



Public Procurement Litigation in Germany

What rights do bidders have?

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You are participating as a bidder in an EU tender and want to make sure that you do not make any mistakes in form or content. You may have received a rejection letter or your bid may have been excluded from the tender. Now the question arises as to what rights you can assert. You might be of the opinion that the procedure was carried out incorrectly. You fear that you have been discriminated against. You would like to take action against this. But how do bidder remedies work in Germany?

1.

First of all, you must notify the contracting authority of the infringement of procurement law. The complaint must be made as soon as possible after becoming aware of the error. It is therefore advisable to check the award documents carefully for possible errors.

2.

If the contracting authority does not rectify the complaint, you can file an application for review with the competent procurement chamber. In the application for review, you must explain to what extent you have suffered damage as a result of the violations of procurement law. You should explain that you had a real chance of being awarded the contract, but that this chance has been diminished by the errors in procurement law.

3.

Regarding the request for review it is necessary to enclose the following documents, among others, with the application for review: Copies of the tender documents, copy of the letter of reprimand as well as position statements of the contracting authorities (if available), copy of the preliminary information letter of the contracting authority.

4.

Deadlines apply to the submission of the application for review: if the contracting authority has already sent a rejection (Section 134 GWB), the bidder must submit the application for review within 10 days of the rejection being sent. If no rejection has been sent but the bidder's complaint has been rejected, the application must be filed within 15 days after the rejection of the complaint (Section 160 (3) no. 4 GWB).

5.

The review procedure is an expedited procedure. The law provides for a five-week period (Section 167 GWB). Within this period, not only an oral hearing must take place, but also the written statement of reasons must be submitted.

6.

If the Public Procurement Tribunal receives an application for review, it first examines whether it is manifestly inadmissible or unfounded. This may be the case, for example, if the bidder simply claims that no competitor can offer more favourably than him. As a rule, however, the board will forward the request to the contracting authority and issue a "prohibition to award". This means that the awarding authority may not award a contract. If it does so, the award is invalid.

7.

The Procurement Chamber then requests the files from the contracting authority. Once the award file has arrived at the chamber, the complaining bidder is granted access to the file (Section 165 GWB). Today, this inspection is usually granted electronically by the chamber sending a PDF file.

8.

Subsequently, the parties exchange written pleadings. The Procurement Chamber sets tight deadlines for these pleadings, usually only a few days. In addition, the chamber informs the parties when the oral proceedings will take place.

9.

The chamber is composed of the chairperson and two assessors, one of whom is a fully qualified lawyer, the second should have relevant technical expertise. The chair shall also be occupied by a fully qualified lawyer. All arguments shall be presented at the oral proceedings. As a rule, the Board publishes a decision with reasons soon after the oral proceedings.

10.

Both parties may appeal the decision of the Public Procurement Tribunal to the competent Higher Regional Court within two weeks by means of an "immediate appeal" (Section 171 GWB). The Higher Regional Court also decides only after oral proceedings and an exchange of pleadings. This is also an urgent procedure, i.e. the court makes its decision within a few weeks.