

Public Procurement Law—An International Overview

Legalink

An international network of independent law
firms

2011 Edition

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INTRODUCTION

Globalisation is one of the key topics in discussion worldwide. Undertakings are operating not only in their home countries but also more and more across borders. Cross-border transactions require advice on the laws of other countries, which is something a professional network such as Legalink provides. Considering the kinds of business areas involved in the global markets, special attention should be paid to one element of cross-border opportunities: participation in contracts with public authorities all over the world. This is a huge market, which the recent financial crisis has only enlarged.

In situations where undertakings are not organized as foreign subsidiaries in the particular state involved, business opportunities can seem out of reach or at least very difficult to handle. To overcome these hurdles, the Legalink network with its special know-how in this field of law can help businesses interested in pursuing such opportunities.

This booklet provides guidelines for practitioners on the basis of 17 frequently asked questions concerning contracts with public authorities. The answers hereto* may give you an overview with regard to the laws of many countries represented by the Legalink network. The answers are ordered by countries in alphabetical order.

Thirty-six member firms of Legalink collaborated to assemble this information. The personal working relationships that enabled us to produce this project also enable us to help our clients find the right lawyer for the right matter in numerous countries. Should you have issues pertaining to public procurement matters, you should contact the lawyer and law firm identified with the response from the particular country. You may also contact

* Disclaimer: **This book does not provide legal advice, which can be obtained only by discussing specific facts with a qualified lawyer who is expert in the subject matter of public procurement in the jurisdiction in which you are doing business.** What may be perfectly acceptable in one country may be an invitation to legal liability across the border. Please also remember: laws change. This book is being published in May 2011. The only way to know that the information you are reading still is current is to talk to a qualified lawyer in the relevant country.

Markus Jakoby, the leader of this public procurement project at jakoby@jakobyrechtsanwaelte.de or Rita Jardim, the Chief Administrative Officer of Legalink at ritajardim@legalink.ch, and we will be happy to put you in touch with the appropriate Legalink member.

Berlin, 2010
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1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?

Yes, the legal system in Germany provides specific procedures for the award of contracts. In Germany, as in all member states of the EU, there are several national regulations concerning the different procurement procedures and their details to be followed in the respective member state. However, the domestic legislation still has to observe multiple standards given by EU directives for awards of contracts with EU-wide relevance. As a consequence, national regulations for the award of contracts are legislated or adapted according to the requirements of the EU directives. Unless the EU directives are entirely implemented in German legislation, the relevant EU standards have to be considered for the interpretation of German laws.

2. Do the procedures for the award of contracts depend on the kind of goods, services etc., which are to be procured?

Yes, German law—subject to the EU regulations—distinguishes according to the type of goods/services that are to be procured. Thus, several national ordinances are effective, which mostly differ very little. The following national ordinances apply to the following goods/services:

- i. Public works contracts are governed by the “Vergabe- und Vertragsordnung für Bauleistungen (VOB/A)” [official contracting terms for the award of works contracts]
- ii. Other public supply and service contracts are governed by the “Vergabe- und Vertragsordnung für Leistungen (VOL/A)” [official contracting terms for the award of supply contracts]

- iii. Public service contracts concerning professional services (e.g., lawyer, architect) are regulated by the “Verdingungsordnung für freiberufliche Leistungen (VOF)” [official contracting terms for the award of service contracts concerning the freelance professions]
- iv. Contracts in the water, energy, and transport sectors are regulated by special sector provisions, Sektorenverordnung. These specific regulations reflect the strong influence of the public authorities by granting specific and exclusive rights to entities operating in these sectors.
- v. Public supply contracts in the field of defense (arms, munitions, war material)
 - v. 1. are governed by the VOL/A (as to (ii), unless
 - v. 2. German essential security interests are concerned, in which case the VOL/A does not apply (exemption subject to Article 296 of the EC Treaty), but national budget laws, which contain only fragmentary provisions governing the procedure or no provisions at all, control these procurements.
- vi. Public supply/service contracts in specific fields (e.g., if contract demands secrecy or special security measures, also services concerning research and development) are controlled by national budget laws, which contain only fragmentary provisions concerning procedures or no provisions at all.

The aforesaid regulations are closely based on the relevant EU Directives of March 31, 2004 (2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts and 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors). Both EU Directives are lastly amended by Regulation (EC) No 1177/2009 of November 30, 2009. The remedies of bidders have been regulated in the Directive 2007/66/EC of November 15, 2007, to improve rights of rejected bidders.

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc., which are to be procured (thresholds) and if so, what are the thresholds?

Yes, both depend on the estimated value of the public contract. For public contracts that have a value greater than specific thresholds as laid down in the Directives 2004/18/EC and 2004/

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17/EC. To contracts with a value greater than these, thresholds apply strict criteria for the awarding procedure; furthermore, there are special rules concerning primary legal protection. The essential thresholds currently amount to

- i. EUR4,845,000—for public works contracts;
- ii. a. EUR125,000—for supply/service contracts awarded by federal public institutions;
- ii. b. EUR193,000—for all other public supply/service contracts;
- iii. public supply/service contracts for professional services; same limits as (iia)–(iib)
- iv. EUR387,000—for public supply/service contracts in the sector field (water, energy, and transport sectors);
- v. for public supply contracts in the field of defense (arms, munitions, war material), same as (iia)–(iib); if VOL/A applies (see above Answer 2.v.).

4. In what way does the contracting authority have to inform the market about the intended procurement?

Public contracts that have a value exclusive of value added tax (VAT) estimated to be equal to or greater than the above thresholds have to be awarded EU-wide, i.e., they have to be announced in the Supplement to the Official Journal of the European Union (OJS) (http://simap.europa.eu/index_en.html). The contracts in principle have to be awarded by applying the “open procedure,” i.e., for an unlimited number of bidders.

5. Does a potential bidder that is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

No, in order to submit a tender, a bidding consortium may not be required by the contracting authorities to assume a specific legal form; however, the bidding consortium selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract. This is normally not the case.

6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

Yes, both are possible.

7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

Legally it is not required that a bidder or its subcontractor have a registered office or branch office in Germany; therefore, a bidder theoretically can act completely from abroad. From experience, it makes sense for the award of a contract and for the satisfactory performance of the contract to have a temporary office in Germany, at least on the occasion of the award of the contract.

Regarding contracts in the sector field (water, energy, and transport, see above Answer 2.iv.), bids may be rejected, if more than 50% of the total value of goods to be supplied under the contract originate in non-EU member states or countries that have no international treaty with Germany or the EU. [§ 28 Sektorenverordnung (Sector Ordinance)].

8. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

In Germany contracting authorities may—as far as the object of the contract requires—request evidence from domestic and foreign bidders:

- i. that the bidder does not employ a person who is convicted of certain offenses that indicate the unreliability of the person and, therefore, of the bidder;
- ii. concerning registration of the bidder in its country of origin;
- iii. that applicable taxes and duties, as well as the social insurance contributions, have been duly paid by the bidder;
- iv. bank inquiry;
- v. concerning liability insurance;
- vi. concerning financial statements or an abridgement of it, if a publication is provided in the country of origin;
- vii. concerning declarations about overall turnover of the tending undertaking as well as the turnover in the special field, which is matter of the award of the contract;
- viii. that the bidder deposits an amount as security to guaranty the proper performance of the contract

9. Is a multinational bidding consortium allowed to submit a bid?

Yes, that is possible. All members of a bidding consortium have to be stated. One of the members needs to be appointed as proxy representative to contract and to operate the contract.

10. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail, or digital?

The contracting authority shall make known in the public contract notice, at the latest when sending the specifications to the potential bidders that requested to participate et al.,

- i. the language or languages in which the bids must be drawn up—mostly in German—;
- ii. the required form for the bids;
- iii. the deadline for the receipt of the bids;
- iv. the minimum deadline for the validity of bids (see also below).

11. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

All bidders are to be provided “adequate” time so that all receive a fair chance to calculate their bid and to fulfill the formal requirements of the award of the contract. In the case of open procedures for public supply/service contracts or public works contracts, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent (see Answer 2 (i), (ii) and Answer 3 (i), (ii)). Under specific circumstances the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days, but in no case to less than 22 days running from the date on which the contract notice was sent. Further shortening of time limits may be allowed where notices are drawn up and transmitted by electronic means and/or where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents (cp. § 12 EG VOL/A).

12. Can the bidders claim their costs for preparing their bid? If so what are the conditions for and the maximum amount of reimbursement?

As a general rule, bidders cannot claim reimbursement for the cost of submitting a bid. This may be different if the contract-

ing authority shall demand drafts, designs, drawings, calculations, etc., as part of the bid, which are typically asked only for value. In this case, an adequate reimbursement will be set in the specifications valid for all bidders and each candidate who has submitted a bid together with the required supplementary documents may claim this compensation.

13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

Yes. The contracting authority may only take into account those bidders who demonstrate their suitability to perform the contract in terms of their economic and financial standing, as well as their professional and technical knowledge and ability. For this purpose, the contracting authorities may ask several questions which are to be answered by bidders, oftentimes supported by references. When preparing a bid, the bidder must be sure to submit all required answers, references/documents concerning suitability criteria completely, and as requested. Otherwise, the bidder might be excluded due to formal reasons. The contracting authority may not show any tolerance even in case of only small nonconformities. German jurisdiction calls this “formal competition.”

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so, please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

Yes, every bidder may complain to the contracting authority that its rights were violated by alleged noncompliance with the provisions governing the award of contracts. The noncompliance might concern general aspects of the procedure, aspects of the specifications, or other supplementary documents, but especially the duty of the contracting authority to inform every bidder at least 14 days before the award of the contract about the intention to select another bidder.

Unless the contracting authority takes remedial action concerning the claimed unlawful measures, the bidder may institute proceedings (so-called proceeding to control compliance with the procedure of the award of contracts) by filing a formal

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application with a special tribunal (Public Procurement Tribunal). The Public Procurement Tribunal shall review the bidder's claims. If the Public Procurement Tribunal is convinced that the claimed aspect is intended to protect the bidder and furthermore might restrict the rights of the claiming bidder, the Public Procurement Tribunal may serve the claim on the authority and may order the authority to set aside the unlawful measures and to take certain lawful measures. If the subject of the tenderer's claim is the intended award to a competitor, the contracting authority must not award the contract as originally intended before the conclusion of the proceedings. If the contracting authority still makes the award, the award is void. Both sides may file an appeal subject to a time limit against the decision of the Public Procurement Tribunal with the higher regional court (Oberlandesgericht), senate for the award of contracts. The senate is the court of last resort and therefore, its judgment is final unless the senate intends to overrule a judgment of another senate or of the Federal Supreme Court (Bundesgerichtshof); the overruling aspect is to be submitted to the Federal Supreme Court for final judgment.

15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services, etc., to be procured? If so, what are the conditions?

In Germany, specific regulations concerning legal protection via review procedures exist only regarding procedures for the award of contracts concerning goods or services with a value that is estimated to be equal to or greater than certain thresholds. For contracts with a value that is estimated to be smaller than the thresholds, there are no specific regulations concerning primary legal protection. If and to what extent primary legal protection exists according to general German, but particularly to European Law, is a controversial issue.

16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims, etc. (secondary legal protection)? If so, what are the principal conditions that have to be presented to a court in order to receive a damage award?

If there is not granted primary legal protection in Germany or in certain cases if primary legal protection was not effective for certain reasons and a damage is caused, secondary legal protec-

tion exists, in principle. To the extent a bidder suffers damages due to an irreversible act contrary to public procurement law, he can claim for damages at civil court. The claim might be successful provided that (i) there is evidence of an act contrary to public procurement law, which is a violation of (ii) a provision that protects bidders and (iii) through this the bidder who is supposed to be protected by the provision is affected. In practice, it is very difficult to prove causation between the violation and the damage.

17. Can your office

- i. **give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc., and assist in the procurement procedure in your country?**
- ii. **represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?**
- iii. **Please name a contact person within your office for questions of public procurement law**

Yes, our office has the competence to

- i. advise clients on bid preparation in Germany and
- ii. represent foreign clients in procedures for the award of contracts before all public offices/courts in the Federal Republic of Germany.
- iii. Contact persons within our office for questions of public procurement law are
 - Markus Jakoby, <mailto:jakoby@jakobyrechtsanwaelt.e.de>,
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