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# Guidelines for Contracts with Public Authorities

5th Edition

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# Guidelines for Contracts with Public Authorities

2023 Update

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Public  
Procurement

5th Edition

Contributions  
from the following

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# Jakoby Rechtsanwälte Germany

## 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 must observe multiple standards given by EU directives for awards of contracts with EU-wide relevance. Therefore, 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 must 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?

- i. In principle, all public supply and service contracts are governed by the provisions of the 4th part of the "Gesetz gegen Wettbewerbsbeschränkungen (GWB)" [Act against Restraints of Competition]
- ii. In addition to the provisions of the GWB, 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.
- iii. In addition to the provisions of the GWB, the awarding of concessions is also subject to the regulations of the Konzessionsvergabeverordnung [Concession Award Regulation]
- iv. In addition to the provisions of the GWB, the awarding of defense or security-related contracts is also subject to the provisions of the Vergabeverordnung Verteidigung und Sicherheit (VSVgV) [Defense and Security Procurement Regulation]
- v. If they do not fall into one of the aforementioned categories (ii to iv), the awarding of contracts is, in addition to the provisions of GWB, the also subject to the provisions of the Vergabeverordnung (VgV) [Public Procurement Regulation]
- vi. In addition to the provisions of the GWB and the VgV, the award of construction contracts is also subject to the provisions of the "Vergabe- und Vertragsordnung für Bauleistungen (VOB/A)" [Regulation for the awarding and contracting of construction works]

The aforesaid regulations are closely based on the relevant EU Directives (i) 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, (ii) 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and (iii) 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors. 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 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/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. EUR 5,382,000 —for public works contracts and concessions;
- ii.a. EUR 140,000 —for supply/service contracts awarded by federal public institutions;
- ii.b. EUR 215.000 —for all other public supply/service contracts;
- iii. EUR 431.000 —for public supply/service contracts awarded by federal public institutions in the defense and security sector;
- iv. EUR 750.000 – for social and other special services

**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 (ted.europa.eu). The contracts in principle have to be awarded by applying the “open procedure,” i.e., for an unlimited number of bidders, or the “non-open procedure with bidding competition”.

**5. Are calls for tender from contracting authorities published on a single or on multiple freely accessible website(s)? If yes, please name the website(s).**

In addition to the EU-wide calls for tenders published in the electronic version of the Supplement to the Official Journal of the EU (TED), calls for tenders may be found in Germany on various websites, e.g. the following:

- <https://www.evergabe-online.de> (central platform of the federal government for the electronic award of contracts)
- <https://www.berlin.de/vergabeplattform/> (awarding platform of the state of Berlin)

**6. 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, 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.

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

Yes, both are possible.

**8. 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. [Sec. 50 par.1 Sektorenverordnung (Sector Ordinance)]

**9. 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 tendering 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 guarantee the proper performance of the contract

## 10. **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.

## 11. **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).

## 12. **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 35 days from the date on which the contract notice was sent. Under specific circumstances the minimum time limit for the receipt of tenders may be shortened to a minimum of 15 days running from the date on which the contract notice was sent.

## 13. **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 contracting 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.

**14. Are there any selection criteria set by law that bidders have to satisfy to 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.”

**15. 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 15 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 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.

**16. 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, on the federal level, no specific regulations concerning primary legal protection. On the state level, some federal states of Germany (Thuringia, Saxony-Anhalt, Saxony and Rhineland-Palatinate) have in recent years established a special review procedure in the area below the EU thresholds. In general, the existence and scope of primary legal protection remains a controversial issue.

**17. 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 protection 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 often difficult to prove causation between the violation and the damage.

**18. 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:
  - Anette Prasser, [prasser@jakobyrechtsanwaelte.de](mailto:prasser@jakobyrechtsanwaelte.de)
  - Lotte Herwig, [herwig@jakobyrechtsanwaelte.de](mailto:herwig@jakobyrechtsanwaelte.de)

