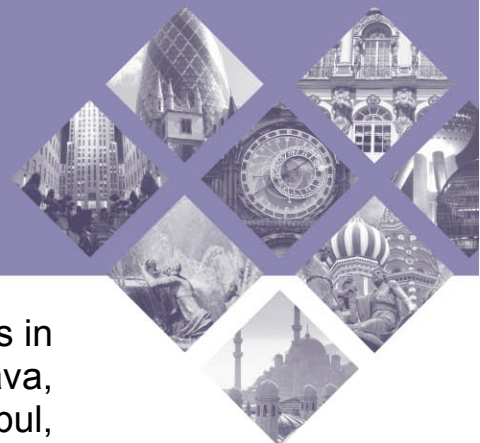


Salans LLP

Current Public Procurement Law



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Act on the Modernisation of Public Procurement Law is in Force

Public procurement law on the advance

Public procurement law is becoming more and more present in areas which until recently were considered as being completely free from public procurement restrictions.

Such an area is, for example, the healthcare sector. The European Court of Justice confirmed in its judgment from 11 June 2009 (C-300/07) that state health insurance funds are public authorities for the purposes of public procurement law. In the case of rebate contracts or other contracts (e.g. relating to provision with medical appliances) of the state health insurance funds with pharmaceutical companies, public procurement rules are therefore to be observed. Another area, which was subject to a great deal of discussion last year, concerns property transactions involving public bodies. The German legislature has now tried to smooth ruffled feathers by providing a more precise definition of the term "public contract". Whether or not the new rule will survive the scrutiny of the European Court of Justice is questionable, however.

The financial crisis has also contributed to the fact that the area of application of public procurement law is being reviewed. Thus,

thoughts are being formulated as to whether or not, as a result of the state rescue package which has been made use of (bank rescue package) and the accompanying influence and control possibilities for the SoFFin (Special Fund for Financial Market Stabilisation), public, and also private, banks are to be considered as contracting entities within the meaning of public procurement law. A further aspect of the financial crisis which has a reciprocal effect on public procurement law is the second economic stimulus package. The Federation and the federal provinces have simplified public procurement law for a limited period of time by increasing the value limits for restricted calls for tenders and single tender actions.

Last but not least, recently, contracting within a state organisation has time and again entered into the area of public procurement law (under the header: intercommunal cooperation). The European Court of Justice has however recently restricted the area of application of public procurement law in this domain; see the judgment from 9 June 2009, C-480/06.

In view of the vastly increasing importance of public procurement law, public contracting entities and bidders have to know about the extent of public procurement law. For this it is necessary for the contracting entities and bidders to be aware of the numerous changes made to public procurement procedures and the award review procedures which were brought about by the Act on the Modernisation of Public



Procurement (“**GWB 2009**“) which came into force on 24 April 2009. Some of the most important new rules are set out in the following overview:

Support for medium-sized businesses and criteria not related to public procurement (vergabefremde Kriterien)

One aim of the reform is the strengthening of medium-sized businesses. This is why in Sec. 97 GWB there is now an obligation on contracting entities to support medium-sized businesses by subdividing contracts according to quantity and type into trade-specific and partial lots. Combined public procurement comprised of several trade-specific and partial lots requires justification on the basis of economic or technical reasons. In this way, it should be easier for medium-sized businesses to become involved in large public contracts.

Sec. 97 GWB now provides for the possibility of the bidders being subject to additional social, environmental or innovative requirements as part of the bidding procedure. These requirements have to have an objective connection with what is being procured, however. Ultimately, the contracting entities are to make greater use of the functional notice so that bidders have the opportunity to offer their own innovations. The opening up of public procurement law for purposes which are not related to public procurement (*vergabefremde Zwecke*) has however met with criticism in many areas of business due to the feared considerable bureaucracy burdens for the bidders and the dangers of a lack of transparency and of abuse.

Public contracts – sale of communal property

One of the most significant changes which was undertaken by the legislator is the revision and extension of Sec. 99 GWB on the term “public contracts”, in particular in respect of “works contracts” and “works concession”. With this measure, the considerable legal uncertainty which had arisen as a result of differing case law is to be removed. For the past one and a half years it has been disputed in both case law and legal articles as to whether or not public property sales which are connected with urban development measures are subject to public procurement rules. This discussion was provoked by the so-called “Ahlhorn” case law of the Higher Regional Court (OLG) Düsseldorf, which interpreted “works contract” and “works concession” very widely, based on case law from the European Court of Justice and provisions of the public procurement directives. The legal uncertainty which arose had the consequence that many communes refrained from acting on their intentions to sell.

Even if the sale of communal property to private investors is not subject to the duty to call for tenders under the new statutory rules, the legal uncertainty remains because it is questionable whether or not the new rule is compatible with EU law. Clarity will not arrive before the decision of the European Court of Justice is made in the pending preliminary ruling referral made by the Higher Regional Court (OLG) Düsseldorf on 2 October 2008.



Pre-qualification systems

Public contracting entities have to ensure that contracts are only awarded to skilled, efficient and reliable bidders. The examination of the relevant documents is often extremely complex and time-consuming. The preparation of the documents can also represent a large effort and use of time for the bidders. In order to achieve the provision of proof of suitability, the Act now provides for the use of pre-qualification systems by public contracting entities. Previously this was only permitted in the area of construction. Bidders which do not want to go through the pre-qualification procedure can still present their suitability by means of the proof required in the bidding documents.

Prior information and waiting duties / invalidity consequence

The duty to inform bidders which have not been successful and the duty to respect the subsequent 14-day period of silence already existed in German public procurement law prior to the reform. There are however now amendments to the period of silence which is now ten or 15 calendar days depending upon which means of communication was used to send the prior information. Amendments have also been made to the circle of addressees and the contents of the prior information in Sec. 101a GWB.

It is particularly important to highlight the fact that a breach of the prior information duty no longer leads to nullity of the contract per se. In order for there to be nullity there now not only needs to be a breach of the prior information obligation, but also the breach

needs to be ascertained in award review proceedings. Until such time, the contract displays its (preliminary) validity, which can lead to practical problems. Here, the time limits for commencing award review proceedings, laid down by the legislature in Sec. 101 b GWB, have to be carefully monitored.

Objection duties and exclusion period for subsequent review made stricter

If a bidder wants to challenge a breach of the provisions governing the awarding of public contracts, the bidder first of all has to object to the breach without undue delay during the award procedure following his obtaining knowledge of the breach. Breaches which are not objected to without undue delay and delayed objection to public procurement breaches recognisable from the notice already led to the loss of the remedy under the rules in force until now.

In the new Sec. 107 para. 3 GWB, the bidders' objection duties are made noticeably stricter. The breaches which are recognisable from the procurement documents have to be objected to at the latest by the expiry of the period for submitting tenders laid down in the notice or at the point in time of the bidder submitting a tender. Thereby the examination obligations are considerably augmented and the time requirements have been formulated more strictly. Moreover, a further exclusion period for the review of the awarding of public contracts by public procurement tribunals was introduced. The bidder is now obliged to submit a review application to the public procurement tribunal within 15 calendar days following receipt of a notice from the



contracting entity which rejects the objection. If the bidder misses this period, the bidder's objection can no longer be enforced in later award review proceedings.

The fact that the objection obligation has become stricter requires greater awareness from undertakings from the phase of the preparation of tenders onwards. The undertakings may have to make a decision at a very early stage of the public procurement procedure as to whether or not they want to seek a remedy from the public procurement tribunals.

De facto public procurement

In certain economic branches the phenomenon of so-called de facto public procurement, whereby the contracting entity awards a contract directly to an undertaking in breach of the public procurement rules, is still very widespread. Until now, the problem of de facto public procurement was not explicitly statutorily regulated, meaning that there was a need to deal with and make do with a good deal of in part contradictory case law.

Sec. 101b para. 1 No. 2 GWB now clarifies that public procurement without the carrying out of an award procedure is void from the outset if the breach has been determined in award review proceedings. In such cases there is no need for a prior objection. However, the exclusion periods must also be noted here: the application for review proceedings has to be made within 30 calendar days of having knowledge of the breach, but in any case not later than six months following the conclusion of the contract. The short period of 30 calendar

days also applies if the award of the contract has been published beforehand in the Official Journal of the European Union.

The public contracting entities should now therefore be more cautious and conscientious in deciding whether or not there has to be a public procurement procedure. In cases of doubt they should decide to carry out a formal public procurement procedure. Potential bidders, for their part, have to act quickly because, in contrast with the previous situation, they now only have a maximum of six months in order to challenge de facto public procurement. Legal uncertainty still exists in respect of the rescission of a void contract in terms of the relationship between the contracting entity and the bidder. The new Act is silent on this.

Cost of proceedings before the public procurement tribunals

The minimum fee for the public procurement tribunals – in contrast to what was stated in the interim – remains the same at EUR 2,500.00. However, the limit for costs in the public procurement tribunals was raised from EUR 25,000.00 to EUR 50,000.00; for extreme cases even to EUR 100,000.00.

In the case of the withdrawal of an application for review proceedings by the applicant, the applicant now has to reimburse the necessary expenditure incurred by the respondent and interested third parties admitted to the proceedings for their corresponding legal defence.



Further new rules in relation to the cost of proceedings enable the public procurement tribunals to decide on who bears costs in accordance with fair discretion and therefore in a more flexible way.

Further reforms of public procurement law – prospects

With the coming into force of GWB 2009, an important part of the public procurement law reform has been carried out. However, further reforms to the waterfall-structured

area of public procurement law are still to come. In the meantime, however, there is the election of the members of the German federal parliament in autumn. A renewing of the Regulation on the Award of Contracts (VgV) should no longer be anticipated in this legislative period. The same applies to the Contract Award Rules for Supply and Service Contracts, for Construction Contracts as well as for Self-employed Contracts (VOL/A, VOB/A und VOF) and to the planned Sector Code (*Sektorenverordnung*).



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