

## Public procurement law in practice – significance and principles

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Public authorities, if they are to perform their duties and provide their services to citizens and society, must first acquire the means to do so through public procurement. Some resources tendered, such as office supplies, are solely for use by the public administration itself, whereas others, such as road-construction services, are of direct benefit to the public. In either case, it is important to make ever-limited funds stretch as far as possible. It is in the interest of the public authorities that procurement should deliver the best possible value for money, and therefore medium- and long-term considerations should also be taken into account. Public procurement law also makes an important contribution in the fight to prevent corruption.

### The role of public procurement law

Public procurement is regulated by public procurement law which essentially sets out the rules for *how* it should be carried out. *What* the public authorities procure is largely left up to them and depends on their own specific needs.

Much of German public procurement law is based on European regulations. However, all relevant rules are geared towards enabling the contracting authority to meet its needs as cost-effectively as possible. This goal is also served by a number of other fundamental principles of public procurement law: the maximisation of competition; transparency; equal treatment of tenderers. Since these principles are enshrined in law, they are legally binding for the public administration.

The fact that these principles are binding is also in the interests of the companies that participate in the public procurement process, since they too have rights. The German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) stipulates that the public contracting entity must observe all regulations intended to protect tenderers' rights. Participation in public bids is crucial to their commercial survival, insofar as they need to win a certain number of contracts to secure the future of their companies.

### Competition

The goal of maximising competition is especially important. If several companies are bidding for a contract, they will seek to differentiate themselves from their competitors by submitting as attractive a proposal as possible. This ensures that the contracting entity receives highly competitive bids.

However, it is also important for this competition to be healthy. The current ban on transferring unquantifiable risks to the contractor and the obligation to provide clear and unambiguous Terms of Reference (ToR)

are intended to protect tenderers against speculative proposals that could ruin their businesses. Price negotiation is also prohibited in order to prevent bidding wars.

## Transparency

The competition principle first and foremost concerns the relationship between the contracting entity and those companies interested in bidding for the contract. However, insofar as the public authorities have a particular responsibility towards the public and society as a whole, various other stakeholders must also be taken into account. It is vital that public procurement is subject to scrutiny – not just of individual employees, but of the public administration as a whole. The highest possible degree of transparency is necessary to facilitate auditing public procurement processes and the democratic scrutiny thereof by parliaments at all levels of government. This involves the transparent documentation of the tender procedure and decisions taken, as well as the publication of the details of planned and concluded procurements. Obviously transparency also benefits the interested companies and tenderers.

## Equal treatment

The contracting authority must treat all bidders equally, provide them all with identical information, use identical criteria to evaluate their price proposals and avoid any influence from extraneous factors. This ensures a level playing field for all tenderers and creates effective competition. This in turn benefits the contracting entity, as it will receive several competitive offers as a result.

Various formal requirements exist to ensure equal treatment. They include the need to publish the contract award criteria (so that they are available for public view) and for all tenders to be opened on the same date.

## Procurement as a policy tool

The public authorities may, on occasion, use procurement to pursue policy goals. They may, for instance, prioritise sustainable procurement as part of their role of setting an example to others, creating markets for sustainable products and making them attractive to businesses. Public procurement law is now used as one (additional) means of pursuing other policy goals such as fair pay and support for disadvantaged groups.

## Conflicting goals

Some aspects of the above goals are at odds with each other, and it is therefore often necessary to find a middle way. For instance, effective competition is only possible if the procurement process is *not completely* transparent – tenderers must not know the details of their competitors' proposals, since this could result in price fixing or prices that do not conform to standard market rates. Bidders are required to pay a minimum wage and therefore cannot go below a certain price (unless they are prepared to make a loss counter to business sense). Finally, when specific innovative service features are stipulated, any company that cannot meet these requirements is precluded from taking part in the tender procedure.

## Requirements for effective competition

Public procurement law must channel and resolve conflicting goals. Some of the solutions it provides are briefly outlined below, taking, as an example, the so-called open procedure. Until 2016, the open procedure was the standard procedure provided for by the GWB. It has now been joined on an equal footing by the “restricted procedure” (a two-stage process in which a call for tender is followed by a second stage where selected candidates are invited to submit their proposals). However, the fundamental principles underpinning the two procedures remain unchanged.

The key procedural steps of the “open procedure” are as follows:

1. A call for tenders is published (nationally or throughout the EU)

2. The tender documentation is sent out/downloaded
3. The tenders are received
4. The tenders are opened
5. The tenders are reviewed and evaluated for
  - technical expertise, efficiency, reliability of the bidder
  - tender content and value for money
6. Tenderers are asked to clarify details of their bids – but, crucially, no price negotiations are allowed.
7. Tenderers are notified of the final decision as per Art. 134 GWB (only if the value of the contract exceeds the EU threshold)
8. The contract is awarded
9. The decision is published

In order to ensure efficient, effective and transparent competition, compliance with these procedural steps is ensured through, for example:

- the publication of information before and after the tender process;
- the involvement of several different members of staff, on the principle that several pairs of eyes are better than one;
- the provision of documentation;
- the effective protection of tenderers' rights.

The publication of details before the procurement process begins gives companies the opportunity to find out about forthcoming tenders and notify the contracting authority of their interest. The published information should therefore describe the key features of the services being procured, as well as requirements for bidders. In this instance, both the function of creating competition and a desire for transparency go hand in hand. Since 2016, public contracting authorities have even, as a rule, been obliged to make the tender documentation (i.e. the Terms of Reference (ToR) and contract terms and conditions) freely available on the Internet. This enables businesses, members of the public, the press, watchdogs, etc. to view and assess forthcoming public tenders. Businesses obviously want to be able to decide whether they wish to participate in the tender procedure and whether they are in a position to do so successfully given the requirements specified by the contracting authority. It is therefore important that both the selection criteria for tenderers and the contract award criteria be published. Bidders should be able to form a clear idea of the contracting entity's requirements right from the outset so that they can tailor their tenders to meet them.

## Scrutiny of public procurement

The protection of tenderers' rights enjoys particularly high priority under German law. Only one regulation explicitly states that a signed contract shall be declared null and void in the event of infringement. Article 135 of the GWB contains the specific provision that a contract shall be deemed ineffective if the contracting authority fails in its duty to provide tenderers with all relevant information, thereby depriving them of the opportunity to question any potential irregularities in the award procedure.

However, it should also be said that further scrutiny is provided by the press, regional and national parliaments, courts of auditors, etc.

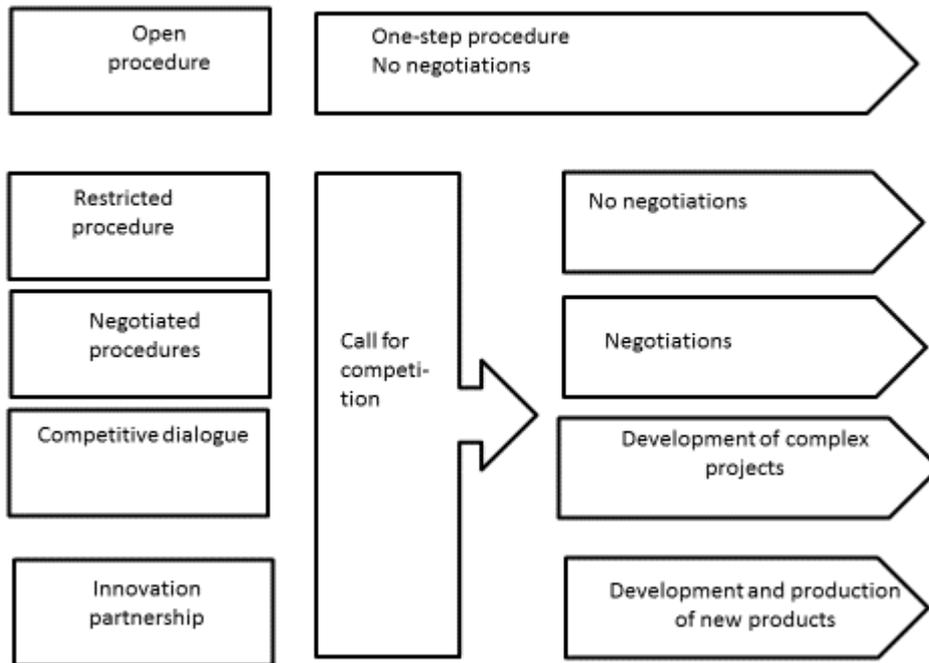
## Procurement as a social responsibility

Efficient and effective procurement also, however, requires a culture of competition within the public entity. Preferential treatment of local businesses can, for example, constitute a blatant violation of the principles of public procurement law which states that all companies must be treated equally. Authorities should have a

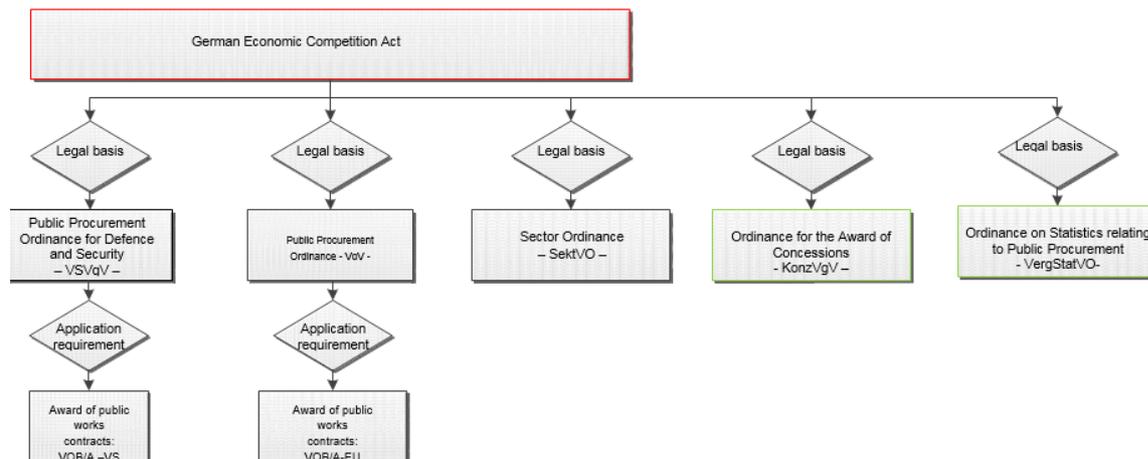
procurement culture where commercial relationships and conflicts of interest are disclosed as a matter of course.

Irregularities in public procurement and in particular all forms of corruption are unacceptable both to government and to society as a whole. Germany is, unfortunately, not immune to abuse or criminal offences of this nature. The newspapers frequently contain reports about bidder cartels and uncover new corruption scandals. However, when this type of behaviour is exposed, the consequences are, at least, extremely serious both in terms of civil and often also criminal proceedings and above all at a social and societal level.

**Chart 1: Overview of procedures**



**Chart 2: Cascade system for EU public procurement law**



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This paper reflects the opinion of the author.

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