Title: Procurement Law in Germany

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Section 1 Introduction

1. Commercial Relevance

The commercial relevance of government procurement is immense: More than €1,500 Billion in government contracts will be assigned in the European Union – comprising about 16% of the GDP of the EU. In Germany the share is slightly higher with government procurement representing 17% or €352 Billion, which is an essential economic factor. The IT budget alone comprises approximately €18 Billion. This same sum was the amount issued by the German government in the 2010 Economic Stimulation Package.

In the opinion of the OECD, this is by far not enough for the maintenance of an efficient and modern European infrastructure. Instead the OECD estimates that approximately $53 Billion USD is required until the year 2030. From the viewpoint of the OECD, an efficient and modern public infrastructure is an essential prerequisite for the social development of a company. Such an infrastructure also creates an important advantage in regional competition (*see* OECD, Infrastructure to 2030, Paris 2007).

The government sector cannot reach this goal alone. In many areas it relies on procurement for outsourcing construction and maintenance of the public infrastructure.

This begs the question: what rules direct the government sector if it awards a government contract to a private entity? Obviously specific rules are needed for government procurement. If the government sector – like the private civil sector – were free to award contracts at its discretion, then a system of preferred suppliers would develop. In this system only a small circle of market participants would be considered and there is a significant danger that government procurement would be inefficient as a result. Tax money would be wasted and would then be unavailable for essential infrastructure measures. Consequently, special legal provisions for the process of awarding contracts are necessary.

Regulation of the process of awarding government contracts also has the task of streamlining procurement measures so that an efficient and modern public infrastructure can be provided.

In addition, the merchandise, transportation and service freedoms provided in Art. 28 ff. AEUV apply to government contracts. Therefore, uniform regulations concerning how these contracts can be procured are needed so that government contract bidders from other member states can put forth offers and participate.

Specific rules regulating the awarding of government contracts are needed not only because a substantial danger for inefficiency would exist otherwise, but also because there is a danger of bad faith usage. Only when procurement is subject to ascertainable, transparent, non-discriminatory and objective criteria can corruption be effectively prevented. There is a direct relationship between unrestricted freedom for corruption and the quality of public infrastructure; in Transparency International's 2010 Corruption Perceptions Index (www.transparency.org/policy-research), Singapore, Denmark and New Zealand collectively held first place – all are countries which simultaneously possess an outstanding public infrastructure.

Section 2 Competition as a Basic Principle of Procurement Law

The organization of competition in government procurement has been recognized as an effective instrument in the pursuit of the above-mentioned regulatory goals. Just as competition in the private civil sector is an effective means for bringing together optimal supply and demand, competition is also suited for the procurement of government contracts that furnish merchandise and services to demanding countries.

Accordingly, procurement law sets forth a set of rules for the organization of competition contests. Such provisions additionally help to provide a necessary distinction between state procurement and state activity on the one hand and private procurement on the other.

Procurement law thereby presents itself as a hybrid legal theory. Apart from procedural rules, procurement law provisions contain regulations concerning how contracts between governmental and private entities are to be concluded. Such a contract is, at least in Germany, subject to civil law and not governmental law aspects (*see* The Federal Constitutional Court, on 13.06.2006, Az.: 1 BVR 1160/03).

The essential basic principles for the execution of contract procurement procedures are those of **transparency** (*see* § 97 Abs. 1 GWB) and **non-discrimination** (*see* § 97 Abs. 2 GWB).

The basic principle of transparency requires, for one, the **disclosure of decision-making bases** for bidder selection as well as comprehensive **documentation** of the selection decision in case of court review.

The basic principle of non-discrimination requires that the allocating party give all bidders the **same procedural treatment** with regard to the assessment of offers and the provision of information.

Government contracting entities continually search to base their procurement activities and criteria on regulatory goals. In Germany such activity is legally anchored in **SME (small and medium enterprise) support** (*see* § 97 Abs. 4 GWB). Social, environmental and innovational considerations can also serve as bases for selection criteria (*see* § 97 Abs. 4 GWB).

Hereby, government procurement can open the door for accomplishing political industrial objectives. One hopes that in this way, considerable economic growth in certain industries or particular socio-political objectives can be bolstered in the national economy.

Obviously, the implementation of the described objectives can conflict with one another. For example, the principles of efficiency and competition can conflict when both the client and the bidders incur significantly higher costs than would be required as a result of a direct award.

Here the guiding ecological and social principles for procurement can be inefficient for the government sector, although this need not always be the case. Conflict can also be seen when maximal transparency in the award process contradicts the confidentiality requirement and the principle of secret competition (for details see Pünder/Schellenberg, *Vergaberecht*, 2011, § 97, Rn 49 ff.).

Section 3 History

The current legal rules for government procurement in Germany date back to the 1920s. At that time so-called “Contract and Procurement Committees” were formed. Together, these committees represented different governmental ministries as well as the private civil landscape, and they developed general contractual terms for government construction contracts. The participants in this early regulatory framework agreed upon rules for the allocation of contracts from the government sector to the private civil sector.

Hence, the German Contracting Rules for Construction Contracts (***Verdingungsordnung für Bauleistungen (VOB)*)** emerged first. With its procedural section (VOB/C), substantive contractual section (VOB/B) as well as technical rules (VOB/C), today the VOB forms the foundation for government construction contract procurement. The substantive contractual section (VOB/B) carries through into private civil construction as well and is accordingly used for contracts between private builders and contractors.

In the 1960s the corresponding German Contracting Rules for Terms and Conditions (***Verdingungsordnung für Lieferungen und Leistungen (VOL)***) were conceived. The VOL regulations were subdivided into VOL/A, containing the procedural rules, and VOL/B, containing substantive contractual obligations. Sometime later came the German Contracting Rules for Freelance Contracts (***Verdingungsordnung für freiberufliche Aufträge (VOF)***). It only contained procedural rules and did not provide any substantive contractual rules.

Procedural regulations were developed by these Contract Committees for the execution of government contract procurement at the national, state and municipal level. Explanations for government budget codes, award laws, and obligatory guidelines were also given.

Budgetary considerations were decisive. From the viewpoint of budgetary law, government procurement regulations needed to serve the principles of efficiency and frugality. Procedural rules, therefore, had to be formed to enable the government sector to efficiently and inexpensively procure supplies, services and construction assistance. For this, the law needed to reflect a necessary knowledge of the market to adequately assess performance and price. It had to properly describe performance and have the contractor agree accordingly.

An important component already present in this system was the competition between various offers. It should be noted, however, that the system evolved with hardly any bidder protections. The government sector neglected to create rules for damages. In Germany until the year 1999, an unsuccessful bidder was unable to pursue a claim on the basis that competition procedures were thwarted and a direct award was given instead. A complaint was only conceivable on the basis of compensation. In such a case, the unsuccessful bidder was required to prove that the contract would have been favorably awarded to it. This was only possible in the rarest of cases.

The situation decisively changed in 1999 with the implementation of the EC Directives on the allocation of government contracts (**Directives 2004/18/EG, 2004/17/EG and 89/665/EWG**). These directives contained procedural regulations for government contract procurement in construction, supplies and services.

Unlike the German law, the EU Directives were not built upon the principles of efficiency required by budgetary law. Rather, the Directives were implemented to serve the purpose of creating a uniform domestic market and to promote the free-flow of goods and services between member states. Because the economy of member states consists to a considerable degree of government procurements, it was logical to create uniform rules for this purpose. The idea was that companies of

one member state should not be restricted from bidding on a government contract in another member state simply as a result of different procedural rules.

Another component of this “opening” of the government procurement market, which was further anchored in the Directives, was the advertisement of a tender offer throughout Europe. The EU standardized a platform for this purpose in the Official Journal of the EU, both published in hardcopy and electronically.

Perhaps the most important directive was that which imposed a disclosure obligation upon governmental contracting entities to inform all procurement bidders of a successful bidder’s identity and provide an explanation of the decision **before** making an award. With this, a duty was imposed upon member states to provide effective **legal protections** for unsuccessful bidders in cases of illegal award decisions.

The EU establishes regulatory thresholds to ensure that only awards of economic importance are given system protections. Meeting such thresholds necessitates the taking of further actions, such as making an EU-wide invitation to bid and adhering to other procurement rules and corresponding protections.

The height of these thresholds are determined on the basis of so-called “special drawing rights” and were developed against the backdrop of the 1996 EU **Government Procurement Agreement (GPA) -** by which the EU committed to the imposition of suitable regulations for all its member states. Special drawing rights are used to affix threshold values into the monetary systems involved.

In 2011, threshold values for construction contracts will amount to €4,845 Million and for delivery and service contracts €193,000 (VO/EG/Nr.1177/2009 from November 11, 2009). Additionally, for so-called sector contractors - those contracting in areas pertaining to water, energy supply systems and transportation - special thresholds exist if the contract comes from an uppermost federal authority.

Section 4 An Overview of Procurement Award Procedure

1. Definition of Demand

Before an award procedure can be initiated, the governmental entity must know **what** it is seeking to procure. Herein related are the budgetary resources to which the entity is bound. It is not sufficient to identify needs by simply denoting “police vehicles,” “city hall annex” or “telecommunication system,” for it is well-known that the quality and performance of goods is highly varied. Also of significant impact are the rights and duties of the parties as defined by the contract.

The submitter, therefore, does more than just develop service performance quality requirements, indeed it also considers other factors such as the type of delivery. For example, the submitter can decide whether a contract will be for continued services or for a one-time delivery. Moreover, the submitter defines service guarantees and possible maintenance obligations.

The definition of demand is often accompanied by a market survey. The submitter can accomplish this either by executing formal testimony procedures or by conducting informal inquiries of well-known market participants.

2. Tender Documents

After the definition of demand, the submitter creates a **description of services**. A description of services properly fulfils the abovementioned requirements of transparency and non-discrimination if it **unambiguously** and **thoroughly** describes the expected services in such a way that all bidders can, in the same sense, understand them and thereby generate comparable offers (*see* § 8 EG Abs. 1 VOL/A, § 7 Abs. 1 VOB/A).

Hereby is the submitter also required to conform its technical requests to European standards to the greatest extent possible. This is required in order to help prevent the creation of requests that are tailor-made to a single bidder and to promote competition (*id*.).

The submitter must also affix the basic requirements of the contract to the description of services. If the contract concerns construction or civil engineering, then formulated

agreement terms and conditions are regularly applied (*see* VOB/B as well as the conditions contained in the Federal Ministry of Transport Handbook, *Bundesministerium für Verkehr*).

With regard to supplies and services the standards are less pronounced, for example with vehicles, cleaning and surveillance. Here different contract rules are used for different contracting entities. However, IT procurement is an exception to this, as the federal ministry, in collaboration with industry associations, has designed a standard set of contractual rules for IT contracts (*see* EVB IT, http://www.evb-it.de/pages/frame_a.html).

In addition to the above, the submitter must determine how it will value the offers. For this the submitter must affix **a ratio between price and service** and must determine by which evaluation criteria the services will be judged.

Furthermore, the submitter must conform to certain rules of performance. The duration for which offers can remain open, specifications as to what documents are to be produced, the admissibility of alternative offers as well as legally-required information, are all within the province of supervisory authorities. In fact, VOL/A and VOB/A both contain relevant regulations concerning the proper procedural course. A strict focus of these regulations is on complex infrastructure procurement, although considerable latitude in the practical application of these procedural rules must be exercised.

All named documents are then summarized in the **"Tender Documentation**."

3. Documentation

In this phase of the procedure the submitter must create the so-called **Award Documentation**. Therein included are all essential procedural decisions, which are documented in such a way so as to be understood by an external inspector. The documentation is not an end in itself, rather, it is in place in the event the procedure

is reviewed to assess whether an award decision was made on the basis of objective, transparent and non-discriminatory criteria (*see* Art. 43 VKR).

In a procedural review, any documentation deficiencies concerning these factors will necessitate repetition of the entire procedure, from the date the contract was executed to the date the defect was discovered (OLG Celle from Feb. 11, 2010, Az.: 13 Verg 16/09). Rehabilitation of the documentation at a later time is not permitted (*see* OLG München from Dec. 19, 2007, Az.: Verg 12/07).

4. Procedural Options

Before an announcement can be published, the submitter must determine the type of procedure to be used. First, it must be determined whether or not the prospective threshold of the contract's value will necessitate **publication of the announcement throughout Europe**.

If submitter subdivides the contract into different **lots**, as provided in § 97 Abs. 4 GWB, the threshold value will not be calculated on the value of each lot, but on the value of the lots as a whole. An artificial subdivision of the contract for the purpose of lowering the contract value below the regulatory threshold is not permitted (*see* § 3 Abs. 2 VgV).

Moreover, the submitter must establish whether an **exception** applies that would remove the obligation to make an announcement or would reduce the necessary scope of an announcement. This can be seen, for example, in the procurement of security telecommunications networks for the police or army (*see* § 100 Abs. 2 d) GWB), or when specialized technical services are only able to be produced by a particular supplier (*see* § 3 EG Abs. 4 c) VOL/A; *cf.* Chapter 2.3).

Basically, **four types of procedures** are available to the submitter. These include an **open procedure**, a **restricted procedure**, a **negotiation procedure** and a **competitive dialogue** (*see* § 101 GWB).

The submitter is not free however, to select the type of procedure. Generally, the submitter must employ the open procedure. The other types of procedures are only applicable when an exception applies. (*see* § 3 EG Abs. 1 VOL/A). The open procedure requires the submitter to provide the same contracting and supporting documents to all interested parties. It also requires the submitter to assess the suitability of the bidder as well as the quality and price of the offer after receipt of the offers without any further intermediate steps (*see* § 101 Abs. 2 GWB).

The restricted procedure differs from the open procedure in that it is arranged in two stages. First, a prequalification competition is announced and carried out, then those applicants making it past prequalification are requested to submit an offer. Only the restricted group making it past prequalification is provided the tender documents in their entirety.

The prerequisites for the application of this procedure are relatively easy to meet: the restricted procedure is allowable if it is certain from the start that only a restricted group can fulfil the order, or if the creation of the offer would otherwise require the submitter to bear a disproportionate expense. These are easily fulfilled in the case of any complex assignment of tasks. As a rule, large construction proposals or complex IT projects can only be mastered by a limited group of businesses. Moreover, considerable expense would be incurred if an open offer were required. To prevent this, the prequalification procedure was put in place to rule out inappropriate businesses for the offer.

No considerable restriction on competition is present here. Indeed, a restricted procedure requires a Europe-wide notice be given, thereby giving all interested parties the ability to submit an offer for performance. In the two-stage process, both the bidders and the submitters are saved the expense of extra charges associated with offer creation and bidder evaluation, costs that would unnecessarily result if bidders who have no chance to receive the award from the beginning - based on their qualifications - are included.

The negotiation procedure on the other hand is only exercised in legitimately exceptional cases (*see* § 101 Abs. 5 GWB) and is applicable when the very nature of the contract means that there are risks associated with any prior establishment of a total price. Such risks do not allow for full disclosure (*see* § 3 EG Abs. 3 b) VOL/A). This procedure may be used if the submitter is not in a position to precisely determine the description of services with the contractual specification needed for bidders to put forth comparable offers (*see* § 3 EG Abs. 3 c) VOL/A). As with the above-mentioned exceptions, the reasoning is the same: a contract is so particularly complex that the submitter is unable, despite maximal efforts, to develop a clear and comprehensive description of services. As a result, the process is instead directed at the joint development of a description of services together with bidders.

Jurisprudence places high demands on the legitimacy of negotiated procedures, requiring adherence to enumerated provisions. Before the negotiation procedure can be chosen, the submitter is expected to make use of outside resources in ascertaining and detailing the description of services. Only when the submitter is incapable of doing this as a result of the order's uniqueness may it select the negotiation procedure (*see* OLG Hamburg from 24.09.2010, Az.: 1 Verg 2/10).

The negotiation procedure may be implemented in the event an open procedure, restricted procedure or competitive dialogue are cancelled because no valuable offers were submitted (*see* § 3 EG Abs. 3 a) VOL/A).

Lastly, the competitive dialogue is a form of procedure that is more strongly structured than the negotiation procedure. It is conducive to particularly complex awards (*see* § 101 Abs. 4 GWB) and is only allowable if the submitter is not in an objective position to describe the request in a technical, legal or financial regard (*see* § 3 EG Abs. 7 VOL/A). Therefore, the prerequisites for the application of this form of procedure are essentially similar to those in the negotiation procedure.

5. Publication

Once the submitter has selected the procedure and prepared the corresponding documents, the announcement can be published. With Europe-wide announcements,

the submitter does so via a European Commission form and electronic announcement on the European Commission's online platform (http://ted.europa.eu/TED/main/HomePage.do).

The form contains details about the submitter as well as details about the contract to be awarded. To ease translation, the subject matter and items of the award are systematically arranged by CPV (Common Procurement Vocabulary) Codes.

The demands required of applicants and for offer submission must also be listed on this form. With an announcement not subject to the open procedure, it is sufficient to simply list the eligibility criteria. With the open procedure, award criteria and evaluation criteria must be indicated. In practice, a separately provided document is regularly used for this purpose. This document will contain all of the tender materials named above, including the description of services, contract-, eligibility-, and award criteria, as well as the procedural determinations applicable in the open procedure. In the restricted procedure, the contracting entity may restrict the definition of procedural rules and eligibility criteria (*Id*.).

At this stage in the process the negotiation procedure and the competitive dialogue are treated differently than the open procedure because the eligibility of an applicant must be tested first. A separate, non Europe-wide publication step occurs whereby the selected applicant then receives the remaining tender documents.

A publication contains the pertinent time period for participant applications and offers to be submitted. As a basic principle, 52 days are planned for this procedure (*see* § 12 EG Abs. 2 VOL/A). In exceptional cases a reduction is possible.

Finally, a publication should also indicate which entity is **legally responsible for the procurement's protection**. One all of this has been satisfied, the applicable time limitation periods for the lodging of legal grievances begin running (such as a petition for procedural review).

6. Bidder Requests

In practice, bidder questions already arise during the first phase of participation and offer creation (depending on whether an open procedure applies). A submitter is well-advised to answer such questions in a prompt manner to ensure that it will properly receive qualitatively high-value proposals and offers.

To enhance transparency and the equal treatment of bidders, questions and answers must be made available to all interested parties. In order to avoid a renewed publication, it is recommended that a registry of all interested business parties be created. Bidder questions and answers can then be circulated via E-mail or through a comparable internet platform by using this registry.

At the end of the applicable time period, and after submission of the proposals and offers, the submitter enters into the evaluation phase. This occurs whether or not the open procedure applies. In the negotiation procedure and in the competitive dialogue, further development of the description of services is carried out jointly with bidders through a structured round of talks. Following these talks and corresponding revision of the tender documents, bidders are requested to submit a final binding offer.

7. Evaluation of Offers

The evaluation of offers must be conducted on the basis of well-known **award criteria**. Any retroactive changes are impermissible at this point (*see* EuGH from 09.12.2010, Rs. C-568/08). The process of evaluation s documented in the contract award report.

The submitter is required to inform unsuccessful bidders of the identity of the chosen bidder. The submitter must identify both to whom the award was given as well as enumerate what factors were decisive in the decision (*see* § 101 a) GWB).

After the dispatch of this information, unsuccessful bitters have fifteen days - or ten days in the case of electronic transmission - to bring forth a challenge against the award decision (*see* § 101 a) S. 2 GWB). If the submitter issues the award before the

expiration of this time period, then the contract will be invalid (*see* § 101 b) Abs. 1 Nr. 1 GWB).

If no such bidders advance any claims challenging the award decision or if such attacks are unsuccessful, then the award can be given.

8. Required Notification of Defect

Bidders who are of the opinion that the submitter violated a valid right and that they were thereby handicapped as a result, are first obligated to formally address the issue with the submitter (*see* § 107 Abs. 3 GWB). Such a notification is only effective if it identifies the particular offense and requests the submitter to remedy the issue. A notification of this nature need not be in writing; it can also be made orally.

The purpose of this notification is to give the submitter the possibility to timely correct award defects so that the procedure need not be interrupted. German law requires that notification be given immediately after recognition of the offense; or at the latest, at the time the offer is given. This presupposes that the offense is generally recognizable, which is not the case, for example, if the submitter defectively appraised the bidder's offer. Such an offence would only first become recognizable to a bidder in the award memorandum.

By way of a European Court of Justice decision (*see* EJC from 28.01.2010, Rs. C-406/08) it became doubtful whether the German Law's enumerated requirement of "immediacy" was sufficiently definite. The decision of the European Court of Justice concerned a similarly-phrased requirement in Irish Law. As a result of the case, the German judicature came to the conclusion that the immediacy requirement was until further notice no longer effective (*see* OLG Celle from 26.04.2010, Az.: 13 Verg 4/10; cf. VK Bund from 05.03.2010, Az.: VK 1-16/10; OLG Dresden from 05.07.2010, Az.: W Verg 6/10; OLG Rostock from 20.10.2010, Az.: 17 Verg 5/10).

If the submitter declines to address the bidder's notification of defect, the bidder then has 15 days to file a petition for review with the Procurement Chamber (*see* § 107 Abs. 3 Nr. 4 GWB). This is certainly not the case if the bidder already received

notification from the submitter that the award was to be given to another bidder. In that case, the unsuccessful bidder must file a petition for review within a 10 or 15-day time period, which commences upon receipt of the submitter's identification of the successful bidder (*see* § 101 a) GWB).

9. Review Process

The Procurement Chamber is not legally viewed as an arm of the judiciary, but rather as a part of the administration. Regardless, it is legally independent (*see* § 105 Abs. 1 GWB) and has virtually developed as an independent institution standing outside of administrative influences. In the last few years, the separate Procurement Chambers of the German States have been nationally centralized. Therefore, for example, the Federal Anti-trust Commission is now responsible for all procurement in Germany. The earlier-used, more local means once available to submitters have been eliminated. Thereby, submitter attempts to exert influence over Procurement Chambers have been substantially reduced.

The three-member Procurement Chamber consists of one fully-qualified lawyer and two other chamber members. Usually one of these other chamber members is also a fully-qualified lawyer, while the second generally comes from the relevant field. For example, in a case concerning a cleaning contract the second chamber member would likely be a member of the Chamber of Skilled Trades (*Handwerkskammer*) with knowledge of the cleaning field.

A Procurement Chamber hearing is carried out as a **summary proceeding**. The Chamber usually makes a decision within five weeks of the petition's filing (*see* § 113 Abs. 1 S. 1 GWB). In especially complex cases this period can be extended.

After a petition for review is filed, it is first examined to determine whether the claim upon which it is based is clearly inapplicable or ill-founded. This can be the case, for example, if the bidder did not previously notify the submitter of the supposed offense before submitting the petition, or if the bidder's claims are obviously out of the blue and unsubstantiated, such as a claim that the award is defective because there is no possible way that another bidder could have put forth a more favorable price.

If the Procurement Chamber concludes at this stage of review that the petition is not clearly inadmissible or unfounded, then the petition continues forth against the submitter. At this stage the award process is effectively **enjoined** (*see* § 115 Abs. 1 GWB). The Chamber then requests the award documentation from the submitter. In order to prevent the submitter from having the opportunity to beneficially amend the documents, the Law requires that the award documentation be placed "**immediately**" at the disposal of the Chamber (*see* § 110 Abs. 2 S. 5 GWB). A maximum of 24 hours is given to produce the documents, which underlines the importance and urgency of this policy.

The Procurement Chamber then gives the parties involved an opportunity to **examine the records**. This applies not only to the petitioner, but also to „businesses whose interests could be heavily affected by the decision" (*see* § 109 S. 1 GWB). These are normally bidders who stand to gain something as a result of an award decision by the submitter. The ability to examine the records is not unlimited. Trade secrets of the bidders are to be respected, therefore, bidders must identify in their offers which information qualifies as confidential. Such information is then retracted and blackened out on the all of the copies provided in the examination of records.

Notwithstanding the above, it often so happens that a bidder with only a sparse claim makes use of the review process, during which the bidder is able to access to the award documentation and find circumstantial evidence of other rights violations which can be then be asserted after discovery. The bidder is not necessarily "precluded," from these claims on the basis that such defects were not disclosed to the submitter for self-remedy. This stand to reason because the offenses were only recognizable through an examination of the records, therefore a notification of the defect could not have been made prior. Accordingly, no duty to notify the submitter of such defects previously existed.

This process gives the parties the opportunity present facts in support of their legal positions once more before the matter is shelved.

The Procurement Chamber then submits the parties to an oral hearing (*see* § 112 GWB). It is frequently the case in such hearings that the parties present and support their positions for many hours, after which they have the ability to submit their legal arguments once more in writing. Doing so usually results in the inability of the procedure to be carried out within the generally-planned five-week period (§ 13 Abs. 1 GWB). The Procurement Chamber often makes use of the possibility to extend the decision deadline two weeks longer (*see* § 113 Abs. 1 S. 3 GWB).

The Chamber's decision and its reasoning are then established in writing. Therein it can reject the petition as either inadmissible or unfounded or it can uphold the petition as admissible and founded. It may simultaneously implement specific procedures, as long as the procedures are not tied to the bidder's proposal. The Chamber can, for example, mandate that the procedure be repeated from the time of the injury onward, or it can cancel the procedure altogether.

On the other hand, the Chamber my not mandate to whom the award must be given. A submitter cannot be forced to choose a particular bidder. Whether or not a contract will be concluded remains the sole province of the submitter, just as in the private sector. Also, the Procurement Chamber cannot order the payment of compensation (*see* § 114 GWB). However, it can assess that a breach of the law occurred in regard to how the procedure was discharged, and its opinion can then be introduced by the petitioner in a later compensation proceeding before a civil court.

All parties to the procurement review process - both the petitioner as well as the respondent and others involved - can challenge the decision of the Procurement Chamber via an "**immediate appeal**" to the responsible Federal Court (*Oberlandesgericht - OLG*) (*see* § 116 Abs. 1 GWB). This must be done within two weeks of the Procurement Chamber's decision (*see* § 17 Abs. 1 GWB). The OLG appellate procedure must then be concluded within a five-week time frame (*see* § 121 Abs. 3 GWB).

A notice of opposition by "immediate appeal" to the OLG continues the enjoinder of the award (*see* § 118 Abs. 1 S. 1 GWB). This "suspending" effect terminates two

weeks after the limitations period for appeal closes. However, insofar as the OLG orders the complaint's continued application, the award enjoinder continues until the appellate procedure is completed (*see* § 118 Abs. 1 S. 2 und 3 GWB).

With the execution of an appeal to the OLG, all legal options are exhausted. Procurement law provides no further recourse for bidders.

It does remain the prerogative of the bidder to go directly to the **EU Commission** in an attempt to persuade the Commission to initiate an infringement proceeding against Germany as a member state. Here, however, the submitter is not enjoined from making the award. Such infringement proceedings are rarely initiated against member states. Only if the relevant member state does not does not provide recourse can the EU Commission take legal action through the **European Court of Justice (ECJ)** (*Europäischen Gerichtshof - EuGH*).

In this way the EJC has the possibility to exercise judgment over procurement law. The EJC does not assess the matter under national legal standards, but on the basis of EU contract procurement directives and within the context of the basic European freedoms, Art. 28 ff. and 56 ff Treaty on the Functioning of the European Union (TFEU).

The majority of EJC decisions related to procurement law are based upon the rulings of national courts and are usually concerned with thether or not the national laws are compatible with the TFEU (*see* Art. 267, 2nd UA TFEU). It should be noted here, that both the federal courts and the Procurement Chambers are entitled to be petitioned before the EJC is involved (*see* Reith/Stickler/Glahs, VergabeR, 2010, § 124, Rn 19).

Section 5 Other Considerations

1. Government Contracting Entities

In a modern political system the state can act via different avenues, such as through **regional authorities**. In Germany, action can be at the federal, state or municipal level. It can also appear in other ways, for instance through government outsourcing,

government organizations and private civil institutions. The government can thereby act through public personnel entities, real entities, associate entities, institutes or foundations, and also private civil law institutions (*see* Schall, Gesellschaftsrecht, S. ...).

Against this backdrop of various private and public legal avenues stands the question: under what circumstances should an agreement be subject to private civil law, as opposed to the comparatively severe government procurement law regulations? The objective is to keep the public government sector from being able to evade such regulations through an "**escape into private civil law**."

Analogously, private civil law companies are bound by procurement law when they are **controlled** by the government sector. Such a case results from specific procurement law inclusion rules (§ 98 GWB). Control can be found through **predominant financing** and/or majority occupation of the **supervisory board**. Additionally, a prerequisite for the application of procurement law is that the private civil law organization's **general interests** are not of a commercial nature.

Possible cases of doubt for the application of procurement law are therefore those situations where companies are either economically-mixed, i.e. have **public-private partnerships**, or have private and public partners. Additionally, there are a number of corporations and institutions that are not directly funded by that state, but by users. These include, for example, public service broadcasters (*see* Stefan Engels, Medienwirtschaftsrecht, § 3 S. ...), health insurance companies, religious groups and government-owned savings banks. The question of whether procurement law applies to them, as well as to trade fair companies and former monopolies such as the postal service, telecom service and railroads is complicated, as discussed below:

Public service broadcasters in Germany are not financed by taxes but by a license fee (*see* Stefan Engels, Medienwirtschaftsrecht, S. ...). Their supervision stands on the same footing as "community groups" and is therefore not occupied by the state.

In 1997 the EJC decided that public service broadcasting was subject to procurement law despite its specific funding and supervision (judgment from 13.12.1997, Rs. C-337/06). Because supervision and funding of public service broadcasting were only a result of national constitutional considerations, this did not alter the fact that there was a material consideration in state funding.

However, because of the constitutional importance of free press, public service broadcasting is exempted from the obligation to apply government procurement law to the core area of programming (*see*. § 100 Abs. 2 j) GWB – *to this* 3 Ziff. 3).

Government health insurance companies are public corporations. Doubts about the application of procurement law could result in that they are not financed by state subsidy, but rather by the contributions of their members. These contributions are determined by the insurance companies themselves.

However, it has also been decided via case law that this special type of financing is equivalent to financing by the state in regard to procurement, and therefore governement procurement law applies (Higher Regional Court, *OLG*, Düsseldorf from 23.05.2007, Az.: VII Verg 50/06; EJC from 11.06.2009, Rs. C-300/07). Membership fees to finance public health insurance are insufficient, so a state is obligated in cases of doubt to hold that they are corporations subject to public governmental law.

Religious Groups are not subject to government procurement law, although in Germany they are also public corporations in part as their revenue is levied by tax. However, religious groups do not serve the public interest, they only serve the interests of their members. Further, they are not financed by public funds, instead the state merely acts as a collecting agency of their funds (*see* VK Baden-Württemberg from 16.01.2009, Az.: 1 VK 65/08).

For **trade fair companies** it is important that the realization of profit is an intention in their activities. Trade fairs are a means of strengthening and enjoying a site regularly,

which in results in a loss of protection by the municipality (*see* EJC from 10.05.2001, Rs. C-223/99). For this reason procurement law is applicable.

Deutsche Post and **Deutsche Telekom AG** have both been fully active in the open market for some time. Regardless of the persistent involvement of federal share capital in these entities, procurement law is not applicable because the activities are not classifies as those in the public interest.

Deutsche Bahn AG, however, is subject to procurement law. All shares of the entity are federally owned and it is mostly recognized as providing an activity for the public interest.

So-called **sector entities** are subject to special rules (*see* § 98 Nr. 4 GWB). For instance, the supply of drinking water and energy and transport is subject to procurement law, yet when compared to “classical contracting” they enjoy broader procurement leeway. They may, for example, always use the negotiating process and are not bound by the above-described pre-eminence of the open procedure.

Finally, government procurement law is applicable to private civil companies when they are carrying out construction projects that are **primarily funded by the public**.

2. Government Contract

The applicability of procurement law requires not only a public authority, but also a government contract. Not all contracting activities of the public sector are subject to procurement law. If the state, for example, hires new employees, it need not advertise in accordance with procurement law (*see* § 100 Abs. 2 1. Alternative GWB).

What is needed is a **state purchase**. However, where the public governmental sector sells plots of land (*see* EJC from 25.03.2010, Rs. C-451/108), goods or services, such is not tied to procurement law.

Procurement law is also inapplicable in the event that the state gives a private entity the possibility to generate revenues from third-parties on the basis of an exclusive right ("**service concession**"). This can, for example, be the case in the provision of public land for bike rental.

The EJC has demanded that the procedure for awarding a service concession contract satisfy the basic procurement principles of transparency and non-discrimination (*see* EJC from 13.10.2005, Rs. C-485/03).

To differentiate between a service contract and a service concession, according to the EJC, is simply to inquire as to whether the public sector has enabled the service dealer to generate fees from third parties. Whether the concessionaire decreases the economic risks of the business is not new case law (*see* EJC from 10.09.2009, Rs. C-206/08).

However, If the matter concerns the possibility to generate revenue from third-parties as a result of the form provided by the public sector - such as a construction concession - then it is fully subject to procurement law (*see* § 99 Abs. 6 GWB).

The distinction is difficult when the assignment takes place within the public sector („**In-house Procurement**"). Certainly procurement law procedures are not attached when the same legal person is "commissioned." Thus, a government contract does not exist, for example, if a Federal Ministry engaged another ministry to provide certain services or supplies.

The reasoning is different, for example, if a municipality "commissions" another municipality for waste disposal. This reasoning has been established for some time. Because the two municipalities are joined in a common purpose for the joint performance of the waste disposal, no relevant procurement law mechanism is triggered. A recent EJC decision made clear that **inter-communal cooperation** in the area of public services between municipalities is not subject to procurement law (*see* EJC from 09.06.2009, Rs. C-480/06). Therefore, a municipality need not make

an announcement if it intends to fulfil tasks such as waste disposal jointly with a neighboring municipality.

3. Exceptions to the Duty to Announce

Even if a contracting authority awards a government contract within the meaning of the above statements, there may be exceptions to the duty to make an announcement for bids.

This can, for example, be true in the case of **national security** (*see* § 100 Abs. 2 d) GWB). Hereby, public contracts need not be advertised if they are “classified” according to state security rules. In Germany this is provided for under the Security Clearance Law, *Sicherheitsüberprüfungsgesetz* (SUG). If something is thereby labelled “CONFIDENTIAL (VS-VERTRAULICH)” an announcement can be forgone (Higher Regional Court, *OLG*, Düsseldorf from 20.12.2004, Az.: Verg 101/04).

If it cannot, however, be accurately indentified whether the procurement is for a sensitive national security purpose or a non-comparable confidentiality subject to civilian life, i.e. "**Dual-Use Goods**," then an exemption from procurement law is not justified, as was held by the EJC in a case concerning the procurement of helicopters by the Italian Government (ECJ of 08.04.2008, Case C-337/05).

Defense procurement is subject to general government procurement law if the goods are not on a restricted list (*see* § 100 Abs. 2 lit. e) GWB, Art. 346 Abs. 1 b) AEUV). The EU has adopted specific procurement rules in the area of defense and security (RL 2009/81/EG). For example, it provided that the negotiation process would be the general rule in defense cases, as is the case with the utility sector (*see* Art. 25 RL 2009/81/EG).

Less relevant in practice are exemptions that apply when the case concerns procurement within the scope of an international troop deployment by an international organization or based on an international agreement. In any case, when German submitters operate on their own behalf and act only on behalf of an international

organization, then procurement law is fully applicable (*see* VK Bund from 20.12.2005, Az. VK 2-159/05).

A sector-specific exception is also provided for public-service broadcasters (*see* § 100 Abs. 2 lit. j) GWB). It applies only to the acquisition, development, production or co-production of programs and contracts for broadcasting time. Public service broadcasters should be able to operate free of the economically- and competitively-based procurement rules, so that they can exercise their constitutionally-protected programming mandate (*see* Stefan Engels, *Medienwirtschaftsrecht*, § 3). In the areas of administrative organization - such as the procurement of office supplies - they remain subject to procurement law (*see* above Section 2 S….).

A further sector-specific exception exists for **financial services** (*see* § 100 Abs. 2 lit. m) GWB). It does not apply generally to the activities of banks for their public clients, rather only to a bank's lending and securities business. However, if a public contractor uses a bank for consultation services, for example, for privatization or strategic financial planning interests, then the service must be advertised for.

Also, it is necessary for **arbitration and Alternative Dispute Resolution services** to have an exemption from the obligation to advertise (*see* hereby, Einzelnen Graf, *Kaufmännische Alternativen zu den staatlichen Gerichten – Schiedsgerichtsbarkeit und Wirtschaftsmediation* –). This exemption is pursuant to § 100 Abs. 2 lit. l) GWB.

Whether or not the duty to announce comes into play with government-directed **research and development services** depends on if such services are for the public sector's own use. If, for example, the public sector develops an IT system for social services processing, an announcement is compulsory. On the other hand, if the measure is purely one supportive of research, then there is no obligation to announce (*see* § 100 Abs. 2 lit. n) GWB).

There are a number of exceptions that are not tied to specific sectors or professions. A direct award without an announcement is allowable, for example, for replacements,

accessories, or additional supplies (*see* § 3 EG Abs. 4 lit. e) f. und g) VOL/A), so long as these comprise no more than 50% of the original procurement volume.

Also, no announcement need be obtained if it is certain from the outset that achievement can only be accomplished by one corresponding supplier (*see* § 3 EG Abs. 4 lit. c) VOL/A). Given the above-described government procurement objectives, it goes without saying that the law places high a demand on proving the existence of such a situation.

The same applies for an exception on **urgency grounds** (*see* § 3 EG Abs. 4 lit. d) VOL/A). A hands-off procurement on the basis of urgency may only be done "to the extent strictly required" and only if the time limits cannot be met for "compelling reasons." This is applicable, for example, in the case of natural disasters (*see* Higher Regional Court (OLG) Dresden from 25.01.2008, Az.: WVerg 10/07).

4. Description of Services

The description of services is at the core of procurement and it has a dual nature. For one, it forms the basis for the **implementation of a particular procurement process**, whereby it serves to aid the creation of offers by bidders and aid the submitter in its review of the offers. And secondly, it is the **basis for the contract's execution** and it determines the mutual rights and obligations in cases of default.

The contract and the description of services form a unit whereby the specifications concerning performance and the consequences of faulty performance are clarified. For example, the necessary achievement (service level) for IT maintenance can be contained in both the contract itself and in the description of services.

Typical examples of this practice can be found in the construction of an administrative building or the creation of an IT system. In the first, the contracting client undertakes to do the **planning** and detail specification on their own or through a contractor. In the area of construction, the contracting does this as part of the legally-required planning stages and the consultant is at hand for individual

instructions concerning the building's construction. The area of IT is similarly situated; however, the planning steps are standardized to a much lesser extent.

An announcement on the basis of such extensive planning requirements is referred to as a „**structured description**."

Its counterpart is a „**functional description**," whereby, to put it simply, the focus is the result itself, not the path of performance. A functional description requires bidders to undertake the development of their own plans before they can make an offer. Only when they themselves foresee the necessary steps and materials, are they in the position to efficiently calculate and provide such. The submitter can be functionally characterized as **transferring the risk** to the contractor. In case of planning deficiencies, the contractor can no longer withdraw as it would have been able to if it had received the planning requirements from the submitter. Rather, the contractor is responsible since it developed the plans itself.

In practice, however, there are no purely functional descriptions. The submitter cannot be said to have procured the creation of just an average administrative building or an okay IT system. In both examples, there are a multitude of interfaces that the submitter must constructively describe in order to obtain a suitable outcome. With the construction of a building, this can already be seen with a declaration as to which plot of land the building will be erected upon. In the IT area, it can be seen in the compatibility requirements to assure harmony with existing system requirements.

As a result, the „functional tender" is usually a mixture of both functional and structured methods for the description of services. The trick is to establish the necessary requirements and still leave bidders enough functional space to provide sufficient room for creative market approaches the submitter may not have accounted for.

Announcements characterized as „functional" are often found in **public-private partnership** projects. In collaborations with private parties, maximum efficiency and an economic model for the description of services should be developed.

Procurement procedures especially well-lent to such cases are the negotiation procedure and the competitive dialogue (*see* above Section 2). On the basis of a functional, results-oriented or “output-oriented” performance description, the bidders create constructive plans during various stages of the process and provide these to the submitter for discussion in negotiations. From this the submitter refines its requests, both constructively and functionally, and then demands from the bidders a final binding offer.

The description of services, therefore, gradually develops with the process. Ultimately, it is important that the services are not so specifically specified that bidders can only differ from one another with regard to price. The final outcome of the negotiation process concerning a description of services must also sufficiently retain enough functional space to enable bidders to have different performance variations in their offers.

In the evaluation, it is important that the functional specifications in the proposal plans are written into the contract. Only in this way can the submitter acknowledge operation proposals with credit points.

Technical Standards play an essential role in the description of services. Specifications to ensure performance in conformance with technical standards are the province of constructive descriptions in particular. The reference to specific standards contributes to standardization of the required performance and increases transparency for bidders. This applies at the European level, but only when the relevant standard is adopted in Europe or if it is compatible with a European standard. Accordingly, procurement law contains requirements for the use of standards that are of fundamental priority in European regulatory frameworks (*see* § 8 EG Abs. 3 VOL/A).

Through reference to specific standards, the description of services protects the bidder; at the same time the submitter could write the performance standard so narrowly that only a sole supplier or group of suppliers could be considered. Such a

product-specific announcement is forbidden (*see* § 8 EG Abs. 7 VOL/A) and product designations should generally be avoided. Therefore, a tender announcement for Mercedes sedans or an HP-server is not allowed. Only in especially narrow cases is a product-specific announcement acceptable, this is the case with the procurement of climate measuring instruments needed to harmonize with previous equipment (*see* Higher Regional Court (OLG) Düsseldorf from 03.03.2010, Az.: Verg 46/09).

Supplies and services for maintenance may be procured both in one-time tenders or reoccurring cases. In the latter situation, a **framework agreement** can be utilized. Such contracts are understood as those that specify all contract performance and price parameters, but leave the contracting client the freedom to abrogate the services. Thus, for example, a framework agreement could be concluded for the supply of IT hardware, whereby the contractor would be obliged to deliver the equipment provided in the contract as well as maintenance. Framework agreements are often resorted to for services such as cleaning, removal or guarding, so as not to initiate new announcements for fluctuating requirements.

In addition to the establishment of a framework agreement with a contractor, it is also permissible to set up framework agreement with several suppliers for the same performance (*see* § 4 EG VOL/A). In this case, the contracting client is obligated to conduct a “mini competition” concerning the price and individual performance conditions before the request for services. It should be noted that framework agreements are not allowable for construction services (with the exception of certain sectors) or professional services under the VOF.

The maximum duration of framework agreement normally may not exceed four years (*see* § 4 EG Abs. 7 VOL/A). A longer time period is only allowed in exceptions, when for example, significant preliminary investment by the contractor is needed (for instance, in the erection of telecommunication infrastructures) for which a period of four years is not amortizable.

Even outside the context of framework agreements, public contracting entities can reserve tender flexibility. By using an "**alternative announcement**," they can arrange to first decide the acceptance of performance variations first.

With **PPP announcements**, for example the purchase or rental of school buildings, there are Market alternatives. Depending on which version is more advantageous based on a present value cost comparison, the award may be given in one way or another.

To be distinguished from the alternative announcement is the tender of "**options**" or "**demand items**." Here the contracting client decides after an award is given whether it would like to make use of a service component by implementing an order. For example, the client could implement an order for the provision of maintenance in addition to the delivery of hardware. Hereby the contracting client reserves the right to first buy only the devices and then decide on services after the warranty period.

In shifting performance risks to private contractors, the public sector is not left completely unencumbered. It is not entitled to shift the risk of "**unusual ventures**" to the contractor - those for which the contractor has no control over the circumstances or does not have the ability to estimate costs (*see* § 7 Abs. 1 Nr. 3 VOB/A).

It is perfectly legitimate for the contractor to waive this protection and accept risky tasks, such as munitions removal. But the law places limits where the financial factors of the risk would lead to unreasonably high prices. This is the case, for example, if the submitter does not make basic information for calculation available to the bidders. The same is assumed for building values in an announcement concerning building insurance (*see* Higher Regional Court (OLG) Celle from 15.12.2005, Az.: 13 Verg 14/05).

The contracting client receives further flexibility through contractual incorporation of **extension options**. For example, a contract for cleaning services can be executed for a period of four years as well as a further optional contract period of two years.

Section 6 Fair Play

Competition, as shown, is an essential factor for the success of a modern and efficient public infrastructure. However, the beneficial effects of competition can only manifest themselves if a competition is carried out fairly and not as a pseudo-competition.

2. Violations by the Government Client

Both for the government client and for private bidders, a danger exists that the rules of competition in the awarding of government contracts will be violated, either intentionally or as a result of carelessness. **Bribery** and **corruption** are factors, but they are not the only factors related to rules violations in government procurement (*see* www.transparency-international.de). Apart from the practice of such criminal behaviors, intentional or careless rule violations can also compromise procedural validity. This can be seen, for example, when a submitter aims for a specifically preferred bidder and transmit information to this bidder that is not provided to other bidders in the preparation of a bid.

Submitters can also completely design an announcement so that only a specifically preferred bidder can participate, which not only violated fair-play but also violates the previously described requirement for a product neutral announcement.

The judicature has recognized the freedom of a government entities to determine **what** they want to acquire. Therefore, **procurement autonomy**, does allow the submitter to restrict the applicant field in some sense (*see* OLG Düsseldorf v. 03.03.2010, Az.: Verg 46/09; OLG Düsseldorf v. 17.02.2010, Az.: Verg 42/09; OLG Düsseldorf v. 14.04.2005, Az.: VII-Verg 93/04). However, inappropriate bases for restriction (i.e. the preference of a specific bidder) that cause an illegal distortion of competitors can lead to an annulment of the procedure.

It is the case in practice that if the submitter's bidder is excluded from the procedure for cause this exclusion does not justify an annulment of the procedure (*see* VK Bund v. 17.08.2010, Az.: VK 1 – 70/10). Additionally, submitters can aim evaluation criteria

changes or additions of sub-criteria to direct the award in a certain direction (*see* EuGH v. 09.12.2010, Rs. C-568/08, VK Schleswig v. 09.07.2010, Az.: VK-SH 11/10).

The crassest violation is certainly an illegal direct commission without performance of the required procedure, a so-called **de-facto award**. Such an award can also block the advancement of procedural review.

2. Bidder Violations

Bidders can fraudulently alter competition in that they can make procedural arrangements. Such arrangements are forbidden and can lead to disqualification of the offer (*see* § 19 Abs. 3 lit. f VOL/A). No proof of an actual arrangement is required. It suffices if it can be shown that several bidders possess knowledge of the terms of the offerings. It is not sufficient, if two bidders mutually designate each other as subcontractors (*see* OLG Celle v. 02.12.2010, Az.: 13 Verg 12/10).

It is also problematic if bidders offer their services as **consultants/advisors** and contribute in the creation of the description of services ("**project engineer**") prior to the submitter's announcement. Here there is a danger that the description of services will be so aligned with the corresponding bidder that the bidder will receive a competitive advantage.

However, it is not mandatory to exclude a bidder who co-operated in the creation of the description of services from the procedure. The submitter can **offset** the bidder's **informational advantage** in such a situation. This can be accomplished by making the prior documentation similarly available to all bidders (*see* § 6 EG Abs. 7 VOL/A).

Proven illegal behavior by a bidder can have not only criminal consequences, but can also lead to procedural disqualification. Additionally, a submitter can impose an "**award barrier**." This means that the bidder may not participate in similar procedures under the particular governing authority for a period of up to three years. Some German states also maintain a "**corruption index**" (*see e.g.* Corruption Law in Berlin, version from 01.12.2010; Berlin Law Gazette, from 10.12.2010, page 535). Both persons and businesses committing such transgressions are registered therein.

For businesses, the possibility to again participate in government procurement procedures can exist following "**self cleaning measures.**" Hereby businesses must prove that internal mechanisms have been established to prevent the violation from occurring again in the future. This includes the appointment of an independent compliance representative and voluntary agreement of the personnel who were involved.

Section 7 Large Infrastructure Project Compliance Requests

Large public sector infrastructure plans are usually under great pressure to succeed. Normally, substantial budgetary resources have been committed for construction. In a PPP-Project, operational costs also come into play. This also means that the submitter is tied to a partner for a long period of time. Both political bodies and the public itself are at the table. Accusations about wasted public resources and irregularities in the procedural course are quick to be raised.

All of this leads to questions about the timing of public sector infrastructure projects and specific compliance regulations. In Germany there are in certain rules for each respective industry. In the German construction industry this applies to "value management". Financing banks also operate extensive compliance controls and the public sector itself is equipped with a corresponding Public-Corporate-Government-Codex. It can be argued that government procurement can be superfluous concerning certain regulations.

On the other hand, compliance is not to be underestimated. Indeed, procurement law maintains a range of strict provisions for procedural performance. These regulations are above EU threshold values, are actionable, and are based upon the subjective rights of bidders. However, in Germany it has been criticized for some time that complex infrastructure plans are not adequately regulated.

In particular, detailed structures for the implementation of the negotiation procedures and the competitive dialogue are lacking. As a consequence, considerable uncertainty sometimes exists as to how the procedure is formed.

Uncertainty about the scope of transparency the procedure must possess vis-à-vis the public and political bodies also exists. Here especially, the ratio between freedom of information laws and an offer's confidentiality under procurement law plays a role.

Finally, with the economic crisis in Germany, groups critical of large infrastructure projects have appeared, for example Stuttgart 21 - the protest of which resulted from mistrust and anger about the holding back of information concerning procedural and contractual details. Another criticism is that because of the complexity of the projects, democratic control cannot adequately be provided.

Against this backdrop it seems appropriate to consider whether specific compliance rules for PPP and other major infrastructure projects are necessary.

Because of the importance of major infrastructure projects for the public, it seems necessary to regularly inform and integrate the population in the decision process. This does not mean that the procedure and all of the documents would have to be made publically accessible (this already prohibited in procurement law by the duty of confidentiality, without which effective competition could not be guaranteed). Therefore, a suitable middle-ground must be found that will ensure both public involvement in the project and that competition under procurement law is not compromised.

Council members and members of parliament are the conduits of the governmental submitter. Just as in private corporations, they have the legal ability to access all documents of significance affecting the corporation. Accordingly, it is not acceptable to argue that they be denied access to information because of the risk of unauthorized transmission to a third party. However, it is possible to require the signature of an explicit confidentiality agreement if certain documents will be made available to a larger group of people.

It is advisable to adopt rules of procedure at the beginning of a project, which regulate internal and external communication. The internal rules of procedure are

aimed at project team members and organs of the submitter. The external rules of procedure are aimed at the bidder and any participating subcontractors and consultants. The rules of procedure specify that any involved party must conduct communication with the opposite side only via planned rounds of talks. Any attempts to influence are reported immediately to the project management, who is then obligated to implement appropriate sanctions. The purpose of these rules is that specific negotiation situations are taken into consideration.

Normally, procurement law bars negotiations so as to prevent undue influence in decision making. However, negotiations of this nature are necessary to secure project efficiency and are allowed so long as they proceed in a strictly-regulated manner and will not result in a situation where the procurement law requirements of competitive neutrality and transparency are violated. Where existing procurement law provisions are not sufficient in this regard, the prior mentioned compliance rules could fill in the gaps.

For implementation, different organizational schemes come into play. One, which Germany has had good experiences with, is an “Integrity Pact” executed by all of the parties at the start of the project. This “Integrity Pact” is initiated by Transparency international. It looks to the appropriate rules of conduct and also establishes a “monitor” with access to all procedural documents and records which can investigate irregularities. The pact also provides other penalties for the violation of relevant rules.

The involvement of Transparency International is only one way to adopt such compliance rules. A listing of suitable rules in a “Code of Conduct” could also be used. These could be determined by the project managers and could be specified the actual project. What is important in this context is that the rules apply to each individual participant and not the corporations or entities. Only through the personal obligation of individuals can the integrity and transparency of the process be assured.