


European Society of Construction Law

Practical experiences in Germany in the area of public tenders

- Qualifications of persons representing the principal
- Official lists of prequalified commercial companies

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I. German law implementation of tenders under EU law

Step 1: "Budgetary solution"

German legislator initially only adapts budgetary regulations

Objective: Prevention of subjective rights of losing bidders

Consequence: Tender supervisory committees are responsible for reviewing tender procedures against which objections have been raised without this preventing the respective public-sector body from awarding the respective contract

ECJ declares "budgetary solution" to be unlawful in Case C-433/93

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I. German law implementation of tenders under EU law

Step 2: "Competition law solution"

- **Legal protection:** Introduction of new 4th section of German Act Against Restraints On Competition in 1999 (GWB, Sections 97 ff.)
- Objective:** Creation of subjective rights for losing bidders and effective supervision of tender procedures without excessively rapid award of contract
- Tender and Contract Regulations for Construction Services, Part A, Sections 2-4 (VOB/A)
- Regulations for the Award of Services other than Construction Services, Part A, Sections 2-4 (VOL/A)
- Regulations for the Award of Freelance Services (VOF)


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Public tender law below the EC thresholds

- No formal legal protection in accordance with the provisions of the GWB; only informal opportunity to raise objections and possible legal protection via courts of law and/or administrative courts
- Not formally clarified whether the material provisions of Section 1 of VOB/A and VOL/A have external effect
- Legal mechanisms below the EC thresholds are questionable in terms of EU law

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II. Requirements of bids and applications in German public-sector tender procedures

Formal approach, including with regard to:

- **Prices**
A range of specific (unit) prices must be disclosed in the bid documents; "mixed calculation" not permitted
- **Signatures**
A number of signatures is required on various individual documents (in some cases hidden)
- **Subcontractors** (name/address and parts of contract to be implemented) must be precisely specified in the bid documents
- **Completeness of bid** – including details – is vital

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Wide range of formal requirements leads to a significant number of tender review procedures

→ Even relatively minor errors in bids with no relevance from a competition perspective can constitute grounds for exclusion


Consequence:

- Around 1,300 tender review procedures p.a. (largest number in the EU)

Conclusion:

- Formal requirements greatly exceed the requirements of EU law (e.g. transparency, fair competition)
- Fundamentally different approach in the UK (no formalized approach, only 5-6 tender review procedures every year)

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III. Parties involved in review procedures

First instance: Contract Award Chamber

- Lawyers not required for representation, as administrative review rather than formal court proceedings


Second instance: Higher Regional Court

- Every lawyer admitted to practice in Germany may act in an advisory and representative capacity in tender review procedures at the second instance (Higher Regional Court) (Section 117 (3) of the German Act Against Restraints On Competition)

However:

- In all other areas of law, lawyers must demonstrate practical experience in order to be admitted to the court of second instance


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Technical and commercial staff at the principal

- No specific requirements in terms of qualifications
- Advisors "advertise" based on their specific experience
- Technical/commercial staff are subject to legal influence due to formal requirements and high number of tender review procedures
- Consequence:
 - If public-sector bodies wish to prevent the successful contestation of tenders, the respective teams must include highly specialized legal, technical and commercial staff

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Voluntary qualifications


- Seminars
- Academic programs on public tenders are rarely available (but are occasionally offered by institutions such as the University of Bochum)
 - Public tender law does not form part of regular legal education and examinations

However:

German public tender law is extremely complex and evolves rapidly

- Seminars for qualification are insufficient; learning by doing

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Experience in other countries


New EU member states:

- Specific experience with law firms registered as "Advisors for public tender law": such registrations rarely demonstrate any real qualifications in the area of public tenders

Reasons:

- Qualifications in the area of public tenders depend in particular on practical experience
 - Demand references
 - Examine publications (formal qualifications are unreliable)


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Contractor-side measures: prequalification (Germany)

- National prequalification procedure for construction companies since January 2006
- "Association for the Prequalification of Construction Companies" monitors the performance of prequalification procedures and maintains lists of pre-qualified construction companies
- Prequalification procedures are performed by "prequalification offices" chosen in competition

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Objectives of the national prequalification system

- A prequalification system instead of qualifying examinations for all public tenders
- Significant cost reductions
- Prequalification possible for individual specialist fields of construction
- Rationalization of assessment by principals

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Complaints with regard to the prequalification procedure

- "Association for Prequalification" has established a Complaints Committee to decide on complaints submitted by companies rejected for prequalification
- Audit Committee (3 members) responsible for decision-making
- Initial problems of interpretation with regard to the applicable regulations
 e.g.: Are the branches of large construction companies required to obtain separate prequalification if the parent company has already been pre-qualified?

Key adequacy criteria in the prequalification procedure

- At least 3 reference projects in the relevant specialist areas within the last 3 financial years
- No insolvency or comparable proceedings
- No tax arrears
- No misdemeanors that could cast doubt on the reliability of the company
- Total revenue within the last three financial years
 > In accordance with EC tender directives

IV. De lege ferenda measures:

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| <ul style="list-style-type: none"> • Administrative requirements • Advisors/lawyers/technical and commercial staff • EU accession countries | <ul style="list-style-type: none"> - Reduction in formalities/harmonization with EU law - Qualification alongside professional activity (specialist law), studies at universities of administrative sciences, legal subject as university elective - Admission only after several years of professional experience - Orientation towards "best practice", e.g. UK - Introduction of prequalification procedures (and mutual recognition of such procedures) > Simpler, quicker, better |
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I cannot say whether things will get better
 If we change;
 what I can say is that things must change
 If they are to get better!

Christoph Lichtenberg