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General Chapters:

Country Question and Answer Chapters:

EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Public Procurement.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of public procurement laws and regulations.

It is divided into two main sections:

Two general chapters. These chapters cover the EU Public Procurement Rules and the implications of Brexit for public procurement.

Country question and answer chapters. These provide a broad overview of common issues in public procurement laws and regulations in 22 jurisdictions.

All chapters are written by leading public procurement lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Euan Burrows and Edward McNeill of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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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 antitrust procurement law applies to public procurement procedures exceeding the threshold for a European-wide tender:

- §§ 97 – 184 German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB). This law regulates the following:
  - The general principles of public procurement law.
  - The scope of application and types of award procedures.
  - The general requirements pertaining to suitability, the award decision and conditions of performance.
  - The reasons for exclusion from the procedure.
  - The requirements pertaining to "self-cleaning" mechanisms for companies.
  - Legal protection procedure applying to the review bodies.
- German Regulation on the Award of Public Contracts (*Vergabeverordnung* – VgV). The VgV provides an in-depth regulation of the procedure for awarding public contracts in the area of public supplies and services. In the case of works contracts, only Chapter 1 and Chapter 2, subchapter 2 shall be applied. Freelance services are also covered by the VgV.
- Procurement Regulation for Public Works, Section 2 (*Vergabe- und Vertragsordnung für Bauleistungen* – VOB/A-EU): The VOB/A-EU is the core on which public procurement law in the field of construction work is based.
- German regulation on the award of public contracts by entities operating in the transport, water and energy sectors (*Sektorenverordnung* – SektVO): The SektVO deals with the award procedure in the water and energy supply as well as the transport sectors.
- German Public Ordinance for Contracts in the Fields of Defense and Security for the implementation of Directive 2009/18/EC of the European Parliament and of the Council of 13.07.2009 on the coordination of procedures for the award of specific works, supply and service contracts in the defence and security sectors in amendment of Directives 2004/16 EC and 2004/18/EC (*Vergabeverordnung Verteidigung und Sicherheit* – VSVgV): This ordinance applies to the award of contracts in the defence and security sectors.
- German regulation on the award of concession contracts (*Konzessionen Konzessionsvergabeverordnung* – KonzVgV): This regulation lays down more detailed provisions on the procedure for the award of a concession by a concession grantor.

Below the threshold for European-wide tenders, public procurement law runs under the umbrella of local budget law. Therefore, these rules are traditionally seen as only applying within a purely internal administrative context. However, despite this fact, the civil courts offer preventative legal protection in the case of a violation of the rules of procedure. The following regulations are considered the most important:

- German Regulation on the Award of Public Supply and Service Contracts below the EU Thresholds (*Unterschwellenvergabeordnung* – UVgO): The contents and structure of the UVgO are aligned to those of the VgV. It is intended to replace the VOL/A which until now it has been necessary to observe in cases below the thresholds. Up until the autumn of 2017 the UVgO has only been enforced at German federal level and in the federal state of Hamburg.
- General conditions for the award of public supplies and services (*Vergabe- und Vertragsordnung für Leistungen* – VOL/A), Section 1: In as far as the UVgO has not yet come into force, VOL/A, Section 1, shall continue to apply to the award of public supplies and services.
- General conditions for the award of public works contracts, Section 1 (VOB/A): Applies to the award of public works contracts below the thresholds for European-wide tenders.

Furthermore, contracting entities must also observe the German regulation pertaining to statistics resulting from the award of public contracts and concessions (*Vergabestatistikverordnung* – VergStatVO). This regulation governs which information public contracting entities are required to report to the Federal Ministry for Economic Affairs and Energy for statistical purposes.

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

During the award procedure, contracting entities and bidders are required to observe the original public procurement law provisions as well as any other legal provisions that may be applicable beyond the scope of these provisions. Particularly important in this connection is legislation pertaining to public funding. Questions relating to the law of associations and competition law are also common. In individual cases, a course of action based on the German freedom of information act (*Informationsfreiheitsgesetz* – IFG), resp. federal state laws, may be considered in order to be able to review the procedural documentation outside the procurement review process in accordance with antitrust procurement law.

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

Germany has implemented the provisions of European public procurement law within the scope of the antitrust procurement legislation. As European public procurement law also takes the requirements of the GPA into account, the antitrust procurement legislation can be considered as being GPA-compliant.

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?

The fundamental principles of public procurement law include the principle of competition, the principle of transparency as well as the principle of equal treatment of bidders and applicants. In case law, these principles are also referred to when examining individual award cases. They have an influence on how the legal provisions are applied in practice and also where these result from more detailed regulations.

Furthermore, when applying antitrust procurement law during the award procedure, quality and innovation as well as social and environmental aspects (also) need to be taken into account within the scope of the legal provisions. The same applies to the interests of medium-sized companies which are met, in particular, by dividing the contracts into lots.

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

As described in question 1.1 above, public procurement law already takes specific sectors, such as the defence and security sectors (VSVgV), the transport, water and energy supply sectors (SektVO) and the award of concession contracts (KonzVgV) into account. Alongside these, additional special regulations can also be found in individual cases. In special areas, competitive public procurement proceedings must be conducted based on these regulations although these do not directly fall under public procurement law. This applies, in particular, to the award of concession contracts in the electricity and gas sectors which are aligned to the German Energy Industry Act (*Energiewirtschaftsgesetz* – EnWG).

2 Application of the Law to Entities and Contracts

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

Within the scope of applicability of antitrust procurement law, the definition of a public contracting entity that purchases goods and services includes the following institutions:

- Regional authorities, including their special funds.
- Legal entities governed by public law founded for the special purpose of fulfilling tasks of a non-commercial nature in the interests of the general public which are controlled by one or several public contracting entities.
- Associations whose members are included in the points listed above.

Furthermore, other legal entities governed by public law are also considered to be public contracting entities when these carry out specific construction work in cases where these projects are subsidised to over 50% (§ 99 (4) GWB).

It should be noted that below the threshold for a European-wide tender, the concept of the so-called institutional contracting entity applies. In this case, therefore, German procurement law only covers those public institutions to which respective budget regulations directly apply or which by virtue of other legal dictates (e.g. statutes) are under obligation to apply procurement law.

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

Antitrust procurement law uses a functional definition of a public contracting entity. Accordingly, legal entities governed by private law are also ranked among the public contracting entities, if they were founded for the special purpose of fulfilling tasks of a non-commercial nature in the interests of the general public which are controlled by public contracting entities (§ 99 (2) GWB). Furthermore, other natural and legal persons governed by private law are also considered to be public contracting entities when these carry out specific construction work in cases where these projects are subsidised to over 50% (§ 99 (4) GWB).

In addition, natural and legal entities governed by private law are considered to be sectoral contracting entities according to the German Sector Ordinance, if these engage in activities in the transport, drinking water or energy supply sectors where such activities are conducted based on specific or exclusive rights granted by the responsible authority or where public contracting entities are able to exercise a controlling influence – either individually or mutually – on the entity concerned (§ 100 (1) GWB).

Below the thresholds, private institutions are only covered by German procurement law in exceptional cases. This applies, for example, where these are accordingly bound by statutory requirements or other respective provisions, for example, those contained in grant notifications.

2.3 Which types of contracts are covered?

Public contracts are defined as contracts for pecuniary interest concluded between public contracting entities or contracting entities in the transport, water and energy sectors and undertakings for the procurement of services involving the supply of goods, the fulfillment of works contracts or the provision of services (§ 103 GWB). Within the scope of applicability of antitrust procurement law, German public procurement law also covers concession contracts. This concerns contracts for pecuniary interest whereby the so-called concessionaire is entrusted with the provision of construction services, which may also include the provision and management of services, whereby the service in return consists of the right to utilise the structure, resp. exploit the services or consists of the respective right coupled with the payment of a fee. The decisive factor here is that the concessionaire carries the risk for his activities (§ 105 GWB).

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

Suppliers located outside Germany are not restricted in any way from participating in public procurement procedures in Germany. They may invoke the principles of competition, transparency and equal

treatment at any time. It is only possible to reject a tender, if it falls under the rules of the SektVO and over 50% of the total value of the goods originates from countries which are not Contracting Parties of the Agreement on the European Economic Area and with which no other agreements on mutual market access exist. Unaffected hereby, a contracting entity may specify certain implementation rules which are justified by the nature of the respective contractual object which then have to be observed by suppliers in third countries and which restrict them accordingly. These may include, for example, "no spy requirements" in the IT area as a result of which, for example, databases may not be hosted outside the EU.

2.5 Are there financial thresholds for determining individual contract coverage?

The scope of applicability of antitrust procurement law is determined by whether the value of the contract needed for a European-wide tender exceeds or falls below that specified in the provisions of the European procurement regulations. In 2018 the threshold for works contracts amounts to 5,548,000.00 euros. The threshold for supply and service contracts amounts to 221,000.00 euros. In the transport, drinking water and energy supply sectors: 443,000.00 euros. For contracts issued by top-level federal authorities (outside the construction industry): 144,000.00 euros. For the award of social and other special services acc. to Annex XIV of Directive 2014/24/EU, the threshold lies at 750,000.00 euros.

For award procedures that are to be conducted at a solely national level, limits are also in place up until which orders may be directly placed without a call for competition procedure – or where restricted tenders are also permitted. These thresholds are individually defined by the federal and state authorities.

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

When implementing the provisions of European procurement law, the value of a contract may not be split in such a way as to avoid the applicability of German public procurement law (Section 3, para. 2 VgV). The expected total value of the intended services is to be used as a basis, whereby any options and contract extensions must also be taken into consideration. In the case of works contracts, the estimated total value of all the supplies and services required to the works contract that are provided by the public contracting entity must also be taken into account in addition to the actual value of the works contract.

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

Please refer to questions 1.1 and 1.2 above.

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

General framework agreements are to be awarded in the same manner as other contract forms in accordance with the provisions of German procurement law. However, individual orders may then be requested from the framework contract partner without the need to refer back to the procurement law provisions. In as far as a framework contract has been closed with several partners, it may be necessary to conduct so-called mini-competition proceedings (please refer to Section 120 VgV, Section 15 UVgO, Section 4 a VOB/A, Section 4 a VOB/A-EU, Section 19 SektVO, Section 14 VSVgV as well as Section 4 VOL/A).

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

The fundamental principle that applies to the award procedure is that services need to be divided according to quantity (partial lots) or according to fields of expertise (trade-specific lots). Partial and trade-specific lots may only be awarded collectively, if economic or technical reasons deem this necessary (§ 97 (4) GWB), Section 5 VOB/A, Section 322 UVgO, Section 24 SektVO, Section 10, para. 1 VSVgV). According to case law, the common disadvantages associated with splitting a contract into lots are not a sufficient argument for justifying the award of the contract as one joint contract.

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.

For contracts exceeding the thresholds for a European-wide tender, the following types of award procedures are available:

- Open procedure

  The contracting entity publicly requests an unlimited number of undertakings to submit a tender based on a European-wide tender notice.
- Restrictive procedure

  Based on a European-wide tender notice, the first stage consists of a call for competition procedure (phase 1). Only suitable undertakings that may have been selected through the call for competition procedure are then actually requested to submit a tender (phase 2). A selection may be made from amongst those undertakings deemed suitable according to objective, transparent and non-discriminatory criteria.

  Both the open and restrictive procedures represent standard procedures between which the contracting entity may freely choose. Both procedures are characterised by the fact that negotiations on the content of the tenders are strictly forbidden.
- Negotiated procedure

  A negotiated procedure may be conducted with or without a preceding call for competition phase. The contracting entity may negotiate all aspects of the tenders with the bidders.
- Competitive dialogue

  Following the call for competition procedure, the contracting entity then enters a dialogue with the selected undertakings in order to determine how his needs can best be met. The tenders are only submitted once the competitive dialogue phase has been completed. These tenders are then only open to limited negotiation.
- Innovation partnership

  Following the call for competition procedure, the contracting entity conducts several phases of negotiations with the selected undertakings in cases where and in as far as innovative products and services that are not yet available on the market first need to be developed.

Below the thresholds, the following types of award procedure are available:

- Public tender procedure (the basic procedure corresponds to that of an open procedure).
- Restricted tender with or without a call for competition procedure (when a call for competition procedure is conducted, the basic process corresponds to that of a restrictive procedure).

- Negotiated award, resp. direct award without a call for competition procedure (the basic procedure corresponds to that of a negotiated procedure).

3.2 What are the minimum timescales?

For award proceedings according to antitrust procurement law, the following minimum timescales apply:

In an open procedure, the minimum term for submitting a tender is 35 days. If electronic tenders are accepted, this minimum term may be shortened by five days. In cases where the grounds for an urgent decision have been duly substantiated, the minimum term may not be less than 15 days.

In award proceedings that include a call for competition procedure, the minimum term for submitting applications for participation (participation deadline) is 30 days. In urgent cases, the minimum term may not be less than 15 days. The minimum term for submitting a tender in procedures that incorporate a call for competition is always 30 days. In cases where the grounds for an urgent decision have been duly substantiated, the minimum term may be set to 10 days. A deviating minimum term may be used, if a consensus has been achieved between all the bidding parties – with the exception of top level federal authorities. If no consensus has been achieved, the minimum term may not be less than 10 days.

In the case of award procedures that are only to be conducted at national level, there are no fixed minimum terms. All minimum terms must be reasonable.

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

Above the threshold, a negotiated procedure without preceding call for competition is only possible under extremely restricted conditions. In practice, this is most commonly applied in the following cases:

- A preceding open or restrictive open procedure has failed and there are no fundamental changes to the original conditions of contract.
- When viewed objectively, the contract can only be fulfilled or the services provided by one specific undertaking, for example, for technical reasons or where there is no competition due to the need to protect exclusive rights.
- In situations where there are extremely urgent, pressing reasons due to events which the contracting entity was unable to foresee, resulting in a situation where the minimum terms provided for within the scope of a standard procedure cannot be complied with. The reasons behind the urgency of the situation must not be attributable to the public contracting entity.

Below the thresholds applying to a European-wide tender procedure, it is possible to fall back on a restricted procedure without a call for competition procedure, if a preceding public tender procedure has failed to lead to an economic result, or where the costs to the applicant/bidder of an open, resp. restricted procedure with a call for competition procedure would be out of proportion to the advantages thus achieved or to the total value of the services. Furthermore, negotiated procedures, resp. direct awards without a call for competition are also possible below the threshold in conditions similar to those in negotiated procedures without a call for competition procedure above the threshold.

3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The contract for the most economically advantageous tender may either be awarded solely on the basis of the lowest price or by also taking other non-price-related award criteria into account. Contracting entities are free to choose how they handle this, whereby, however, it is generally recognised that pricing may not simply be pushed to one side in the decision-making process. Alongside the price, particular consideration may also be given to qualitative – and even environmental and social – aspects. Within the scope of applicability of antitrust procurement law, it is compulsory to state the award criteria and their respective weighting either in the tender notice or in the respective tender documentation. No explicit rules exist to this effect for procedures below the threshold. However, procedural transparency allows no other alternatives.

3.5 What are the rules on the evaluation of abnormally low tenders?

The reasons behind an abnormally low tender must be examined by the contracting entity. The other bidders have a subjective legal right to this clarification process. The aim of the examination is to provide the contracting entity with a clear picture of whether or not he can expect the respective tender to result in the proper provision of services despite the strikingly low price. Therefore, this clarification process, resp. examination, may involve, in particular, the technical solutions selected and the conditions to be met by the undertaking concerned with a view to providing its services, or may concern the bidder's sources of supply. Should any doubts remain as to whether the services can be properly provided, the contracting entity is permitted to refuse awarding the contract based on an abnormally low tender.

3.6 What are the rules on awarding the contract?

For the most part, no specific formal requirements apply to the actual award of a contract. However, notice of the award decision is generally made in textual form – for documentary purposes and the purpose of providing evidence. One exception to the freedom of form principle, however, exists for European-wide procurement procedures in the defence and security sectors (VSVgV). In such cases, the award decision must either be communicated in written form or electronically using an advanced electronic signature. In the case where service or supply contracts are awarding in accordance with VOL/A below the threshold, the respective award decision must likewise be communicated either in written form or electronically via telefax.

3.7 What are the rules on debriefing unsuccessful bidders?

Only in cases above the thresholds for conducting European-wide procurement proceedings must those bidders whose tenders are not to be given consideration be notified in textual form prior to the award of the contract of the name of the undertaking whose tender is to be accepted, the reasons for the planned 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 out by post, resp. 10 days, if this information has been sent out electronically or by fax (§ 134 GWB).

In addition, applicants and bidders both above and below the thresholds are to be informed upon request of the reasons why their application, resp. tender was rejected, possibly including information on the features and advantages offered by the successful tender as well as the name of the bidder awarded the contract.

3.8 What methods are available for joint procurements?

The general rules apply to joint purchasing bodies. Here, one must consider that, in individual cases, joining a purchasing body that constitutes a demand cartel may be problematic from a competition law perspective. Apart from purchasing bodies, public contracting entities can also fall back on central procurement bodies that award public contracts or close framework agreements on their behalf (please refer to § 120 (4) GWB).

3.9 What are the rules on alternative/variant bids?

During award procedures, alternative/variant bids above the threshold for a European-wide tender may only be considered if these have been explicitly allowed by the contracting entity. In addition, the formal requirements as well as the minimum requirements pertaining to the contents of the bid must be stated by the contracting entity. Alternative/variant bids may also be permitted in cases where the price is the sole criterion for awarding the contract.

Below the threshold, alternative/variant bids are always allowed in the construction sector, if not explicitly excluded by the contracting entity (Section 8, para. 2 No. 3 VOB/A). In the case of supplies and services, alternative/variant bids below the threshold must also be explicitly allowed by the contracting entity in order to be evaluated.

3.10 What are the rules on conflicts of interest?

Individuals to whom a conflict of interest applies may not participate in the award procedure (Section 6, para. 1 VgV). A conflict of interest leading to a ban on participation is assumed to exist in the case of individuals who:

- are applicants or bidders;
- are consultants of an applicant or bidder or otherwise support him or act as his legal representative or merely represent him during the award procedure; and
- are employed or work for:
  - an applicant or bidder on a remuneration basis or who are engaged as a member of the applicant's or bidder's board, supervisory board or similar body; or
  - an undertaking engaged in the award procedures in cases where this undertaking simultaneously maintains a business relationship with the public contracting entity and the applicant or bidder.

It should be noted that in the specific constellations described above, an assumed conflict of interest may be refuted.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

If an undertaking or other company associated with this undertaking has already provided advice to the public contracting entity or otherwise been involved in the preparation of the award procedures, the public contracting entity must take suitable measures to ensure that competition is not distorted through the participation of this undertaking (Section 7 VgV). This includes, in particular, ensuring that the other undertakings participating in the award procedures have the same level of information as the previously involved undertaking. In addition, the deadlines for the submission of the tenders and applications to participate must be set so as to be reasonably achievable for all interested parties. Exclusion from the call for competition procedure due to prior involvement is only allowed as a last resort (§ 124 (1) No. 6 GWB).

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

The general exclusions that apply to the application of antitrust procurement law correspond to the provisions contained in the European procurement directives. Antitrust procurement law, for example, does not apply to arbitrary court services, the rental or lease of property or buildings, employment contracts as well as emergency and disaster control services (please refer to § 107 GWB).

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

Parallel to the provisions of the European procurement directives, in-house arrangements are excluded from antitrust procurement law under certain conditions. Apart from cases of self-provision, contracts with legally independent third parties that constitute an in-house arrangement are exempted from the procurement law stipulations, if one or several of the public contracting entities exert similar control on the entity concerned to that which it exerts on its own departments, if at least 80% of the activities of the entity concerned are conducted on behalf of the public contracting entity and where there is no private capital investment in the entity concerned (§ 108 GWB). Furthermore, administrative co-operations are also exempted from the procurement law provisions under certain conditions.

5 Remedies

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

The award of public contracts exceeding the threshold for a European-wide tender is subject to review by a public procurement tribunal. Bidders have a subjective right to the observance of the stipulations applying to award procedures *vis-à-vis* the contracting entity. An application is a prerequisite for initiating the procurement review process. All undertakings have the right to submit an application, if they have an interest in the respective public contract or concession and claim that their rights have been violated through non-compliance with the award provisions. All bidders participating in the award procedures are considered as having an interest in the contract – which also extends to all undertakings whose participation has been unlawfully prevented. In addition to the right to submit an application, the undertaking must also demonstrate that it is likely to suffer damage as a result.

A further prerequisite is that the bidder must have reprimanded the contracting entity with respect to the procurement law violation

in a timely fashion and in accordance with § 160 (3) GWB prior to submitting his application, thus presenting the latter with the opportunity of correcting the situation himself.

Those participating in the procedure are free to challenge a decision made by the public procurement tribunal by choosing the legal remedy of filing an immediate complaint with the responsible Higher Regional Court (§ 171 GWB). Therefore, all decisions made by the public procurement tribunal which closed this first court instance then become the subject matter of the immediate complaint.

The immediate complaint must be filed within a non-extendable two-week period following the formal notification of the decision of the public procurement tribunal (§§ 171, 172 GWB). In accordance with § 162 GWB, all participants have the right to submit a complaint, i.e. this also extends to intervening parties adversely affected by the decision of the public procurement tribunal.

Both instances have in common that the application for initiation of the review procedure, resp. the filing of an immediate complaint, has a suspensive effect, meaning that the contracting entity is not permitted to make a decision on the award of the contract. Regarding the immediate complaint, the suspensive effect does only last two weeks without an application to extend the effect.

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

Above the thresholds, primary legal protection is only available through the procurement review process. Besides this, there is also the option of asserting a claim for damages aimed at achieving a refund of the costs of compiling the tender or, if additional prerequisites are fulfilled, a refund of the profit lost.

Below the thresholds, the primary legal protection offered by the public procurement tribunals simply does not exist. Bidders only have the option of preventing the award decision and correcting the award procedures by applying for a temporary restraining order at the responsible district court or by involving the department responsible for the awarding office. In the federal states of Saxony-Anhalt and Thuringia, it is also possible to review the procedure below the thresholds through a so-called "light" version of the procurement review process. In all cases, it is important to assert the claim before the award decision takes effect. Apart from this, claims for damages may also be asserted.

5.3 Before which body or bodies can remedies be sought?

The legal protection system in the procurement law sector consists of two instances. Above the thresholds, the public procurement tribunals are solely responsible for the review of award procedures in the first instance (§ 155 GWB). These are independent chambers whose organisation is similar to that of a court. These have been established at both federal and state level, whereby the federal public procurement tribunals are solely responsible for federal award procedures.

In the second instance, responsibility for examining the decisions made by a public procurement tribunal lies with the Higher Regional Court.

5.4 What are the limitation periods for applying for remedies?

An application for review is only then permissible, if a complaint was submitted to the contracting entity with respect to the alleged procurement law violation prior to the initiation of the proceedings. In cases where the violation was identifiable to the bidder from reviewing the tender notice or tender documentation, he must submit a complaint to this effect before the expiry of the participation deadline in a two-phase procedure, respectively before the expiry of the minimum term for submitting a tender in a single-phase procedure. Besides this, the bidder must submit a complaint on any violation that he has effectively identified to the contracting entity within a period of 10 calendar days following his gaining knowledge of such violation. Should the contracting entity reject this complaint, the bidder has to submit his application during the 15-calendar-day period following receipt of the notification of the rejection of his complaint.

An award decision that has already been effectively made cannot be annulled by way of the procurement review process (§ 168 (2) GWB). However, in as far as the public contracting entity has violated his duty to provide information or failed to observe the standstill period according to § 134 GWB or awarded the contract unlawfully without publishing a tender notification, the award decision may be deemed ineffective by a public procurement tribunal even after the award of the contract (§ 135 GWB). This application must be submitted within 30 calendar days of notifying the respective bidders of the conclusion of the contract by the public contracting entity or, in the case where no such notification exists, not later than six months following the conclusion of the contract. If the public contracting entity has already published the award of the contract in the Official Journal of the European Union, 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?

Procurement law only allows very limited options for shortening the limitation periods in connection with initiating the procurement review process. The only option open to the contracting entity is to send the initial notice electronically or by fax in order to thus shorten the limitation period prior to awarding the contract from 15 to 10 calendar days.

5.6 What remedies are available after contract signature?

As described in question 5.4 above, the award decision may be deemed ineffective by a public procurement tribunal even after the award of the contract, if the public contracting entity has violated his duty to provide information or failed to observe the standstill period according to § 134 GWB or has awarded the contract without publishing a tender notification (§ 135 GWB). Besides this, once the contract has been effectively concluded, the only option is to consider asserting a civil claim for compensation.

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

The public procurement tribunal should make its decision in writing within five weeks of receiving the application for review (principle of acceleration, § 167 (1) GWB). In exceptional cases, the period for making a decision may be extended, whereby such extension period may not exceed two weeks. No such timescales exist in the case of a Higher Regional Court decision on an immediate complaint which means that such proceedings take considerably longer. In practice, appellate procedures often take between four and seven months.

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

The application of procurement law is strongly influenced by case law. In particular, in the procurement review process, competitors are often able to successfully challenge deviations on the part of the bidder from the requirements contained in the performance specifications, for example, in the case where something other than what is actually required is offered.

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

Apart from observing all the requirements of procurement law throughout the whole award procedure, no specific mitigation measures exist. It is impossible to completely rule out complaints or the initiation of review proceedings. However, as seen from the number of respective cases reported by the public procurement tribunals pertaining to the rejection of applications for review proceedings, it is difficult for bidders to successfully shape the way they handle the procurement review process. The erroneous exemption of applicants and bidders on the part of the contracting entity is also frequently the subject of review proceedings.

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?

During both open and restrictive procedures, changes to the tender documents, irrespective of the specific cause, inevitably lead to an exclusion of the respective bidder from the award procedure. In a negotiated procedure, resp. in a competitive dialogue, such changes on the part of the bidder are, to a certain extent, allowed. There is one exception, however, in as far as the minimum requirements specified in the tender documentation and the award criteria may not be the subject of negotiation. Accordingly, changes to this effect are not allowed. The reasons for this lie in the principles of equal treatment, procedural transparency and fair competition which render changes to the minimum requirements and/or award criteria inadmissible.

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

In as far as the award decision is made in an open or restrictive procedure, procurement law provides for a general ban on negotiations. The contracting entity is not allowed to negotiate the contents of the tender, in particular, changes to the goods and services offered or prices, with the bidder (Section 15, para. 4 VgV).

In a negotiated procedure or competitive dialogue, negotiations are possible even after a tender has been submitted. Negotiations with just one preferred bidder in the final phase of a negotiated procedure, however, are not allowed as the contracting entity must ensure that all bidders are treated equally during the negotiations and that enough tenders are also available in the final stage in order to ensure fair competition, in as far as a sufficient number of tenders was originally available.

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

Following the conclusion of the award procedure, major changes to a contract during the contract period necessitate a new award procedure (§ 132 (1) GWB) as this would otherwise represent an unlawful *de facto* award. A major change is considered when new conditions are introduced that would have allowed other applicants and bidders to be admitted to the original proceedings or another tender to be accepted, or when there is a shift in economic balance in favour of the contractor.

Changes in accordance with § 132 (2) GWB are permissible, however, without new proceedings where:

- explicit, exact and unambiguously worded review clauses or options are provided for in the original tender documentation (No. 1);
- additional supplies, works or services have become necessary that were not provided for in the original tender documents and a change of contractor cannot be carried out for economic or technical reasons, and where this would entail considerable problems or substantial additional costs for the public contracting entity (No. 2);
- the change has become necessary due to circumstances which the public contracting entity was unable to foresee within the context of his duty to exercise care, and where the overall character of the contract is not altered as a result of the change (No. 3); or
- a new contractor replaces the previous one (No. 4) (please refer here to question 6.4).

In the cases described in § 132 (2) Nos. 2 and 3 GWB, the price may not be increased by more than 50% of the value of the original contract. Where there has been a succession of changes to the contract, this limitation applies to the value of each individual change, in as far as the changes are not carried out with the intention of circumventing the regulations.

Furthermore, as per § 132 (3) GWB, changes that do not require new award procedures are possible where the overall character of the contract remains unchanged, the value of the change does not exceed the respective threshold and does not amount to more than 10% of the original contract value in the case of supply and service contracts, respectively 15% in the case of works contracts, whereby the total value of all changes is decisive in the case of several successive changes.

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

A change of contractor during the contract period constitutes a major change that requires new award procedures. In accordance with § 132 (2) No. 4 GWB, there are exceptions to this rule when a new contractor replaces the previous one:

a) based on a review clause in line with § 132 (2) No. 1 GWB;

b) due to the fact that another undertaking that the originally stipulated requirements pertaining to suitability wholly or partially supersedes the original contractor in the course of a restructuring of the undertaking, for example, through a takeover, merger, acquisition or insolvency, in as far as this does not result in any major changes as described in paragraph one above; or

c) due to the fact that the public contracting entity itself takes on the commitments of the main contractor *vis-à-vis* the latter's subcontractors.

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?

The sale of company shares during the privatisation process does not generally represent a procedure which is subject to procurement law. However, other rules apply in the case of a simultaneous award decision. This may turn the transaction, which has to be viewed as a whole, into a public contract.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Public procurement law does not provide for special rules in relation to PPPs. Due to their complexity, it is normally possible to fall back on a negotiated procedure with a call for competition procedure or a competitive dialogue.

8 Enforcement

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

Procurement review processes are not uncommon. After the filing of 751 review applications in 2014, 864, resp. 880 applications were filed in 2015 and 2016, i.e. considerably more bidders sought legal protection against decisions taken by public contracting entities.

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

In 2017, the Federal Court of Justice (*Bundesgerichtshof* – BGH) made two noteworthy decisions which put an end to a long debate in case law and legal literature:

In its decision of 31.01.2017 (X ZB 10/16), the BGH adopted a formal position on the question of whether a competitor has a right *vis-à-vis* the contracting entity to have a tender submitted by a competitor that includes an abnormally low price reviewed. The BGH made it clear that this right cannot be made conditional on a limited number of exceptional circumstances as the bidder submitting the application normally lacks insight into the sphere of the undertaking that is making the low offer. On the contrary, the contracting entity must undertake a closer examination of the pricing structure in the case where the price difference to the next-highest tender exceeds 20%. Should he fail to do so, a competitor has the right to assert a claim to this effect against the contracting entity.

In a further decision of 04.04.2017 (X ZB 3/17), the BGH deemed the use of a so-called school grading system to rate concepts as permissible within the scope of the procurement regime. This manner of evaluation is permissible in as far as the tender documentation, including, in particular, the performance specifications and the award criteria, provide the bidders with a sufficient description of the requirements of the contracting entity. The contracting entity is not required to specify direct or indirect solutions approaches.

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?

National procurement law is undergoing constant change. The abolishment of the VOL/A is currently under discussion.

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?

Since the reform of German public procurement law in 2009, the requirement to give primary consideration to the interests of small and medium-sized undertakings based on the principle of dividing the contract into trade-specific or partial lots is embodied in the law (§ 97 (4) GWB). The contracting entities are primarily responsible for ensuring the observance and application of this rule; the review bodies are responsible for its monitoring. Exceptions involving the award of several partial or trade-specific lots in a collective award contract for economic or technical reasons are treated by case law in a highly restrictive fashion, thus promoting and ensuring the participation of small and medium-sized undertakings.

9.3 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

Following the coming into force of the UVgO at federal level on 02.09.2017, one now has to wait to see whether, when and how this is implemented at state level.

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Since March 2005, Dr. Kirch has been working for the Leinemann Partner Rechtsanwälte office in Berlin. His main area of focus is on supporting contracting parties and bidders during the procurement process, in particular during complex procurement procedures involving public transportation, IT or construction projects or in the defence and security sector. As the project preparation and realisation phases progress, Dr. Kirch works hand-in-hand with his clients to not only develop a respective conflict-avoidance strategy but, if necessary, to also defend their interests *vis-à-vis* other parties involved in the procurement process before the review bodies. The "*Legal 500 Deutschland"* service for the legal trade in Germany ranks Dr. Kirch as a "highly recommended" procurement law expert.

Dr. Kirch is one of the editors of the "*VergabeNews*" [procurement news] information service run by the *Federal Gazette*. He also lectures at procurement law seminars and symposiums and regularly publishes contributions in procurement law journals and books.

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Jörg Mieruszewski has been supporting the Leinemann Partner team since 2014 and currently works at our Berlin office. Jörg Mieruszewski's activities concentrate on procurement law. In complex tender proceedings, he is mainly involved in providing advice in connection with the award of public services but is also frequently engaged in the construction sector. Within this context, he represents both sides: contracting entities as well as bidders. He offers public contracting parties a broad range of services which include help and support with the compilation of comprehensive procurement and contractual documents, as well as conducting award procedures from start to finish in the role of "external awarding office". In addition, Jörg Mieruszewski's consulting services include supporting bidders throughout the procurement process and helping them to enforce their interests' *vis-à-vis* other parties involved in the proceedings before the review bodies. His professional activities also focus on the provision of advice to contractors during larger infrastructure engineering projects as well as the enforcement of claims both in and out of court.

Alongside his work as a lawyer, Jörg Mieruszewski regularly publishes contributions in the "*VergabeNews*" [procurement news] procurement law information service and speaks at procurement law seminars.

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Leinemann Partner has been providing advice and supporting procurement procedures for all involved parties ever since the introduction of formal public procurement legislation. Following the introduction of effective legal protection in 1999, Leinemann Partner has conducted hundreds of procurement review processes, supported both bidders and contracting entities and compiled numerous legal opinions on procurement law matters. The expertise of the procurement law team, which practises throughout Germany, extends to all public procurement areas. Leinemann Partner handles the design of the whole award process for public contracting entities. The law firm also supports bidders throughout the bid processing procedure – right up to the actual award decision.

The clients benefit from the broad service portfolio offered by the six German offices: The team of procurement law experts is one of the largest groups of experts specialised in this practice area in Germany. Currently, with a team of over 90 lawyers, Leinemann Partner belongs to one of Germany's leading law firms in the procurement, construction and real estate law fields. The law firm has been involved in numerous, pioneering legal processes and provides advice to a large number of major projects, such as the Elbe Philharmonic Hall in Hamburg, numerous highway PPP projects and IT projects.

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