

THEMATIC COMPILATION OF RELEVANT INFORMATION SUBMITTED BY GERMANY

ARTICLE 9 UNCAC

PUBLIC PROCUREMENT

GERMANY (SEVENTH MEETING)

In relation to integrity in public procurement and management of public finances (article 9), States parties and signatories may wish to provide information on measures that:

- Utilize online platforms for the distribution of information relating to public procurement and tenders as a way to prevent corruption, enhance transparency and ensure competition and objective criteria in procurement decision-making.

Information sought may, in particular, include the following:

- Description of any electronic system of public procurement, including, for example:
- The means by which tender invitations are published;
- The inclusion of all pertinent information on the award of contracts;
- Ways in which applications may be submitted (including the use of electronic procurement platforms); and
- Ways in which the criteria to be used for selection and award are publicized.

When providing information on the use of ICT to increase the transparency of procurement processes, States parties and signatories may wish to refer to their submissions for the sixth intersessional meeting of the Working Group, held in 2015.

With regard to the use of information and communication technologies (ICT) to increase the transparency of procurement processes, Germany has taken the following measures:

The reform of public procurement legislation, which entered into force on 18 April 2016, makes the use of ICT obligatory for all public procurement procedures above the EU-thresholds, for central-level as well as for sub-central procurement and for utilities. This is an important step to enhance the transparency of public procurement processes and thereby also to prevent corruption and ensure fair competition.

The principle of e-procurement is laid down in Article 97 para. 5 of the new Act against Restraints of Competition (GWB), which states that for sending, receiving, transferring and recording of data in procurement procedures, contracting authorities as well as bidders have to use electronic means. This general principle is laid down in more detail in the Regulation on Public Procurement (VgV). Tender invitations, selection and award criteria and all other pertinent information on the award of a public contract are published in the European online platform TED (Tender European Daily). The same applies to notifications of awards and notifications of changes of public contracts. Applications and

tenders have to be submitted to the contracting authority by electronic means. The obligatory use of e-procurement will enter into force at the latest on 18 October 2018. Before this date electronic means can be used voluntarily by contracting authorities. In addition to TED, there exist further electronic procurement platforms in Germany, e.g. from certain Bundesländer (regions).

Information on the public procurement legal framework (Act against restraints of competition and Ordinances) are published online e.g. at: <https://www.gesetze-im-internet.de/cgi-bin/htsearch>.

THEMATIC COMPILATION OF RELEVANT INFORMATION SUBMITTED BY GERMANY

ARTICLE 9, PARAGRAPH 1 UNCAC

PUBLIC PROCUREMENT

GERMANY (SIXTH MEETING)

1. Description of the measures/steps Germany has taken has taken (or is planning to take) to implement this provision of the Convention

Measures to ensure the national procurement system is based on principles of transparency, competition and objective criteria in decision-making; establishing in advance the conditions for participation, including selection and award criteria and tendering rules:

The principles of transparency, competition, and objective criteria in decision-making/non-discrimination form the key cornerstones of all public procurement laws in Germany. They are expressly contained in Article 97 (1) and (2) of the Act Against Restraints on Competition, Section 1 and Section 2 Article 2 (1) VOL/A, Article 2 (1) VOB/A and Article 2 VOF (see below for further explanations on these regulations). Publication of tenders, pre- and post-notifications are required according to several provisions, in particular in legislation of the European Union on public procurement, or in national laws based on European Union legislation. In general, the award criteria have to be publicized or to be made available to participating enterprises.

Selection and award criteria must be objective and related to the goods or services to be procured, and are subject to independent review in tribunal / court proceedings as set out below in further detail.

Procurement laws which are applied in Germany, and, thus, procurement procedures, are based on different sources of law. With respect to procurement procedures above a certain threshold (based on the value of the public contract), which are determined by the laws of the European Union, the rules are based on Part IV of the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*)

http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0603, which are complemented by the Regulation on the Award of Public Contracts (*Vergabeverordnung*). Even more detailed rules are set out

- in section 2 of the Procurement Regulations for Construction Works (*Vergabeund Vertragsordnung für Bauleistungen; VOB/A - no free English publication available*),
- in section 2 of the Procurement Regulations for Public Supplies and Services (*Vergabe- und Vertragsordnung für Leistungen; VOL/A*),

<http://bmwi.de/BMWi/Redaktion/PDF/V/vergabe-vertragsordnung-fuerleistungen-vol-en,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>

- and in the Procurement Regulations for Professional Services (*Vergabeordnung für freiberufliche Dienstleistungen; VOF*).

<http://bmwi.de/BMWi/Redaktion/PDF/V/vergabeordnungfreiberuflicheleistungen-vofen,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>

- For the procurement of utilities (water, energy, transport), the Ordinance on Awarding Contracts in the Areas of Transport, Drinking Water and Energy Supply - Sector Ordinance (*Sektorenverordnung; SektVO*) applies, while the Public Procurement Ordinance - Defence and Security (*Vergabeverordnung Verteidigung und Sicherheit – VSVgV*) contains specific rules on procurement for defence and security-related procurement (with respect to building works in those sectors, part 3 of the VOB/A also applies). The national laws mentioned before had been enacted to transform EU regulations 2004/18/EC, 2004/17/EC, and 2009/81/EC into national law.

In the following text, reference to the VOB/A is not made, as a free English translation is not available. The relevant regulations in the VOB/A are very similar to those in the VOL/A and the VOF. In EU regulations 2014/23/EU, 2014/24/EU, and 2014/25/EU, the European Parliament and the Council have laid down new rules on procurement procedures, on concessions, and on procurement in the sectors water, energy, transport, and postal services. The EU Member States, this including Germany, and other EEA states, are obliged to transform the regulations into national law by 18 April 2016. The aforementioned directives can be found (in almost all official EU languages) at URLs:

<http://eur-lex.europa.eu/legalcontent/>

[EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0024>

<http://eur-lex.europa.eu/legalcontent/>

[EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG)

With respect to procurement below the EU threshold, for federal agencies, section 55 subsection 1 of the Federal Budget Act (*Bundeshaushaltsordnung*) provides:

“Before entering into contracts on goods or services, a preceding public tender is obligatory, as far as the nature of the contract or specific circumstances justify an exemption.”

In the (binding) general administrative regulations to the Federal Budget Act, section 1 of the Procurement Regulations for Construction Works (*Vergabe- und Vertragsordnung für Bauleistungen; VOB/A*) and section 1 of the Procurement Regulation for Public Supplies and Services (*Vergabe- und Vertragsordnung für Leistungen; VOL/A*) are declared applicable. The rules in the “non-EU” sections 1 of those procurement regulations provide for procedures which are almost as comprehensive and strict as the EU law based rules (sections 2).

The federal ministries have the power to define a threshold up to which certain simplifications, as provided for in the Procurement Regulations, are permitted in order to keep administrative burdens in proportion. However, those thresholds are not high. For example, the Federal Ministry of the Interior and its agencies have limited the amount up to which “single tender action” (award of contract without prior publication) is permitted to generally Euro 8,000 (without value added tax), and direct purchasing (without formal comparison of prices of several providers) is permitted only up to a contract value (without value added tax) of Euro 500.

Measures to provide for sufficient time to potential tenderers to prepare and submit their tenders and using by default an open tender procedure;

The regulations provide for sufficient time to potential tenderers to prepare and submit their tenders, see, for example, section 2 Article 12 EC VOL/A (above EU threshold), section 1 Article 10 VOL/A (below EU threshold), Article 7 VOF (professional services).

An open tender procedure is defined as default procedure, cf. section 2 Article 3 (1) EC VOL/A (above EU threshold), section 1 Article 3 (2) VOL/A (below EU threshold). For professional services, the negotiated procedure with a prior public invitation to take part (call for competition) is the default procedure. cf. Article 3 (1) VOF.

Measures to provide for transparent publishing of all procurement decisions including publishing the invitations to tender;

The publication of notices is provided for in the regulations, cf. section 2 Article 15 EC VOL/A, section 1 VOL/A and Article 9 VOF (publication in the Official Journal of the EU with respect to procedures above the EU threshold), and section 1 Article 12 VOL/A (publication on www.bund.de with respect to procedures below the EU threshold). With respect to the publication of the award decision, cf. section 2 Article 23 EC VOL/A and Article 14 VOF (above the EU threshold), section 1 Article 19 VOL/A (procedures below the EU threshold).

Establish procedures, rules and regulations for review of the procurement process, including a system of appeal

In tender procedures with a value exceeding the EU threshold, remedy is available in form of speedy review procedures (cf. § 102 to § 124 GWB - see the above link) before an independent tribunal, with the possibility to appeal to a court. The independent tribunals are set up in the cartel authorities. As a result of such review, the contracting authority can be barred from entering into the contract. The laws provide for damages claims (cf. § 125, § 126 GWB), and, in some cases, for the contract awarded against the rules to be null and void (cf. § 101b GWB).

In case of a substantial violation of the rules which apply for procurement below the threshold, damages can be claimed.

Measures to provide for a thorough selection of personnel responsible for procurement, including screening procedures; as well as establishing a conflict of interest management system with declarations of interest and methods to resolve conflicts in particular cases.

There are no specific rules applying to procurement personnel. The standard rules for staff members for areas of activity especially vulnerable to corruption apply.

Those rules are contained in a brochure called “Rules on Integrity” which can be downloaded here:

http://www.bmi.bund.de/SharedDocs/Downloads/EN/Broschuere/2014/rules-onintegrity.pdf?__blob=publicationFile

In particular, no. 4.1 of the Directive Concerning the Prevention of Corruption (Number 2 in the brochure) provides for a careful selection of such staff.

In the Recommendations on Preventing Corruption (no. 3 in the brochure “Rules on Integrity”), where the Directive is further commented, the principle of careful staff selection is further explained:

When staff are hired for positions especially vulnerable to corruption, the organizational unit responsible for personnel matters and supervisors involved in personnel decisions determine the level of risk associated with persons considered for the position. Their assessment will typically be limited to evaluation of any noticeable problems, e.g.

- investigations of criminal or disciplinary offences,
- in-house investigations of suspected corruption,
- excessive debt, disorderly financial situation,
- social problems (alcohol or drug addiction, compulsive gambling),
- conspicuous behaviour leading to doubts about the person’s reliability.

Any persons to whom any of the above apply may not be considered for a position in an area especially vulnerable to corruption while the relevant investigation is under way or until any suspicion has been found to be groundless. A conflict of interest management system with declarations of interest and methods to resolve conflicts in particular cases is in effect. Staff having a conflict of interest may not be assigned for taking relevant decisions. The requirement for reporting and / or a permission to accept secondary employment is thoroughly regulated in sections 97 to 105 of the Act on Federal Public Servants (*Bundesbeamtengesetz* - cf. pages 71 to 74 of the brochure “Rules on Integrity”) and the Ordinance on Secondary Employment (*Nebentätigkeitsverordnung*), both applying to federal public servants, and in the Act on the Status of Public Servants (*Beamtenstatusgesetz*) and *Länder* legislation for public servants of the states (*Länder*). For contractual employees,

similar provisions are contained in an industrial agreement (cf. page 74 of the brochure “Rules on Integrity”). In case of a conflict of interest, staff may be prohibited from specific secondary employment.

Furthermore, Germany maintains a highly efficient tax administration. All inhabitants of Germany who have earnings above a certain threshold are obliged to file an annual tax return. For persons who receive a salary from which income tax is already deducted (which applies to all persons working in the public administration), that threshold amounts to 410 Euro per year. In the tax return, all taxable income has to be reported. This includes illegal earnings, which are taxable, as well. If the illegal earnings are not reported in the tax return, and thus, they are not taxed, this constitutes the crime of tax evasion (Article 370 of the Fiscal Code - *Abgabenordnung* - an English translation is published here: http://www.gesetze-iminternet.de/englisch_ao/englisch_ao.html#p2134).

Furthermore, in severe cases of corruption or misappropriation of public funds, the facts may be disclosed to prosecution authorities by the taxation authorities if “there is a compelling public interest in such disclosure; such compelling public interest shall be deemed to exist in particular where [...] crimes and wilful serious offences against [...] the State and its institutions are being or are to be prosecuted, [...] economic crimes are being or are to be prosecuted, and which in view of the method of their perpetration or the extent of the damage caused by them are likely to substantially disrupt the economic order or to substantially undermine general confidence in the integrity of business dealings or the orderly functioning of authorities and public institutions [...].” (cf. Article 30 of the Fiscal Code - *Abgabenordnung* - http://www.gesetze-iminternet.de/englisch_ao/englisch_ao.html#p0152).

With respect to award procedures, conflicts in individual cases - which lead to the non-assignment of staff which is affected in the individual case - are dealt with in section 16 of the Regulation on the Award of Public Contracts (*Vergabeverordnung*), which reads (unofficial translation into English):

(1) Natural persons, who are deemed to be biased, may not participate in decisions made in an award procedure as a member of an organ or of the staff of a purchaser, or as a representative or as member of the staff of a representative of a purchaser, as far as, in that procedure, they

1. are tenderer or applicant,

2. consult a tenderer or applicant, or otherwise support him or her, or represent him or her legally or only in that award procedure,

3. a) are employed by the tenderer or applicant against remuneration, or are acting for him or her as a member of the executive board, the supervisory board, or a similar organ,

b) are acting for an enterprise which is involved in the award procedure, if that enterprise maintains business relations to the purchaser as well as to the tenderer or applicant at the same time, except where a conflict of interest does not evolve for such persons, or the activities do not have any effect on the decisions in the award procedure.

(2) Persons, whose relatives fulfil the criteria set out in subsection 1 no. 1 to 3, shall also be deemed biased. Relatives are the fiancée, the spouse, the (registered same gender) civil partner, persons related by birth or by marriage in direct line, siblings, children of siblings, spouses and civil partners of siblings, and siblings of spouses and civil partners, siblings of the parents, as well as foster parents and foster children.

A violation of the ban on participation, as set out in the regulation quoted above, leads to the abrogation of the award. Each tenderer or applicant has the right to object the award in the procedure set out in section 97 ff. GWB (a link to the GWB is provided above) on the grounds of such participation of an excluded person.

Measures to put in place other administrative practices promoting integrity in procurement (such as the rotation of personnel, debarment procedures, etc.)

Such measures are set out in the Directive Concerning the Prevention of Corruption (Number 2 in the brochure “Rules on Integrity”) and further explained in the recommendations for its application (Number 3 in the brochure “Rules on Integrity”). They provide, inter alia, for the rotation of personnel with the obligation to record reasons for any assignment to a post which exceeds five years (no. 4.2 of the Directive Concerning the Prevention of Corruption). No. 11 of the Directive Concerning the Prevention of Corruption contains specific guidelines for awarding contracts, concerning the principle of competition, the separation of planning, awarding, and the settlement of accounts, and debarment.

Furthermore, debarment of tenderers who have been convicted of offences such as corruption, or who are guilty of other forms of misconduct, is regulated in detail in the relevant EU directives on procurement, as well as in section 2 Article 6 (4) to (7) VOL/A and Article 4 (6) to (9) VOF (above EU threshold), and Article 6 (5) and (6) VOL/A (below EU threshold). In some cases, such as in the case of a conviction because of corruption, debarment of the bidder from the procurement procedure is obligatory for the contracting authorities.