



Ordinance on the Award of Public Contracts (Procurement Ordinance (*Vergabeverordnung – VgV*))

in the version of the Ordinance on the Modernisation of Public Procurement Law
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Chapter 1

General Provisions and Communication

Subchapter 1

General Provisions

§ 1

Purpose and Scope

(1) This Ordinance adopts detailed rules on the procedure to be followed for the awarding of public contracts that are subject to Part 4 of the Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) and for the organisation of design contests by the contracting entity.

(2) This Ordinance does not apply to

1. the award of public contracts and the organisation of design contests by sector contracting entities for the purpose of sector activity;
2. the award of public contracts relating to defence or security; and
3. the award of concessions by their grantors.

§ 2

Awarding of Works Contracts

Chapter 1 and chapter 2, subchapter 2, are to be used for the awarding of works contracts. Apart from that, part A, chapter 2 of the contracting rules for the award of public works contracts (*Vergabe- und Vertragsordnung für Bauleistungen*) as published on 19 January 2016 (Official Section of the Federal Gazette 19 January 2016 B3) is to be applied.

§ 3

Estimating the Contract Value

(1) The estimation of the contract value is to be based on the anticipated total value of the intended performance without value-added tax. In addition, any options or contract extensions are to be considered. If the contracting entity provides prizes or payments to the candidate or tenderer, these shall also be considered.

(2) The method for calculating the estimated contract value may not be selected with the intention of circumventing the requirements of part 4 of the Act against Restraints on Competition or this Ordinance. Procurement may not be subdivided in such a way as to fall outside the scope of the provisions of the Act against Restraints on Competition or this Ordinance unless there are objective reasons for this, such as when an independent organisational unit is responsible for its own procurement or for certain categories of the procurement.

(3) The relevant time for estimating the contract value is the day on which the contract notice is sent or the procurement procedure is initiated in another manner.

(4) The value of a framework agreement or dynamic purchasing system is calculated based on the estimated total value of all individual contracts that are planned during the full duration of a framework agreement or dynamic purchasing system.

(5) In the case of an innovation partnership, the value to be considered is the estimated total value of the research and development activities expected to take place during all phases of the envisaged partnership and of works, supplies or services that are to be developed and procured at the end of the envisaged partnership.

(6) For estimating the contract value of works, the estimated total value of all supplies and services provided by the contracting entity that are required for executing works must be considered along with the contract value of the works. The option of the contracting entity to award contracts for the design and execution of works either separately or jointly shall remain unaffected.

(7) If the proposed work or the planned provision of a service can result in a contract being awarded in separate lots, the estimated total value of all lots is to be taken as a basis. In the case of design services, this applies only to lots of similar services. If the estimated total value reaches or exceeds the applicable threshold value, this Ordinance shall apply to the awarding of each lot.

(8) If a project for the purpose of purchasing similar services can result in a contract that is awarded in multiple lots, the estimated total value of all lots shall be taken as a basis.

(9) When awarding individual lots, the contracting entity may deviate from paragraph 7 third sentence and paragraph 8 if the estimated net value of the affected lot is less than eighty thousand euros in the case of supplies and services and under one million euros in the case of works and the total of the net values of such lots does not exceed twenty percent of the total value of all lots.

(10) In the case of regularly recurring contracts or standing supply or service contracts and in the case of supply or service contracts that are to be renewed within a specific period, the contract value is to be estimated

1. based on the actual total value of corresponding successive contracts from the preceding budget year or financial year; in the process, anticipated changes in quantities or costs expected during the twelve months following the original contract are to be considered as much as possible; or
2. based on the estimated total value of successive contracts during the twelve months following the first delivery or during the budget year or financial year following the first delivery if this is longer than twelve months.

(11) In the case of contracts for supplies or services for which no total price is stated, the basis for calculation for the estimated contract value is

1. in the case of fixed-term contracts where the term is less than or equal to 48 months, the total value for the duration of these contracts; and
2. in the case of contracts without a fixed term or with a term of more than 48 months, the monthly value multiplied by 48.

(12) In the case of a design contest under section 69 that is expected to result in a service contract, the value of the service contract is to be estimated, plus any prizes and payments to the participants. In the case of all other design contests, the contract value is equal to the total of the prizes and payments to the participants, including the value of the service contract that could be awarded if the contracting entity does not exclude this award in the contest notice.

§ 4

Occasional Joint Procurement; Central Procurement

(1) Multiple contracting entities may agree on joint public procurement. This shall also apply to joint procurement with contracting entities from other Member States of the European Union. The options to use central purchasing bodies remain unaffected.

(2) If the entire procurement procedure is conducted jointly in the name and on behalf of all contracting entities, they are jointly responsible for complying with the rules on the procurement procedure. This also applies when a contracting entity executes the procedure alone in its name and on behalf of the other contracting entities. When joint execution is only partial, the contracting entities are only jointly responsible for those parts that were executed jointly. If a contract is awarded jointly by contracting entities from different Member States of the European Union, they shall by agreement specify the responsibilities and the applicable provisions of national law and cite them in the procurement documents.

(3) The Federal Government may issue general regulations in appropriate areas for federal agencies on the establishment and use of central purchasing bodies and on the procurement services that are to be provided through the central purchasing bodies.

§ 5

Maintenance of Confidentiality

(1) Unless otherwise specified in this Ordinance or other provisions of law, the contracting entity may not share any information revealed by the undertakings which they have marked as confidential. This expressly includes business and trade secrets and the confidential aspects of the tenders, including their enclosures.

(2) The contracting entity must safeguard the integrity of the data and the confidentiality of the expressions of interest, confirmations of interest, requests to participate and tenders, including their enclosures, for the entire communication and during the exchange and storage of information. The expressions of interest, confirmations of interest, requests to participate and tenders, including their enclosures, as well as the documentation of opening and assessment of the requests to participate and tenders shall also be treated confidentially following completion of the procurement procedure.

(3) The contracting entity may prescribe targeted requirements for undertakings to protect the confidentiality of the information in the course of the procurement procedure. The submission of a non-disclosure agreement is expressly included in this.

§ 6

Avoidance of Conflicts of Interest

(1) Members of the executive body or employees of the contracting entity or of a procurement service provider acting in the name of the contracting entity for whom a conflict of interest exists may not participate in a procurement procedure.

(2) A conflict of interest exists for persons who participate in performing the procurement procedure or who are able to influence the outcome of a procurement procedure and who have a direct or indirect financial, economic or personal interest that could compromise their impartiality and independence in the context of the procurement procedure.

(3) It is presumed that a conflict of interest exists when the persons named in paragraph 1

1. are candidates or tenderers;
2. advise or otherwise assist a candidate or tenderer or represent a candidate or tenderer as a legal representative or only in the procurement procedure;
3. are employed or work
 - a) with a candidate or tenderer for compensation or with a candidate or tenderer as a member of the managing board, supervisory board or similar body; or
 - b) for an undertaking engaged in the procurement procedure if such undertaking at the same time has business relations with the contracting entity and with the candidate or tenderer.

(4) The presumption in paragraph 3 also applies to persons whose relatives satisfy the requirements under paragraph 3, numbers 1 through 3. Relatives are: a person to whom one is engaged to be married, spouse, domestic partner, lineal relations by blood and by marriage, siblings, children of siblings, spouses and domestic partners of siblings and siblings of spouses and domestic partners, siblings of the parents or foster parents and foster children.

§ 7

Participation in Preparation of the Procurement Procedure

(1) If an undertaking or an undertaking associated therewith has advised the contracting entity or participated in another manner in the preparation of the procurement procedure (previously participating undertaking), the contracting entity shall take appropriate measures to ensure that competition is not distorted through the participation of such undertaking.

(2) The measures under paragraph 1 particularly include briefing the other undertakings participating in the procurement procedure regarding the relevant information that was exchanged or that results in association with the previously participating undertaking's inclusion in the preparation of the procurement procedure and setting the appropriate deadlines for arrival of the tenders and requests to participate.

(3) Before the previously participating undertaking is excluded under section 124(1) number 6 of the Act against Restraints on Competition, it shall be given the opportunity to prove that its participation in the preparation of the procurement procedure cannot distort competition.

§ 8

Documentation and Individual Report

(1) The contracting entity shall continuously document the procurement procedure from the start in writing under section 126b of the German Civil Code (*Bürgerliches Gesetzbuch*) to the extent this is required for justifying the decisions at every stage of the procurement procedure. This includes, for example, documentation of communication with undertakings and internal consultations, of preparation of the contract notice and the procurement documents, opening of tenders, requests to participate and confirmations of interest, negotiations and dialogues with the participating undertakings as well as the reasons for selection decisions and the contract award.

(2) The contracting entity shall draw up a report in writing pursuant to section 126b of the German Civil Code on each procurement procedure. This individual report shall comprise at least the following:

1. the name and address of the contracting entity, the subject matter and value of the contract, the framework agreement or dynamic purchasing system;
2. the names of the selected candidates or tenderers and the reasons for their selection;
3. the tenders and requests to participate that were not accepted, the names of the candidates or tenderers not accepted and the reasons for the non-acceptance thereof;
4. the reasons for the rejection of tenders found to be abnormally low;
5. the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement that the successful tenderer intends to subcontract to third parties; and, where known at this point in time, the names of the main contractor's subcontractors, if any;
6. for negotiated procedures and competitive dialogues, the circumstances as laid down in section 14(3) which justify the use of those procedures;
7. for negotiated procedures without prior competitive tender, the circumstances referred to in section 14(4) which justify the use of this procedure;
8. where applicable, the reasons why the contracting entity has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;
9. where applicable, the reasons why means of communication other than electronic means have been used for the submission of tenders;
10. where applicable, conflicts of interest detected and subsequent measures taken.
11. where applicable, the reasons why multiple individual or subject-specific lots were procured together; and
12. where applicable, the reasons for not indicating the weighting of the award criteria.

(3) The individual report is not required for contracts based on framework agreements if they were concluded pursuant to section 21(3) or section 21(4) number 1. If the contract award notice contains the required information, the contracting entity may refer to this.

(4) The documentation, individual report and tenders, the requests to participate, the expressions of interest, the confirmations of interest and their enclosures are to be retained through the end of the term of the contract or framework agreement, but for at least three years from the day of the contract award. The same applies to copies of all concluded contracts having at least the following contract value:

1. one million euros in the case of supply or service contracts;
2. ten million euros in the case of works contracts.

(5) The individual report or its main elements as well as the concluded contracts shall be forwarded to the European Commission and the competent supervisory and audit authorities at their request.

(6) Section 5 shall remain unaffected.

Subchapter 2

Communication

§ 9

General Principles of Communication

(1) The contracting entity and the undertakings shall in principle use devices and programs for electronic data transmission (electronic means) to send, receive, forward and store data in a procurement procedure.

(2) Communication in a procurement procedure may be oral if it does not pertain to the procurement documents, the requests to participate, the confirmations of interest or the tenders and if it is adequately documented in an appropriate manner.

(3) The contracting entity may require that every undertaking provide an unambiguous business name and an electronic address (registration). The contracting entity may not require any registration to access the contract notice and the procurement documents; voluntary registration is permitted.

§ 10

Requirements for the Electronic Means Used

(1) The contracting entity shall set the required level of security for electronic means. Electronic means used by the contracting entity to receive tenders, requests to participate and confirmations of interest as well as plans and drafts for design contests must ensure that

1. the time and date of receipt of the data can be determined precisely;
2. it is not possible to access the received data ahead of schedule;
3. the date for initial access to the data received can only be set or changed by the authorised persons;
4. only authorised persons have access to the data received or to a portion thereof;
5. only authorised persons may grant access to the data received or to a portion thereof to third parties after the set time;
6. received data is not shared with unauthorised persons; and
7. breaches or attempted breaches of the requirements in numbers 1 through 6 can be clearly detected.

(2) The electronic means used by the contracting entity to receive tenders, requests to participate and confirmations of interest as well as plans and drafts for design contests must have a uniform data communication interface. The applicable interoperability and IT security standards of information technology in section 3(1) of the State treaty on the Establishment of the IT Planning Council and on the Principles of Cooperation Underlying the Use of Information Technology in the Administrations of the Federation and the *Länder* dated 1 April 2010 are to be used.

§ 11

Requirements for the Use of Electronic Means in the Procurement Procedure

(1) Electronic means and their technical characteristics must be generally available, non-discriminatory and compatible with information and communications technology devices and programs in general use. They may not restrict access by undertakings to the procurement procedure. The contracting entity shall ensure that the electronic means are designed in an accessible manner pursuant to sections 4 and 11 of the Act on Equal Opportunities for Persons with Disabilities (*Gesetz zur Gleichstellung behinderter Menschen*) of 27 April 2002 (Federal Gazette I p. 1467, 1468), as amended.

(2) For sending, receiving, forwarding and storing data in a procurement procedure, the contracting entity shall exclusively use electronic means that guarantee the integrity, confidentiality and authenticity of the data.

(3) The contracting entity must supply the undertakings all necessary information on

1. the electronic means used in a procurement procedure;
2. the technical parameters for the submission of requests to participate, tenders and confirmations of interest by electronic means; and
3. encryption and time registration methods used.

§ 12

Use of Alternative Electronic Means for Communication

(1) In the procurement procedure, the contracting entity may require the use of electronic means which are not generally available (alternative electronic means) if it

1. grants undertakings free, unlimited, full and direct access to these alternative electronic means at an Internet address during the entire procurement procedure and
2. itself uses these alternative electronic means.

(2) The contracting entity may require the use of electronic means for data modelling of the work in the context of the procurement of works and for design contests. If the required electronic means are not generally available for data modelling of the work, the contracting entity shall offer alternative access to them pursuant to paragraph 1.

§ 13

General Regulations

The Federal Government may, with the consent of the federal assembly, issue general regulations on the electronic means to be used (basic services for the electronic procurement) as well as the technical standards that are to be complied with.

Chapter 2

Procurement Procedure

Subchapter 1

Types of Procedures

§ 14

Selection of the Type of Procedure

(1) Public procurement is conducted in accordance with section 119 of the Act against Restraints on Competition in the open procedure, the restricted procedure, the negotiated procedure, the competitive dialogue or the innovation partnership.

(2) The open procedure and the restricted procedure, which always requires competitive tendering, are available to the contracting entity at its option. The other types of procedures are only available to the extent they are permitted by law or pursuant to paragraphs 3 and 4.

(3) The contracting entity may award contracts in the negotiated procedure with competitive tender or in the competitive dialogue where

1. the needs of the contracting entity cannot be met without adaptation of already available solutions;
2. the contract includes design or innovative solutions;
3. the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial framework or because of the risks attached to them;
4. the performance, particularly its technical requirements cannot be described with sufficient precision by the contracting entity with reference to a standard, European Technical Assessment, common technical specifications or technical references within the meaning of annex 1, number 2 to 5; or
5. if irregular or only unacceptable tenders were submitted in response to an open or restricted procedure; irregular tenders are especially those that do not comply with the procurement documents, were not submitted on time, are evidently based on collusion or corruption, or that have been found by the contracting entity to be abnormally low. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders having a price that exceeds the contracting entity's budget as determined and documented prior to the launching of the procurement procedure shall be considered unacceptable; the contracting entity may disregard the competitive tender in such cases if it involves all eligible undertakings in the negotiated procedure that have submitted the tenders in the proper form and within the relevant time limits.

(4) The contracting entity may award contracts in the negotiated procedure without competitive tender

1. where no tenders or no suitable tenders or no suitable requests to participate have been submitted in an open or restricted procedure, provided that the initial conditions of the contract are not substantially altered; a tender shall be considered not to be suitable where it is manifestly incapable, without changes, of meeting the contracting entity's needs and requirements as specified in the procurement documents; a request to participate shall be considered not to be suitable where, due to

compulsory or facultative grounds for exclusion, the undertaking concerned is to be or may be excluded pursuant to sections 123 and 124 of the Act against Restraints on Competition or does not meet the selection criteria;

2. where the contract can be performed only by a specific undertaking
 - a) because a unique work of art or artistic performance is intended to be created or acquired;
 - b) because competition is absent for technical reasons; or
 - c) for the protection of exclusive rights, particularly industrial property rights;
3. where, for reasons of extreme urgency brought about by events unforeseeable by the contracting entity, the minimum time limits for the open, the restricted procedure and the negotiated procedure with competitive tender cannot be complied with; the circumstances to justify extreme urgency shall not be attributable to the contracting entity;
4. where supplies are to be purchased which were manufactured purely for the purpose of research, experimentation, study or development; this does not include quantity production to establish commercial viability or to cover research and development costs;
5. where additional supplies are to be purchased by the original supplier that are intended either as a partial replacement or extension of performances that have already been rendered, and a change of the undertaking would oblige the contracting entity to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts shall not, as a general rule, exceed three years;
6. where supplies are quoted and purchased on a commodity market;
7. where supplies or services are purchased on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency, settlement or composition procedure, or a similar procedure provided under the laws of another Member State of the European Union;
8. where, following a design contest referred to in section 69, a service contract is to be awarded under the rules provided for in the contest to the winner or one of the winners; in the latter case, all winners of the contest must be invited to participate in the negotiations; or
9. where a service is to be procured, consisting of the repetition of similar services entrusted to the undertaking to which the same contracting entity awarded the first contract, provided that the services are in conformity with a basic project for which the first contract was awarded pursuant to a procurement procedure, with the exception of a negotiated procedure without competitive tender; the possible use of the negotiated procedure must already be disclosed in the contract notice for the first project; moreover, the basic project shall indicate the extent of possible additional services and the conditions under which they will be awarded; the total estimated cost of the subsequent services shall be taken into consideration by the contracting entity when calculating the contract value; the negotiated procedure without competitive tender may be used only within the three years following the conclusion of the first contract.

(5) In the case of paragraph 4 number 1, a report shall be submitted to the European Commission upon request.

(6) The requirements mentioned in paragraph 4 number 2, a and b for using the negotiated procedure without competitive tender shall only apply when no reasonable alternative or substitute solution exists and the absence of competition is not the result of an artificial narrowing of the contract award parameters.

§ 15

Open Procedure

(1) In an open procedure the contracting entity publicly invites an unlimited number of undertakings to submit tenders. Any interested undertaking may submit a tender.

(2) The minimum time limit for the receipt of tenders (time limit for tender) shall be 35 days from the day after the contract notice was issued.

(3) Where a duly substantiated state of urgency renders impracticable the time limit laid down in paragraph 2, the contracting entity may fix a time limit which shall be not less than 15 days from the day after the contract notice was issued.

(4) The contracting entity may reduce by five days the time limit in paragraph 2 when it accepts that tenders may be submitted by electronic means.

(5) The contracting entity may request from tenderers only clarification of the tender or of their eligibility. Negotiations, particularly on changes to the tenders or prices, are not permitted.

§ 16

Restricted Procedure

(1) In a restricted procedure the contracting entity publicly invites an unlimited number of undertakings to submit requests to participate in response to a competitive tender. Any interested undertaking may submit a request to participate. With the request to participate, undertakings submit the information requested by the contracting entity to review their eligibility.

(2) The minimum time limit for the receipt of requests to participate (time limit for requests to participate) shall be 30 days from the day after the contract notice was issued.

(3) Where a duly substantiated state of urgency renders impracticable the time limit for requests to participate, the contracting entity may fix a time limit which shall be not less than 15 days from the day after the contract notice was issued.

(4) Only those undertakings invited by the contracting entity following review of the information provided may submit a tender. Pursuant to section 51, the contracting entity may limit the number of suitable candidates invited to tender.

(5) The minimum time limit for tender shall be 30 days from the day after the invitation to tender was issued.

(6) With the exception of the supreme federal authorities, the contracting entity may set the time limit for tender by mutual agreement with the candidates invited to tender, provided that all candidates are granted the same time limit for submitting the tenders. If the time limit for tender cannot be set by mutual agreement, the minimum shall be 10 days from the day after the invitation to tender was issued.

(7) Where a duly substantiated state of urgency renders impracticable the time limit for tender laid down in paragraph 5, the contracting entity may fix a time limit which shall be not less than 10 days from the day after the invitation to tender was issued.

(8) The contracting entity may reduce by five days the time limit for tender in paragraph 5 when it accepts that tenders may be submitted by electronic means.

(9) Section 15(5) shall apply *mutatis mutandis*.

§ 17

Negotiated Procedure

(1) In a negotiated procedure with competitive tender, the contracting entity publicly invites an unlimited number of undertakings to submit requests to participate in response to a competitive tender. Any interested undertaking may submit a request to participate. With the request to participate, undertakings submit the information requested by the contracting entity to review their eligibility.

(2) The minimum time limit for the receipt of requests to participate (time limit for requests to participate) shall be 30 days from the day after the contract notice was issued.

(3) Where a duly substantiated state of urgency renders impracticable the time limit for requests to participate, the contracting entity may fix a time limit which shall be not less than 15 days from the day after the contract notice was issued.

(4) Only those undertakings invited by the contracting entity following review of the information provided may submit an initial tender. Pursuant to section 51, the contracting entity may limit the number of suitable candidates invited to tender.

(5) In a negotiated procedure without competitive tender, there is no public invitation to submit requests to participate, but rather a direct invitation to submit initial tenders to the undertakings selected by the contracting entity.

(6) The minimum time limit for the receipt of initial tenders shall be 30 days from the day after the invitation to tender was issued.

(7) With the exception of the supreme federal authorities, the contracting entity may set the time limit for tender by mutual agreement with the candidates invited to tender, provided that all candidates are granted the same time limit for submitting the tenders. If the time limit for tender cannot be set by mutual agreement, the minimum shall be 10 days from the day after the invitation to tender was issued.

(8) Where a duly substantiated state of urgency renders impracticable the time limit for tender laid down in paragraph 6, the contracting entity may fix a time limit which shall be not less than 10 days from the day after the invitation to tender was issued.

(9) The contracting entity may reduce by five days the time limit for tender in paragraph 6 when it accepts that tenders may be submitted by electronic means.

(10) The contracting entity shall negotiate with the tenderers the initial and all subsequent tenders submitted by them, except for the final tenders, in order to improve the content thereof. The entire content of the tenders may be negotiated, except for the minimum requirements and the award criteria stipulated by the contracting entity in the procurement documents.

(11) The contracting entity may award contracts on the basis of the initial tenders without negotiation where they have indicated, in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so.

(12) If the contracting entity has indicated this in the contract notice or procurement documents, it may conduct the negotiations in various successive phases in order to reduce the number of tenders to be negotiated by applying the specified award criteria. In the final phase of the procedure, there must still be enough tenders to ensure competition, provided that there were originally a sufficient number of tenders or eligible tenderers.

(13) During the negotiations, the contracting entity shall ensure the equal treatment of all tenderers. In particular, it shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. It shall inform all tenderers whose tenders have not been eliminated under paragraph 12, in writing pursuant to

section 126b of the German Civil Code, of any changes in the tender specifications, particularly to the technical requirements or other components of the procurement documents, other than those setting out the minimum requirements and award criteria. Following these changes, the contracting entity shall provide sufficient time for tenderers to modify and submit amended tenders, as appropriate. The contracting entity shall not reveal to the other participants confidential information communicated by a tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given only with reference to the intended communication of specific information.

(14) When the contracting entity intends to conclude the negotiations, it shall inform the remaining tenderers and set a common deadline to submit any new or revised tenders. It shall verify that the final tenders meet the minimum requirements and decide on the contract award based on the award criteria.

§ 18

Competitive Dialogue

(1) The contracting entity shall describe its needs and requirements for the performance to be procured in the contract notice or the procurement documents for conducting a competitive dialogue. At the same time it shall specify and outline the underlying award criteria and set a provisional time frame for the dialogue.

(2) The contracting entity shall publicly invite an unlimited number of undertakings to submit requests to participate in response to a competitive tender. Any interested undertaking may submit a request to participate. With the request to participate, undertakings submit the information requested by the contracting entity to review their eligibility.

(3) The minimum time limit for the receipt of requests to participate shall be 30 days from the day after the contract notice was issued.

(4) Only those undertakings invited by the contracting entity following review of the information provided may participate in the dialogue. Pursuant to section 51, the contracting entity may limit the number of suitable candidates invited to participate in the dialogue.

(5) The contracting entity shall open a dialogue with the selected undertakings in which it identifies and defines how its needs and requirements can best be met. In this dialogue it may discuss all aspects of the procurement with the selected undertakings. It shall ensure equality of treatment among all undertakings during the dialogue, not reveal to the other participants solutions proposed or confidential information communicated by an undertaking without its agreement and shall use such only in the context of the particular procurement procedure. Such agreement shall not take the form of a general waiver but shall be given only with reference to the intended communication of specific information.

(6) The contracting entity may provide that the dialogue be conducted in various successive phases, provided that it has indicated this in the contract notice or in the procurement documents. In each dialogue phase the number of the solutions to be discussed may be reduced by applying the specified award criteria. The contracting entity shall inform the undertakings if their solutions are not planned for the following dialogue phase. In the final phase, there must be enough solutions to ensure competition, provided that there were originally a sufficient number of solutions or eligible tenderers.

(7) The contracting entity shall conclude the dialogue when it has identified the solutions that can satisfy the needs and requirements for the service to be procured. The participants remaining in the procedure shall be informed of this.

(8) Following the conclusion of the dialogue, the contracting entity shall ask the undertakings to submit their final tenders on the basis of the solutions presented and

specified during the dialogue phase. The tenders shall contain all the elements required for the performance of the project. The contracting entity may request clarifications and supplements to these tenders. These clarifications or supplements may not result in fundamental changes to material components of the tender or of the public procurement, including the needs and requirements set forth in the contract notice or in the procurement documents if such will distort competition or discriminate against other undertakings participating in the procedure.

(9) The contracting entity shall assess the tenders on the basis of the specified award criteria laid down in the contract notice or procurement documents. The contracting entity may conduct negotiations with the undertaking identified as having submitted the most economically advantageous tender, with the objective of confirming financial commitments or other terms contained in the tender, which shall be conclusively set forth in the conditions of contract. This may not result in fundamental changes to material components of the tender or of the public procurement, including the needs and requirements set forth in the contract notice or the procurement documents, distort competition or discriminate against other undertakings participating in the procedure.

(10) The contracting entity may provide prizes or payments to the dialogue participants.

§ 19

Innovation Partnership

(1) The contracting entity may enter into an innovation partnership to engage in public procurement that aims to develop an innovative supply or service, followed by the acquisition thereof. The procurement need on which the innovation partnership is based must not be capable of being satisfied through supplies and services that are already available on the market. In the contract notice or procurement documents, the contracting entity shall describe the need for the innovative supply or service. It shall indicate which elements of this description define minimum requirements. Selection criteria shall be specified concerning the undertakings' capabilities in the field of research and development and of developing and implementing innovative solutions. The information provided must be sufficiently precise to enable undertakings to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(2) The contracting entity shall publicly invite an unlimited number of undertakings to submit requests to participate in response to a competitive tender. Any interested undertaking may submit a request to participate. With the request to participate, undertakings submit the information requested by the contracting entity to review their eligibility.

(3) The minimum time limit for the receipt of requests to participate shall be 30 days from the day after the contract notice was issued.

(4) Only those undertakings invited by the contracting entity following an assessment of the information provided may submit a tender in the form of research and innovation projects. Pursuant to section 51, the contracting entity may limit the number of suitable candidates invited to tender.

(5) The contracting entity shall negotiate with the tenderers the initial and all subsequent tenders submitted by them, except for the final tenders, in order to improve the content thereof. The entire contractual contents of the tenders may be negotiated, except for the minimum requirements and the award criteria stipulated by the contracting entity in the procurement documents. If the contracting entity has indicated this in the contract notice or procurement documents, it may conduct the negotiations in various successive phases in order to reduce the number of tenders to be negotiated by applying the specified award criteria.

(6) During the negotiations, the contracting entity shall ensure the equal treatment of all tenderers. In particular, it shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. It shall inform all tenderers whose tenders have not been eliminated under paragraph 5, in writing pursuant to section 126b of the German Civil Code, of any changes in the requirements and other information in the procurement documents, other than those setting out the minimum requirements. Following these changes, the contracting entity shall provide sufficient time for tenderers to modify and submit amended tenders, as appropriate. The contracting entity shall not reveal to the other participants confidential information communicated by a tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given only with reference to the intended communication of specific information. The contracting entity must specify in the procurement documents the applicable arrangements made to protect intellectual property.

(7) The innovation partnership is entered into by awarding a public contract on the basis of tenders from one or more tenderers. Awarding the public contract based solely on the lowest price or cost is prohibited. The contracting entity may enter into an innovation partnership with one or more partners who conduct separate research and development activities.

(8) The innovation partnership shall be structured in two successive phases consistent with the research and innovation process:

1. a research and development phase that includes the manufacture of prototypes or the development of the service; and
2. a performance phase in which the performance resulting from the partnership is rendered.

The phases shall be subdivided by setting intermediate targets which, by agreement, are to be attained for payment of the remuneration in appropriate instalments. The contracting entity shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities. The estimated value of the supply or service shall not be disproportionate in relation to the investment required for their development.

(9) Based on the intermediate targets, the contracting entity may decide after each development phase whether to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting entity has, in the contract notice or procurement documents, indicated those possibilities and the conditions for their use.

(10) Following completion of the research and development phase, the contracting entity shall thereafter be obliged to acquire the innovative supply or service only if the level of performance and cost ceiling set upon entry into the innovation partnership are complied with.

§ 20

Setting Reasonable Time Limits; Duty to Extend Time Limits

(1) In fixing the time limits for the receipt of tenders and requests to participate pursuant to sections 15 through 19, reasonable account shall be taken of the complexity of the performance and the time required for drawing up tenders.

(2) Where tenders can be prepared only after a visit to the site of performance or after on-the-spot inspection – at the contracting entity – of the documents supporting the procurement documents, the time limits for tender shall be fixed so that under normal

circumstances all undertakings are able to take note of all the information needed to produce the tender.

(3) Except for the cases regulated in section 41(2) and (3), the time limits for tender shall be extended

1. where, despite timely request by an undertaking, additional information is not supplied within six days before the end of the time limit for tender; in the cases of section 15(3), section 16(7) or section 17(8), this period is four days; or
2. where the contracting entity makes material changes to the procurement documents.

The length of the extension shall be proportionate to the importance of the information or change and ensure that all undertakings can take note of the information or changes. This shall not apply where the information or change is irrelevant for preparation of the tender or the information was not requested in good time.

Subchapter 2

Special Techniques and Instruments in Procurement Procedures

§ 21

Framework Agreements

(1) A framework agreement shall be concluded by means of an applicable type of procedure under this Ordinance. The prospective contract volume shall be calculated and announced as precisely as possible, but does not need to be finally determined. A framework agreement may not be used improperly or in such a way as to prevent, restrict or distort competition.

(2) Individual contracts based on a framework agreement shall be awarded pursuant to the criteria of this paragraph and paragraphs 3 through 5. Individual contracts shall be awarded exclusively between the contracting entities named in the contract notice or the invitation to confirm interest and those undertakings which are a party to the framework agreement at the time the individual contract is concluded. No material changes to the conditions of the framework agreement may be made in the process.

(3) Where a framework agreement is concluded with only one undertaking, individual contracts based on this framework agreement shall be awarded within the limits of the terms laid down in the framework agreement. For the award of individual contracts, the contracting entity may consult the undertaking which is a party to the framework agreement, in writing pursuant to section 126b of the German Civil Code, requesting it to supplement its tender as necessary.

(4) Where a framework agreement is concluded with more than one undertaking, the individual contracts shall be awarded as follows:

1. following the terms and conditions of the framework agreement, without reopening the procurement procedure, if it sets out all the terms governing the provision of the performance and the objective conditions for determining which of the undertakings, party to the framework agreement, shall perform them; the latter conditions shall be indicated in the contract notice or procurement documents for the framework agreement;
2. where the framework agreement sets out all the terms governing the provision of the performance, partly without reopening the procurement procedure in accordance with number 1 and partly with reopening the procurement procedure amongst the undertakings that are parties to the framework agreement in accordance with number 3, if this possibility has been stipulated by the contracting entities in the

contract notice or the procurement documents for the framework agreement. The decision as to whether specific supplies or services shall be acquired following a reopening of the procurement procedure or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the contract notice or the procurement documents for the framework agreement. The contract notice or the procurement documents shall also specify which terms may be subject to reopening the procurement procedure; these possibilities shall also apply to any lot of a framework agreement for which all the terms governing the provision of the performance are set out in the framework agreement, regardless of whether all the terms governing the provision of a performance under other lots have been set out; or

3. where not all the terms governing the provision of the performance are laid down in the framework agreement, through reopening the procurement procedure amongst the undertakings that are parties to the framework agreement.

(5) The procurement procedures referred to in number 2 and 3 of paragraph 4 shall be based on the same terms as applied for concluding the framework agreement and, where necessary, on more precisely formulated terms, and, where appropriate, other terms referred to in the contract notice or the procurement documents for the framework agreement, in accordance with the following procedure:

1. before awarding each contract, the contracting entity shall consult, in writing pursuant to section 126b of the German Civil Code, the undertakings capable of performing the contract;
2. the contracting entity shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject matter of the contract and the time needed to submit tenders;
3. tenders shall be submitted in writing pursuant to section 126b of the German Civil Code and shall not be opened until the stipulated time limit for submission has expired;
4. the contracting entity shall award each individual contract to the tenderer that has submitted the most economically advantageous tender on the basis of the award criteria set out in the contract notice or the procurement documents for the framework agreement.

(6) The term of the framework agreement may not be for more than four years unless the subject matter of the framework agreement is a justified special case.

§ 22

General Principles for the Operation of Dynamic Purchasing Systems

(1) The contracting entity may use a dynamic purchasing system to purchase performances that are generally available on the market.

(2) When conducting the procurement process via a dynamic purchasing system, the contracting entity shall follow the regulations for the restricted procedure.

(3) A dynamic purchasing system shall be set up and operated exclusively by electronic means. Sections 11 and 12 shall apply.

(4) A dynamic purchasing system shall be available for the entire duration of its existence to all tenderers who meet the selection criteria in the relevant procurement procedure. The number of candidates admitted to the dynamic purchasing system shall not be limited.

- (5) Access to a dynamic purchasing system is free of charge for all undertakings.

§ 23

Operation of a Dynamic Purchasing System

(1) The contracting entity shall indicate in the contract notice that it is using a dynamic purchasing system and for what period it will be operated.

(2) The contracting entity shall inform the European Commission about a change in the period of validity as follows:

1. Where the period of validity is changed without termination of the dynamic purchasing system, the current version of the form in Annex II of the Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No. 842/2011 (OJ L 296 of 12 November 2015, p. 1) shall be used.
2. If the dynamic purchasing system is terminated, the form in Annex III of the Implementing Regulation (EU) 2015/1986 shall be used.

(3) The procurement documents shall indicate at least the nature and the estimated quantity of the performance to be purchased as well as all required data of the dynamic purchasing system.

(4) It shall be indicated in the procurement documents whether a dynamic purchasing system has been divided into categories of performances. If applicable, the objective characteristics of each category shall be indicated.

(5) If a contracting entity has divided a dynamic purchasing system into performance categories, it shall specify the selection criteria separately for each category.

(6) Section 16(4) and section 51(1) shall apply, provided that admitted candidates are to be separately invited to tender for each individual procurement process that takes place through a dynamic purchasing system. If a dynamic purchasing system has been divided into categories of performance, all of the candidates admitted for the category corresponding to a specific contract shall be invited each time to submit a tender.

§ 24

Time Limits for the Operation of Dynamic Purchasing Systems

(1) In deviation from section 16, the provisions of paragraphs 2 through 5 shall apply to the use of a dynamic purchasing system.

(2) The minimum time limit for receipt of requests to participate shall be 30 days from the day after the contract notice or, where a prior information notice is used pursuant to section 38(4), the invitation to confirm interest is issued. No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

(3) The contracting entity shall assess the request of an undertaking to participate in a dynamic purchasing system based on the selection criteria within 10 working days following its receipt. That deadline may be extended to 15 working days in individual cases where justified, in particular because of the need to examine documentation or to otherwise verify whether the selection criteria are met. If the invitation to tender for the first specific procurement under the dynamic purchasing system has not yet been sent, the contracting entity may extend the deadline provided that no invitation to tender is issued during the extended period. The extended period shall be indicated in the procurement documents. Each undertaking shall be promptly informed whether or not it has been admitted to participate in a dynamic purchasing system.

(4) The minimum time limit for the receipt of tenders shall be 10 days from the day after the invitation to tender was issued. Section 16(6) shall apply.

(5) The contracting entity may, at any time, require candidates admitted to a dynamic purchasing system to submit a renewed and updated European Single Procurement Document as provided for in section 48(3), within five working days from the date on which the invitation to tender was sent. Section 48(3) through (6) shall apply.

§ 25

General Principles for Conducting Electronic Auctions

(1) Prior to awarding a contract, the contracting entity may conduct an electronic auction in the context of an open, restricted or negotiated procedure, provided that the content of the procurement documents can be described with sufficient precision and the performance can be ranked using automatic evaluation methods. Electronic auctions may not have intellectual-creative services as their subject. Before the electronic auction commences, there shall be a complete initial evaluation of all tenders in accordance with the award criteria and the weighting fixed for them. The first and second sentences shall apply *mutatis mutandis* to a reopened procurement procedure between the parties to a framework agreement pursuant to section 21 and to a reopened procurement procedure during the term of a dynamic purchasing system pursuant to section 22. An electronic auction may comprise several successive phases.

(2) In the course of the electronic auction, tenders shall be electronically evaluated and automatically ranked using set methods. The repetitive electronic evaluation of the tenders shall be based on

1. new prices, revised downwards, if the contract is awarded based solely on the price; or
2. new prices, revised downwards, or new values based on certain elements of tenders where the contract is awarded on the basis of the best price-quality ratio or to the tender with the lowest cost using a cost-effectiveness approach.

(3) The evaluation methods shall be defined using a mathematical formula and announced in the invitation to participate in the electronic auction. If the contract is not awarded based on the price alone, the weighting of all elements of the tender under paragraph 2 number 2 must also follow from the mathematical formula. If variant tenders are allowed, a mathematical formula must be announced for these as well.

(4) Elements of tenders under paragraph 2 number 2 must be described numerically or as a percentage.

§ 26

Conducting Electronic Auctions

(1) The contracting entity shall announce in the contract notice or the invitation to confirm interest that it is conducting an electronic auction.

(2) The procurement documents must contain at least the following information:

1. all tenders elements having values that will become the basis of the automatic revised ranking of the tenders;
2. if applicable, the limits on the values under number 1 as they result from the technical specifications;
3. a listing of all data supplied to the tenderers during the electronic auction;

4. the date on which the data in number 3 will be made available to the tenderers;
5. all relevant data concerning the electronic auction process; and
6. the conditions under which the tenderers will be able to bid during the electronic auction, in particular the minimum differences between the prices or values based on the automatic revised ranking of the tenders.

(3) The contracting entity shall simultaneously invite all tenderers that have submitted admissible tenders to participate in the electronic auction. From the indicated time on, the internet connection is to be used in accordance with the instructions stated in the invitation to participate in the electronic auction. The result of the complete evaluation of the tender at issue in accordance with the third sentence of section 25(1) shall be attached to the invitation to participate in the electronic auction.

(4) An electronic auction shall not start sooner than two working days after the invitation to participate is sent out pursuant to paragraph 3.

(5) Throughout each phase of the electronic auction, the contracting entity shall promptly communicate to all tenderers at least the relative ranking of their tender within the sequence of all tenders. It may provide the tenderers additional data in accordance with paragraph 2 number 3. In no case may the identity of the tenderers be disclosed in any phase of an electronic auction.

(6) The time of the start and end of each phase shall be indicated in the invitation to participate in an electronic auction as well as, if appropriate, the time that must pass after receipt of the most recent new prices or values in accordance with section 25(2) numbers 1 and 2 before a phase of an electronic auction is closed.

(7) An electronic auction is closed when

1. the previously set time that was announced in the invitation to participate in an electronic auction has been reached;
2. the tenderers communicate no new prices or values in accordance with section 25(2) numbers 1 and 2 that satisfy the conditions for minimum differences in accordance with paragraph 2 number 6, and the time, announced before the start of the electronic auction, that must pass between the receipt of the last new price and the close of the electronic auction has elapsed; or
3. the last phase of an electronic auction is closed.

(8) After an electronic auction has closed, the contract award shall be communicated as per its outcome.

§ 27

Electronic Catalogues

(1) The contracting entity may require tenders to be submitted in the form of an electronic catalogue or to include an electronic catalogue. Tenders submitted in the form of an electronic catalogue may be accompanied by other documents.

(2) If the contracting entity accepts tenders in the form of an electronic catalogue or requires that tenders be submitted in the form of an electronic catalogue, it shall indicate this in the contract notice or the invitation to confirm interest.

(3) If the contracting entity concludes a framework agreement with one or more undertakings following submission of tenders in the form of an electronic catalogue, it may require a reopened procurement procedure to be conducted for individual contracts on the basis of updated electronic catalogues by

1. inviting tenderers to resubmit their electronic catalogues, revised in line with the requirements of the individual contract to be awarded; or
2. notifying tenderers that it shall collect at a specific point in time, from the electronic catalogues that have already been submitted, the data needed to prepare tenders in line with the requirements of the individual contract to be awarded; this procedure shall be announced in the contract notice or the procurement documents for concluding the framework agreement; the tenderer may reject this method of data collection.

(4) If pursuant to paragraph 3 number 2 the contracting entity has already independently collected data from the submitted electronic catalogues for preparation of the tenders, it shall present the collected data to each tenderer before the contract is awarded to give them the opportunity to object or confirm that the tender contains no material errors.

Subchapter 3

Preparation of the Procurement Procedure

§ 28

Market Research

(1) Before launching a procurement procedure, the contracting entity may conduct market research to prepare for the procurement and to inform undertakings of its procurement plans and requirements.

(2) Conducting procurement procedures solely for market research and for the purposes of ascertaining costs and prices is not permitted.

§ 29

Procurement Documents

(1) The procurement documents include all information needed to make it possible for the candidate or tenderer to decide on participating in the procurement procedure. As a general rule, they consist of

1. the cover letter, particularly the invitation to submit requests to participate or tenders or cover letters for submission of the requested documents;
2. the description of the particulars for conducting the procedure (application requirements), including specification of the selection and award criteria unless already mentioned in the contract notice; and
3. the contract documents, which consist of the tender specifications and the contract terms.

(2) Part B of the Regulations on Contract Awards for Public Supplies and Services (*Vergabe- und Vertragsordnung für Leistungen*) as published on 5 August 2003 (Official Section of the Federal Gazette No. 178a) shall normally be included in the contract. This shall not apply to the award of contracts that are performed in the course of freelance activity or offered in competition with freelancers and the object of which is a problem having a solution that cannot be clearly and comprehensively described in advance.

§ 30

Division by Lots

(1) Notwithstanding section 97(4) of the Act against Restraints on Competition, the contracting entity may determine whether the tenders may be submitted for only one lot, for several or for all lots. Even where tenders may be submitted for several or all lots, it may limit the number of lots to a maximum number for which an individual tenderer may receive an award.

(2) The contracting entity shall announce the guidelines in accordance with paragraph 1 in the contract notice or the invitation to confirm interest. It shall indicate in the procurement documents the objective and non-discriminatory criteria it intends to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

(3) Where more than one lot may be awarded to the same tenderer, the contracting entity may award contracts combining several or all lots where it has specified in the contract notice or in the invitation to confirm interest that it reserves the possibility of doing so and indicates the lots or groups of lots that may be combined.

§ 31

Tender Specifications

(1) The contracting entity shall frame the tender specifications (section 121 of the Act against Restraints on Competition) in such a way that they afford all undertakings equal access to the procurement procedure and do not unfairly hinder the opening of the national procurement market for the competition.

(2) The characteristics of the subject matter of the contract are to be described in the tender specifications:

1. in terms of performance or functional requirements or a description of the task to be addressed, which shall be framed in the most precise manner possible in order to clearly represent the subject matter of the contract and give reason to expect sufficient comparable tenders to allow the contracting entity to award the contract;
2. by reference to the technical requirements defined in Annex 1 in the order of preference:
 - a) national standards transposing European standards;
 - b) European Technical Assessments;
 - c) common technical specifications;
 - d) international standards and other technical reference systems established by the European standardisation bodies; or
 - e) when such standards and specifications do not exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of works and the use of products; or
3. as a combination of numbers 1 and 2
 - a) in terms of performance or functional requirements with reference to the technical requirements referred to in number 2 as a means of presuming conformity with such performance or functional requirements; or

- b) by reference to the technical requirements referred to in number 2 for certain characteristics, and by reference to the performance and functional requirements referred to in number 1 for other characteristics.

Each reference to a requirement under number 2 a through e shall be accompanied by the words 'or equivalent'.

(3) The characteristics may also relate to aspects of quality and innovation as well as social and environmental aspects. They may also refer to the process or method of production or provision of the performance or to another stage in the life cycle of the subject matter of the contract, including the production and supply chain, even where such factors do not form part of the material substance of the performance, provided that these characteristics are linked to the subject matter of the contract and proportionate to its value and objectives.

(4) The tender specifications may also specify whether the transfer of intellectual property rights or the grant of rights of use to the contracting entity are required.

(5) Where mandatory accessibility requirements in terms of section 121(2) of the Act against Restraints on Competition are adopted by a legal act of the European Union, the tender specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

(6) Unless justified by the subject matter of the contract, tender specifications shall not refer to a specific make or source, or a particular process that characterises the products or services provided by a specific undertaking, or to trade marks, types or a specific origin with the effect of favouring or eliminating certain undertakings or certain products. Such references shall be permitted on an exceptional basis, where a sufficiently precise and generally intelligible description of the subject matter of the contract is not otherwise possible; such references shall be accompanied by the words 'or equivalent'.

§ 32

Technical Requirements

(1) If the contracting entity refers to technical requirements under section 31(2) number 2 in the tender specifications, it shall not reject a tender on the grounds that the supplies and services tendered for do not comply with the technical requirements of the tender specifications to which it has referred, where the undertaking in its tender proves to the contracting entity with appropriate means that the solutions proposed by the undertaking satisfy such technical requirements in an equivalent manner.

(2) If the tender specifications include performance or functional requirements, the contracting entity shall not reject a tender where these requirements have to do with the performance or functional requirements it called for and the tender satisfies the following:

1. a national standard transposing a European standard;
2. a European Technical Assessment;
3. a common technical specification;
4. an international standard; or
5. a technical reference system established by the European standardisation bodies.

In its tender, the undertaking shall prove that the supply or service complying with the relevant standard meets the performance or functional requirements of the contracting entity. Proof may, in particular, consist of a technical description of the manufacturer or a test report from a recognised body.

§ 33

Furnishing of Proof through Certificates from Conformity Assessment Bodies

(1) As proof that a supply or service complies with characteristics required in the tender specifications, the contracting entity may request the submission of certificates, particularly test reports or certifications, from a conformity assessment body. Where the submission of a certificate from a specific conformity assessment body is requested, the contracting entity shall also accept certificates from equivalent other conformity assessment bodies.

(2) The contracting entity shall also accept other appropriate documents than those referred to in paragraph 1, particularly a technical dossier of the manufacturer where the undertaking had no access to the certificates referred to in paragraph 1 or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the undertaking. In the cases of the first sentence, the undertaking shall prove through the documents produced that the performance to be provided by it meets the stated requirements.

(3) A conformity assessment body is a body that conducts conformity assessments and is accredited pursuant to Regulation (EC) No. 765/2008 of the European Parliament and the Council dated 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No. 339/93 of the Council (OJ No. L 218 of 13 August 2008, p. 30).

§ 34

Furnishing of Proof through Quality Labels

(1) As proof that a supply or service complies with characteristics required in the tender specifications, the contracting entity may require the submission of quality labels in accordance with paragraphs 2 through 5.

(2) The quality label must fulfil all of the following conditions:

1. all label requirements shall be appropriate to define characteristics of the performance and be linked to the subject matter of the contract in accordance with section 31(3).
2. the label requirements shall be based on objectively verifiable and non-discriminatory criteria;
3. the label was developed in an open and transparent procedure in which all relevant stakeholders could participate;
4. the label is accessible to all undertakings concerned;
5. the label requirements were set by a third party on which the undertaking applying for the label could not exercise a decisive influence.

(3) In case the performance does not have to satisfy all label requirements, the contracting entity shall indicate the requirements concerned.

(4) The contracting entity must accept other quality labels that subject the performance to equivalent requirements.

(5) Where an undertaking had demonstrably no possibility of obtaining the specific quality label indicated by the contracting entity or an equivalent label within the relevant time limits for reasons that are not attributable to that undertaking, the contracting entity must accept other appropriate means of proof, provided that the undertaking proves that the performance to be provided by it fulfils the requirements of the label or the specific requirements indicated by the contracting entity.

§ 35

Variant Tenders

(1) The contracting entity may authorise or require variant tenders in the contract notice or in the invitation to confirm interest. Variant tenders are not authorised without such indication. Variant tenders must be related to the subject matter of the contract.

(2) A contracting entity authorising or requiring variant tenders shall state the minimum requirements in the procurement documents and indicate the manner in which the variant tenders are to be presented. Pursuant to section 127(4) of the Act against Restraints on Competition, the award criteria shall be stated in a way that they apply both to main tenders and variant tenders. Variant tenders may also be authorised or required where the price or the costs are the sole award criterion.

(3) The contracting entity shall consider only variant tenders meeting the minimum requirements. A variant tender may not be excluded solely on the grounds that it would, where successful, lead to a service contract rather than a supply contract or to a supply contract rather than a service contract.

§ 36

Subcontracts

(1) The contracting entity may in the contract notice or the procurement documents invite undertakings, when submitting a tender, to specify the parts of the contract they intend to subcontract to third parties and, if possible, the designated subcontractor. Before awarding a contract, the contracting entity may require that tenderers whose tenders are on the shortlist specify the subcontractors and prove that these subcontractors will have at their disposal the necessary resources. Where a candidate or tenderer intends to subcontract part of the contract to a third party and at the same time rely on the capacities of such third party pursuant to sections 45 and 46, in such case section 47 shall also be applied.

(2) The main contractor's liability toward the contracting entity shall remain unaffected by paragraph 1.

(3) When awarding service contracts to be provided at a facility of the contracting entity under its direct oversight, the contracting entity shall require in the contract terms that the main contractor is to disclose, at the latest when the performance of the contract commences, the name, contact details and legal representatives of its subcontractors and every change at the level of the subcontractor occurring during the performance of the contract. When awarding other service contracts or supply contracts, the contracting entity may provide that the notification obligations in the first sentence shall also be in the contract terms. Moreover, the notification obligations can also be extended to suppliers involved in service contracts as well as to other stages in the chain of subcontractors.

(4) Section 128(1) of the Act against Restraints on Competition applies to subcontractors at all stages.

(5) Before the contract is awarded, the contracting entity shall verify whether grounds for excluding the subcontractor exist. If compulsory grounds for exclusion exist, the contracting entity shall require the subcontractor to be replaced. If facultative grounds for exclusion exist, the contracting entity may require that said subcontractor be replaced. The contracting entity can set a deadline for the candidate or tenderer for this purpose.

Subchapter 4

Publications, transparency

§ 37

Contract Notice; Buyer Profile

(1) The public contracting entity shall announce, in the form of a contract notice, its intention to award a public sector contract or conclude a framework agreement. Section 17(5) and section 38(4) shall remain unaffected.

(2) The contract notice is to be drafted on the basis of the standard form provided in Annex II of the Implementing Regulation (EU) 2015/1986.

(3) In the contract notice, the public contracting entity nominates the public procurement tribunals to which the undertakings can apply for a review of claimed breaches of procurement law.

(4) The public contracting entity can also set up an online buyer profile. This profile contains the publication of prior information notices, details of planned or current procurement procedures, of awarded contracts or cancelled procurement processes and all other information relevant to award of contracts, such as the contact agency, address, e-mail address, telephone and fax number of the contracting entity.

§ 38

Prior Information Notice

(1) The public contracting entity can announce its intention to award a contract by publishing a prior information notice using the standard form in accordance with Annex I of the Implementing Regulation (EU) 2015/1986.

(2) The prior information notice can be sent to the Publications Office of the European Union or be published in the buyer profile. If the public contracting entity publishes a prior information notice in the buyer profile, it shall notify the Publications Office of the European Union of this publication using the standard form in accordance with Annex VIII of the Implementing Regulation (EU) 2015/1986.

(3) If the public contracting entity has published a prior information notice in accordance with paragraph 1, the minimum time limit for the submission of tenders can be reduced to 15 days in the case of an open procedure and to 10 days in the case of restricted procedures and negotiated procedures, provided that

1. the prior information notice contains all information required by Annex I of the Implementing Regulation (EU) 2015/1986, to the extent such information is available at the time of publishing the prior information notice, and
2. the prior information notice was transmitted to the Publications Office of the European Union at least 35 days and no more than 12 months before the date of issuing the contract notice.

(4) With the exception of the supreme federal authorities, the contracting entity conducting a restricted procedure or a negotiated procedure can dispense with a contract notice according to section 37(1), provided that the prior information notice

1. states the supplies or services that will be the subject of the contract to be awarded,
2. indicates that the contract in question is to be awarded in a restricted procedure or negotiated procedure without a separate contract notice,

3. invites interested undertakings to express their interest (expression of interest),
4. contains all information required under Annex I of Implementing Regulation (EU) 2015/1986 and
5. is published at least 35 days and no more than 12 months before the date of issuing the invitation to confirm interest.

Regardless of the obligation to publish the prior information notice, this prior information can also be published in a buyer profile.

(5) The contracting entity shall invite all undertakings that have transmitted an expression of interest in response to the publication of a prior information notice according to paragraph 4 to confirm their interest in further participation (invitation to confirm interest). The invitation to confirm interest initiates the competitive tender according to section 16(1) and section 17(1). Statements confirming interest must be submitted within 30 days of the date after issuing the invitation to confirm interest.

(6) The period covered by the prior information notice shall not be more than 12 months from the date of transmitting the prior information notice to the Publications Office of the European Union.

§ 39

Contract Award Notice; Notice of Contract Changes

(1) No later than 30 days after awarding a public contract or concluding a framework agreement, the contracting entity shall transmit an award notice with the results of the procurement procedure to the Publications Office of the European Union.

(2) The award notice is to be drafted on the basis of the standard form provided in Annex III of the Implementing Regulation (EU) 2015/1986.

(3) If the procurement procedure has been initiated by a prior information notice and if the contracting entity has decided not to award any further contracts during the period covered by the prior information notice, the award notice must contain a statement to this effect.

(4) The award notice shall include the framework agreements concluded, but not the individual contracts awarded on the basis of these agreements. In the case of contracts that are awarded under a dynamic purchasing system, the award notice shall comprise a quarterly grouping of the individual contracts; the grouping must be sent no later than 30 days after the end of the quarter.

(5) Contract changes according to section 132(2) numbers 2 and 3 of the Act against Restraints on Competition must be published in accordance with section 132(5) of the Act against Restraints on Competition using the standard form provided in Annex XVII of the Implementing Regulation (EU) 2015/1986.

(6) The contracting entity is not obliged to publish individual details, if the publishing of said details would

1. prevent enforcement by law,
2. be against the public interest,
3. damage the legitimate business interests of an undertaking or
4. hinder fair trade between undertakings

§ 40

Publication of Notices

(1) Contract notices, prior information notices, award notices and notices about contract changes (notices) must be transmitted by electronic means to the Publications Office of the European Union. The contracting entity must be able to provide evidence of the transmission date.

(2) Notices are published by the Publications Office of the European Union. The Publications Office of the European Union sends a confirmation to the contracting entity that the transmitted information has been published, which serves as proof of publication.

(3) Notices may only be published at national level following publication by the Publications Office of the European Union or 48 hours after the Publications Office of the European Union has confirmed receipt of the notice. The notice must not contain any details other than those specified in the notices transmitted to the Publications Office of the European Union or that have been published in a buyer profile. The national notice must include the transmission date to the Publications Office of the European Union or the date of publication in the buyer profile.

(4) The contracting entity can also transmit, to the Publications Office of the European Union, contract notices about public supply or service contracts that are not subject to the notification requirement.

§ 41

Provision of Procurement Documents

(1) In the contract notice or invitation to confirm interest, the contracting entity shall specify an electronic address from which there is free, unlimited, full and direct access to procurement documents.

(2) The contracting entity can transmit the procurement documents using other suitable means, if the necessary electronic means for calling up the procurement documents

1. are not compatible with generally available or generally used ICT devices or programs, due to the particular nature of the contract award
2. use, for describing the tenders, file formats that cannot be processed with generally available or used programs or that are protected by licences that are not free and generally available, or
3. require the use of office equipment that is not generally available to the contracting entity.

In these cases, the time limit for tender shall be extended by five days, if there is no duly substantiated state of urgency under section 15(3), section 16(7) or section 17(8).

(3) In the contract notice or invitation to confirm interest, the contracting entity shall specify which measures have been taken to protect the confidentiality of the information and how the procurement documents can be accessed. In these cases, the time limit for tender shall be extended by five days, unless the measure to protect confidentiality consists only of issuing a non-disclosure agreement or if a duly substantiated state of urgency exists under section 15(3), section 16(7) or section 17(8).

Subchapter 5

Requirements of undertakings; eligibility

§ 42

Selection of Eligible Undertakings; Exclusion of Candidates and Tenderers

(1) The contracting entity shall assess the eligibility of the candidates or tenderers on the basis of the selection criteria under section 122 of the Act against Restraints on Competition (GWB) and the absence of grounds for exclusion under sections 123 and 124 of the GWB and also on the basis of the self-cleansing measures taken by the candidate or tenderer under section 125 of the GWB and, if necessary, shall exclude candidates and tenderers from the procurement procedure.

(2) In the restricted procedure, the negotiated procedure with competitive tender, the competitive dialogue and the innovation partnership, the contracting entity only invites candidates to submit a tender who have proven their eligibility and have not been excluded. Section 51 shall remain unaffected.

(3) In the case of open procedures, the contracting entity can decide whether to evaluate the tenders before carrying out the eligibility review.

§ 43

Legal Form of Undertakings and Bidding Consortiums

(1) Candidates or tenderers who are entitled to supply the relevant performance in accordance with the regulations of the State in which they are based must not be rejected solely because they are required to be a natural or legal person according to German regulations. However, in the case of services contracts and supply contracts that also comprise additional services, legal persons may be obliged, in their request for participation or their tender, to furnish the names and professional qualifications of the persons who will be entrusted with providing the performance.

(2) Candidate and bidding consortiums shall be treated in the same way as individual candidates and tenderers. The contracting entity may not make it a compulsory requirement for groups of undertakings to have a specific legal form in order to request participation or submit a tender. If necessary, the contracting entity can specify conditions in the procurement documents under which groups of undertakings must fulfil the selection criteria and execute the contract; these conditions must be objectively justified and proportionate.

(3) Notwithstanding paragraph 2, the contracting entity can require a bidding consortium to adopt a particular legal form, provided this is necessary for proper execution of the contract.

§ 44

Qualification and Authorisation to Pursue the Professional Activity

(1) The contracting entity may require the candidate or tenderer, depending on the regulations of the country in which they are established, to be enrolled in a professional or trade register in the particular State or to otherwise prove they are authorised to pursue a particular professional activity. For EU Member States, the relevant professional and trade registers and corresponding declarations or certificates confirming authorisation to engage in a professional activity are listed in Annex XI of Directive

2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94 of 28.3.2014, p. 65).

(2) In procurement procedures for public service contracts, in so far as candidates or tenderers have to possess a particular authorisation or be members of a particular organisation in order to be able to perform the relevant service in their State of origin, the contracting entity may require them to prove they hold such authorisation or membership.

§ 45

Economic and Financial Standing

(1) With regard to the economic and financial standing of candidates or tenderers, the contracting entity may set requirements to ensure that the candidates or tenderers have the necessary economic and financial capacities to perform the contract. For this purpose, the contracting entity can require the following in particular:

1. a minimum annual turnover, including a minimum annual turnover in the area covered by the contract,
2. Information about the balance sheets of the candidates or tenderers; the contracting entity may take into consideration the ratio between assets and liabilities in the balance sheets provided that it applies transparent, objective and non-discriminatory methods and criteria to do so and specifies said methods and criteria in the procurement documents, or
3. an appropriate level of professional risk indemnity insurance

(2) If a minimum turnover is required, this shall not exceed two times the estimated contract value, except in cases where special risks arise due to the nature of the contract subject matter. The contracting entity must provide adequate justification for such a requirement in the procurement documents or in the individual report.

(3) If a public contract is awarded in lots, paragraphs 1 and 2 shall apply to each individual lot. However, if the successful tenderer is awarded a contract for several lots that are to be executed simultaneously, the contracting entity may require a minimum annual turnover in relation to this group of lots.

(4) The contracting entity can generally require one or more of the following documents to be submitted as proof that candidates or tenderers have the necessary economic and financial standing:

1. appropriate bank statements
2. evidence of relevant professional risk indemnity insurance
3. financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the candidate or tenderer is established
4. a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract; such a statement can be required for a maximum of the last three financial years, as far as the relevant information is available.

(5) Where, for any valid reason, the candidate or tenderer is unable to provide the documents requested by the contracting entity, it may prove its economic and financial standing by presenting any other document considered appropriate by the contracting entity.

§ 46

Technical and Professional Ability

(1) With regard to the technical and professional ability of candidates or tenderers, the contracting entity may set requirements to ensure that the candidates or tenderers have the necessary human and technical resources, and sufficient experience, to perform the contract to an appropriate quality standard. In the case of supply contracts requiring siting or installation work, and in the case of services contracts, the professional ability of the undertakings may also be evaluated with regard to their skills, efficiency, experience and reliability.

(2) The contracting entity can reject the professional ability of a candidate or tenderer if it has established that the candidate or tenderer has interests that are in conflict with the performance of the public contract and could adversely affect said performance.

(3) Depending on the nature, purpose and quantity or scope of supplies or services to be provided, the contracting entity can solely require one or more of the following documents to be submitted as proof that candidates or tenderers have the necessary technical and professional ability:

1. suitable references on supply and service contracts performed in the past, in the form of a list of the main supplies and services delivered or performed over the last three years, at most, with details of the sums, delivery or performance dates, public or private recipients; where necessary, in order to ensure an adequate level of competition, the contracting entity may indicate that evidence of relevant supplies or services delivered or performed more than three years ago will be also taken into account,
2. details of the technicians or technical bodies to be involved in the provision of the performance, whether or not they belong to the undertaking, especially those responsible for quality control,
3. a description of the technical facilities, quality assurance measures and the study and research facilities available to the undertaking;
4. an indication of the supply chain management and tracking systems available to the undertaking when performing the contract;
5. where the performance to be provided is complex or, exceptionally, is required for a special purpose, a check - carried out by the contracting entity or on its behalf by a competent official body of the State in which the undertaking is established - on the production capacities or technical ability of the undertaking and, where necessary, on the study and research facilities available to the undertaking and the measures implemented by the undertaking to ensure quality control;
6. the educational and professional qualifications of the undertaking's owner or managerial staff, provided that these are not evaluated as an award criterion;
7. an indication of the environmental management measures that the undertaking will apply when performing the contract;
8. a statement of the average annual number of staff overall in the undertaking and the number of managerial staff for the last three years;
9. A statement clearly indicating the tools, plant and technical equipment available to the undertaking for carrying out the contract;
10. An indication of which parts of the contract the undertaking intends possibly to subcontract;
11. in the cases of supplies:

- a) samples, descriptions or photographs of the goods to be delivered, the authenticity of which must be certified if the contracting entity so requests;
- b) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.

§ 47

Reliance on the Resources of Other Undertakings

(1) A candidate or tenderer can call upon the capacities of other undertakings to meet the requirements for a particular public contract in terms of economic and financial standing and technical and professional ability, provided that it proves that it actually has access to the resources required for the contract by submitting, for example, a declaration of commitment from these undertakings. This option exists, irrespective of the legal nature of the relationships between the candidate or tenderer and the other undertakings. However, a candidate or tenderer can only rely on the capacities of other undertakings, in respect of providing evidence of the required professional ability such as educational and professional qualifications under section 46(3) number 6 or of the relevant professional experience, if said undertakings provide the performance for which these capacities are required.

(2) In conducting the eligibility review, the contracting entity reviews the undertakings offering capacities that the candidate or tenderer wishes to avail of in order to meet certain selection criteria and verifies whether these undertakings actually meet the selection criteria and whether criteria for exclusion apply. If the candidate or tenderer submits a European Single Procurement Document (ESPD) pursuant to section 50, this must also include the information required for the review under the first sentence. The contracting entity shall require the candidate or tenderer to replace an undertaking that fails to meet a particular selection criterion or to which compulsory grounds for exclusion apply under section 123 of the Act against Restraints on Competition. It may require the candidate or tenderer to also replace an undertaking to which facultative grounds for exclusion apply under section 124 of the Act against Restraints on Competition. The contracting entity can set a deadline for the candidate or tenderer for this purpose.

(3) Where a candidate or tenderer calls upon the capacities of another undertaking to meet the requirements in terms of economic and financial standing, the contracting entity may require the candidate or tenderer and the other undertaking to share joint liability for performance of the contract, to an amount commensurate with the scope of the “borrowed” capacities.

(4) Paragraphs 1 through 3 shall also apply to consortiums of candidates or tenderers.

(5) In the case of certain critical tasks for service contracts or critical siting or installation work for a supply contract, the contracting entity may require these activities to be carried out directly by the tenderer or, in the case of a bidding consortium, by a member of the bidding consortium.

§ 48

Proof of Eligibility and of the Absence of Grounds for Exclusion

(1) The contract notice or invitation to confirm interest shall specify, in addition to the selection criteria, which documents (self-declarations, statements, certificates and other means of proof) must be provided by candidates or tenderers as proof of their eligibility under sections 43 to 47 and as proof of the absence of grounds for exclusion.

(2) The contracting entity shall always require the submission of self-declarations. If requesting certificates or other means of proof, the contracting entity shall usually require the type of documentary evidence covered by the online document archive e-Certis.

(3) The contracting entity shall accept the submission of a European Single Procurement Document under section 50 as preliminary proof of eligibility and of the absence of grounds for exclusion.

(4) As sufficient proof that the grounds for exclusion named in section 123(1) to (3) of the Act against Restraints on Competition do not apply to the candidate or tenderer, the contracting entity shall recognise an extract from a relevant register, in particular a clearance certificate from the Federal Central Criminal Register or, failing that, an equivalent certificate issued by a competent judicial or administrative authority in the country of origin or the State where the candidate or tenderer is established.

(5) As sufficient proof that the grounds for exclusion named in section 123(4) and section 124(1) number 2 of the Act against Restraints on Competition do not apply to the candidate or tenderer, the contracting entity shall recognise a certificate issued by the competent authority in the country of origin or the State where the candidate or tenderer is established.

(6) Where the country of origin or the State where the candidate or tenderer is established does not issue documents or certificates according to paragraphs 4 and 5, or if these documents do not mention all grounds for exclusion under section 123(1) through (4) and section 124(1) number 2 of the Act against Restraints on Competition, they may be replaced by a declaration in lieu of oath. In States where there is no provision for a declaration in lieu of oath, this may be replaced by a solemn declaration made by a representative of the undertaking in question before a competent judicial or administrative authority, a notary or a competent professional or trade body in the country of origin or State where the candidate or tenderer is established.

(7) The contracting entity may ask the candidate or tenderer to provide an explanation for the documents received.

(8) If the candidate or tenderer is registered in an official list or possesses a certificate, and these respectively meet the requirements of Article 64 of Directive 2014/24/EU, the contracting entity shall not question the documents and information in the official list or certification system without justification (presumption of eligibility). An official list that meets the requirements of Article 64 of Directive 2014/24/EU can also be compiled by Chambers of Industry and Commerce. In maintaining the official list, the Chambers of Industry and Commerce use the services of a joint body responsible for the official list. The contracting entity may require separate submission of relevant certification in relation to the payment of taxes, charges or social security contributions.

§ 49

Proof of Compliance with Quality Assurance Standards and Environmental Management Standards

(1) The contracting entity shall, where it requires the production of certificates drawn up by independent bodies attesting that the candidate or tenderer complies with certain quality assurance standards, refer to quality assurance systems that

1. meet the relevant European standards and
2. are certified by accredited bodies.

The contracting entity shall also recognise equivalent certificates from accredited bodies established in other countries. Should a candidate or tenderer, for reasons not attributable to them, be unable to obtain the relevant certification within a reasonable time limit, the contracting entity must also recognise other documentation on equivalent quality

assurance systems, provided that the candidate or tenderer proves that the proposed quality assurance measures comply with the required quality assurance standards.

(2) Where the contracting entity requires the production of certificates drawn up by independent bodies attesting that the candidate or tenderer complies with certain environmental management systems or standards, it shall refer to

1. either the Eco-Management and Audit Scheme (EMAS) of the European Union or
2. other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation of organisations in a Community eco-management and audit scheme (OJ L 342 of 22 December 2009, p. 1) or
3. other environmental management standards that are based on the relevant European or international standards and are certified by accredited bodies.

The contracting entity shall also recognise equivalent certificates from bodies established in other countries. Where, for reasons not attributable to them, a candidate or tenderer has had demonstrably no access to the relevant certificates or no possibility of obtaining said certificates within the relevant time limits, the contracting entity must also accept other documentation on equivalent environmental management measures, provided that the candidate or tenderer proves that these measures are equivalent to those required under the applicable environmental management system or standard.

§ 50

European Single Procurement Document

(1) The European Single Procurement Document shall be transmitted in the form provided in Annex 2 of the Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ L 3 of 6 January 2016, p. 16). Candidates or tenderers can reuse a European Single Procurement Document from a previous procurement procedure, provided that they confirm that the information it contains still applies.

(2) Where a European Single Procurement Document is transmitted, the contracting entity may ask candidates or tenderers at any stage during the procedure to submit all or part of the documents required under sections 44 to 49, where this is necessary for proper execution of the procedure. Before awarding the contract, the contracting entity shall require the tenderer to which it wishes to award the contract to submit the required documents.

(3) Notwithstanding paragraph 2, candidates or tenderers shall not be required to submit documents where and in so far as the contracting entity

1. can obtain the documents by accessing a database within the European Union that is available free of charge, in particular as part of a prequalification system or
2. already possesses the documents.

§ 51

Limiting the Number of Candidates

(1) In the case of all procurement procedures except open procedures, the contracting entity may apply a limit to the number of qualified candidates invited to submit a tender or engage in dialogue, provided there are sufficient qualified candidates. For this purpose, the contracting entity shall specify in the contract notice or invitation to confirm interest the objective and non-discriminatory selection criteria it intends to apply to limit

the number, the minimum number of candidates it intends to invite and where appropriate also the maximum number.

(2) The minimum number of candidates to be invited that is set by the contracting entity must not be less than three and not less than five in a restricted procedure. In any event the minimum number set must be sufficient to ensure genuine competition.

(3) If sufficient eligible candidates are available, the contracting entity shall invite a number of eligible candidates that is not less than the specified minimum number of candidates. If the number of eligible candidates is less than the minimum number, the contracting entity may go ahead with the procurement procedure by issuing an invitation to the candidate(s) that meet the eligibility requirements. Other undertakings that have not applied to participate, or candidates that do not meet the eligibility requirements, shall not be admitted to this procedure.

Subchapter 6

Form, Submission and Handling of Expressions of Interest, Confirmations of Interest, Requests to Participate and Tenders

§ 52

Invitation to Confirm Interest, Submit a Tender, Negotiate or Participate in the Dialogue

(1) If a competitive tender has been used, the contracting entity shall select candidates in accordance with section 51 and invite these to submit a tender in a restricted procedure or negotiated procedure, to participate in the competitive dialogue or in negotiations as part of an innovation partnership.

(2) The invitation provided for under paragraph 1 shall include at least the following:

1. a reference to the published contract notice,
2. the deadline for the receipt of the tenders, the address to which the tenders must be sent, the type of submission and the language in which the tenders must be drawn up,
3. in the case of competitive dialogue, the date and the address set for the start of a dialogue phase and the language used;
4. a reference to any possible adjoining documents to be submitted, provided these are not already included in the contract notice,
5. the criteria for awarding the contract and the relative weighting thereof or, where appropriate, the criteria in order of their importance, where this information is not already provided in the contract notice or in the invitation to confirm interest.

In the case of contracts awarded through a competitive dialogue or an innovation partnership, the information referred to in number 2 shall not appear in the invitation to participate in the dialogue or to negotiate but rather in the invitation to submit a tender.

(3) In the case of a prior information notice as provided for in paragraph 4, the contracting entity shall simultaneously invite all undertakings that have transmitted an expression of interest to confirm their interest, in accordance with section 38(5). This invitation shall include at least the following information:

1. scope of the contract, including all options concerning complementary contracts and, where possible, an estimation of the time available for exercising these options; in

- the case of recurring contracts, the nature and scope and, where possible, the estimated publication dates of future contract notices for supplies or services to be put out to tender,
2. type of procedure,
 3. where appropriate, the date on which the supplies shall be provided or the services shall commence or terminate;
 4. Internet address via which there is free, unlimited, full and direct access to the procurement documents,
 5. where electronic access to the procurement documents cannot be offered, the address and closing date for the submission of requests for procurement documents and the language in which the expression of interest is to be drawn up,
 6. the address of the contracting entity that is to award the contract,
 7. all economic and technical conditions, financial guarantees and information required from the undertakings,
 8. the type of contract that is the subject of the procurement procedure, and
 9. the criteria for awarding the contract and the relative weighting thereof or, where appropriate, the criteria in order of their importance, where this information is not already provided in the prior information notice or procurement documents.

§ 53

Form and Transmission of Expressions of Interest, Confirmations of Interest, Requests to Participate and Tenders¹

(1) The undertakings shall transmit their expressions of interest, confirmations of interest, requests to participate and tenders in writing pursuant to section 126b of the German Civil Code using electronic means under section 10.

(2) The contracting entity is not obliged to request the submission of tenders using electronic means if one of the reasons named in section 41(2) numbers 1 through 3 applies to the electronic means required for submission or if, at the same time, the submission of physical or scale models that cannot be transmitted using electronic means is required. In these cases, communication shall take place by post or other suitable carrier or by combining post or another suitable carrier with the use of electronic means. The contracting entity shall indicate, in the individual report, the reasons why the tenders may be submitted by means other than electronic means.

(3) The contracting entity shall check if the data to be transmitted entail higher security requirements. Where necessary, the contracting entity may require expressions of interest, confirmations of interest, requests to participate and tenders to be accompanied by an advanced electronic signature in accordance with section 2 number 2 of the Act on framework conditions for electronic signatures of 16 May 2001 (Federal Law Gazette I p. 876), which was last amended through Article 4(111) of the Act dated 7 August 2013 (Federal Law Gazette I p. 3154), or with a qualified electronic signature in accordance with section 2 number 3 of the Act on framework conditions for electronic signatures of 16 May 2001 (Federal Law Gazette I p. 876), which was last amended through Article 4(111) of the Act dated 7 August 2013 (Federal Law Gazette I p. 3154).

(4) The contracting entity may require tenders to be submitted using means other than electronic means, if such tenders include especially sensitive data that cannot be adequately protected through the use of generally available or alternative electronic means, or if the security of the electronic means cannot be guaranteed. The contracting

¹ See also section 81 of this Ordinance.

entity shall indicate, in the individual report, the reasons why the tenders must necessarily be submitted by means other than electronic means.

(5) Expressions of interest, confirmations of interest, requests to participate and tenders transmitted directly or by post shall be submitted in a sealed envelope and marked as such.

(6) Expressions of interest, confirmations of interest, requests to participate and tenders transmitted directly or by post must be signed. In the case of fax submissions, a signature on the telefax template shall suffice.

(7) Changes to the procurement documents are not permitted. The expressions of interest, requests to participate and tenders must be complete and must contain all required information, declarations and prices. Any variant tenders must be identified as such.

(8) The undertakings shall specify if industrial property rights for the contract subject matter are in existence, being applied for or under consideration.

(9) Candidate and bidding consortiums must, in each of their confirmations of interest, requests to participate or tenders, list their respective members and nominate one member as an agent authorised to conclude and execute the relevant contract. If any of this information is missing, it must be submitted before the contract award.

§ 54

Storing Unopened Expressions of Interest, Confirmations of Interest, Requests to Participate and Tenders

Expressions of interest, confirmations of interest, requests to participate and tenders that have been electronically transmitted must be appropriately identified and stored in encrypted format. Expressions of interest, confirmations of interest, requests to participate and tenders that have been transmitted directly and by post must be stamped, unopened, with a notice of receipt and locked away safely until the opening date. Expressions of interest, confirmations of interest, requests to participate and tenders that have been transmitted by fax must be appropriately identified and locked away safely.

§ 55

Opening the Confirmations of Interest, requests to Participate and Tenders

(1) The contracting entity may not take note of the contents of the confirmations of interest, requests to participate and tenders until after the relevant time limits have expired.

(2) Tenders shall be jointly opened by at least two representatives of the contracting entity at an arranged time immediately after the time limit for tender has passed. Tenderers are not admitted to this process.

Subchapter 7

Reviewing and evaluating the confirmations of interest, requests to participate and tenders; contract award

§ 56

Reviewing the Confirmations of Interest, Requests to Participate and Tenders; Follow-up Requests for Documentation

(1) The confirmations of interest, requests to participate and tenders shall be reviewed for completeness and technical accuracy; tenders shall also be reviewed for mathematical accuracy.

(2) The contracting entity may, in compliance with the principles of transparency and equal treatment, ask the candidate or tenderer to complete, send on or correct any incomplete, missing or incorrect business-related documents, particularly self-declarations, statements, certificates or other means of proof, or to complete or send on any incomplete or missing documents related to the performance. The contracting entity is entitled to state in the contract notice or procurement documents that it will not follow up with requests for documents.

(3) Follow-up requests for performance-related documents concerning the economic evaluation of the tenders using the award criteria are excluded. This shall not apply to pricing, provided only non-essential individual entries are involved, the individual prices of which do not change the overall price or adversely affect the evaluation sequence and the competition.

(4) Following the contracting entity's request, the documents shall be submitted by the candidate or tenderer within a reasonable time limit to be set by the contracting entity according to a calendar date.

(5) The decision to follow up with requests for documents and the result thereof shall be documented.

§ 57

Exclusion of Expressions of Interest, Confirmations of Interest, Requests to Participate and Tenders

(1) The evaluation shall exclude tenders from undertakings that do not meet the selection criteria and tenders that do not fulfil the requirements of section 53, in particular:

1. tenders that were received late or not in the proper form, unless this occurred for reasons not attributable to the tenderer,
2. tenders that do not include the documents requested initially or by follow-up request,
3. tenders in which tenderers' changes to their own data entries are questionable,
4. tenders in which changes or additions have been made to the procurement documents,
5. tenders that do not contain the required pricing information, unless only non-essential individual entries are involved, the individual prices of which do not change the overall price or adversely affect the evaluation sequence and the competition, or
6. variant tenders that are not admitted to this process.

(2) If the contracting entity has admitted variant tenders, it shall only consider those variant tenders that meet its prescribed minimum requirements.

(3) Paragraph 1 shall apply *mutatis mutandis* to the review of expressions of interest, confirmations of interest and requests to participate.

§ 58

Contract Awards and Award Criteria

(1) The contract shall be awarded to the most economically advantageous tender, as regulated in section 127 of the Act against Restraints on Competition.

(2) The most economically advantageous tender shall be determined on the basis of the tender offering the best price-quality ratio. Apart from the price or costs, the award decision may also take into account qualitative, environmental or social criteria, particularly:

1. quality, including technical merit, aesthetic and functional characteristics, accessibility of the performance, especially for people with disabilities, compliance with “Design for all” requirements, social, environmental and innovative characteristics, as well as sales and trading conditions;
2. organisation, qualification and experience of staff entrusted with performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
3. availability of after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The contracting entity may also specify fixed prices or fixed costs, with the result that the most economically advantageous tender shall then only be determined on the basis of qualitative, environmental or social award criteria, according to sentence 1.

(3) The contracting entity shall indicate, in the contract notice or procurement documents, the relative weighting that it assigns to the individual award criteria in order to determine the most economically advantageous tender. This weighting may also be expressed in the form of a range, with an appropriate maximum spread. Where weighting is not possible for objective reasons, the contracting entity shall indicate the award criteria in decreasing order of importance

(4) As regards proof of whether and to what extent the tendered performance meets the required award criteria, sections 33 and 34 shall apply *mutatis mutandis*.

(5) In general, at least two representatives of the contracting entity shall take part in the decision to award a contract.

§ 59

Calculating the Life-cycle Costs

(1) The contracting entity may specify that the “Costs” award criteria must be calculated on the basis of the life-cycle costs of the performance.

(2) The contracting entity shall indicate, in the contract notice or procurement documents, the method for calculating the life-cycle costs and the information to be transmitted by the undertaking for the purposes of this calculation. The calculation method may include:

1. the costs relating to acquisition,

2. costs of use, such as consumption of energy and other resources,
3. maintenance costs,
4. end of life costs, such as the costs of collection, recycling and disposal.
5. costs imputed to environmental externalities linked to the performance during its life cycle, provided their monetary value can be determined and verified under paragraph 3; such costs may include the cost of greenhouse gas emissions and of other pollutant emissions and other climate change mitigation costs.

(3) The method for calculating the costs imputed to environmental externalities must satisfy the following conditions:

1. it shall be based on objectively verifiable and non-discriminatory criteria. Where the method has not been developed for repeated or continuous application, it shall not unduly favour or disadvantage certain undertakings;
2. it shall be accessible to all interested parties;
3. the information required for the calculations can be provided with reasonable effort by undertakings exercising normal due diligence, including undertakings from third countries party to the 1994 Agreement on Government Procurement (GPA), (OJ C 256 of 3 September 1996, p. 1), amended by the Protocol on Amending the Agreement on Government Procurement (OJ. L 68 of 7 March 2014, p. 2), or other international agreements by which the European Union is bound.

(4) Where a method for calculating life-cycle costs has been made mandatory by a legislative act of the European Union, the contracting entity shall prescribe this method.

§ 60

Abnormally Low Tenders

(1) Where the price or costs of a tender appears to be abnormally low in relation to the performance to be provided, the contracting entity shall seek clarification from the tenderer.

(2) The contracting entity shall review the constituent elements of the tender and consider the transmitted documents. The review may in particular apply to:

1. the economics of the manufacturing process of a supply or a service provided;
2. the technical solutions chosen or any exceptionally favourable conditions available to the undertaking for the supply of the products or for the execution of the services;
3. the particularities of the supplies or services proposed,
4. compliance with obligations referred to in section 128(1) of the Act against Restraints on Competition, in particular any environmental, social or labour regulations applicable to the undertaking, or
5. any state aid granted to the undertaking.

(3) If, following the review under paragraphs 1 and 2, the contracting entity is unable to establish a satisfactory explanation for the low price or costs tendered, it may refuse to award the contract to this tender. The contracting entity shall reject the tender if it has established that the price or costs of the tender are abnormally low because of a failure to comply with obligations under paragraph 2 second sentence number 4.

(4) Where the contracting entity establishes that a tender is abnormally low because the tenderer has obtained state aid, the contracting entity shall reject the tender

if the tenderer is unable to prove, within a certain time limit, that the aid in question was lawfully granted. The contracting entity shall inform the European Commission of a rejection in these circumstances.

§ 61

Contract Performance Conditions

As regards proof of the tendered performance meeting the required contract performance conditions pursuant to section 128 of the Act against Restraints on Competition, sections 33 and 34 shall apply *mutatis mutandis*.

§ 62

Informing Candidates and Tenderers

(1) Notwithstanding section 134 of the Act against Restraints on Competition, the contracting entity shall promptly inform each candidate and tenderer of the decisions it has reached concerning the conclusion of a framework agreement, the award of the contract or the admission to a dynamic purchasing system. The same shall apply to a decision to suspend or re-initiate the procurement procedure, including the reasons for said decision, where a contract award notice or prior information notice has been published.

(2) The contracting entity shall inform, on request by the candidate or tenderer, without undue delay and in any event within 15 days after receipt of the request in writing pursuant to section 126b of the German Civil Code,

1. any unsuccessful candidate of the reasons for the rejection of its request to participate,
2. any unsuccessful tenderer of the reasons for the rejection of its tender,
3. all tenderers of the characteristics and advantages of the successful tender as well as the name of the successful tenderer and
4. all tenderers of the conduct and progress of negotiations and competitive dialogue with the tenderers.

(3) Section 39(6) shall be applied *mutatis mutandis* to the information specified in paragraphs 1 and 2 about the contract award, the conclusion of framework agreements or admission to a dynamic purchasing system.

§ 63

Cancellation of Procurement Procedures

(1) The contracting entity is entitled to cancel a procurement procedure entirely or in part, where

1. no tender that fulfils the conditions has been received,
2. the basis of the procurement procedure has materially changed,
3. no economically advantageous result has been achieved or
4. other serious reasons apply.

Furthermore, the contracting entity is not obliged in principle to award the contract.

(2) Following cancellation of the procurement procedure, the contracting entity shall inform the candidates or tenderers without undue delay for the reasons behind its decision not to award a contract or to re-initiate the procedure. It shall provide this notification to the candidates or tenderers in writing on request pursuant to section 126b of the German Civil Code.

Chapter 3

Special Provisions for the Award of Contracts for Social and Other Special Services

§ 64

Awarding Contracts for Social and Other Special Services

Public contracts for social and other special services within the meaning of section 130(1) of the Act against Restraints on Competition shall be awarded pursuant to the provisions of this Ordinance, giving consideration to the particularities of the relevant service in accordance with this Chapter.

§ 65

Additional Procedural Rules

(1) In addition to the open and restricted procedure, the contracting entity can LAO opt to use, in deviation from section 14(3), the negotiated procedure with competitive tender, the competitive dialogue and the innovation partnership. A negotiated procedure without competitive tender shall only be available to the extent where this is permitted according to section 14(4).

(2) The term of a framework agreement shall not exceed six years, in deviation from section 21(6), save in exceptional cases justified by the subject of the framework agreement.

(3) The contracting entity may, taking into account the particularities of the service in question, specify time limits other than those referred to in sections 15 to 19 for the receipt of tenders and requests to participate. Section 20 shall remain unaffected.

(4) Section 48(3) shall not apply.

(5) In evaluating the criteria listed in section 58(2) second sentence, number 2, the contracting entity may take into account the success and quality of services already provided by the tenderer or by the staff assigned by the tenderer. For services under the German Social Code II and III, the contracting entity may take into account the following to evaluate the success and quality of services already provided by the tenderer, in particular:

1. integration rates,
2. drop-out rates,
3. educational qualifications attained and
4. assessment of contract performance, using transparent and non-discriminatory methods.

§ 66

Publications, Transparency

(1) The public contracting entity shall announce, in the form of a contract notice, its intention to award a public sector contract for the provision of social or other special services. Section 17(5) shall remain unaffected.

(2) No contract notice shall be required if the contracting entity publishes a prior information notice continuously, provided that the prior information notice

1. refers specifically to the types of services that will be the subject of the contracts to be awarded,
2. indicates that the contract in question is to be awarded without a separate contract notice,
3. invites interested undertakings to express their interest (expression of interest),

(3) The contracting entity that has awarded a contract for the provision of social and other special services shall make known the results of the procurement procedure. It may group the contract notices on a quarterly basis. In this case, it shall send the grouped notices within 30 days of the end of each quarter.

(4) For the notices under paragraphs 1 to 3, the standard form provided in Annex XVIII of Implementing Regulation (EU) 2015/1986 shall be used. The notices shall be published in accordance with section 40.

Chapter 4**Special Provisions for the Procurement of Energy-related Performances and of Road Vehicles**

§ 67

Procurement of Energy-related Supplies or Services

(1) Where energy-related products, technical devices or equipment are the subject of supplies or an essential prerequisite for performing a service (energy-related supplies or services), the requirements described in paragraphs 2 through 5 must be observed.²

(2) The tender specifications shall set forth the following requirements in particular in relation to energy efficiency:

1. the highest level of performance in terms of energy efficiency and,
2. where available, the highest energy efficiency class under the Ordinance on Energy Consumption Labelling.

(3) The following information is to be requested from the tenderers either in the tender specifications or at another point in the procurement documents:

² Section 67 of the Procurement Ordinance transposes the following directives:

- Directive 2010/30/EU of the European Parliament and of the Council on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJ L 153 of 18 June 2010, p. 1),
- Directive 2012/27/EU of the European Parliament and of the Council on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315 of 14 November 2012, p. 1).

1. specific details on energy consumption, unless the products, technical devices or equipment offered on the market only marginally differ in terms of permissible energy consumption, and
2. in suitable cases
 - a) an analysis of minimised life-cycle costs or
 - b) the results of a comparable method to letter a) for reviewing cost-effectiveness.

(4) The contracting entity may review the information submitted pursuant to paragraph 3 and request further explanations for this from the tenderers.

(5) In determining the most economically advantageous tender, reasonable account shall be taken of the energy efficiency determined using the information under paragraph 3 or the results of a review under paragraph 4 as an award criterion.

§ 68

Procurement of Road Vehicles

(1) When procuring road vehicles, the contracting entity must take account of energy consumption and environmental effects. At least the following factors must be taken into account in this process, in each case based on the lifetime mileage of the road vehicle set out in Table 3 of Annex 2:³

1. energy consumption,
2. carbon dioxide emissions,
3. emissions of oxides of nitrogen,
4. emissions of non-methane hydrocarbons and
5. particulate exhaust components.

(2) The contracting entity shall meet the obligation under paragraph 1 to take into account energy consumption and environmental effects by

1. setting out requirements on energy consumption and environmental effects in the tender specifications or
2. taking into account the energy consumption and environmental effects of road vehicles as award criteria.

(3) If energy consumption and environmental effects are to be financially evaluated, the method defined in Annex 3 shall be used. Where the information in Annex 2 allows the contracting entity some leeway in evaluating the energy content or emission costs, the contracting entity shall use this leeway in accordance with local conditions at the site where the road vehicle is deployed.

(4) Road vehicles that are designed and built for use in official duties carried out by the disaster relief, fire brigade and police services and armed forces of the Federal Government and *Länder* (operations vehicles) are excluded from the application of paragraphs 1 to 3. For the procurement of operations vehicles, the requirements under paragraphs 1 to 3 shall be taken into account, as far as the state of the art allows and provided that the operational capability of the operations vehicles to carry out the official duties listed in the first sentence is not affected.

³ Section 68 of the Procurement Ordinance transposes Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles (OJ L 120 of 15 May 2009, p. 5).

Chapter 5

Design Contests

§ 69

Scope

(1) Contests as regulated under section 103(6) of the Act against Restraints on Competition are conducted in particular in the fields of town and country planning, urban development and construction or data processing (design contests).

(2) In conducting a design contest, the contracting entity shall apply sections 5, 6 and 43 and the provisions of this chapter.

§ 70

Publication, Transparency

(1) The contracting entity shall announce its intention to organise a design contest in a contest notice. The contest notice shall be issued on the basis of the standard form provided in Annex IX of the Implementing Regulation (EU) 2015/1986. Section 40 shall apply *mutatis mutandis*.

(2) If the contracting entity intends, following a design contest, to award a services contract in a procurement procedure without competitive tender, the contracting entity shall already indicate the selection criteria and the documents required as proof of eligibility for this purpose in the contest notice.

(3) The results of the design contest must be announced and transmitted to the Publications Office of the European Union within 30 days. The notice shall be issued on the basis of the standard form provided in Annex X of the Implementing Regulation (EU) 2015/1986.

(4) Section 39(6) shall apply *mutatis mutandis*.

§ 71

Organisation

(1) The applicable contest rules must be communicated to the parties interested in taking part in a design contest before the contest starts.

(2) The admission of participants to a design contest shall not be limited

1. by reference to the territory or part of the territory of a Member State of the European Union, or
2. exclusively to natural or legal persons.

(3) Where design contests are restricted to a limited number of participants, the contracting entity shall lay down clear and non-discriminatory selection criteria. The number of candidates invited to participate must be sufficient to ensure genuine competition.

§ 72

Jury

(1) The jury shall be composed exclusively of jurors who are independent of participants in the contest. Where a particular professional qualification is required from participants in a contest, at least a third of the jurors must have the same qualification or its equivalent.

(2) The jury shall be autonomous in its decisions or opinions. Its decisions shall be reached solely on the grounds of the criteria indicated in the contest notice. The contest projects shall be submitted to the jury anonymously. Anonymity shall also extend to the opinions or decisions of the jury.

(3) The jury shall compile a report on the ranking of the contest projects it has selected, by examining the individual projects in detail and listing its comments and questions to be clarified. This report shall be signed by the jurors.

(4) The participants may be invited to clarify certain aspects of the contest projects in response to questions that the jury needs to note in its minutes. The dialogue between the participants and the jurors shall be documented.

Chapter 6

Special Provisions for the Award of Contracts for Architectural and Engineering Services

Subchapter 1

General

§ 73

Scope and General Principles

(1) The provisions of this section shall apply additionally to the award of contracts for architectural and engineering services, the object of which is a problem with a solution that cannot be clearly and comprehensively described in advance.

(2) Architectural and engineering services are

1. services recorded under the (German) Fee Scale for Architects and Engineers of 10 July 2013 (Federal Law Gazette I p. 2276), and
2. other services for which an architectural or engineering professional qualification is required or stipulated by the contracting entity.

(3) Contracts for services pursuant to paragraph 1 shall be awarded independently of provider and supplier interests.

§ 74

Type of Procedure

As a general rule, architectural and engineering services shall be awarded as part of the negotiated procedure with competitive tender pursuant to section 17, or in a competitive dialogue pursuant to section 18.

§ 75

Eligibility

(1) If the professional qualifications of architect, interior architect, landscape architect or urban planner are required, those entitled under the applicable *Land* law governing public procurement to bear the corresponding professional title or carry out the corresponding activities in the Federal Republic of Germany shall be deemed eligible.

(2) If the professional qualifications of "consulting engineer" or "engineer" are required, those entitled under the applicable *Land* law governing public procurement to bear the corresponding professional title or carry out the corresponding activities in the Federal Republic of Germany shall be deemed eligible.

(3) Legal persons shall be deemed eligible as contractors if they nominate a responsible member of a profession pursuant to paragraph 1 or 2 to execute the task.

(4) Pursuant to section 122(4) of the Act against Restraints on Competition, the selection criteria must be related and proportionate to the subject matter of the contract. These criteria are to be selected, for suitable project assignments, in a way that allows smaller office organisations and job starters to participate.

(5) The presentation of reference projects is permitted. If the contracting entity requests suitable references in terms of section 46(3) number 1, it shall admit for this purpose reference projects whose planning or consulting requirements are comparable to those of the planning or consulting services for which contracts are to be awarded. With regard to the comparability of reference projects, it is generally irrelevant whether the candidate has previously planned or executed projects of the same usage type.

(6) If multiple candidates in a competitive tender with a defined maximum number pursuant to section 51 satisfy the requirements to an equal extent, and if the number of applicants is too high even following an objective selection process pursuant to the underlying eligibility criteria, selection may be made by drawing lots from among the remaining applicants.

§ 76

Contract Award

(1) Contracts for architectural and engineering services shall be awarded based on a competition for tender. If the service to be provided is to be remunerated pursuant to statutory regulations on fees or charges, the price in the scope prescribed there shall be taken into account.

(2) The contracting entity may only request the elaboration of proposed solutions to the given task as part of a design contest, a negotiated procedure or a competitive dialogue. Costs shall be reimbursed on the basis of section 77. Any unsolicited elaborated solutions that are submitted shall not be considered.

§ 77

Costs and Remuneration

(1) The costs of drawing up application and tender documents shall not be reimbursed.

(2) If the contracting entity additionally requests the elaboration of proposed solutions for the given planning task outside the scope of design contests in the form of drafts, plans, drawings, calculations or other documents, an appropriate and consistent level of remuneration shall be defined for all applicants.

(3) This shall not affect the statutory regulations on fees or charges and copyright protection.

Subchapter 2

Design contests for architectural or engineering services

§ 78

General Principles and Scope of Design Contests

(1) Not only do design contests guarantee selection of the best solution to the planning task, they are also suitable instruments for ensuring planning quality and promoting building culture.

(2) The aim of design contests is to elicit alternative suggestions for planning, especially in the field of town and country planning, urban development and construction, based on published standard guidelines and directives. They may be held in advance of or without a procurement procedure. The standardised guidelines and directives also regulate the participation of chambers of architects and engineers in the preparation and implementation of design contests. For project assignments in the area of buildings, urban development and bridge construction as well as landscape architecture and open space planning, the contracting entity shall check whether a design contest is necessary and document its decision.

(3) The provisions of this subchapter shall be applied in addition to section 5 for the organisation of design contests. The applicable rules on conducting design contests pursuant to paragraph 2 shall be disclosed in the contest notice.

§ 79

Conducting Design Contests

(1) The organisation of a design contest shall involve offering prizes or recognition in addition to prizes, commensurate with the significance and difficulty of the construction project and the scope of work and pursuant to the relevant applicable fee scale.

(2) Persons whose involvement in the preparation or hosting of design contests may place them at an advantage or enable them to influence the decision of the jury are excluded from design contests. The same shall apply to persons who might gain such an advantage or influence through family members or persons to whom they are economically linked.

(3) In deviation from section 72(1) second sentence, the majority of jurors must possess the same or an equivalent qualification as that required of the participants. The majority of jurors must also be independent of the organiser.

(4) In reaching its decisions, the jury must observe such instructions by the organiser that are listed as binding in the contest notice. Partial performances that are inadmissible or that go beyond the required extent shall be excluded from the assessment.

(5) The jury must compile a report, to be signed by the jurors, on the ranking and assessment of its selected contest projects. The organiser shall inform the participants without undue delay of the outcome by despatching the minutes of the jury meeting. The organiser shall exhibit publicly the contest projects submitted no later than one month after the decision of the jury, along with the names of the authors and the minutes. If a winner cannot be considered due to a lack of eligibility or a breach of contest rules, the remaining winners along with the other participants shall move up the ranking of the jury, unless otherwise specified by the jury in the minutes.

§ 80

Invitation to Negotiate; Using the Results of the Design Contest

(1) Insofar as and as soon as the outcome of the design contest is to be realised and one or several of the winners are to be commissioned with the design services to be procured, the contracting entity shall request, in the invitation to participate in negotiations, the documents necessary to verify eligibility in respect of the selection criteria previously specified pursuant to section 70(2) in the contest notice.

(2) Statutory provisions, under which partial solutions submitted by participants in the design contest but not considered in the contract award may only be used with the participants' permission, are not affected.

Chapter 7

Transitional and Final Provisions

§ 81

Transitional Provisions

Central purchasing bodies within the meaning of section 120(4) first sentence of the Act against Restraints on Competition may also request until 18 April 2017 (other contracting entities until 18 October 2018) and in deviation from section 53(1) that tenders, requests to participate and confirmations of interest be submitted by post, by another suitable channel, by fax or by a combination of these methods. The same shall apply to other communication within the meaning of section 9(1), insofar as it does not affect the transmission of notices and the provision of procurement documents.

§ 82

Calculation of Time Limits

The time limits governed by this regulation are calculated pursuant to Regulation (EEC) No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits.

Annex 1 (to section 31(2))

Technical Requirements Definitions:

1. "Technical specification" in relation to supplies or services has one of the following meanings:

a specification contained in a document that lays down the characteristics required of a product or service such as levels of quality, environmental and climate performance levels, "design for all" (including disabled access) and conformity assessment, performance, requirements for fitness for purpose, safety or dimensions of the product, including the requirements applicable to the product as regards its sales description, terminology, symbols, testing and test methods, packaging, marking and labelling, operating instructions, production processes and methods during every phase of the life cycle of the supply or service and as regards conformity assessment procedures.
2. "Standard" refers to a technical specification approved by a recognised standards body for repeated or continuous application, compliance with which is not mandatory and which falls under one of the following categories:
 - a) international standard: a standard adopted by an international standards organisation and made available to the general public;
 - b) European standard: a standard adopted by a European standards organisation and made available to the general public;
 - c) national standard: a standard adopted by a national standards organisation and made available to the general public.
3. "European Technical Assessment" means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the relevant European Assessment Document pursuant to the definition in Article 2 Number 12 of Regulation (EU) No. 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products (OJ L 88 of 4.4.2011, p. 5).
4. "Common technical specifications" are technical specifications in the area of information and communication technology, which were defined pursuant to Articles 13 and 14 of Regulation (EU) No. 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC of the Council as well as Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No. 1673/2006/EC of the European Parliament and of the Council (OJ L 316/12 of 14.11.2012, p. 12).
5. A "technical reference" refers to any reference framework other than a European standard that has been developed by the European standardisation bodies according to procedures adapted to market needs.

Annex 2 (to section 68(1) and (3))

Data for Calculating the External Costs Incurred over the Service Life of Road Vehicles

Table 1 – Energy Content of Fuels

Fuel	Energy content in megajoules (MJ)/litre or megajoules (MJ)/standard cubic metre (Nm ³)
Diesel fuel	36 MJ/litre
Petrol fuel	32 MJ/litre
Natural gas	33–38 MJ/Nm ³
Liquefied petroleum gas (LPG)	24 MJ/litre
Ethanol	21 MJ/litre
Biodiesel	33 MJ/litre
Emulsion fuel	32 MJ/litre
Hydrogen	11 MJ/Nm ³

Table 2 – Road Traffic Emission Costs (2007 prices)

Carbon dioxide (CO ₂)	Nitrogen oxides (NO _x)	Non-methane hydrocarbons	Particulate exhaust components
0.03–0.04 €/kg	0.0044 €/g	0.001 €/g	0.087 €/g

Table 3 – Lifetime Mileage of Road Vehicles

Vehicle class (categories M and N pursuant to Directive 2007/46/EC)	Lifetime mileage
Passenger cars (M ₁)	200,000 km
Light commercial vehicles (N ₁)	250,000 km
Heavy commercial vehicles (N ₂ , N ₃)	1,000,000 km
Buses (M ₂ , M ₃)	800,000 km

Annex 3 (to section 68(3))

Method for Calculating the Operational Costs Incurred over the Service Life of Road Vehicles

1. For the purposes of section 68, the energy consumption and emission costs (operational costs) incurred over the service life of a road vehicle as a result of its operation are assessed and calculated in financial terms according to the method described below:
 - a) The energy consumption costs incurred by the operation of a road vehicle over its service life are calculated as follows:
 - aa) The fuel consumption per kilometre of a road vehicle pursuant to number 2 is calculated in terms of energy consumption per kilometre (megajoule/kilometre, MJ/km). If fuel consumption is expressed in other units, it is converted to MJ/km according to the conversion factors in table 1 of Annex 2.
 - bb) In the context of the tender evaluation, a financial value per energy unit must be defined (€/MJ). This financial value is determined following a comparison of the costs per energy unit of petrol or diesel fuel before taxes. The cheaper fuel in each case determines the financial value per energy unit (€/MJ) to be taken into account by the tender evaluation.
 - cc) To calculate the energy consumption costs incurred by the operation of a road vehicle over its service life, the lifetime mileage pursuant to number 3 (where applicable, taking into account the previous mileage covered), the energy consumption per kilometre (MJ/km) pursuant to clause aa and the costs in euros per energy unit (€/MJ) pursuant to clause bb are multiplied by each other.
 - b) To calculate the carbon dioxide emissions generated by the operation of a road vehicle over its service life, the lifetime mileage pursuant to number 3 (where applicable, taking into account the previous mileage covered), the carbon dioxide emissions in kilograms per kilometre (kg/km) pursuant to number 2 and the emission costs per kilogram (€/kg) pursuant to table 2 of Annex 2 are multiplied by each other.
 - c) To calculate the costs of pollutant emissions listed in Table 2 of Annex 2, which are generated by the operation of a road vehicle over its service life, the costs of emissions of nitrogen oxides, non-methane hydrocarbons and particulate exhaust components are added. To calculate the costs arising over the service life for each individual pollutant, the lifetime mileage pursuant to number 3 (where applicable, taking into account the previous mileage covered), the emissions in grams per kilometre (g/km) pursuant to number 2 and the respective costs per gram (€/g) are multiplied by each other.
 - d) In calculating emission costs pursuant to letters b and c, contracting entities may use higher values than those specified in Table 2 of Annex 2 as a basis, provided that the values in Table 2 of Annex 2 are not exceeded by a factor greater than two.
2. The values for fuel consumption per kilometre and for carbon dioxide emissions and pollutant emissions per kilometre are based on the standardised Community test procedures of the Community regulations by means of the type approval. In the case of road vehicles for which no standardised Community test procedures exist, generally recognised test procedures and the outcomes of tests carried out for the contracting entity, or manufacturers' specifications are used to guarantee the comparability of various tenders.

3. Refer to Table 3 of Annex 2 for the lifetime mileage of a vehicle.