

# Challenges in sustainable public procurements

## International conference in Budapest

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# Public Procurement Review in Germany

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Gabriele Herlemann  
Bundeskartellamt  
2<sup>st</sup> Public Procurement Tribunal  
of the Federation

# “Preliminary stage”: Necessary action the contracting authority has to take before the conclusion of the contract

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- Time slot between decision about the successful tender and conclusion of the contract with the successful tenderer: unsuccessful tenderer must be **informed** in writing of
  - the reason for the rejection of his tender
  - the name of the successful tenderer
  - the earliest date of the conclusion of the contract
- **Standstill obligation:** The contract may only be concluded at the earliest **10 calendar days after** the information → unsuccessful tenderer has time
  - to check the legality of award procedure, probably with assistance of a lawyer,
  - to decide if he wants to take legal action

# Violation of information/standstill obligation: Ineffectiveness of the contract

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In case of conclusion of the contract with the successful tenderer under violation of these obligations:

- contract is not automatically void,
- but **ineffectiveness** of the contract **can be claimed** by the unsuccessful tenderer in review proceedings at the PP-tribunal,
- within certain **time limits**:
  - 30 calendar days after the public contracting authority informs the affected tenderers about the conclusion of the contract,
  - but at the latest 6 months after conclusion of the contract.

Reason for the time limits: legal certainty about the effectiveness of the contract.

# Importance of information and standstill period for review proceedings I

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- Principle of “pacta sunt servanda” in German substantive civil law
- → Contract is effective in principle, even though there was an infringement of PP-law in the award procedure - contract is not automatically ineffective!
- → Once an award has been made, it cannot be revoked by the PP-tribunal, even if there were infringements of PP-law during the award procedure (different in other EU-member states!)

# Importance of information and standstill period for review proceedings II

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- Consequence for the review procedure: tenderer can submit an application to the PP-tribunal only as long as the award has not been made
- If the **application** is being **filed after the conclusion of the contract**: application is **inadmissible**
- → Tenderer has to submit his application before the standstill period ends and before the contract with the successful tenderer is concluded
- This is why the standstill period is so important for effective legal protection

# “Preliminary stage”: Necessary action the tenderer has to take before initiating the review proceedings I

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- Prior to submitting an application at the PP-tribunal the unsuccessful tenderer has to **complain to the contracting authority** within certain time limits, otherwise the application is **inadmissible**.
- 3 different constellations with consequences for the time limits and for the scale of the recognisability:
  - complain within 10 calendar days after the unsuccessful tenderer **became aware** of the claimed violation of PP-law,
  - violations of PP-provisions which **became apparent** already from the tender notice in the Official Journal: tenderer has to notify by the end of the time limit for the submission of a tender,
  - violations which **became apparent** from the procurement documents: notification also before end of submission time limit

# “Preliminary stage”: Necessary action the tenderer has to take before initiating the review proceedings II

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- Reasons behind this regulation:
  - to **avoid litigation**: parties might find consensus without a decision of the PP-tribunal, for example the contracting authority has the chance to correct an infringement of PP-law
  - to **avoid delay** of the award procedure: if there has been an infringement already in the tender notice or in the procurement documents, the contracting authority should become aware of this as quickly as possible, not only at the end of the award procedure
- Practical difficulties concerning the obligation to prior complain: **proof of the “becoming aware”** and the question, which infringements of PP-law are **“apparent”** to a tenderer

# “Preliminary stage”: Necessary action the tenderer has to take before initiating the review proceedings III

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- Jurisdiction: the obligation to complain or to notify prior to file the application exists only, if the applicant has had
  - awareness of the **facts** of the award procedure,
  - but also the awareness that the award proceedings and the alleged infringement were **legally** wrong.
- Difficult question, if tenderers can be expected to have any knowledge of PP-law: contracting authorities are obliged to act according the provisions of PP-law → they are addressees of PP-law, not the tenderers!
- Frequent argument: “awareness”, “apparent infringement” only after consultation of a lawyer → this condition for admissibility often runs dry



# Are there time limits for filing the application?

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- No official time limit within the applicant has to file his application,
- but there are two relevant aspects:
  - As pointed out before (page 5), no admissible application once the contract between contracting authority and successful tenderer has been concluded, what usually happens after the standstill period → advisable to file the application before the standstill deadline, otherwise applicant runs the risk of filing only after the contract has been concluded
  - Application is inadmissible if more than 15 calendar days have expired since the applicant has received a notification from the contracting authority that it is unwilling to redress the tenderers objection he made in his complain/notification (see page 6).

# Initiation of review proceedings

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- Applicant (= usually an unsuccessful tenderer) submits the application in writing to the PP-tribunal
- **No ex officio initiation** of review proceedings
- No lawyer required in the 1<sup>st</sup> instance, but in the 2<sup>nd</sup> instance
- Minimum fee: 2.500.- € for contract value 80.000.- €, maximum fee 50.000.- € (7.000.000.- € and more)
- The fee should not be prohibitive!

# First actions to be taken by the PP-tribunal

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- PP-tribunal shall review the application for manifest inadmissibility or unfoundedness
- Unless the application is clearly inadmissible or clearly unfounded, the PP-tribunal shall serve a copy thereof upon the contracting authority (usually by fax)
- The PP-tribunal also requests from the contracting authority the files documenting the procurement procedure (**award files** or **USB stick** in case of electronic award process)
- Contracting authority shall immediately make the award files available to the tribunal (standard time limit: 1 week)

# Suspension of the procurement procedure

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- High level of legal protection for the applicant`s rights due to the **automatic suspension** of the procurement procedure:
- If the PP-tribunal informs the contracting authority in writing about the application for review, the contracting authority **must not make the award** prior to the decision of the PP-tribunal and before the expiry of the time limit (2 weeks) for a complaint in the 2<sup>nd</sup> instance.
- In case of award contrary to the suspension: contract is **void** according to civil law rules (violation of a legal ban makes a contract void; automatic suspension is a legal ban)

# Review proceedings: Open to any public contract?

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- No! Historic development of PP-law in Germany: PP-law was regarded as part of **budget law** until 1999
- German PP-law is divided into two parts, regulated by different substantive law, different judicial control:
  - **Below the European thresholds:** PP-law is still part of budget law → no right for tenderers to have the provisions of substantive PP-law to be applied; civil courts are in charge
  - **Above the European thresholds:** substantive law according to the European Directives; most efficient review procedure; PP-tribunals are in charge
- Review proceedings **only admissible for contracts above thresholds**

# Review proceedings: Open to any economic operator?

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- Review proceedings don't serve an objective legal control of award procedures
- Scope of review proceedings: to ensure that the right of tenderers to have the provisions concerning the procurement procedure are complied with is not infringed
- Therefore only an undertaking that
  - has an interest in the public contract
  - claims that it's rights were violated by non-compliance with the provisions governing the award procedures
  - shows that it has been or risks being harmed by the alleged violation of public procurement provisionshas the right to file an admissible application.

# Review instances

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## Review bodies:

- 1<sup>st</sup> instance: Public Procurement Tribunal (at Federal or State level) – *Vergabekammer*; part of administration → court only in a functional sense in the 1<sup>st</sup> instance
- 2<sup>nd</sup> instance: Higher Regional Court – *Oberlandesgericht*
- No regular 3<sup>rd</sup> instance → diversified jurisdiction on PP-law.

Exception: If a Higher Regional Court intends to deviate from the decision taken by another Higher Regional Court, it shall refer the matter to the Federal Court of Justice, what in practise the Higher Regional Courts try to avoid!

# Public Procurement Tribunals I

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- Consist of three members per case
  - Chairman
  - Associate member (case handler)
  - Honorary associate member (proposed by German head organisations of chambers of commerce/industry)
- Independent in exercising their functions



# Public Procurement Tribunals II

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- At Federal level:
  - 1<sup>st</sup> and 2<sup>nd</sup> Federal Public Procurement Tribunal at the *Bundeskartellamt* (case allocation according to incoming)
  - Responsible for public contracts of the Federation and respective contracting entities
- At State level:
  - One or more public procurement tribunals in each State (*Land*)
  - Responsible for public contracts of the States (*Länder*) and municipalities and respective contracting entities

# Investigation of the facts

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- Public procurement tribunal investigates the facts, especially examines the award files, ex officio (principle of judicial investigation)
- Right Parties (applicant, third parties admitted) can apply for access to the files regarding the award files – except for business secrets (e.g. tenders of competitors) or other secret information

# Further procedural steps

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- Admission of third party/ies to the proceedings
  - Companies whose interests are severely affected by the final decision must be admitted: company that is supposed to get the award, because it`s economic interests are severely affected by the application
- Exchange of written submissions between the parties
- Oral hearing
- Final decision: short time limit of 5 weeks, to avoid undue delay of the award process, but extension possible in difficult cases
- Appeal within 2 weeks; no time limit in the 2<sup>nd</sup> instance
- Binding effect of the decision for actions for damages

# For further information

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File Bearbeiten Ansicht Chronik Lesezeichen Extras Hilfe

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www.bundeskartellamt.de/EN/Publicprocurement/Furtherdocuments/Furtherdocuments\_node.html

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## Further information and documents

The following information on legal protection in the award of public contracts applies to award proceedings which began on 24 April 2009 or later, including subsequent review proceedings:

- Information leaflet on the legal protection available in the field of public contracts
- Checklist for application for review

In its [Activity Reports](#) the Bundeskartellamt also provides extensive information on the legal protection available in award procedures for public contracts.

Information brochure

The Bundeskartellamt in Bonn (PDF, 2MB)

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Thank you for your attention!



Gabriele Herlemann

Bundeskartellamt

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