

Information leaflet

on the legal protection available in the award of public contracts
(Sections 97 ff of the Act against Restraints of Competition (ARC) in the version as published on 17 February 2016)

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This information leaflet summarises the main aspects of the legal protection applicable as of 1 January 1999 for bidders in public procurement procedures. It takes account of the amendments to the ARC brought about by the Act to Modernize Public Procurement Law of 17 February 2016 (Federal Law Gazette, volume 2016, part I no. 8 of 23 February 2016, p. 203 ff.) and **therefore applies exclusively to review procedures on award proceedings which only began on 18 April 2016 or later.**

I.

Necessity for a regulation on legal protection in the award of public contracts above the specified thresholds

The legal framework for the award of public contracts is based on the EU public procurement directives and applies to contracts exceeding certain contract values specified in the directives (so-called threshold values). In 2007 and 2014 these directives were fundamentally revised.¹

The German legislator has transposed the Community's legal framework on public procurement into Part 4 of the Act against Restraints of Competition (ARC).

The provisions on the award of public contracts contained in the ARC are concretized in the Ordinance on the Award of Public Contracts (VgV), which in turn refers to the provisions of the so-called Award Procedures for construction services (VOB/A), the Ordinance on the Award of Public Contracts in Specific Sectors (SektVO), the Ordinance on the Award of Concession Contracts (KonzVgV) and the Ordinance on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security (VSVgV).

In line with European law the new provisions for contracts exceeding certain contract values (see II. 2.) give a bidder the right to the award procedures being observed by the public contracting entities. Legal protection is afforded in a two-stage control

¹ Cf. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94 of 28 March 2014, p. 65 ff.; Directive 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 and repealing Directive 2004/17/EC, OJ L 94 of 28 March 2014, p. 243 ff.; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94 of 28 March 2014, p. 1 ff.; Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335 of 20 December 2007, p. 31 ff.; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216 of 20 August 2009, p. 76.

procedure: at the first stage by public procurement tribunals which are part of the administrative authorities of the Federation and the *Länder* and at the second stage by the award divisions of the Higher Regional Courts.

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 law-abiding bidders will be considered as contractors.

2. Public contracting entities and scope of application of public procurement law under the ARC

The Act describes in Section 99 ARC the categories of public 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 public interest objectives. Contracting entities within the meaning of Section 100 ARC also include companies which operate in the fields of transport, the supply of drinking water or energy (so-called sectoral contracting entities) if they exercise their activity on the basis of special or exclusive rights they have been granted by a competent authority or if they are at least jointly controlled by one or more of the traditional public contracting entities mentioned above.

The procurement rules under the ARC apply only to the award of contracts which reach the threshold values stipulated in Section 106 (1) ARC (minimum contract values excl. VAT). If a contract is divided into lots, the total value of the contract is primarily relevant. As a rule the threshold values for the lots are different (cf. Section 3 (7) VgV).

3. Categories of awards

Public contracts are awarded through open procedures, restricted procedures, negotiated procedures, competitive dialogue or in the innovative partnership (Section 119 (1) ARC). Contracting entities can choose between open and restricted procedures. Sectoral contracting entities may freely choose between the first two of these award procedures, the negotiated procedures and the competitive dialogue (Section 13 (1) SektVO). The grantor is free to configure the award procedure within the boundaries of the Ordinance on the Award of Concession Contracts (KonzVgV).

III. Review procedures

1. Reviewing authorities

The reviewing authorities are the public procurement tribunals.

The public procurement tribunals of the Federation are responsible for reviewing the award of public contracts that fall within the scope of responsibility of the Federation, and those of the *Länder* are responsible for reviewing the awards falling within their scope of responsibility. The public procurement tribunals of the Federation are located 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 bound by instructions in their decision-making. They take their decisions through a chairperson and two associate members.

4. 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. ARC) being complied with by the contracting entity. Participants may therefore submit a written and substantiated application for review of the award procedure in question to the public procurement tribunal, provided the contract has not yet been awarded by the contracting entity.

In order to enable the participant in an award procedure to exercise these rights before a contract is awarded, the public contracting entity is obliged to inform in writing and without further delay the bidders whose offers are unsuccessful of the name of the company whose offer is to be accepted, why their offers are not to be considered and of the earliest possible date of the conclusion of the contract. A contract may only be concluded at the earliest 15 calendar days after this information has been sent, whereby this time limit is reduced to ten calendar days if the information is sent by telefax or electronically (so-called information and standstill period under Section 134 (1) ARC). The time limit begins on the day on which the public contract entities dispatched the information. The date of receipt by the bidder in question is irrelevant. This obligation to inform the bidding parties does not apply in cases in which negotiation procedures are justified without previous notification on grounds of particular urgency (Section 134 (3) ARC).

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 it has suffered a loss or may be about to suffer a loss in consequence of the alleged violation (Section 160 (2) ARC). 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 the applicant already became aware of the violation during the award procedure and did not object to the contracting entity within ten days. Any errors apparent in the official announcement must be challenged accordingly by the end of the period for submitting tenders or applications that is specified therein. The contracting entity must be notified of any violations of the provisions governing the award of public contracts which become evident from the award documents before expiry of the period specified in the notice for the submission of a tender or application.

An application for review is also inadmissible if more than 15 calendar days have expired since receipt of notification from the contracting authority that it is unwilling to remedy the complaint (on the requirements for making a complaint see Section 160 (3) No 4 ARC).

The objection should be submitted in writing. 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 € 2,500. When submitting the application, a preliminary payment to this amount is to be made which will be refunded if and to the extent to which 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 182 (1) ARC in conjunction with Section 4 (1) of the rules of procedure of the public procurement tribunals of the Federation).

The fee is to be paid into the account "Bundeskasse Trier", at the Saarbrücken branch of Deutsche Bundesbank, Bank Identification Code (BIC) MARKDEF1590, International Bank Account Number (IBAN) DE81 5900 0000 0059 0010 20, quoting a specific reference. This must be requested from the Public Procurement Tribunal before each payment: +49 (0) 228 94 99-421/-561/-578/-249.

The application for review must be sent to:

Bundeskartellamt
Vergabekammern des Bundes
Villemombler Str. 76
53123 Bonn (Germany)
Fax-Nr.: +49 (0) 228 94 99 – 163

The application for review should be submitted within the information and standstill period under Section 134 (1) ARC, allowing for sufficient time for the procurement tribunal to review the application for evident inadmissibility or unfoundedness and to inform the public contracting entity before this time limit expires. The statutory prohibition to make the award is only activated upon the contracting entity's receipt of the application for review in writing.

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 must be provided, for example, in the form of a copy of the credit bank transfer form or by a crossed cheque), the public procurement tribunal informs the contracting entity in writing of the application. After receipt of this information, 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 Higher Regional Court.

Contrary to this provision, the public procurement tribunal may, upon application by the contracting entity or the company which has been named by the contracting entity as the company to be awarded the contract, allow the award to be made if the advantages of a quick conclusion of the contract 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.

Companies whose interests are severely affected by the decision can be admitted to the proceedings by the public procurement tribunal (Section 162 ARC).

Investigating the facts and decision:

On serving the application for review on the contracting entity, the public procurement tribunal also requests the award files 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 shall refuse such inspection where this is required for important reasons, in particular for the protection of business secrets (Section 165 (2) ARC).

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 shall take its decision on the application and give reasons for it within a period of 5 weeks. The chairperson may extend this period in exceptional cases by issuing a reasoned statement to the parties (Section 167 (1) ARC).

In principle the decisions of the public procurement tribunals are made after an oral hearing. This may, however, be dispensed with if the application is inadmissible or clearly unfounded or if the parties agree to this (Section 166 (1) ARC). No oral hearing is necessary either when deciding on applications made by a contracting entity to be allowed to award a contract during the proceedings and on 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 influence the lawfulness of the award procedure (Section 168 (1) ARC). It cannot cancel an award which is legally effective. 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, without being bound by a time limit, whether there has been a violation of rights.

5. Complaints procedure

Decisions of the public procurement tribunal can be contested by immediate complaint. This must be lodged with the appellate court named in the instruction on rights of appeal within a period of two weeks after service of the decision and be supported by reasons. With the exception of legal persons under public law, representation by a lawyer is mandatory for filing 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 a complaint has expired. If after examination the public procurement tribunal rejects the application for review, the appellate court may, upon application by the complainant, extend the suspensive effect up to the time of the decision on the complaint (Section 173 ARC).

Upon the written and substantiated application of the contracting entity or upon application by the company named as the company to be awarded the contract, the appellate court may allow the award procedure to continue and the contract to be awarded if, taking into account all interests which may be impaired, the negative consequences of delaying the award up to the time of the decision on the complaint outweigh the advantages involved. The appellate court must make a decision on such an application within five weeks; no appeal is admissible against this decision (Section 176 ARC).

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 on the relevant points of law.

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 Higher Regional Courts have made with regard to the award procedure concerned (Section 179 (1) ARC).

2. Damages in the event of an abuse of law

Companies which abusively exercise their rights to legal protection in the area of public procurement will face claims for damages from the opponent and other parties to the proceedings (Section 180 ARC). An abuse exists in particular if

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

3. Claim to compensation for damage

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 (Section 181 ARC).

V. 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 the maximum fee €50,000.

The costs of the proceedings are in principle to be borne by the unsuccessful party/parties (Section 182 (3) ARC).

The fee to be charged by the public procurement tribunal is generally based on the value of the contract to be awarded (so-called gross contract value). The table below indicates which fee would usually be payable in relation to the contract value in question. The indicated fees apply to review procedures which involve an average expenditure on material and human resources on the part of the public procurement tribunal. The table therefore only serves as a reference for how a fee is calculated. The actual fees are always determined on a case by case basis according to the actual amount of material and human resources deployed by the public procurement tribunal and can therefore deviate from the amounts indicated below.

Value of contract in €	Basic fee in €
< 80,000	2,500
80,000	2,500
200,000	2,575
400,000	2,725
600,000	2,850
800,000	3,000
1,000,000	3,125
2,000,000	3,800
3,000,000	4,475
4,000,000	5,175

5,000,000	5,850
6,000,000	6,525
7,000,000	7,200
8,000,000	7,875
9,000,000	8,575
10,000,000	9,250
11,000,000	9,925
12,000,000	10,600
13,000,000	11,275
14,000,000	11,975
15,000,000	12,650
16,000,000	13,325
17,000,000	14,000
18,000,000	14,675
19,000,000	15,375
20,000,000	16,050
22,000,000	17,400
24,000,000	18,775
26,000,000	20,125
28,000,000	21,475
30,000,000	22,850
32,000,000	24,200
34,000,000	25,575
36,000,000	26,925
38,000,000	28,275
40,000,000	29,650
50,000,000	36,450
60,000,000	43,250
70,000,000	50,000
>70,000,000	50,000