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Participating in public tenders: Rules and procedures

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Modul	Sachverhalt
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Leistungsbezeichnung II	Rules and procedures to be followed when participating in public tenders
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Handlungsgrundlage	<ul style="list-style-type: none"> • Competition Act (Gesetz gegen Wettbewerbsbeschränkungen - GWB) • Regulation on the Award of Public Contracts (Vergabeverordnung - VgV) • Sector Regulation (Sektorenverordnung - SektVO) • Regulation on the Award of Concession (Konzessionsvergabeverordnung - KonzVgV) • Regulation on the Award of Public Security and Defence Contracts (Vergabeverordnung Verteidigung und Sicherheit - VSVgV) • German Construction Contract Procedures Part A EU (Vergabe- und Vertragsordnung für Bauleistungen Teil A - VOB/A EU) • Lower Threshold Public Award Regulation (Unterschwelvenvergabeordnung - UVgO) • Competition Register Act (Wettbewerbsregistergesetz - WRegG) https://www.gesetze-im-internet.de/vsvgv/BJNR150900012.html https://www.gesetze-im-internet.de/vgv_2016/BJNR062410016.html https://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_02022017_IB6261902.htm https://www.gesetze-im-internet.de/sektvo_2016/BJNR065700016.html https://www.gesetze-im-internet.de/wregg/BJNR273910017.html https://www.gesetze-im-internet.de/vsvgv/BJNR150900012.html https://www.gesetze-im-internet.de/wregg/BJNR273910017.html https://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_31012019_BWI781063060120180001604634.htm https://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_31012019_BWI781063060120180001604634.htm

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Teaser	<p>If you participate in a public tender, there are different rules, regulations, deadlines and thresholds to be observed depending on the procurement procedure. This section provides information on the different public procurement procedures and on the corresponding requirements.</p>
Volltext	<p>Public procurement procedures</p> <p>The public procurement procedure requirements are essentially determined by whether the estimated contract value is above or below the European thresholds. The thresholds apply to different types of procurement, such as the procurement of goods and services or construction works. With some exceptions, the thresholds are generally set every 2 years by the European Commission and are subsequently published by the Federal Ministry for Economic Affairs and Climate Action.</p> <p>Currently - for example in the area of the federal awarding of contracts - the most significant thresholds are EUR 140 000 for the majority of goods and services purchased by contracting authorities and EUR 5 382 000 for public works contracts. The thresholds will next be updated on 1 January 2024.</p> <p>Procurement procedures above the EU thresholds:</p>

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In the upper threshold, the national public procurement law, insofar as it implements EU public procurement law, provides for different types of procedures for awarding public supply, construction and service contracts:

- open procedure
- restricted procedure
- negotiated procedure
- competitive dialogue
- innovation partnership

In an open procedure, the contracting authority publicly invites an unlimited number of undertakings to submit tenders.

In a restricted procedure, which requires a preliminary competition, following an initial public invitation to participate, the contracting authority selects a limited number of undertakings based on objective, transparent and non-discriminatory criteria.

The contracting authority is always free to choose between the open and restricted procedure; both procedures are of equal rank. The aim is always to ensure a broad level of competition.

The other types of procedure are:

- negotiated procedure
- competitive dialogue
- innovation partnership

These procedures are linked to the fulfilment of certain eligibility requirements, which are detailed in the Regulation on the Award of Public Contracts (VgV) and, for construction contracts, in the German Construction Contract Procedures Part A EU (VOB/A EU). The contracting authority may choose one of these procedures only once the requirements have been met.

The negotiated procedure provides for negotiations on the object of the contract between the contracting authority and the undertakings involved. For example,

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the contents and price may be negotiated, but not the minimum requirements of the tender specifications. The negotiated procedure can be executed with or without a preliminary competition. The latter variant does not require European publication and is therefore only permissible in particularly restrictive exceptional cases.

The competitive dialogue gives the contracting authority greater latitude for negotiations with the tenderers.

In an innovation partnership, following a competition, the contracting authority negotiates with the selected undertakings on initial and follow-up tenders.

Procurement procedures below the EU threshold values

Below the EU thresholds, in the lower threshold range, the different procedures are primarily based on the Lower Threshold Public Award Regulation, to the extent that this is applicable. Thereafter, the contracting authority may choose between:

- a public tender to an unlimited number of parties and;
- a restricted public tender with a competition.

These two procedures have priority over the other procedure types:

- restricted invitation to tender without competition and;
- negotiated award with or without a competition,

which in turn require additional eligibility requirements detailed in the Lower Threshold Public Award Regulation.

Up to a given low contract value, a contract can also be awarded as a direct contract without an award procedure.

There are special considerations for the awarding of

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construction services. In the lower threshold range, these are subject to Section 1 of the German Construction Contract Procedures (VOB/A). Once again, public contracts must primarily be awarded by way of a public tender and the restricted procedure with a competition; the client is free to choose. If the necessary additional eligibility requirements apply, these are followed by the restricted procedure without a competition and the limited tendering procedure.

In the lower threshold range, it is always important that compliance with the requirements of the Lower Threshold Public Award Regulation or the German Construction Contract Procedures is stipulated separately. Unlike in the upper threshold range, the provisions of public procurement law are not applicable. An implementation order is always necessary, which specifies compliance with procurement law in the lower threshold range. This can be a federal state law or an administrative ruling.

Do different rules exist depending on the type of invitation to tender?

Yes, different rules need to be observed depending on the type of tender. In particular, this depends on whether the award is made in the upper or lower threshold range and which service is being procured.

In the upper threshold range

Contracts awarded above the EU thresholds are subject to the Restriction of Competition Act/public procurement law, which is based on the implementation of the corresponding provisions in the EU directives:

Above the threshold, the foundations of public procurement law are contained in Part 4 of the Competition Act (GWB). This part consists of two chapters containing:

- public procurement award procedure provisions in Chapter 1 and;
- the review procedure in Chapter 2.

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Chapter 1 consists of three sections:

- Section 1 includes regulations on the scope, principles and definitions;
- Section 2 sets out the essential rules for classical awards by contracting authorities. It provides regulations on the overall sequence of the award procedure, for instance, on the types of procedures, the format of the terms of reference, the suitability, the exclusion criteria and the award through to the conditions for implementation and amendments to the contract.
- Section 3 contains regulations on awarding contracts in specific sectors and concessions.

Chapter 2 contains regulations on the review procedure by the public procurement tribunals as well as for the procedure implemented by the public procurement divisions of the higher regional courts.

The Regulation on the Award of Public Contracts (VgV) specifies the provisions on the award of public contracts in Part 4 of the GWB. It regulates the general provisions and overlapping rules on (electronic) communication, on the award procedure, on the specific requirements and the precise sequence of the different types of procedures; especially on matters of form, submissions of tenders and suitability tests.

In addition, the VgV addresses the awarding of contracts in special areas such as:

- social and other specific services;
- the procurement of energy-related services and road vehicles;
- the implementation of planning competitions and;
- the specific features of awards for architectural and engineering services and;
- of construction design competitions.

When awarding construction services, certain parts of the VgV as well as the German Construction Contract Procedures within the scope of the EU Public Procurement Directive on German Construction

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Contract Procedures Part A EU (VOB/A EU) must be taken into account.

Sector Regulation The award of construction, supply and service contracts in the transport, the drinking water supply and the energy supply sector by sectoral contracting entities is regulated by the Sector Regulation (SektVO). These may be contracting authorities as well as certain private undertakings. In this case, the SektVO takes the special considerations of the sector into account.

Regulation on the Award of Concessions The Regulation on the Award of Concessions (KonzVgV) contains the regulations for the award of construction and service concessions. The scope also extends to sectoral contracting entities. Concessions are generally long-term and complex arrangements in which the concessionaire takes on responsibilities and risks, which are usually borne by the grantor and normally fall within its scope of responsibility.

In contrast to the award of public contracts by contracting authorities and by sectoral contracting entities, grantors are not required to apply specific types of procedures and may freely structure the procurement procedure within the scope of the provisions.

Regulation on the Award of Public Security and Defence Contracts The Regulation on the Award of Public Security and Defence Contracts (VSVgV) was enacted for public procurement in the defence and security sector. It implements EU Directive 2009/81/EC and takes account of the sector-specific considerations in the procurement of defence and security services.

In the lower threshold range

In principle, budgetary regulations apply for the award of public contracts. These are supplemented by public procurement regulations.

Since 2017, the Rules of Procedure for the award of public supply and service contracts below the EU

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thresholds (Lower Threshold Public Award Regulation - UVgO) have applied for procurement procedures of the federal government and its authorities.

The UVgO, as applicable in the respective federal state, also applies for contracts awarded at the state and municipal level. Nearly all of the federal states have issued corresponding implementation orders for the UVgO in their federal state laws. The UVgO has not yet entered into force in a few federal states; instead the Procurement and Contract Procedures for Services (VOL/A Section 1) still applies.

The award of construction services is once again an exception. Part 1 of the German Construction Contract Procedures (VOB/A) continues to apply in this case.

Are there maximum values that determine the different regulations?

Yes, in the lower threshold range, different maximum values also apply depending on the federal state and type of contract and should be checked accordingly. The value limits can vary significantly.

In principle, according to Section 14 UVgO, services up to an expected contract value of EUR 1 000, not including value added tax, can be awarded as a direct contract without a procurement procedure.

In addition, pursuant to Section 8(4)(17) UVgO, the implementing provisions enacted by a federal or state ministry may permit the negotiated award with or without a competition (without further conditions) up to certain maximum values.

Sometimes, however, individual federal state laws also provide for different maximum values from the UVgO.

When can a tenderer be excluded from participating in an invitation to tender?

Section 123 GWB stipulates compulsory exclusion criteria, which, if they apply, may result in an undertaking being excluded from participating in an

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invitation to tender. This includes, in particular, final convictions or fines imposed under the Act on Regulatory Offences for:

- active bribery
- trafficking in human beings
- criminal association
- terrorist financing
- money laundering
- withholding of social security contributions
- tax evasion

In addition, Section 124 GWB defines optional exclusion criteria - in particular, breaches of anti-trust and labour law provisions - which, if applicable, may result in the exclusion of an undertaking from the procurement procedure.

Pursuant to Section 31(1) UVgO, these exclusion criteria also apply to the lower threshold range.

To further prevent corruption and to combat financial crime, a competition register was also set up by the Bundeskartellamt [Federal Cartel Office]. The register has been functional since 1 June 2022. The register contains, among other things, records of companies to which certain offences related to exclusion can be ascribed. Contracting authorities are obliged to enquire whether the company to be awarded the contract is registered in the competition register if the contract value exceeds an estimated EUR 30 000. Contracting authorities can as a consequence better decide on whether a company should be excluded. Clients are also entitled to check the register below the maximum values.

Lastly, a company is also excluded from the award procedure if it cannot prove that it is capable of executing the contract.

What deadlines apply for the submission of a tender?

In the upper threshold range

The contracting authority must essentially take

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adequate account of the complexity of the service and the time required for drawing up the tenders when defining the submission deadlines for tenders for all the different award procedures.

In addition, statutory minimum deadlines apply:

- In open procedures, the deadlines in Section 15(2) VgV apply. As a rule, from the day after the contract notice, the interested undertakings have at least 35 days to submit a tender. In exceptional cases of urgency, this deadline may be reduced to 15 days or, if the contracting authority accepts electronic tender submissions, to 30 days.
- In the restricted procedure with competition, the deadline for submitting the applications for participation is at least 30 days, which can once again only be reduced to 15 days in exceptional cases of urgency. Participants that are invited to submit a tender after a review of the applications then have at least 30 days to dispatch their tender. Once again, the deadlines only start to run on the day after the applications or tenders are sent. There is also the option of defining individual deadlines, if this has been mutually agreed between the client and all applicants.

The corresponding regulations relating to deadlines also apply in the negotiated award and for the competitive dialogue.

In the lower threshold range

In the lower threshold range, Section 13 of the Regulation on sub-threshold procurement (Unterschwelvenvergabeordnung, UVgO) stipulates that the contracting authority must define appropriate deadlines for the different award procedures. The following must be taken into account when making the decision:

- the complexity of the services required;
- the number of documents to be submitted by the interested parties;
- the time needed for drawing up and;
- assessing the tenders and applications and;

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- the chosen means of communication.

What documents can a client request?

In principle, public contracts are awarded to competent and efficient undertakings. To ensure that this is the case, the contracting authority checks the suitability of the applicants based on various criteria. As a result, the relevant declarations, evidence and documents that an applicant needs to submit in its tender depends on the specific contract.

For instance, the client may request evidence of competence and entitlement to practice a profession. They may verify the economic and financial capacity by means of various supporting documents, such as:

- relevant bank statements;
- evidence of business liability insurance;
- financial statements or;
- annual reports.

In addition, the contracting authority checks the technical and professional capacity and may also request different supporting documents to do this, for example:

- references on previous supply and service contracts;
- evidence of technical and human resources;
- evidence of studies or formal qualifications.

In the lower threshold range

The client also checks the suitability of the applicants in the lower threshold range. To do so, economic, financial, technical and professional capacity can be contingent on certain requirements, which are subsequently checked. However, these requirements must always be related to the tendered service and must be proportionate to this service.

Where can public tenders be found?

EU-wide notifications are published on the internet by the Publications Office of the European Union (TED -

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Tenders Electronic Daily) and are updated daily.

In addition, there are a number of different contract award portals on which contracting authorities can essentially invite tenders for their projects online - at the national, state or municipal level.

The federal government publishes invitations to tender on its central contract award platforms. The states also operate their own contract award platforms.

In addition, countless commercial contract award portals collect contracting authorities invitations to tender and publish these online.

How are e-invoices submitted?

The Regulation on Electronic Invoicing in Public Procurement of the Federal Government (E-Rech-VO) has been in force since 2018. The regulation implements the EU directive on electronic invoicing for public contracts. Undertakings that have been awarded a public contract or have received a concession submit invoices electronically based on the E-Rech-VO.

The relevant state regulations apply for the use of electronic invoices within the scope of the contract management in the federal states.

Where can tenderers and applicants obtain further information?

The contract advisory agencies of the federal states provide information and support for undertakings. These are part of the self-administration units for business and are predominantly organised as chambers of commerce, industry and crafts organisations of the states.

The website of the Federal Ministry of Economic Affairs and Climate Action and various institutions also provide information on current developments in procurement law.

https://www.gesetze-im-internet.de/sektvo_2016/
<https://ted.europa.eu/TED/main/HomePage.do>

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Erforderliche Unterlagen	
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