THE GOVERNMENT PROCUREMENT REVIEW

Sixth Edition

Editors
Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

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PREFACE

It is our pleasure to introduce the sixth edition of *The Government Procurement Review*.

Our geographic coverage this year remains impressive, covering 19 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

In the United Kingdom and European Union, the topic of Brexit still looms large. It is apparent that the United Kingdom will continue to observe the importance of procurement law both during and beyond the planned transitional period. Her Majesty's Government has pronounced itself committed to the need for continued regulation of procurement, which is already reflected in the fact that three of the nine chapters of the Public Contracts Regulations 2015 concern domestic matters, as opposed to transposition of the EU Directives.

As indicated through a series of non-legislative procurement policy notes, the United Kingdom is seeking to regulate or alter procurement behaviour across a broad range of areas, including transparency and advertising, access for small and medium-sized enterprises (SMEs), and compliance with changing data-protection laws. At the time of writing, the government is consulting on possible measures to take into account, for procurement law purposes, the payment behaviour of larger firms in relation to their subcontractors, and increasing transparency and accountability. We believe that, whichever direction Brexit takes, detailed regulation of public procurement in the United Kingdom will continue.

Another prominent topic is the test for availability of damages in procurement cases, with the Supreme Court seemingly at odds with the EFTA Court on whether all or only 'sufficiently serious' breaches trigger a right to damages.

Looking further afield, other trends and developments that have caught our eye include:

a a pendulum swing towards deregulation in the United States on the back of President Donald Trump's drive to reduce regulation;

b the possible renegotiation of NAFTA, including the incorporation of anti-corruption provisions (Mexico and Canada);

c a desire to open up procurement to SMEs and use public procurement as a tool to drive socio-economic transformations (South Africa and Chile);

d the growing importance of electronic procurement internationally (Chile and Venezuela); and

e an increasing recognition of the importance of public procurement in international trade deals (for example, the CETA between Canada and the EU, the CPTPP (although at the time of writing, continued US participation remains in doubt) and NAFTA).

When reading chapters regarding EU Member States, it is worth remembering that the underlying rules are set at the EU level. Readers may find it helpful to refer to both the European Union chapter and the respective national chapter to gain a fuller understanding of the relevant issues. To the extent possible, the authors have sought to avoid duplication between the European Union chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this sixth edition as well as the tireless work of the publishers in ensuring a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than the fifth edition and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2018

Chapter 11

GERMANY

Olaf Otting, Udo H Olgemöller and Christoph Zinger[1]

I INTRODUCTION

German procurement law is based on both European and national law.

The award of contracts with an estimated value equal to or exceeding the thresholds established by European law is subject to the rules stipulated by the European directives. These directives were enacted into the German legal system in 1999 in the Act Against Restraints of Competition (GWB). The GWB reaffirms the procurement principles deriving from the EU directives such as competition, equal treatment and transparency. In addition, the new GWB emphasises the principle of proportionality. In accordance with the European directives, the contracting entity is defined as well as the public contract. The GWB also lists the exemptions from the applicability of procurement rules, including the exemption applicable to cooperation within the public sector. Following amendments in 2016, the GWB now contains basic stipulations with regard to specifications for tenders, qualification of bidders and the award of contracts. Finally, the GWB governs the review procedures.

Based on the GWB, a number of acts of delegated legislation came into effect that were significantly amended during the modernisation of procurement law in 2016. German procurement law consists of a complex set of regulations composed of not only statutes, but also ordinances and even rules established by non-governmental bodies. Further, German law limits the applicability of these rules strictly to contracts exceeding the thresholds; for contracts below the European thresholds, procurement rules are based on budgetary law and differ between the various federal states.

Besides the GWB, the most relevant regulation is the Ordinance on the Award of Public Contracts (VgV), which has been modified significantly to implement the New Directives[2] into German law. The former version of the VgV contained only a few details on the award procedures, but basically declared applicable the procurement rules established by non-governmental committees. With regard to the award of public works contracts with an estimated value equal to or exceeding the European threshold, this is still the case. The award of those contracts is subject to the second section of the Regulation on Contract Awards for Public Works Contracts – Part A (VOB/A). With regard to contracts that are not public works contracts, the second section of the Regulation on Contract Awards for Public Supplies and Services Contracts – Part A (VOL/A) used to apply. Owing to the modernisation process, the procurement rules for the award of those public contracts are now set out in the VgV.

1 Olaf Otting is a partner, Udo H Olgemöller is a counsel and Christoph Zinger is an associate at Allen & Overy LLP.

2 New Concession Contracts Directive, New Public Sector Directive and New Utilities Directive.

The second section of the VOL/A as well as the specific regulations for the award of service contracts that are performed by architects and other providers of independent professional services (VOF) no longer exist.

The award of contracts in the water, energy and transport sectors is regulated by the Ordinance on the Award of Public Contracts by Entities operating in the Water, Energy and Transport Sectors (SektVO). At the same level, the Ordinance on the Award of Public Contracts by Contracting Authorities or Entities in the Field of Defence and Security (VSVgV) stipulates specific rules transforming the Defence Directive. However, for public works contracts, the VSVgV refers to the third section of VOB/A.

The award of contracts with an estimated value below the European thresholds is governed by national budget law. The procurement rules for the award of contracts below the European thresholds were adapted in 2017. The legal framework for the award of contracts that are not public works contracts is now set out in the Regulation on the Award of Public Supply and Service Contracts below the EU Thresholds (UVgO), which was enacted on the federal level in September 2017. Some of the 16 federal states have also adapted these rules, e.g., Bavaria and Hamburg. The UVgO is inspired by the regulations of the VgV and replaces the first section of VOL/A. The award of public works contracts is still governed by the first section of VOB/A. Generally, the UVgO and VOB/A require the competitive award of contracts and procedures. Since the budget law applies to public authorities only, companies and utilities are not regulated. A contract notice in the Official Journal of the European Union (OJEU) is not mandatory. The effective review procedures governed by the GWB do not apply.

During the past few years, an increasing number of federal states have enacted additional procurement laws seeking to ensure compliance with social and environmental standards (and a minimum wage in particular), and in some cases the federal states have also established additional rules on procedures that apply to the award of contracts both below and above the thresholds.

In accordance with the New Directives, public service concessions are subject to German procurement law. They must be awarded in compliance with the regulations in the Ordinance on the award of Public Concessions. Where exemptions apply (e.g., in the field of water supply), the fundamental rules of the Treaty on the Functioning of the European Union (TFEU) have to be observed. Public service concessions in the field of public transport are to be awarded pursuant to Regulation (EC) No. 1370/2007. The German Public Transport Code (PBefG) establishes rules with regard to the award of public service contracts and public service concessions on public passenger transport services.

II YEAR IN REVIEW

Besides the recent amendments to the German legal framework on public procurement below the European thresholds, the German parliament passed a bill on the introduction of a public register aimed at the protection of competition on public contracts and concessions (WettRegG). This register shall be established on the federal level and list companies that have infringed certain commercial and social criminal laws or that have committed related administrative offences. The register will make it easier for contracting authorities to assess whether a bidder is eligible or not. As a next step, the practical and technical conditions will be created for the register to become operational. The register is expected to become operational in 2019 or 2020.

There have been some noteworthy rulings by the German review bodies and courts, including the German Federal High Court (BGH). In previous years, discussions on the design of award criteria had been dominated by decisions of the Higher Regional Court of Düsseldorf. The court had taken a restrictive approach had demanded a very precise description on the assessment process. In May 2017, the German Federal High Court opposed such opinion and ruled that the criterion of the quality may be evaluated by a school grade system without the obligation to publish further specifying details.[3] The procurement review bodies and courts delivered first decisions in the field of electronic tendering. The procurement of military equipment is continually increasing in importance, which is also reflected in corresponding review procedures against the award of high-volume contracts in the field of defence and security.

Beyond the direct scope of procurement law, German courts reaffirmed on several occasions that procedures subject to German energy law aiming at awarding the right to use municipal roads, as well as ways to establish and operate transmission and supply networks for electricity and gas must be conducted in a manner very similar to the principles established under public procurement regulations.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

In accordance with the New Directives, central, regional and local authorities or their associations must comply with the procurement rules. These rules also apply to bodies 'governed by public law' in terms of the New Directives. However, according to the definition of such bodies in the New Directives, these bodies may also be separate legal entities set up under German company law, like a company with limited liability (GmbH), if these companies are directly or indirectly controlled by a public authority, financed by public funds and established for special purposes of general interest that they pursue in a non-commercial manner. Public procurement rules also apply where the contracting authority is (indirectly) financed by public authorities.

Municipal housing companies may qualify as contracting authorities,[4] but a chamber of industry and commerce has not been considered to be a contracting authority even though it has been established by the state.[5] The Utilities Directive does not apply to postal services in Germany. Natural or legal persons under private law may be contracting authorities if they receive public funds, for example for civil engineering projects or for building hospitals. Religious bodies and entities controlled by the church do not qualify as contracting authorities.

As a consequence of the New Directives, a private company that is granted a public works concession is no longer subject to the procurement rules.

Below the European thresholds, procurement rules pertain to entities that must comply with the public budget law.

3 BGH, 4 April 2017, case X ZB 3/17.

4 VK Brandenburg, 27 July 2015, case VK 12/15.

5 VK Sachsen, 12 November 2015, case 1/SVK/033-15.

ii Regulated contracts

The award of public works contracts is subject to the procurement law, as is the award of public supply and service contracts. The Higher Regional Court of Düsseldorf referred a preliminary ruling to the Court of Justice of the European Union (CJEU) on the question of which preconditions danger prevention services (such as ambulance services) are excluded from public tendering.[6] Procurement law also applies to public works concessions and public service concessions, with special rules laid down in Regulation (EC) No. 1370/2007 regarding concessions in the field of public transport. The award of public service concessions and contracts with an estimated value below the European thresholds may be subject to the procurement principles deriving directly from the TFEU. Utilities do not have to award contracts serving purposes other than sectoral activities. According to recent case law, planning services for the construction of a new administration building are usually serving such purpose.[7] The specific regulations in the field of defence and security cover the award of contracts that have been excluded from these rules before on the basis of an excessive interpretation of Article 346 TFEU. In the healthcare sector, contracts between public health insurance funds and the pharmaceutical industry on discounts granted to the funds play an economically important role and have resulted in a number of complex procurement procedures. The open-house model does not constitute a public contract.[8] The open-house model is a contract concluded between a public health insurance company and a producer of pharmaceuticals, and this contract is open to every producer who is interested in delivering the same products on the basis of the same conditions.

Amendments to an existing contract may require the re-tendering of that contract. This is typically, but not exclusively, given where the volume of the contract shall be increased. The German practice and review bodies are guided by the new Article 132 GWB, which transposes Article 72 of Directive 2014/24/EC and the CJEU's case law.[9]

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Contracting authorities and entities may conclude framework agreements in terms of the European directives. According to German case law, bidders may challenge, in particular, a decision to put out to tender framework agreements with a duration exceeding the regular duration of four years. According to the new legislation, framework agreements may be concluded for all types of works and services. This had been doubted by some review bodies under the previous legislation: the GWB did not mention framework agreements.

Generally, contracting authorities and entities are entitled to accumulate their needs and purchase the required works, services and supplies jointly.[10] However, even in such cases of joint procurement, it is mandatory to consider the principle of dividing contracts into lots in order to enforce the interests of small and medium-sized companies. The new legislation now also provides for the possibility of joint procurement procedures by entities based in different Member States of the EU.

6 Higher Regional Court of Düsseldorf, 12 June 2017, case Verg 34/16; CJEU case C-465/17.

7 Higher Regional Court of Munich, 13 March 2017, case Verg 15/16.

8 CJEU case C-410/14.

9 CJEU case C-454/06.

10 VK Bund, 27 July 2016, case VK 2-63/16.

ii Joint ventures

Public–private partnerships must comply with procurement law. Where public contracts are to be awarded in such structures, contracting authorities must choose their partner by way of a regular procurement procedure. The joint venture itself must comply with the procurement law if it is to be qualified as a contracting authority or entity.

With regard to public–public partnerships, the CJEU's in-house concept has been the prevailing point of interest for years.[11] The rules on in-house contracts, first ruled on in the *Teckal* case,[12] are set out in Article 108 GWB, which implements the provisions provided by the New Directives 1:1. Neither contracts awarded between subsidiaries (or sub-subsidiaries) controlled by the same authority nor 'bottom-up contract awards', where the controlled entity awards a contract to the parent company, are subject to German procurement law. In addition, cooperation among public authorities falls outside the scope of the procurement law under specific preconditions.[13] However, this may not be interpreted as a general exemption from the procurement rules in the public sector. In any case, an entity that is awarded a contract may perform only up to 20 per cent of similar activities on the open market, and any cooperation must be governed by a public common interest.

V THE BIDDING PROCESS

i Notice

Notices on contracts having an estimated value equal to or above the European thresholds are to be published in the OJEU. Additionally, pursuant to national or state regulation, the award of contracts may have to be notified on further websites (e.g., www.bund.de). The award of contracts below the thresholds is to be notified in the local or specialised press, on the above-mentioned websites, or both. Generally, contracting authorities must ensure that contracts with a cross-border interest are published in a way that attracts cross-border attention.[14]

ii Procedures

The course of procurement procedures to be followed by contracting authorities is regulated precisely in the procurement regulations VgV and VOB/A. They define open procedures, restricted procedures, negotiated procedures and competitive dialogue. Electronic purchasing systems, particularly electronic auctions and electronic catalogues, are introduced by Articles 25 and 27 VgV but are not yet very common. The very strict priority of open procedures has been removed from the GWB, and German procurement law now stipulates the freedom to choose between open and restricted procedures in accordance with the New Directives. The requirements for the negotiated procedure are the same as for the competitive dialogue. The general exemption for specific services has been replaced by a new flexible regime for social and similar services. The new regime applies to the procurement of social and other specific services listed in Annex XIV of Directive 2014/24/EU where the contract value is above a higher threshold of €750,000. The Directive leaves the procedural provisions up to

11 Higher Regional Court of Düsseldorf, 2 November 2016, case Verg 23/16, or CJEU case C-553/15.

12 CJEU case C-107/98.

13 CJEU case C-51/15, *Piepenbrock*.

14 CJEU case C-318/15.

the Member States. German law refrains from inventing a new procedure, but Article 130 GWB offers the freedom to choose between the common procedure, the open, restricted and negotiated procedures and the competitive dialogue.

Procurement procedures carried out by utilities are regulated by the SektVO, which follows a more flexible approach and allows, in particular, the utility free discretion to choose between open, restricted and negotiated procedures and, newly, competitive dialogue. Specific rules for contracts in the field of defence and security are laid down in the VSVgV and the third section of VOB/A; contracts may be awarded in restricted and negotiated procedures and competitive dialogues, but not in open procedures. Article 5(3) of Regulation (EC) No. 1370/2007 stipulates flexible guidelines with regard to contracts falling under the scope of that provision, specified by the rules laid down in the PBefG and the European Commission's Communication on interpretative guidelines concerning Regulation (EC) No. 1370/2007 on public passenger transport services by rail and by road.[15]

iii Amending bids

In open and restricted procedures, bidders are not entitled to amend their bids when the time limit for receipt of tenders has expired. Queries of contracting authorities seeking to clarify the tenders are allowed but may not lead to amendments of the bids. Negotiated procedures are more flexible. The entire content of the contract is subject to negotiations as long as its identity is not changed, which means that the essential characteristics of the contract cannot be amended without a new notice of the newly defined contract. However, after reception of the final and binding offer, renegotiations with only one of the bidders are not allowed. If the contracting authority intends to do so, the negotiations must be reopened with all bidders due to the principle of fair and equal treatment. Where, in a negotiated procedure, subsequent stages take place to reduce the number of tenders, each decision on an amendment of the content of the contract must avoid the discrimination of bidders that have been excluded from the procedure previously. This may require either a limitation of the scope of negotiations to amendments that have no potential influence on the bidder's ranking, or the readmittance of rejected bidders.

VI ELIGIBILITY

i Qualification to bid

The criteria to qualify to bid are equivalent to European directive standards. Bidders must first demonstrate that exclusion grounds do not apply. German law differentiates between mandatory grounds (Article 123 GWB) and grounds that may justify an exclusion depending on the discretion of the authority (Article 124 GWB). In accordance with Article 122 GWB, bidders must prove their suitability to pursue the professional activity, their economic and financial standing as well as their technical and professional ability. The minimum yearly turnover that tenderers are required to have shall not exceed two times the estimated contract value. Bidders may rely on the qualification of third parties, regardless of the legal nature of the link the bidder has with them. However, recent German case law emphasises that the bidder must disclose the fact that he or she wants to rely on the capacities of other entities. Otherwise, the bidder should be excluded from participation in the procurement

15 OJEU 2014 C 92/1.

procedure. Aiming to promote small and medium-sized companies, German procurement law emphasises that groupings of candidates and tenderers must be treated equally to individual competitors. Nonetheless, in cases where companies join forces by establishing a grouping, they must respect the restrictions stipulated by the antitrust regulations. If a bid is incomplete, it does not have to be excluded from the procedures in each case. Candidates and bidders may complete or explain minor defects, but in some cases it is at the contracting authorities' discretion whether to let parties make use of this opportunity. They must make use of their discretion in a non-discriminatory way. Companies that compete regularly for public contracts may apply for a listing on pre-qualification registers. A reference to a pre-qualification register may replace the submission of evidence in each case. Further, bidders can now prove their qualification by providing the European Single Procurement Document (ESPD) as preliminary evidence. The contracting authority may ask tenderers at any moment during the procedure to submit all or part of the supporting documents. According to German law, the ESPD is not mandatory in procurement procedures, but may be used by bidders in every case (and, if so, must be accepted as preliminary evidence). Alternatively, German law provides for the possibility to make use of self-declaration instead of producing evidence of eligibility.

Infringing bidders may demonstrate that they have taken measures to regain their reliability by means set out in Article 125 GWB. Companies that have infringed the law – in most cases, competition or antitrust rules – may clarify the facts and circumstances by actively collaborating with the investigating authorities, and by taking concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct. Article 125(1) GWB stipulates the necessity to prove that the company has compensated any damage caused by the criminal offence or misconduct. In March 2017, the procurement review chamber Südbayern asked the CJEU for a preliminary ruling regarding the question whether and, if so, to what extent undertakings have to disclose details about their former participation in a cartel to the contracting authority in the context of a self-cleaning procedure.[16]

Recent case law has repeatedly confirmed that companies have large discretion on the decision to enter into an *ad hoc* cooperation aimed at submitting a common bid.[17]

ii Conflicts of interest

German procurement law stipulates specific rules for persons excluded from acting on behalf of the contracting authority: Article 6 VgV lists cases where grounds exist to justify fears of prejudice due to a conflict of interest (such as acting for one of the bidders). Article 42 VSVgV provides the same rules in the field of defence and security, and Article 6 SektVO for utilities. Apart from that, in accordance with the CJEU's *Fabricom* case,[18] candidates and bidders who have advised or otherwise supported the contracting authority or entity before the commencement of the award procedure must be excluded if their advantages cannot be compensated otherwise.

16 CJEU case C-124/17.

17 Higher Regional Court of Düsseldorf, 17 January 2018, case Verg 39/17; Higher Regional Court of Saarbrücken, 27 June 2016, case 1 Verg 2/16.

18 CJEU case C-21/03, C-34/03.

iii Foreign suppliers

Contracting authorities and entities can accept bids from foreign suppliers provided they comply with the qualification criteria. A local branch or subsidiary is not necessary except where markets have not yet been completely liberated on the European level, such as the railway sector (see Article 14 of the German Railway Code). Where service contracts are put out to tender, contracting authorities and entities often prefer tenders offering availability on short notice. Thus, it may be advantageous to promise to establish an office or a branch on-site in the event of being awarded a contract. In any case, such award criterion must be notified transparently to the bidders.

VII AWARD

i Evaluating tenders

Basically, tenders are evaluated in a four-step procedure. First, tenders must comply with the formal requirements. Time limits must be observed as well as all further formal requirements. Tenderers are not allowed to deviate from any conditions established by the contracting authority or entity; these conditions can only be amended in negotiated procedures or as far as they are challenged by objections and review procedures. Second, the qualification of the bidder is to be verified. Third, tenders offering an abnormally low or high price may be excluded. Fourth, the remaining tenders are to be evaluated against the award criteria cited in the notice or in the tender documents in accordance with the notified weighting.

Article 127 GWB now explicitly states that a contract must be awarded to the bid with the most advantageous relationship between price and quality. However, the lowest price may still be the only criterion. Alternatively, various criteria of relevance to the subject matter of the contract (quality, price, etc.) may be defined, allowing the contract to be awarded to the most economically advantageous tender (best value for money). Contrary to previous German case law, the new Article 35(2) VgV allows for variations in the bids even if the price is the only criterion. Another current debate regards the compliance of German regulations on prices and fees (e.g., for architects) with European law.

Principally, criteria for the selection of candidates cannot be reused as award criteria; German case law even anticipated the *Lianakis* CJEU decision of 24 January 2008.[19] In March 2015, the CJEU ruled in *Ambisig* that where a contract is intellectual in nature, it is the abilities and experience of the team proposed that is decisive for the evaluation of the professional quality of the team, and that a contracting authority is entitled to take quality into account as an award criterion.[20] The CJEU distinguished *Lianakis* from the present case on the basis that the *Lianakis* case concerned the staff and experience of the tenderer in general, whereas this case concerned the staff and experience of the persons making up the particular team proposed to perform the contract. In line with *Ambisig* and the New Directives, the VgV now allows consideration of the organisation, and the qualifications and the experience of the team, where this seems to be appropriate for selecting the most economically advantageous tender. This applies to all types of contracts, not only to service contracts.

19 CJEU case C-532/06, *Lianakis*; cf. BGH, 8 September 1998, case X ZR 109/06.

20 CJEU case C-601/13, *Ambisig*.

A bidder is entitled to present two or even more offers if its offers differ from each other in technical or qualitative terms and not only in terms of price. Affiliates of the same company may tender for the same public contract where Chinese walls ensure that such affiliates do not know of the content of the competing entity's bid.

ii National interest and public policy considerations

The protection of national interests justified the refraining from competitive award procedures in the field of defence and security for a long time. This field has been cut back considerably as a result of the Defence Directive and its enactment into German procurement law. However, contracts that are declared secret in accordance with the German legal and administrative provisions are not subject to procurement law, and the same applies to contracts falling within the scope of Article 346 TFEU. Specific rules on the security of information set forth in the VSVgV enact the equivalent provisions of the Defence Directive. First experiences have been gained in a complex negotiated procedure for the procurement of German navy vessels.

Compliance with measures that aim at ensuring data privacy (no-spy requirements) may be demanded by contracting entities if this is required by the matter of the contract in question.[21]

In consequence of the principles of non-discrimination and equal treatment, contracting authorities and entities are not entitled to favour local or domestic suppliers.[22] In practice, cross-border tenders are rare. This may be due, *inter alia*, to language barriers, since most procurement procedures are carried out in German. Nevertheless, at least regarding contracts having an estimated value equal to or above the European thresholds, contracting authorities and entities are not allowed to require that products comply with national standards or quality marks; only compliance with European standards can be required.

Environmental considerations have become more important in recent years. Green procurement can be pursued, for example, by defining mandatory features of products or by setting award criteria favouring eco-sensitive products. For example, carbon dioxide emissions must be an award criterion if public supply contracts on cars are put out to tender. Moreover, in accordance with Article 31(2) VgV, contracting authorities may lay down special conditions relating to the performance of a contract such as eco-friendly specifications of breakdown vehicles where contracting authorities tender out relevant service contracts. The conditions governing the performance of a contract may, in particular, concern environmental considerations. Where contracting authorities award contracts with specific environmental, social or other characteristics, they may require compliance with the standards of specific labels as proof that the bidders meet the requirements. Recent statistics indicate that, despite an upward trend, only 2.4 per cent of public contracts in Germany include green criteria.

Article 31(2) VgV covers social considerations as well. Based on this provision, the federal states have enacted an increasing number of procurement laws that require that tenderers guarantee to pay minimum wages defined in these procurement laws. An example is the procurement law of the federal state of North Rhine-Westphalia, which came into effect on 1 May 2012. This requires, *inter alia*, evidence of tenderers proving that they promote women or require a statement that products used in the bidder's supply chain comply with international labour rules (ILO Standards). It was quite controversial whether these requirements are in compliance with European law. The CJEU's case law sets limits to such

21 Higher Regional Court of Düsseldorf, 21 October 2015, case 28/14.

22 Reconfirmed, e.g., by Higher Regional Court of Koblenz, 20 April 2016, case Verg 1/16.

regulations in a case where subcontractors from other EU Member States were concerned,[23] whereas the CJEU ruling of 14 September 2015[24] generally confirmed that the provisions for minimum wages are in line with European law. However, due to recent modernisation efforts, it is intended to streamline and simplify the procurement law of the federal state of North Rhine-Westphalia by abolishing the aforementioned requirements excluding the provisions for minimum wages.

VIII INFORMATION FLOW

Since contracting authorities and entities are obliged to carry out a fair and transparent procedure, they must inform candidates and bidders on the intended course of the procedure. If a request for participation shall be rejected, the candidate is to be notified. Most notably, all bidders must be notified of the outcome of the procedure. It is a legal obligation to inform the unsuccessful bidders of the name of the successful competitor, the reasons for the rejection of their tenders and the earliest date of the conclusion of the contract (Article 134 GWB). A violation of that obligation and the following standstill period of at least 10 days may lead to the ineffectiveness of the award of a contract (Article 135 GWB). Specific obligations to ensure confidentiality of information apply in the field of defence and security.

IX CHALLENGING AWARDS

i Procedures

Candidates and bidders are only able to challenge procurement procedures if they can invoke the violation of regulations on the award of public contracts that are to protect their rights. The undertaking must demonstrate its interest in the contract, a non-compliance with the relevant rules and that the violation prejudices its expectations to be awarded the contract. Before initiating a review procedure, the bidder must have notified the alleged violation to the contracting authority or entity by way of an objection. Article 160(3) GWB stipulates elaborated requirements on these objections, first of all severe time limits. Non-compliance with these requirements leads to the inadmissibility of a subsequent application to the review bodies. In particular, candidates and bidders are obliged to object to potential violations of the procurement rules within 10 days of their becoming aware of that violation. This deadline was newly introduced, as the former rule that bidders had to object 'without undue delay' was probably not in line with European law.[25] A company that challenges an allegedly unlawful direct award of a contract has to evidence its ability to bid for that contract.[26]

First instance review bodies are the procurement review chambers. They are part of the administration, and not of the judicial branch. Their decisions are subject to an immediate complaint. At the second instance, the higher regional courts of the federal states are competent. The German Federal High Court is not established as a regular third instance. This Court is involved solely if a higher regional court wishes to deviate from a decision of another higher regional court. If necessary, either the higher regional court or the Federal High Court is obliged to request the CJEU's preliminary ruling pursuant to Article 267 TFEU.

23 CJEU case C-549/13.

24 CJEU case C-115/14.

25 CJEU case C-406/08.

26 VK Westfalen, 25 January 2017, case VK 1-47/16.

Below the European thresholds as well as beyond the scope of European directives, said review procedure established by the GWB does not apply. The civil or administrative courts must be invoked where undertakings intend to avoid alleged violations of their rights. However, with increasing regularity the courts require that undertakings must notify alleged violations in compliance with the severe requirements set out by Article 160(3) GWB. Even though the procurement law regime does not provide for an information and standstill obligation for the award of concessions below the thresholds, the Higher Regional Court of Düsseldorf took the view that a public service concession might be ineffective due to the failure to inform unsuccessful bidders about the intended award decision.[27] It remains to be seen whether such legal position will be established by the courts.

ii Grounds for challenge

Procurement procedures can be challenged by candidates and bidders who allege violations of the procurement law, given that the violated provisions seek to protect the applicant's rights. Principally, all provisions of the German procurement law grant the right to undertakings to demand compliance with the law. For example, bidders can invoke violations of the provisions restricting the economic activities of municipalities set by the municipal codes of the federal states. Companies may also challenge a decision to award a contract directly in violation of the duty to put that contract out to tender. A topic of controversial discussions for years had been the question of whether bidders can demand the exclusion of a competitor if their tender appears to be abnormally low. In 2017, the German Federal High Court clarified that unsuccessful bidders are entitled to demand compliance with the obligation to examine unreasonably low tenders.[28] The wide range of provisions allowing review procedures to be initiated led to about 870 review procedures in 2016, with a success rate of around 16 per cent.

iii Remedies

Where review bodies decide that the applicant's rights were violated, they are entitled to take suitable measures to remedy the violation of rights and to prevent any impairment of the interest affected (Article 168 GWB). In most cases of successful proceedings, parts of procurement procedures must be repeated taking into account the review body's legal opinion (e.g., correction of the evaluation of the tenders). Contracts that have been awarded cannot be set aside except in two cases: either the contract was awarded after the beginning of the review procedure, or the contract was awarded directly without any legal justification. According to current case law, undertakings can even prevent the award of contracts below the European thresholds or beyond the scope of the European directives, but details are still controversial. However, undertakings may claim damages either regarding the costs accrued by them during their participation in an unlawful procurement procedure or – in exceptional cases – regarding their losses due to an unlawful award to a competitor.

27 Higher Regional Court of Düsseldorf, 13 December 2017, case Verg 27 U 25/17.

28 BGH, 31 January 2017, case X ZB 10/16.

X OUTLOOK

A major topic on the agenda of the contracting authorities remains the upcoming obligation to organise the tender procedure entirely by electronic means. The electronic submission of tender notices and the obligation to make the tender documents available electronically – which have both been mandatory since 18 April 2016 – have neither required greater investments nor caused material hurdles in the daily operations. In light of the upcoming end to the prolonged implementation period in October 2018, it is a much bigger challenge to carry out the entire procedure, including the correspondence with the bidders via databases or electronic market spaces. Therefore, further case law is expected on this subject.

Germany entered the year 2018 without a federal government. According to the draft coalition agreement between the Christian Democratic Union and the Social Democratic Party, the potential impact of the prospective new government on the public procurement legal framework might be significant as it indicates a potential revision of the legal framework on the award of public works contracts. Another proposed goal is to foster swift and effective procurement procedures in the field of defence and security, *inter alia*, by issuing interpretation guidelines on the application of Article 346 TFEU.

The likely impact of Brexit on existing public procurement contracts with contracting authorities in Germany or with German undertakings is not yet predictable. The public procurement legislation will be heavily influenced by the nature of any future trade agreements between the UK and the EU. As a guideline, the European Parliament issued a paper that examines the implications of the UK's departure from the EU for the EU–UK legal relationship in the field of public procurement.

Appendix 1

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