enacted laws regarding freedom of information (*Informationsfreiheitsgesetze*). However, all of these laws protect the legal interest of the participants in tendering procedures in the confidentiality of their trade secrets.

Other areas of national law related to public procurement are "the prohibition of an abuse of a dominant position" (§ 19 GWB) and "the prohibition of discrimination" (§ 20 GWB). Accordingly, aside from the remedies before the public procurement tribunal, a bidder can also request the institution of antitrust proceedings. In addition, the violation of public procurement regulations may at the same time infringe the Act Against Unfair Competition (*Gesetz gegen unlauteren Wettbewerb – UWG*). The bidder may thus obtain an injunctive relief under the UWG.

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

As a Member State of the EU, Germany is obliged to comply with EU public procurement law. Germany is not a contracting party to the GPA. However, as the EU is one of the parties of the GPA and thus has to comply with obligations under the GPA, Germany

is indirectly affected. Accordingly, as the EU thresholds in the EU Procurement Directives are geared to the thresholds as stipulated in the GPA, it can be said that in general, public procurements above the EU thresholds are covered by the GPA regime.

Another relevant international agreement in this context is the European Economic Area ("EEA") Agreement. The EEA Agreement brings together the EU Member States including Germany, and the EEA and EFTA States, into a single market in public procurement.

1.4 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?

German public procurement law is aimed at ensuring that the three basic principles of public contracting – i.e. transparency, equal treatment and competition – are observed in every public tender procedure. These three core principles arise out of the EU Procurement Directives and the EU Treaties, and they are highly relevant to the interpretation of the legislation. Further fundamental rules are the bidders' right of ensuring compliance with public procurement rules, the consideration of medium-sized companies, the competence and abilities of bidders, and economic efficiency. All of these basic principles and fundamental rules of German public procurement law are laid down in § 97 GWB.

1.5 Are there special rules in relation to procurement in specific sectors or areas?

As described in question 1.1, public procurement contracts concluded by utilities are regulated by a separate Sector Regulation (*Sektorenverordnung – SektVO*). Public procurement of contracts in the fields of defence and security is regulated in the Public Procurement Regulation on Defence and Security (*Vergabeverordnung Verteidigung und Sicherheit – VSVgV*) supplemented by provisions in the GWB. For public works in the fields of defence and security, the VSVgV is supplemented by the regulations of section 3 of the VOB/A.

2 Application of the Law to Entities and Contracts

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

Public entities include all federal, state and local authorities (and their special funds) as well as other public law institutions such as universities, social insurance institutions, pension fund institutions, etc. Associations whose members are public entities as defined above are covered by German public procurement law as well.

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

Private entities are covered if they provide services meeting non-commercial needs in the general interest and are mainly funded or supervised by federal, state or local authorities or by associations that are covered (e.g. waste management companies, regional development companies, publicly funded football clubs). Private associations are covered if their members are private entities as defined above.

Private entities operating in the transport, water and energy sectors are covered if these activities are exercised on the basis of "special or exclusive rights" granted by a competent authority, or if they are under the controlling influence of public authorities or of state-controlled private entities.

Private entities receiving funds from public authorities or from state-controlled private entities for civil engineering projects, for building hospitals, sports, leisure or recreational facilities, school, university or administrative buildings, or for related services and design contests, are also covered if the funds are used to finance more than 50% of these projects.

In addition, except for utilities under the SektVO, private entities who have concluded a works contract with public authorities or state-controlled private entities, with respect to contracts awarded to third parties (works concession), are covered.

2.3 Which types of contracts are covered?

German public procurement law covers public contracts which are defined as contracts for pecuniary interest concluded between contracting entities and undertakings for the procurement of services whose subject matter is supplies, works or services, works concessions and design contests intended to lead to service contracts.

2.4 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Suppliers established outside the German jurisdiction (even if they are established outside the European Economic Area) are allowed to participate in public procurement procedures of all contracting entities of the Federal Republic of Germany. Contrary to other EU Member States, Germany does not provide the possibility for non-European bidders to participate in a public tender dependent on the conclusion of a free trade agreement between the country of the bidder and the EU. The discrimination against market actors by reason of their seat and/or their citizenship is illegitimate according to German public procurement law. It is, in particular, inadmissible to consider only bidders who have a local seat. All bidders have to be treated equally and thus they have equal rights. There is an exception to this basic principle for public tenders of utilities under the SektVO. Utilities can reject a tender for a supply contract if it contains a portion of more than 50% of goods originating from countries which are not Contracting Parties of the Agreement on the European Economic Area or countries which have not signed any agreements of mutual market access.

2.5 Are there financial thresholds for determining individual contract coverage?

As outlined above (see in particular question 1.1), it is decisive to assess whether the public contract reaches or exceeds the applicable EU threshold in order to identify which of the various public procurement rules apply. The EU thresholds are referred to in the VgV, the SektVO and the VSVgV and they are net of VAT. Currently, they are as follows:

- Public work contracts: 5,186,000 euros.
- Public supply/service contracts: 207,000 euros.
- Public supply/service contracts of the highest or higher federal authorities: 134,000 euros.
- Public supply/service contracts in the sectors of transport, water and energy (utilities) and in the fields of defence and security: 414,000 euros.

As the EU thresholds for the application of the EU Procurement Directives are revised every two years, the next change is expected on 1 January 2016.

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

German public procurement law provides for a multitude of rules which aim to prevent the avoidance of the EU-wide public procurement. For example, it is prohibited to estimate or split the value of the contract with the intent to avoid the applicability of German public procurement law above the EU thresholds (§ 3 para. 2 VgV, § 2 para. 2 SektVO, § 3 para. 2 VSVgV). Another example is the ineffectiveness of a contract if the contracting entity has violated its information and standstill obligation or if it has awarded a public contract directly to an undertaking without inviting other undertakings to participate in the award procedure and this violation has been established in review proceedings within certain time limits (§ 101b GWB).

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

German public procurement law covers works concessions except for utilities (see question 2.2). A works concession is defined as a contract for the execution of a works contract, whereby consideration for the building work consists, instead of remuneration, in the limited right to use the installation, if appropriate, plus the payment of a fee (§ 99 para. 6 GWB). § 22 VOB/A-EG stipulates specific rules for the award of works concessions above the EU thresholds, but for the most part, they are regulated like national works concessions, i.e. below the EU thresholds.

In accordance with prevailing EU Procurement Directives, there is no coverage and no definition of service concessions in German public procurement law. However, service concessions are subject to the general principles of the EU Treaties, i.e. transparency, non-discrimination and competition if they have Internal Market relevance.

2.8 Are there special rules for the conclusion of framework agreements?

With regard to public supply and services, framework agreements above the EU thresholds are defined in § 4 VOL/A-EG as contracts between one or more contracting entities and one or more undertakings, the purpose of which is to establish the terms governing the contracts to be awarded during a given period, in particular with regard to the price. The envisaged contract volume must be defined as accurately as possible in the public notice but it does not have to be conclusively determined. The contracting entities are not allowed to conclude several framework agreements for the same contractual performance. The maximum term of the framework agreement is four years, unless the subject matter of the agreement or other special circumstances justify an exception. If a framework agreement is to be concluded with only one undertaking, the specific contracts have to be awarded under the terms and conditions of the framework agreement. Before awarding the specific contracts, the contracting entities may consult with the undertaking in writing and request it to complete its tender if required. If a framework agreement is to be concluded with several undertakings, at least three must participate, provided a sufficient number of undertakings meet the selection criteria and a sufficient number of admissible tenders meet the award criteria. If all terms and conditions are stipulated in the framework agreement, the individual orders can be awarded without calling for competition again. In cases where not all terms and conditions have been stipulated in the framework agreement, a so-called mini-competition (*Miniwettbewerb*) has to be conducted prior to the award of the individual orders.

With regard to public supply and services in the fields of defence and security, there is a similar definition of framework agreements in § 4 para. 2 VSVgV. The rules for the conclusion of a framework agreement are similar to the aforementioned. However, there are some differences, e.g. the maximum term is seven years.

With regard to utilities, there is a similar definition of framework agreements in § 9 SektVO. However, the rules for the conclusion of a framework agreement under the SektVO are far less strict than under the VOL/A. For example, for framework agreements of utilities there is no maximum term.

The question of whether framework agreements can be concluded for public works under the VOB/A and for professional services under the VOF, is disputed among commentators and public procurement tribunals.

2.9 Are there special rules on the division of contracts into lots?

The division of contracts into lots is regarded as one main instrument in order to shelter the interests of small and medium-sized undertakings (see question 9.2). § 97 para. 3 GWB stipulates that public contracts have to be subdivided into partial lots by quantity (partial lots) or by special items of the contract (trade-specific lots). Several partial or trade-specific lots may be awarded collectively for economic or technical reasons. If an undertaking, which is not a public contracting entity, is entrusted with the realisation or execution of a public contract, it shall be obliged by the contracting entity, insofar as it subcontracts to third parties, to divide contracts into lots accordingly.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

German public procurement law provides for four different tender procedures to award a European public contract (public contract reaching or exceeding an applicable EU threshold):

- Open procedure: *This is a "one-stage" procedure where any interested undertaking may participate and submit a tender. There is the possibility to use the so-called "dynamic purchasing system" which is a special form of the open procedure; it is a completely electronic procedure.*
- Restricted procedure: *This is a "two-stage" procedure. In the first stage the contracting entity publishes an invitation to participate. A limited number of the participating undertakings are selected by the contracting entity to submit a tender in the second stage.*
- Negotiated procedure: *This is the most flexible and least formal public procurement procedure. The contracting entity choses – either after a prior prequalification or directly – a limited number of suitable participating undertakings to submit a tender. The tender evaluation phase is combined with negotiations of the tenders and the terms of the contract with the chosen undertakings. Thus, the negotiated procedure may consist of several stages.*
- Competitive dialogue (not applicable under the SektVO): *This tender procedure is usually chosen for complex*

contracts where suitable solutions meeting the needs of the contracting entity have to be identified in a dialogue with the undertakings. The competitive dialogue is conducted between the prequalification and the bidding phase.

A tendering procedure usually begins with the publication of the tender notice in the Supplement to the *Official Journal of the European Union* ("OJ") and in the EU public procurement database ("TED"). The tender notice has to provide sufficient information about the subject matter of the contract in order to enable the undertakings to decide whether to participate or not. Except for the open procedure, all other public procurement procedures consist of several stages, usually starting with the prequalification phase. The (pre)qualified undertakings submit a tender which is evaluated by the contracting entity. The tender procedure ends with the award, which is usually won by the most economically advantageous tender.

As a rule, the open procedure has priority over the other procedures. The other procurement procedures can only be chosen by the contracting entity under the specific requirements outlined in the procurement regulations. However, for contracts awarded under the SektVO, this priority of the open procedure is not applicable. The SektVO provides for a free choice among the procedures. In contrast, contracting entities awarding public contracts under the VSVgV are not permitted to use the open procedure.

3.2 What are the minimum timescales?

The minimum timescales that are to be observed for public procurement above the EU thresholds correspond to the timescales as specified in the EU Procurement Directives. They have to be published in the tender notice.

Accordingly, for submitting a tender (or for a request for participation) the minimum terms are as follows:

Open procedure

- The minimum term for submitting a tender is 52 days after the tender notice has been sent to the OJ. It can be shortened to 15 days if certain preconditions are met.

Restricted procedure (with prior call for competition)

- The minimum term for submitting a request for participation is 37 days after the tender notice has been sent to the OJ. It can be shortened to 15 or 10 days if certain preconditions are met. For utilities, 15 days is the minimum term.
- The minimum term for submitting a tender is 40 days (24 days for utilities) after sending the invitation to tender. It can be shortened to 10 days if certain preconditions are met.

Negotiated procedure with prior call for competition and competitive dialogue

- The minimum term for submitting a request for participation is 37 days after the tender notice has been sent to the OJ. It can be shortened to 15 or 10 days if certain preconditions are met. For utilities, 15 days is the minimum term.
- There is no fixed minimum term provided for submitting the tender, except for utilities where the minimum term is 24 days after sending the invitation to tender. There is consensus that a term of a minimum of 10 days is required under general principles.

In addition, it has to be noted that regardless of the above-mentioned minimum terms, the contracting entities must in particular consider the complexity of the contract and the time required for the preparation of the respective tenders.

3.3 What are the rules on excluding/short-listing tenderers?

In general, a bidder is excluded if the tender contains formal errors, e.g. late submission or changes to the tender documentation. A bidder can also be excluded if, for example, bankruptcy proceedings have been initiated against his/her assets or if he/she has not met his/her obligation to make due payments of taxes and contributions to statutory national insurance. A bidder is also excluded if he/she is not suitable, which means that he/she is not qualified to perform the contractual obligations, either because he/she is not reliable (e.g. due to conviction for certain criminal offences) or because he/she does not have the required technical or financial ability (see question 3.4). In addition, a bidder is excluded if the prices provided in the tender are evidently out of keeping with the contractual performance.

The remaining bidders who are not excluded from the tender procedure on one of the above-mentioned grounds are short-listed in accordance with the notified award criteria and their notified weighting.

3.4 What are the rules on evaluation of tenders?

Public contracts are awarded to bidders who are suitable with regard to the subject of the contract. A bidder is considered suitable if he/she is reliable and if he/she possesses technical and financial ability (§ 97 para. 4 GWB). Once a bidder has been considered to be suitable based on the provided proofs and declarations requested in the tender notice, he/she cannot be tested in additional procedures, unless the contracting entity subsequently receives indications of a potential lack of suitability. In the open procedure, the evaluation of suitability is followed by the evaluation of the fulfilment of the award criteria. In the procedures of two or more stages, only a limited number of suitable undertakings is selected to submit a tender; accordingly, only these tenders are evaluated with regard to the award criteria.

3.5 What are the rules on awarding the contract?

Award procedures are won by the most economically advantageous tender (§ 97 para. 5 GWB). Accordingly, the price is not the only decisive criterion; other order-related criteria such as quality, aesthetics, operating costs and time schedule for the awarded project can be chosen by the contracting entity. In addition, bidders may be expected to meet further requirements involving social, environmental or innovative aspects if these have a direct relation to the subject matter of the contract and if they are either indicated in the tender notice or in the tender documentation. However, awards may also be granted solely on the basis of the lowest price.

3.6 What are the rules on debriefing unsuccessful bidders?

Unsuccessful bidders have to be provided with an advance notification of the intended award (§ 101a GWB). The advance notification has to contain the name of the successful undertaking, the reasons for the rejection of the tender and the earliest date of the conclusion of the contract. A contract may only be concluded at the earliest 15 calendar days after this notification has been sent. If the information is sent by fax or electronically, the standstill period is reduced to 10 calendar days. If the contracting entity fails to notify the bidders or to wait until the expiry of the notification period, the contract can become null and void (see questions 5.4 and 5.5).

The above-described debriefing obligation does not apply in cases in which negotiation procedures are justified without previous notification on grounds of extreme urgency.

3.7 What methods are available for joint procurements?

Joint procurements are allowed if they do not infringe the cartel ban as stipulated in § 1 GWB, i.e. if they do not develop a significant power of demand that leads to a substantial distortion of competition. Several contracting entities can either jointly conduct the tender procedure or they incorporate a separate entity which they use as an "intermediary" to supply the works, supplies and services for them. This method is used in particular with regard to rebate contracts in the healthcare sector. In addition, there exist so-called Central Purchasing Bodies, e.g. the Procurement Agency of the Federal Ministry of the Interior (i). Central Purchasing Bodies are public purchasers which are in charge of all purchases with regard to a certain area of operation. Contracting entities can acquire works, supplies and services from them without conducting tender procedures on their own.

3.8 What are the rules on alternative/variant bids?

In general, contracting entities can allow alternative bids but they must make this clear in the tender notice. If not explicitly allowed in the tender notice, no alternative bids may be submitted. In addition, contracting entities have to set minimum requirements for the alternative bids in the tender notice or in the tender documents. Alternative bids that do not fulfil the minimum requirements must be excluded. The Federal Court of Justice (*Bundesgerichtshof – BGH*) decided that alternative/variant bids are not allowed if the price is the only awarding criteria (judgment of the BGH dated 7 January 2014 – X ZB 15/13). This decision settled one of the most controversial questions of German public procurement law in the past few years. Several Higher Regional Courts have evaluated this question differently in the past. This had led to the dissatisfying result that the admissibility of alternative/variant bids in cases of mere price competition diverged from state to state within Germany.

3.9 What are the rules on conflicts of interest?

In accordance with the case-law of the European Court of Justice ("ECJ"), German public procurement law stipulates that if a bidder has advised the contracting entity or otherwise supported it before the commencement of the tender procedure, the contracting entity must ensure that competition is not distorted by the participation of the bidder (e.g. § 6 EG para. 7 VOL/A and § 6 EG Abs. 7 VOB/A). Accordingly, the contracting entity in particular has to ensure that all bidders have the same level of information, so that the bidder who has advised the contracting entity or otherwise supported it before the commencement of the tender procedure does not gain an edge of information due to his prior involvement. In addition, the contracting entity may set a longer deadline for the submission of the tenders in order to balance a potential head start of the previously involved bidder.

Another rule on conflicts of interest refers to persons who are not allowed to participate in the decision-making of the contracting entity with regard to a tender procedure if they are deemed to be biased due to their dual function (§ 16 VgV). For example, a person is deemed to be biased if he or she is a member of a governing body or an employee of the contracting entity and simultaneously a bidder in the tender procedure. The same is true for a consultant of the contracting entity (e.g. lawyer, tax advisor and auditor) or for another authorised person (e.g. architect or engineer) who – at the same time – is a bidder or consults or supports a bidder. The rule on conflicts of interest also applies where relatives are involved, for example, if the spouse of the employee of the contracting entity is a bidder. In certain cases, it is possible to refute the bias.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Above the EU thresholds, the provisions on exclusions/exemptions from the public procurement regime correspond to the exclusions/exemptions as provided for in the prevailing EU Procurement Directives (e.g. employment contracts, arbitration and mediation services, certain international conventions). Contracting entities have to give the exclusions/exemptions a narrow interpretation.

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

Like the prevailing EU Procurement Directives, German public procurement law does not provide specific provisions on "in-house" arrangements. However, the case-law of the German award review bodies is aligned to the requirements of "in-house" arrangements as set up by the ECJ. Once the new EU Procurement Directives (2014/23/EC, 2014/24/EC and 2014/25/EC) are transposed into national law (see question 9.1), "in-house" arrangements will be codified as provided for in the new EU Procurement Directives.

5 Remedies

5.1 Does the legislation provide for remedies and if so what is the general outline of this?

Full legal protection is only granted for public contracts reaching or exceeding the applicable EU threshold. The judicial review for these European public contracts is based on a two-level system.

The first instance of judicial review is granted by a public procurement tribunal (*Vergabekammer*). Public procurement tribunals are administrative authorities which are institutionalised on a federal as well as on a state level. Their organisational structure is similar to that of a court as they exercise their functions independently and on their own responsibility within the limits of the law. The public procurement tribunal decides whether the applicant's rights were violated, and takes suitable measures to remedy a violation of rights, and to prevent any impairment of the interests affected. The public procurement tribunal is not bound by the applications and can also independently investigate the lawfulness of the tender procedure. It has the competence to issue an order to stop the awarding procedure or to alter the status of the proceedings.

Decisions made by the public procurement tribunals can be challenged by filing an immediate complaint (*sofortige Beschwerde*) with the Higher Regional Court (*Oberlandesgericht – OLG*) within two weeks. The OLG has the competence to overrule the public procurement tribunal's decision or to confirm it. It is also possible to issue the order to the public procurement tribunal for them to decide again with due consideration of the OLG's legal opinion.

In both instances, the application for review generally has a suspensive effect, meaning that during the ongoing legal review, the contracting entity is not permitted to award a contract to any bidder.

Review proceedings involve expenses. The public procurement tribunal usually asks for an advanced payment of 2,500 euros in order to start handling the application.

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

For public contracts above the EU thresholds, the legal protection as outlined above (see question 5.1) is mandatory for the bidders. After the conclusion of the contract, the most common remedy available is a civil claim for compensation against the contracting entity (see question 5.6).

Below the EU thresholds, however, this special legal protection system does not exist. Accordingly, bidders in national public tenders are generally restricted to administrative complaints. Civil claims for compensation against the contracting entity are also possible.

5.3 Before which body or bodies can remedies be sought?

The bodies in charge of monitoring tender procedures are the public procurement tribunals (*Vergabekammern*) in the first instance and the award senates at the Higher Regional Courts (*Oberlandesgerichte*) as appellate bodies (see question 5.1). On a federal level, the public procurement tribunal function lies with the Federal Cartel Office (*Bundeskartellamt*). In the case of a contract awarded by a federal state, the public procurement tribunal of this state is the review body in charge.

5.4 What are the limitation periods for applying for remedies?

It is not necessary to file the application with the public procurement tribunal immediately. However, it has to be considered that the application has to be filed before the contract is concluded, which usually takes place 15 days after sending out the advance notification to the unsuccessful bidders (see question 3.6). In addition, a review procedure is only admissible if the applicant has immediately complained of the alleged violations to the contracting entity (*unverzügliche Rüge*) which must then have failed to respond or to remedy adequately. If the contracting entity rejects the complaint, an application with the public procurement tribunal must be filed within 15 days of that rejection (§ 107 para. 3 no. 4 GWB).

In cases where the contracting entity has violated its duties to inform rejected bidders or to wait for the conclusion of a contract, or where the contract was awarded directly to an undertaking without inviting other undertakings to participate in the award procedure and without this being expressly permissible in accordance with the law, the contract may be deemed ineffective by the public procurement tribunal (§ 101b GWB; see question 3.6). Ineffectiveness can only be established if this is claimed in review proceedings within 30 calendar days after knowledge of the infringement, or at the latest six months after the conclusion of the contract. If the contracting entity has published the award of the contract in the OJ, the time limit for claiming ineffectiveness ends 30 calendar days after publication of this notice.

5.5 What measures can be taken to shorten limitation periods?

As described above (see questions 3.6 and 5.4), usually, a public contract may only be concluded at the earliest 15 days after the advance notification has been sent to the unsuccessful bidders. This standstill period can be shortened to 10 days if the notification is sent by fax or electronically.

In cases where the contracting entity has violated its duties to inform rejected bidders or where the contract was awarded directly to an undertaking without inviting other undertakings to participate (§ 101b GWB), the limitation period can be shortened by publishing the award of the contract in the OJ (see question 5.4).

5.6 What remedies are available after contract signature?

Once the award has been made, it cannot be cancelled. However, as mentioned above (see question 5.4), the public procurement tribunal can rule that a contract is ineffective if the contracting entity violated its duties to inform rejected bidders and to wait for the conclusion of a contract, or if the contract was awarded directly to an undertaking without inviting other undertakings to participate in the award procedure, and without this being expressly permissible in accordance with the law (section 101b GWB). In other cases, the most common remedy available after the conclusion of the contract is a civil claim for compensation against the contracting entity.

5.7 What is the likely timescale if an application for remedies is made?

The public procurement tribunals must take their decision and give their reasons in writing within five weeks of receiving the application (§ 113 GWB). In exceptional cases, this period may be extended by up to two weeks. For the appellate procedure before the Higher Regional Court, there are no fixed timescales. Accordingly, the duration of proceedings very much depends on the complexity of the case and on the workload of the respective Higher Regional Court.

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

Due to the federal structure of Germany and the respective multiplicity of public procurement tribunals and Higher Regional Courts in charge of the remedies for public procurement matters above the EU thresholds, it is very difficult to identify "leading cases". German public procurement case-law covers or at least touches all aspects of procedural and material public procurement law.

5.9 What mitigation measures, if any, are available to contracting authorities?

There are no specific mitigation measures regulated in German public procurement law.

The only way for contracting entities to mitigate the risk of remedies is to comply with the German public procurement law throughout the whole tender procedure, in particular with regard to the tender notices, the tender documentation, the time limits and the awarding criteria. Even if the contracting entity complies with all regulations and conducts the tender procedure correctly, it cannot be excluded that disappointed bidders apply for remedies. Accordingly, contracting entities have to make sure that they are well prepared for remedies and that they handle this risk in the optimal way (e.g. by allowing for some extra time when planning the tender procedure).

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) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

For the open procedure and the restricted procedure, there is the general rule that bidders are not permitted to change the tender documents and the contracting conditions; otherwise, the bidder is excluded from the tender procedure. This general rule does not apply to the negotiated procedure and the competitive dialogue. Thus, changes may be made during the negotiation or the dialogue provided the principles of non-discrimination, transparency and fair competition are observed.

With regard to bidding consortia, there is a rule that bidding consortia must name their respective members in their tenders and nominate one as an authorised representative for the conclusion and execution of the contract. German public procurement law does not specifically govern changes to the membership of bidding consortia. However, there is case-law available with regard to this issue. According to prevailing case-law, changes to the membership of bidding consortia after the submission of the tender (or the submission of the request for participation in a "two stage" tender procedure) lead to the exclusion of the respective tender/request for participation from the further tender procedure. However, please note that this case-law is not consistent, i.e. there is a contrary case-law according to which such changes only lead to a new suitability check of the modified bidding consortia. Thus, a case-by-case review of this question is required.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

As a rule, changes to a final tender pre-contract award are not permitted for open procedures and restricted procedures. The contracting entity may only request bidders to provide details on the tender or their qualification (the so-called principle of non-negotiability).

For the negotiated procedure, subsequent changes to the pre-contract award are permitted as the principle of non-negotiability is not applicable to this type of tender procedure. However, even within the negotiated procedure, such changes are – as a general rule – prohibited after submitting the final binding tender. The principle of equal treatment as well as the principle of fair competition demand that the (preferred) bidder is bound by his tender after the expiry of the submission deadline for the final tender. Exceptions are only supposable if there are substantial reasons. A substantial reason may be given, for example, if the award proposal of the contracting entity deviates from the opinion of the supervisory authority which is in charge of the contracting entity. Renegotiation has to be conducted with all bidders participating in the negotiated procedure.

With regard to the competitive dialogue, there is some limited possibility of subsequent changes to the pre-contract award. However, this may not result in any changes to essential aspects of the tender or the invitation to tender, in distortion of competition, or in the discrimination of other undertakings taking part in the competitive dialogue procedure.

Material changes to final tenders post-contract award are generally excluded as they lead to the changing of the contract (see question 6.3).

6.3 To what extent are changes permitted post-contract signature?

The General Terms and Conditions for Works Contracts (*VOB/B*) and the General Terms and Conditions for Supply and Service Contracts (*VOL/B*) provide for some rules with regard to changes to contract terms post-contract signature. However, it has to be considered that in accordance with the case-law of the ECJ (e.g. ECJ, judgment of 19 June 2008, case C-454/06 – *pressetext*), German public procurement case-law clearly states that material changes to a procurement contract, e.g. certain changes concerning the contractual partner, the price and the term of the contract, constitute a new award of the contract.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

In accordance with the case-law of the ECJ (e.g. ECJ, judgment of 19 June 2008, case C-454/06 – *pressetext*), German public procurement case-law clearly states that as a rule, entering into a procurement contract by a new contractual partner is a material change to the contract and it constitutes a new award of the contract. There are only limited exceptions to this rule. The transfer of a contract to another entity post-contract signature may be allowed if the substitution was provided for in the terms of the initial contract. Another exception may be the transfer of the contract to another entity due to an internal restructuring of the contractual partner. The requirements of an internal restructuring have to be reviewed on a case-by-case basis.

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 in the context of public procurement. German public procurement case-law and legal literature have repeatedly dealt with the question of whether a privatisation is subject to public procurement law, depending on the concrete type of privatisation (e.g. formal, material or functional). In this context, the applicability of the in-house exclusion is also relevant.

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 provide for special rules in relation to PPPs. Nevertheless, PPPs usually fall within the scope of public procurement law as for the most part they include the procurement of construction work, supplies or services by a contracting entity and the contractual partner is at least partly in private hands. The EU thresholds are mostly exceeded due to the complex projects undertaken by PPP structures. The most common tender procedure used for PPPs is the negotiated procedure.

8 Enforcement

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

In Germany, there is a very well-developed "culture of enforcement" with regard to public tender procedures above the EU thresholds. This is documented by statistics of the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie – BMWi*). According to these statistics, in 2013 there have been 751 applications for remedies filed before the public procurement tribunals and 110 appeal proceedings filed before the Higher Regional Courts.

Bidders who are excluded, or who are not successful in a tender procedure for other reasons, often try to defeat the decision of the contracting entity before the public procurement tribunal. Most of the public procurement tribunals have checklists and other helpful information for bidders on their websites. Accordingly, bidders are quite well-informed about the required formal steps and fees in order to submit their case to the public procurement tribunal in charge.

8.2 What national cases in the last 12 months have confirmed/clarified an important point of public procurement law?

The limits of the performance determination right of the contracting entity constitute a permanent issue that has occupied the public procurement tribunals (*Vergabekammern*) and the Higher Regional Courts (*Oberlandesgerichte*) several times during the last 12 months. The Higher Regional Court of Celle (*OLG Celle*) underlined on the one hand the general rule according to which the definition of the subject of the contract lies with the contracting entity. The decision of the contracting entity about the subject of the contract takes place prior to the public procurement procedure, and thus it is not covered by public procurement law. On the other hand, the OLG Celle made clear that the general principles of public procurement law are affected if the definition of the procurement leads to an arbitrary restriction of the competition or to an open or hidden discrimination against certain companies (judgment of the OLG Celle dated 19 March 2015 – 13 Verg 1/15).

With regard to interim contracts of contracting entities, the Higher Regional Court of Koblenz (*OLG Koblenz*) decided that an interim contract has to be regarded as a separate procurement (detached from the main contract), even if the interim contract was concluded between the contracting entity and a company as a result of the fact that it was not possible to award the main contract on time due to ongoing remedies. However, the burden of proof that this interim contract has been concluded and that it reaches or exceeds the relevant EU threshold rests with the bidder who challenges the interim contract. In addition, the OLG Koblenz stated that in view of the average duration of the preliminary ruling procedure before the ECJ (approx. 16 months), it is not objectionable if the contracting entity concludes an interim contract with a term of 12 months which can be terminated prematurely (judgment of the OLG Koblenz dated 24 March 2015 – Verg 1/15).

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?

Germany has to transpose the three new EU Procurement Directives (2014/23/EC, 2014/24/EC and 2014/25/EC) into national law before 18 April 2016.

In July 2015, the federal cabinet of Germany passed the "Draft Bill for the Modernisation of Public Procurement Law" presented by the Federal Ministry for Economic Affairs and Energy. This draft bill was preceded by a key issues paper published by the German federal government on 7 January 2015. It outlines the basic structure and the timeline for the implementation of the three new EU Procurement Directives into national law. It is the legislator's intention to take the opportunity to make public procurement procedures in Germany more simple, more flexible and more user-friendly. At the same time, legal certainty for contracting entities and bidders will be increased.

To highlight some amendments, it can be noted that Part 4 of the amended GWB will contain the key requirements for the awarding of public contracts and concessions, from the specifications and the course of the award procedure (e.g. the review of reasons for exclusion, suitability of the bidder), to contract award and the execution of the contract. The possibilities of the contracting entity to align social, ecological and innovative aspects with the principle of economic viability are going to be strengthened. This is of particular relevance with regard to the generally binding labour agreements and the minimum wage. The amended GWB provides for specific regulations regarding the possibility of (vertical or horizontal) cooperation between public authorities which does not require a tender procedure.

It can be concluded that the requirements of the new EU Procurement Directives are to a large extent being implemented one-to-one with the draft bill of the GWB. The legislative procedure within the Federal Council of Germany (*Bundesrat*) and the Federal Parliament of Germany (*Bundestag*) is expected to begin in autumn 2015.

This reform will be the biggest legislative project for German public procurement law in the past 10 years.

9.2 Are any measures being taken to increase access to public procurement markets for small and medium-sized enterprises and other underrepresented categories of bidders?

Until the last significant reform of German public procurement law in 2009, contracting entities were obliged to consider adequately the interests of small and medium-sized enterprises. This was supported by the regulation on dividing public contracts into lots. However, small and medium-sized enterprises complained that in practice, the division into lots was not strictly followed. As a result of these complaints, the reform in 2009 strengthened the consideration of small and medium-sized enterprises. § 97 para. 3 GWB now declares an obligation to take small and medium-sized enterprises into serious consideration. In addition, division into lots is now the general rule. Exceptions from this primacy of division into lots are only admissible for economic or technical reasons (see question 2.9). Contracting entities have to document the reasons for the deviation from the general rule.

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