

Information Leaflet

on the legal protection available in the field of public contracts (Sections 97 ff of the Act Against Restraints of Competition in the version as of 1 January 1999)

This information leaflet summarises the main aspects of the legal protection applicable as of 1 January 1999 for persons bidding for public contracts.

I.

Why was it necessary to reform public procurement rules?

To fully implement the EU directives concerning public procurement a new framework of legal protection for the award of public contracts had to be created. The new procurement rules introduced by the legislator for this reason were integrated as a fourth part into the Act Against Restraints of Competition and came into force on 1 January 1999. In line with European law, the new legislation for the first time gives a bidder the right to the award procedures being observed by the contracting entity. The new legal protection is afforded in a two-stage control procedure by public procurement tribunals which are part of the administrative authorities of the Federation and the *Länder* and by the award divisions of the Courts of Appeal.

II.

Award Procedure

1. General Principles

Public contracts are contracts under private law that relate to the provision of a service for pecuniary interest concluded between public contracting entities and companies whose subject matter is supplies, works or services. Such contracts must be awarded by public contracting entities through competition and by way of transparent award procedures that observe the principle of equal treatment. In particular, bids by foreign and domestic companies are always to be treated equally. Only skilled, efficient and reliable bidders will be considered as contractors.

2. Contracting entities and scope of application

The Act describes in six categories the contracting entities that have to observe the new law. These are above all the traditional public contracting entities, i.e. the regional or local authorities and their associations, as well as the legal persons under public or private law controlled or mainly financed by these, which were established to meet the needs in the general interest. Contracting entities within the meaning of the Act also include companies which operate in the fields of transport, drinking water or energy (so-called sectoral contracting entities) if they exercise this activity on the basis of special or exclusive rights that they have been granted by the authority responsible or if they are at least jointly controlled by one or more of the traditional public contracting entities mentioned.

The procurement rules under the ARC apply only to the award of contracts which reach the thresholds stipulated in Section 100 of the ARC in conjunction with

Section 2 of the award regulation (VgV) (minimum contract values excl. VAT). The thresholds for supplies and services are € 211,000 in the area of traditional public contracting entities. In the area of supreme and higher Federal authorities they are as a rule € 137,000. In the area of sectoral contracting entities (water, energy and transport) the threshold is € 422,000. For building contracts, the threshold is € 5,278,000 in the areas of both traditional public contracting entities and sectoral contracting entities. If a contract is divided into lots, the total value of the contract is above all relevant. As a rule the thresholds for the lots are different (cf. Section 2 Nos. 7 and 8 of the award regulation).

3. Categories of awards

Public contracts are awarded through open procedures, restricted procedures or negotiated procedures. Open procedures (public tenders) have priority in any case. However, companies falling into the category of sectoral contracting entities under private law and fulfilling the preconditions of Section 98 no. 4 ARC may choose freely from the three award methods.

III. Review Procedures

1. Reviewing authorities

The reviewing authorities comprise public procurement review offices and public procurement tribunals.

Public procurement review offices:

The Federation and the *Länder* are free to establish public procurement review offices. Every bidder can call on the public procurement review office responsible in a particular case, which can, however, also act *ex officio*. The public procurement review office is responsible for checking the award procedure prior to formal review, and if possible for settling disputes between the contracting entity and the bidder. Bringing the matter before a public procurement review office is not a precondition for applying to the public procurement tribunal, nor does it activate any time limits. The contracting entity may award the contract during proceedings before the public procurement review office. Appeals against decisions by the procurement review office can only be brought before the public procurement tribunal.

Public procurement tribunals:

The public procurement tribunals of the Federation are responsible for checking the award of public contracts that fall within the scope of responsibility of the Federation, and those of the *Länder* are responsible for checking the awards falling within their scope of responsibility. The public procurement tribunals of the Federation are set up at the Bundeskartellamt. The *Länder* are free to determine where to establish their public procurement tribunals. The public procurement tribunals are independent and are not accountable to another authority in their decision-making. They take their decisions through a chairperson and two associate members.

2. Proceedings before the Public Procurement Tribunal

Initiation of proceedings:

Participants in an award procedure have the right to the provisions on the award procedure (Sections 97 ff. of the ARC as well as the award rules for building and construction work, services and freelance services) being observed by the public contracting entity. Participants may therefore submit a written and substantiated application for review of the award procedure in question to the public procurement tribunal before the contracting entity awards the contract. Since the coming into force of the new award regulation on 1 February 2001, the contracting entity has to inform the bidders in writing of the name of the bidder whose offer is to be accepted and why the other bidders' offers are not to be considered. This has to be done at the latest 14 calendar days before the conclusion of the contract. An award cannot take effect before this time period has expired.

Every company has the right to file an application if it has an interest in the contract award, claims that its rights in the award procedure have been violated by non-compliance with the provisions governing the award of public contracts and is able to show that in consequence of the alleged violation it has suffered a loss or may be about to suffer a loss. The violation of provisions governing the award of public contracts may also consist in an entity's failure to invite tenders. An application is inadmissible if already during the award procedure the applicant became aware of the violation and did not object to the contracting entity immediately, i.e. without undue delay (as a rule no later than two weeks after the applicant became aware of the violation). Any errors apparent in the official announcement must be challenged accordingly before the end of the period for submitting tenders that is specified therein.

The objection should be submitted in writing. In so doing, a time limit should be set for the contracting entity to remedy the alleged violation or to comment thereon. At the same time the contracting entity should be informed that an application for review will be filed if it continues the behaviour to which objection has been taken. If the violation continues after the objection has been submitted, the bidder may submit an application for review to the public procurement tribunal. An applicant without a domicile or habitual residence, seat or headquarters within Germany shall appoint an authorised receiving agent in Germany.

Review proceedings are subject to fees. The minimum fee is € 2500. When submitting the application, a preliminary payment to this amount is to be made which will be refunded insofar as the action before the public procurement tribunal is successful. The advance payment is a precondition for the service of the application for review upon the contracting entity (cf. Section 4 (1) sentence 1 of the rules of procedure of the public procurement tribunals of the Federation). **The fee is to be paid into the account "Deutsche Bundesbank, Filiale Saarbrücken", account number 590 010 20, at the Saarbrücken branch of Deutsche Bundesbank (bank sorting code 590 000 00) quoting a specific reference. This should be requested from the Public Prosecution Tribunal of the Bundeskartellamt before payment (0228) 94 99-5 61. For international transfers the Bank Identification Code MARKDEF 1590 and the International Bank Account Number of the "Deutsche Bundesbank, Filiale Saarbrücken" DE81 5900 0000 0059 0010 20 should also be quoted.**

The application for review should be sent to:

Bundeskartellamt
Vergabekammern des Bundes
Kaiser-Friedrich-Str. 16
53113 Bonn
Germany
Fax-Nr.: 0049 – 2 28 – 94 99 – 1 63

The application for review should be submitted within the time limit indicated under Section 13 of the award regulation (within 14 days upon the mailing of the preliminary information by the contracting entity), allowing for sufficient time for the Procurement Tribunal to review the application for evident inadmissibility or unfoundedness and to serve it before this time limit expires. The statutory prohibition to make the award is only activated upon the contracting entity's receipt of the application.

Unless the application is clearly inadmissible or unfounded (**as regards the information required for an application to be admissible, see Checklist**) and the advance payment amounting to the minimum fee of € 2,500 has been effected (evidence of payment should be provided for example by a copy of the credit transfer form or by a cross cheque), the public procurement tribunal serves the application upon the contracting entity. After service, the contracting entity may not make the award prior to the decision of the public procurement tribunal and before the expiry of the period for filing an immediate complaint before the Court of Appeal.

Contrary to this provision, the public procurement tribunal may upon application by the contracting entity allow the award to be made if the advantages of a quick conclusion of the award procedure outweigh the negative consequences of delaying the award until the end of the review. The appellate court may, however, reinstate the prohibition of the award.

The public procurement tribunals may upon special application intervene in the public procurement proceedings by taking additional temporary measures if the applicant's rights are jeopardised by factors other than the pending award.

Companies whose interests are severely affected by the decision may be admitted to the proceedings either upon application or *ex officio*.

Investigating the facts and decision:

Once the application has been served on the contracting entity, and if necessary on the public procurement review office, the public procurement tribunal also requests the award files and if necessary also the files of the public procurement review office, and investigates the relevant facts. It has far-reaching investigatory powers for this purpose.

The parties may upon application inspect the files at the public procurement tribunal. The public procurement tribunal must refuse such inspection where this is required for important reasons, in particular for the protection of business secrets.

All the parties to the proceedings must cooperate in furthering the course of the proceedings. They may have to observe certain time limits and once these expire, any further arguments put forward by the parties may be disregarded. The public procurement tribunal must make its decision on the application and give reasons

within a period of 5 weeks. The chairperson may extend this period in particularly difficult cases by issuing a reasoned statement to the parties.

In principle the decisions of the public procurement tribunals are made after a hearing. This may, however, be dispensed with if the application is clearly inadmissible or unfounded or if the parties agree. No hearing is necessary either when deciding upon applications made by a contracting entity to be allowed to award a contract during the proceedings and upon preliminary measures by the public procurement tribunal.

The public procurement tribunal decides whether the applicant's rights were violated, and takes suitable measures to remedy the violation of rights, and to prevent any impairment of the interests affected. It is not bound by the applications and may also independently bring an influence to bear on the lawfulness of the award procedure. It cannot cancel an award which has already been made. If the review procedure becomes obsolete by the granting of an award or in any other way after the application has been filed, the public procurement tribunal determines on the application of a party and without being bound by a time limit whether there has been a violation of rights.

3. Complaints procedures

Decisions of the public procurement tribunal are subject to an immediate complaint. This complaint must be supported by reasons and filed in writing with the Court of Appeal responsible as an appellate court for the seat of the public procurement tribunal. It must be lodged within a period of two weeks after service of the decision. With the exception of legal persons under public law, mandatory representation by lawyers applies in the event of a complaint.

The complaint has a suspensive effect upon the decision of the public procurement tribunal for a period of two weeks after the time limit for the complaint. If the public procurement tribunal refuses to review the award, the appellate court may, upon application by the complainant, extend the suspensive effect up to the time of the decision on the complaint.

Upon the written and substantiated application of the contracting entity, the appellate court may, considering the prospects of the complaint's success and the interests involved, allow the award procedure to continue and the contract to be awarded. The appellate court must make a decision on such an application within five weeks; no appeal is admissible against this decision.

If the court considers the appeal to be well-founded, it reverses the decision of the public procurement tribunal. It either decides on the matter itself or obliges the public procurement tribunal to decide again on the matter with due consideration of the court's opinions as to the law.

4. Submission to the Federal Supreme Court

If a Court of Appeal wishes to deviate from a decision of another Court of Appeal or of the Federal Supreme Court in an award matter, it must refer the matter to the Federal Supreme Court in the interests of uniform court practice throughout Germany.

IV. Civil law claims

1. Binding effect

If damages are claimed before the courts of general jurisdiction because of a violation of the provisions governing the award of public contracts, these courts are bound by the final decisions that the public procurement tribunals and the Courts of Appeal have made relating to the award procedure concerned.

2. Damages in the event of an abuse of law

Companies which abusively apply the new provisions affording legal protection in the field of public procurement will face claims for damages from the opponent and other parties to the proceedings. An abuse exists in particular

- (1.) if a suspension or further suspension of the award procedure is achieved through incorrect statements made intentionally or with gross negligence,
- (2.) if the review is applied for with the intention of obstructing the award procedure or of harming competitors or
- (3.) if an application is made with the intention of subsequently withdrawing it in exchange for money or other benefits.

3. Claim to compensation for damages

A company may demand compensation from the contracting entity for the costs of preparing the tender or of participating in an award procedure if the company would have had a real chance of being granted the award if one of the provisions intended to protect companies in award procedures had not been violated.

IV. Costs

Costs (fees and expenses) to cover the administrative expense are charged for official acts of the public procurement tribunals. In principle, the minimum fee is € 2,500 and it should not exceed € 25,000. The public procurement tribunals of the Federation initiate review proceedings only if an advance payment of a minimum fee of € 2,500 is effected with the application. For the official acts of the public procurement review offices costs are only charged if these go beyond the activities of a specialised and legal supervisory authority.