

Case 1 - The Floors

Which courts or review bodies are competent?

- The claim for damages needs to be filed to ordinary German **civil courts**.
- In case the applicant wishes to challenge the award decision itself that was made by the contracting authority, he needs to file an application for review with the **awards chamber** ("Vergabekammer") in "first instance" and with the competent **Higher Regional Court** ("Oberlandesgericht") in second instance;¹
- Prior to submitting an application for review, the aggrieved bidder needs to **raise an objection** with the contracting authority **without undue delay** after having found the relevant breach of law;²
- **Specific procurement review** aiming at correcting the decision made by the contracting authority is available only **prior** to the contract award; afterwards, in principle, the contract award cannot be challenged any more;³ in the present case, the contract seems to have already been awarded, so that specific procurement review mechanisms do not apply; the award decision itself can thus not be corrected any more, so that the aggrieved bidder might only have a chance to claim compensation for damages occurred.

Breaches of Directive 2004/18/EC and German national law implementing the directive

- The contracting authority might have acted in breach of Article 23(8) of Directive 2004/18/EC; according to **Article 23(8) of Directive 2004/18/EC or § 9(5) of the Vergabe- und Vertragsordnung für Bauleistungen, Teil A**,⁴ reference to specific products can only be made provided contracting authorities are unable to give a description of the subject of the contract using specifications which are sufficiently precise and intelligible to all parties; in case it is inevitable to refer to specific products, "equivalent" types and products must be admitted;⁵
- Although the contracting authority might have complied with the requirement of admitting an "equivalent" product, it is not clear whether the reference made to specific products was justified in the present case; for reasons of transparency, the contracting authority should have made clear in its documents for which reasons the subject

¹ §§ 107(1), 116(1) of the German Act Against Restraints of Competition – Gesetz gegen Wettbewerbsbeschränkungen.

² § 107(3) of the German Act Against Restraints of Competition.

³ § 114(2) 1st sentence of the German Act Against Restraints of Competition.

⁴ Regulation for Contracts and Awards of Public Works, Part A.

⁵ Case 45/87 Commission v. Ireland, judgment of 22 September 1988, paras. 22 and 27; case 263/85, Commission v. Italy, judgment of 16 May 1991; case C-243/89, Commission v. Denmark, judgment of 22 June 1993; case C-71/92, Commission v. Spain, judgment of 17 November 1993 para. 62; case C-359/93, Commission v. Netherlands para. 27, judgment of 24 January 1995.

of the contract could not be described relying on more general specifications; in case, such justification could be created, a breach of Article 23(8) of Directive 2004/18/EC is unlikely; in case the contracting authority did not explain and describe in detail for which reasons reference needed to be made to specific products, it is likely that the contracting authority has acted in breach of Article 23(8) of Directive 2004/18/EC;

- Since the award criterion is the “cheapest tender” it might be doubtful to allow a product B as alternative; German practice seems to allow, however, to proceed like this; handwriting as such is not a ground for exclusion, either.

Adequate measures in case of breaches?

- In case
 - the contracting authority has acted in breach of Article 23(8) of Directive 2004/18/EC and
 - an application for review is still admissible because the contract has not yet been awarded,

the only way of correcting such breach seems to be the cancellation of the whole award procedure; although cancellation can only be the ultima ratio, an alternative cannot be found since all bidders have prepared their bids based on the requirements set by the contracting authority, so that an effective correction does not appear to be possible by taking alternative measures.

- Even if the contract has not yet been awarded, it is unlikely that the procurement review bodies in Germany will – within a specific procurement review procedure – order such cancellation, since the claimant appears to have submitted his offer without having raised an objection with the contracting authority before (§ 107 (3) of the German Act Against Restraints of Competition); arguing now that the requirements set by the contracting authority were of discriminatory in character appears to be delayed and thus not of relevance any more.

Award of compensation?

- There is no settled German case-law yet of whether not having initiated review proceedings or not having raised an objection with the contracting authority might be a hindrance of claiming successfully damages; some judgments made by Higher Regional Courts indicate that such public procurement review is not equal to a requirement of successful claims for damages, the claimant, however, needs to be aware of some remaining risk in case he wishes to proceed with the claim in damages;
- The company requires **compensation for lost profits**, not only compensation for costs in connection with the bid; in German case-law, compensation for lost profits in case of public procurement law infringements is rarely granted only; aggrieved bid-

ders claiming compensation for lost profits must prove that the contracting authority had been obliged to award the relevant contract to the aggrieved bidder in case the procedure had been executed lawfully; such proof is almost impossible; in the present case, if the contracting authority is found to have acted in breach of law, the award procedure would have been cancelled; after such cancellation it is not clear at all to which bidder the contract would have been awarded, so that proof of an obligation to award the contract to the bidder in question does not appear to be realistic;⁶

- Even if, in principle, the aggrieved bidder is entitled to compensation for lost profits, the amount he might be enabled to require might be reduced because the bidder appears to be also responsible for the damages occurred; the reason is that he did not (at least) raise an objection with the contracting authority and thus did not give any hint regarding a possible unlawfulness of the requirements set in the contract documents (referring to specific products); although it is possible under German law to rely on the experience during the last years concerning the amount of compensation, the bidder has not done anything to keep his losses to a minimum, since there was no guarantee at all that he will win the contract; thus, for this reason as well, a possible amount for damages would be reduced.

Case 2 - The Waterfront

Which courts or review bodies are competent?

- The contract does not necessarily appear to have been awarded; it is thus possible to apply for review of the award decision by the contracting authority itself to the awards chamber;
- Claims for damages must be submitted to the competent **civil court**.

Breaches of Directive 2004/18/EC and German national law implementing the directive

- “Major reservations” might be in breach of the **transparency principle**, in case the present wording leaves entirely open to the contracting authority how to evaluate the bids and how to define the term “major reservations”; see case C-448/01, EVN and Wienstrom, para. 37:

“... it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposed to base the award of contract, provided that the purpose of these criteria is to identify the economically advantageous tender **and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer...**”

⁶ This very strict approach regarding evidence is doubtful from an EC law point of view, since damages for lost profits do not seem to be equal to an effective remedy in public procurement.

- From the pure wording, the contracting authority had entirely free discretion to define “major reservation” and could thus decide freely which bids were to be excluded and which ones were to be considered; although the Wienstrom decision refers to award criteria only, it can be taken the view that the principles developed are applicable to all phases of an award procedure; the fact that the contracting could calculate the value of the reservation does not really help; it only shows that the reservation could be evaluated from an economic point of view, but it still does not define what has to be understood by “major” reservation and seems to leave unlimited discretion to decide;
- Another question is whether the contracting authority abused its discretion when evaluating and calculating the reservation; such abuse of discretion is very difficult to prove, since – when evaluating bids – contracting authorities is left broad discretion under both German and ECJ jurisdiction;⁷ in the present case, the aggrieved bidder will need to show and prove that the decision by the contracting authority evaluating the reservation was so unreasonable that no expert (on the world) would confirm the decision by the contracting authority; in case the bidder is able to present an expert’s opinion in his favor of its own and the contracting authority, on the other hand, an expert’s opinion in its favour, the decision taken by the contracting authority cannot be challenged successfully, since it was at least acceptable, although not the only one that could have been correct; thus, no obvious abuse of discretion to be seen.

Adequate measures in case of breaches?

- In case the “major reservation” mechanism is found to be in breach of the transparency principle, the only way to correct such breach is cancellation of the whole award procedure; it is, however, unlikely that a German review body will deal with the question of whether the term of “major reservation” was in breach of the transparency principle, since the bidder does not appear to have raised an objection prior to the submission of the bid;⁸ such a cancellation is thus unlikely to be ordered;
- In case the contracting authority has abused its discretion when evaluating the reservation, the review body will most probably order to repeat the evaluation executed so far, but considering the view taken by the review body and expressed in its decision; anyway, the aggrieved bidder needs to raise an objection with the contracting authority according to § 107(3) of the German Act Against Restraints of Competition prior to applying for review.

Award of compensation?

⁷ Inter alia, case T-139/99, AICS v. Parliament, para. 39.

⁸ § 107 (3) of the German Act Against Restraints of Competition.

- Since the aggrieved bidder wishes compensation for lost profits, he needs to prove that the contracting authority had an obligation to award the contract to him in case the award procedure had been carried out lawfully;
- In case the term of “major reservation” is found to be lawful, there is no realistic chance, either, to get compensation for lost profits, since it does not seem to be realistic to prove that the contract had to be awarded to the aggrieved bidder due to broad discretion for the contracting authority; even in case the aggrieved bidder would be granted compensation for lost profits in principle, a margin of 10% would not be accepted since it cannot be supported by the financial statements referring to the last few years; further details of calculation of compensation need to be supported by an expert’s opinion.

Case 3 - The Carpets

Which courts or review bodies are competent?

- Challenging the award is possible prior to the contract award only; application for review must be submitted to the awards chamber;
- Claims for damages must be submitted to the competent civil court.

Breaches of Directive 2004/18/EC and German national law implementing the directive

- The facts are not clear of whether the claimant had originally been excluded because of incapability or whether, originally, the contracting authority simply argued that his bid was not the economically most advantageous offer;
- In case the contracting authority informed the bidder only about not having won the contract because his bid was thought not to be the economically most advantageous one, according to German case-law, the contracting authority could not rely any more on a lack of incapability, since the discretion granted so far has already been used and cannot be revised by the contracting authority upon its own motion, unless the bidder did not meet mandatory minimum requirements which were transparently published before;
- It is not clear what an “overall estimate” of the tender might refer to besides the economically most advantageous offer; if, for example, the contracting authority mixes up economic evaluation of bids and suitability of bidders, this would result in another breach;

Adequate measures in case of breach?

- Even if the contracting authority argued that the aggrieved bidder needed to be excluded, so that it might not be of relevance to him of whether further breaches of law

might have occurred during the award procedure, the bidder needs to be granted legitimate interest to apply for review: eliminating the bid of a tenderer even before making a final evaluation the decision on eliminating must be subject to review (case C-249/01, Hackermüller, para. 24);

- Contracting authority can be ordered to repeat its evaluation process considering the view taken by the review body in case the contracting authority acted in breach of law and did not evaluate correctly the relevant tender and the suitability of the tenderer.

Award of compensation?

- Regarding damages, the aggrieved bidder wishes to receive compensation for lost profits which is difficult to prove; in case the bidder could have been lawfully excluded because of insufficient suitability, there would not be any chance to obtain any compensation, since the bidder would not have had any (realistic) chance to win the contract;
- Anyway, from a possible compensation all amounts the bidder could save because of not winning the contract, need to be deducted (e.g. material).

Case 4 - The Cleaning

Which courts or review bodies are competent?

- Claims for damages need to be submitted to the civil court, applications for review to the competent award chamber;
- Annulment can be challenged, since it is equal to a decision made by a contracting authority which must be subject to review (case C-92/00, Hospital Ingenieure, judgment of 18 June 2002).

Breaches of Directive 2004/18/EC and German national law implementing the directive

- Case C-27/98, Fracasso, judgment of 16 September 1999 para. 22: no provision that could limit a decision to cancel an award procedure, i.e. not awarding the contract, to exceptional circumstances or serious grounds (paras. 23/24 of the judgment);
- Case C-244/02 “Kauppatalo Hansel”, judgment of 16 October 2002, para. 36:

“... a contracting authority which has commenced a procedure for the award of a contract on the basis of the lowest price may discontinue the procedure, without awarding a contract, when it discovers after examining and comparing the tenders that, because of errors committed by itself in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically

advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of community law on public procurement...”

Adequate measures in case of breaches?

- There is thus no realistic chance that the annulment would be revised during a public procurement review procedure; cancellation without giving any reason would, however, be in breach of law; but, even if the contracting authority had been made to revise its decision for annulment, it could immediately announce another cancellation based on the new reasons that are now presented;
- Case C-285/99 and C-286/99, Lombardini and Mantovani, judgment of 27 November 2001: prior to an exclusion for abnormally low price, a bidder must be asked for clarification; the contracting authority has currently no reason to argue that the bid could have been excluded since it cannot be aware about any explanation made by the bidder regarding the calculation of his prices.

Award of compensation?

- It does not seem to be realistic to obtain compensation for lost profits; there is no obligation to award the contract, since the contracting authority relies on circumstances that came up after initiation of the award procedure;
- The other bidders might at least get some compensation for their costs to create the bids under § 126 of the German Act Against Restraints of Competition in case they can prove to have had a genuine chance of winning the contract; it is not clear yet in German case-law what exactly has to be understood by a “genuine chance” to win the contract in question; according to some authors, only the first three bids could have had a genuine chance of winning the contract; according to others, it is more adequate to argue that all bids which reach the final phase of evaluation had a genuine chance to win the contract, but a substantive breach of the contracting authority cannot be seen in the end.