



## **Act against Restraints on Competition (GWB) – Part 4**

in the version of the Act on the Modernisation of Public Procurement Law  
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## Part IV

### Award of Public Contracts and Concessions

#### Division 1

#### Procurement Procedure

##### Chapter 1

##### General Principles, Definitions and Scope

#### § 97

##### General Principles for Making Awards

(1) Public contracts and concessions are awarded through competition and transparent procedures. The principles of cost-effectiveness and proportionality shall be upheld in the process.

(2) The participants in a procurement procedure (award procedure) shall be treated equally unless discrimination is expressly required or permitted under this Act.

(3) In making the award, aspects of quality and innovation as well as social and environmental aspects shall be considered in accordance with this Part.

(4) The interests of small and medium-sized undertakings shall primarily be taken into account in public procurement procedures. Contracts shall be divided into individual lots (partial lots) and awarded separately according to the type or area of specialisation (trade-specific lots). Several partial or trade-specific lots may be awarded collectively if this is required for economic or technical reasons. If an undertaking that is not a public contracting authority or sector contracting entity is entrusted with the realisation or execution of a public assignment, it shall be obliged by the public contracting authority or sector contracting entity, so far as it subcontracts to third parties, to proceed according to sentences 1 to 3.

(5) For sending, receiving, forwarding and storing data in a procurement procedure, contracting authorities and undertakings shall, in principle, use electronic means in accordance with the ordinances issued under § 113.

(6) Undertakings shall have a right to have the provisions concerning the procurement procedure complied with.

#### § 98

##### Contracting Authorities

Contracting authorities within the meaning of this Part are public contracting authorities within the meaning of § 99, sector contracting entities within the meaning of § 100 and concession grantors within the meaning of § 101.

## § 99

## Public Contracting Authorities

Public contracting authorities are

1. regional and local authorities and their special funds;
2. other legal persons under public or private law that were established for the specific purpose of meeting non-commercial needs in the general interest, if
  - a) they are for the most part financed individually or jointly through a participation or in some other way by entities within the meaning of nos 1 or 3;
  - b) their management is subject to supervision by entities under nos 1 or 3; or
  - c) more than half of the members of their management or supervisory boards have been appointed by entities under nos 1 or 3;

the same shall apply if such legal person, individually or together with others, provides the financing, for the most part, to another legal person under public or private law, exercises supervision over its management or has appointed the majority of the members of a management or supervisory board;

3. associations whose members fall under nos 1 or 2;
4. natural or legal persons under private law as well as legal persons under public law, so far as they do not fall under no. 2, in cases where they receive funds for civil engineering projects, for building hospitals, sports, leisure or recreational facilities, school, university or administrative buildings or for related services and design contests from entities falling under nos 1 to 3, and where these funds are used to finance more than 50% of these projects.

## § 100

## Sector Contracting Entities

(1) Sector contracting entities are

1. public contracting authorities under § 99 nos. 1 to 3 that carry out a sector activity under § 102;
2. natural or legal persons under private law who carry out a sector activity under § 102, where
  - a) such activity is carried out based on special or exclusive rights that were conferred by a competent authority; or
  - b) public contracting authorities under § 99 nos. 1 through 3 can individually or jointly exercise a controlling influence on these persons.

(2) Special or exclusive rights within the meaning of paragraph 1 no. 2 a) are rights which result in reserving the performance of this activity to one or more undertakings while considerably diminishing the eventuality that this activity will be performed by other undertakings. Rights are not special or exclusive rights in this sense if they were conferred based on a procedure under the provisions of this Part or based on another procedure for which adequate notice was given and which is founded on objective criteria.

(3) The exercise of a controlling influence within the meaning of paragraph 1 no. 2 b) is presumed where a public contracting authority under § 99 nos. 1 to 3

1. directly or indirectly owns the majority of the subscribed capital of the undertaking;
2. holds the majority of the voting rights attached to the shares of the undertaking; or
3. can appoint more than half of the members of the administrative, management or supervisory board of the undertaking.

## § 101

### Concession Grantors

#### (1) Concession grantors are

1. public contracting authorities under § 99 nos. 1 to 3 that award a concession
2. sector contracting entities under § 100(1) no. 1 that carry out a sector activity under § 102(2) through (6) and award a concession for the purpose of carrying out this activity.
3. Sector contracting entities under § 100(1) no. 2 that carry out a sector activity under § 102(2) through (6) and award a concession for the purpose of carrying out this activity.

#### (2) § 100(2) and (3) shall apply *mutatis mutandis*.

## § 102

### Sector Activities

#### (1) Sector activities in the field of water are

1. the provision or operation of fixed networks intended to provide a service to the public in connection with the collection, transport or distribution of drinking water;
2. the supply of drinking water to such networks.

Sector activities also include activities under sentence 1 that are associated with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations, or are associated with the disposal or treatment of sewage. The supply, by a sector contracting entity under § 100(1) no. 2, of drinking water to fixed networks which provide a service to the public shall not be considered to be a sector activity where the production of drinking water by the contracting entity concerned takes place because the consumption thereof is necessary for carrying out an activity that is not a sector activity under paragraphs 1 to 4, and the supply to the public network depends only on that contracting entity's own consumption and has not exceeded 30% of that contracting entity's total production of drinking water, on the basis of the average for the preceding three years, including the current year.

#### (2) Sector activities in the field of electricity are

1. the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;
2. the supply of electricity to such networks, unless
  - a) the production of electricity by the sector contracting entity under § 100(1) no. 2 takes place because its consumption is necessary for carrying out an activity that is not a sector activity under paragraphs 1 to 4; and

- b) the supply depends only on the sector contracting entity's own consumption and has not exceeded 30% of that sector contracting entity's total production of energy, on the basis of the average for the preceding three years, including the current year.

(3) Sector activities in the field of gas and heat are

1. the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat;
2. the supply of gas or heat to such networks, unless
  - a) the production of gas or heat by the sector contracting entity under §100 (1) no. 2 is the unavoidable consequence of carrying out an activity that is not a sector activity under paragraphs 1 to 4; and
  - b) the supply is aimed only at the economic exploitation of such production and amounts to not more than 20% of that sector contracting entity's turnover on the basis of the average for the preceding three years, including the current year.

(4) Sector activities in the field of transport services are the provision or operation of networks intended to provide a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable; a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

(5) Sector activities in the field of ports and airports are activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

(6) Sector activities in the field of fossil fuels are activities relating to the exploitation of a geographical area for the purpose of:

1. extracting oil or gas; or
2. exploring for, or extracting, coal or other solid fuels.

(7) For the purposes of paragraphs 1 through 3, the term 'supply' covers generation and production as well as wholesale and retail sale. The production of gas falls within the scope of paragraph 6.

## § 103

### Public Contracts, Framework Agreements and Design Contests

(1) Public contracts are contracts for pecuniary interest concluded between public contracting authorities or sector contracting entities and undertakings for the procurement of services whose subject matter is the delivery of goods, the execution of works or the provision of services.

(2) Supply contracts are contracts for the procurement of goods involving in particular a purchase or hire purchase or leasing, or a lease with or without a purchase option. The contracts may also include ancillary services.

(3) Works contracts are contracts either for the execution or both the design and execution

1. of works in connection with one of the activities mentioned in Annex II of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on

public procurement and repealing Directive 2004/18/EC (OJ L 94 of 28/3/2014, p. 65) and Annex I of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94 of 28/3/2014, p. 243); or

2. of a work for the public contracting authority or the sector contracting entity which is the result of civil engineering or building construction work and is to fulfil a commercial or technical function.

A works contract also exists when a third party produces a work in accordance with the requirements specified by the public contracting authority or the sector contracting entity, the work is of direct economic benefit to the contracting authority or entity and the authority or entity has a decisive influence on the type and design of the work.

(4) Service contracts are contracts for the performance of services that are not covered by paragraphs 2 and 3.

(5) Framework agreements are agreements between one or more public contracting authorities or sector contracting entities and one or more undertakings, the purpose of which is to establish the terms governing public contracts to be awarded during a given period, in particular with regard to price. Unless otherwise specified, the same provisions as for the award of corresponding public contracts apply to the award of framework agreements.

(6) Design contests are award procedures that are intended to enable the contracting authority to acquire a plan or design on the basis of a comparative evaluation by a jury with or without the award of prizes.

## § 104

### Public Contracts Relating to Defence or Security

(1) Public contracts relating to defence or security are public contracts for at least one of the following services:

1. the supply of military equipment, including any related parts, components or assembly kits;
2. the supply of equipment awarded under a classified contract, including any related parts, components or assembly kits;
3. supplies, works and services directly connected with the equipment referred to in nos. 1 and 2 in all phases of the equipment's life cycle; or
4. works and services specifically for military purposes or works and services awarded under a classified contract.

(2) Military equipment is any equipment that is designed specifically for military purposes or adjusted to suit military purposes and destined to be used as a weapon, ammunition or war material.

(3) A classified contract within the meaning of this provision is a contract in the special field of non-military security which has similar characteristics and needs just as much protection as a contract on the supply of military equipment within the meaning of paragraph 1 no. 1 or as works or services that are specifically for military purposes within the meaning of paragraph 1 no. 4; and

1. in the performance of which classified information under § 4 of the German Act on the Prerequisites and Procedures for Security Clearance Checks Undertaken by the Federal Government [*Sicherheitsüberprüfungsgesetz*] or corresponding provisions on the level of the *Länder* is used; or



2. which requires or contains classified information within the meaning of no. 1.

## § 105

### Concessions

(1) Concessions are contracts for pecuniary interest by means of which one or more concession grantors entrust one or more undertakings

1. with the execution of works ('works concessions'), the consideration for which consists either solely in the right to exploit the work or in that right together with payment; or
2. with the provision and management of services other than the execution of works referred to in no. 1 ('services concessions'), the consideration for which consists either solely in the right to exploit the services or in that right together with payment.

(2) As distinguished from the award of public contracts, in the process of the award of a works or services concession, the operating risk for the use of the work or for the exploitation of the services passes to the concessionaire. This is the case when

1. it is not guaranteed under normal operating conditions that the investments made or the costs incurred for operation of the work or provision of the services can be recouped; and
2. the concessionaire is really exposed to the vagaries of the market, such that any potential estimated losses incurred by the concessionaire are not negligible.

The operating risk may consist of either a demand risk or a supply risk.

## § 106

### Thresholds

(1) This Part applies to the award of public contracts and concessions as well as the organisation of design contests with a contract value, exclusive of value-added tax, that reaches or exceeds the thresholds established in each case. § 114(2) shall remain unaffected.

(2) The threshold in each case originates,

1. for public contracts and design contests awarded by public contracting authorities, from Article 4 of Directive 2014/24/EU, as amended; the resulting threshold for central government authorities is to be applied by all supreme federal authorities, all higher federal authorities and comparable federal institutions;
2. for public contracts and design contests awarded by sector contracting entities for the purpose of sector activity, from Article 15 of Directive 2014/25/EU, as amended;
3. for public contracts relating to defence or security, from Article 8 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216 of 20/8/2009, p. 76), as amended;
4. for concessions from Article 8 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94 of 28/3/2014, p. 1), as amended.

(3) The Federal Ministry for Economic Affairs and Energy shall announce the applicable thresholds without delay in the Federal Gazette after they have been published in the Official Journal of the European Union.

## § 107

### General Exceptions

(1) This Part shall not apply to the award of public contracts and concessions for:

1. arbitration and conciliation services;
2. the acquisition, rental or leasing, by whatever financial means, of land, existing buildings or other immovable property or rights thereon;
3. employment contracts;
4. civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and that are covered by Common Procurement Vocabulary (CPV) codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services; non-profit organisations or associations covered by these numbers are the aid agencies recognised as civil and disaster protection organisations under federal or *Land* law.

(2) Nor shall this Part apply to public contracts and concessions:

1. where application of this Part would force the contracting authority to supply information in connection with the procurement procedure or the execution of the contract the disclosure of which it considers contrary to the essential interests of the security of the Federal Republic of Germany within the meaning of Article 346(1)(a) of the Treaty on the Functioning of the European Union; or
2. that fall within the scope of Article 346(1)(b) of the Treaty on the Functioning of the European Union.

## § 108

### Exceptions for Cooperation with Other Public Authorities

(1) This Part shall not apply to the award of public contracts that are awarded by a public contracting authority within the meaning of § 99 nos. 1 to 3 to a legal person under public or private law where

1. the public contracting authority exercises over the legal person a control similar to that exercised by it over its own departments;
2. more than 80% of the activities of the legal person are carried out in the performance of tasks entrusted to it by the public contracting authority or by other legal persons controlled by that public contracting authority; and
3. there is no direct private capital participation in the legal person with the exception of non-controlling and non-blocking forms of private capital participation that are required by national legislative provisions and that do not exert a decisive influence on the controlled legal person.

(2) The exercise of control within the meaning of paragraph 1 no. 1 is presumed when the public contracting authority exercises a decisive influence over the strategic objectives and significant decisions of the legal person. Control may also be exercised by

another legal person which is itself controlled in the same way by the public contracting authority.

(3) Paragraph 1 also applies to the award of public contracts by a controlled legal person, which is at the same time a public contracting authority within the meaning of § 99 nos. 1 to 3, to the controlling public contracting authority or to another legal person controlled by that public contracting authority. It is required that there be no direct private capital participation in the legal person being awarded the public contract. Paragraph 1 no. 3 second half sentence shall apply *mutatis mutandis*.

(4) This Part shall not apply to the award of public contracts where, although the public contracting authority within the meaning of § 99 nos. 1 to 3 exercises no control within the meaning of paragraph 1 no. 1 over a legal person under public or private law,

1. the public contracting authority, jointly with other public contracting authorities, exercises over the legal person a control which is similar to that exercised by each of the public contracting authorities over its own departments;
2. more than 80% of the activities of the legal person are carried out in the performance of tasks entrusted to it by the public contracting authorities or by another legal person controlled by those public contracting authorities; and
3. there is no direct private capital participation in the legal person; paragraph 1 no. 3 second half sentence shall apply *mutatis mutandis*.

(5) Joint control within the meaning of paragraph 4 no. 1 exists where

1. the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities; an individual representative may represent several or all of the participating public contracting authorities;
2. the contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the legal person; and
3. the legal person does not pursue any interests that are contrary to those of the public contracting authorities.

(6) Nor shall this Part apply to contracts concluded between two or more public contracting authorities within the meaning of § 99 nos. 1 to 3 where

1. the contract establishes or implements a cooperation between the participating public contracting authorities to ensure that public services they have to perform are provided with a view to achieving objectives they have in common;
2. the implementation of the cooperation under no. 1 is governed solely by considerations relating to the public interest; and
3. the public contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation under no. 1;

(7) For the determination of the percentage under paragraph 1 no. 2, paragraph 4 no. 2 and paragraph 6 no. 3, the average total turnover or an appropriate activity-based measure for the three years preceding the public contract award shall be taken into consideration. An appropriate activity-based measure is, for example, costs incurred by the legal person or the public contracting authority for this period with respect to supplies, works and services. Where turnover, or an appropriate alternative activity-based measure such as costs, is either not available for the preceding three years or no longer meaningful, it shall be sufficient to show, particularly by means of business projections, that the measurement of activity is credible.

(8) Paragraphs 1 to 7 shall apply *mutatis mutandis* to sector contracting entities within the meaning of § 100(1) no. 1 for the award of public contracts and to concession grantors within the meaning of § 101(1) nos. 1 and 2 for the award of concessions.

## § 109

### Exceptions for Awards Based on International Procedural Rules

(1) This Part shall not be applied where public contracts, design contests or concessions

1. are to be awarded or executed according to procurement procedures that are laid down
  - a) through a legal instrument creating international law obligations, such as an international accord or agreement, concluded in conformity with the EU treaties, between the Federal Republic of Germany and one or more countries that are not Contracting Parties of the Agreement on the European Economic Area or their subdivisions on covering supplies, works or services intended for the joint implementation or exploitation of a project by their signatories; or
  - b) an international organisation; or
2. in accordance with procurement rules provided by an international organisation or international financing institution, where the public contracts and design contests concerned are to be fully financed by that organisation or institution; in the case of public contracts and design contests co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.

(2) § 145 no. 7 shall be applied for public contracts relating to defence or security and § 150 no. 7 for concessions in the fields of defence and security.

## § 110

### Award of Public Contracts and Concessions that Have Different Types of Procurement as Their Subject Matter

(1) Public contracts having different types of procurement, such as supplies, works or services, as their subject matter shall be awarded in accordance with the provisions with which the principal subject matter of the contract is associated. The same applies to the award of concessions having both works and services as their subject matter.

(2) The principal subject matter of public contracts and concessions which

1. consist in part of services that are subject to the provisions on the award of public contracts for social and other specific services within the meaning of § 130 or concessions for social and other specific services within the meaning of § 153, and partially of other services, or
2. consist in part of supplies and in part of services

is determined according to which of the estimated values of the respective supplies or services is highest.

## § 111

Award of Public Contracts and Concessions  
Whose Parts Are Covered by Different Legal Regimes

(1) If the various parts of a public contract that are each covered by different legal regimes can be objectively divided, separate contracts may be awarded for each part or a whole contract may be awarded.

(2) If separate contracts are awarded, each individual contract shall be awarded according to the provisions that are applicable to its characteristics.

(3) If a whole contract is awarded,

1. the contract can be awarded without applying this Part where part of the contract satisfies the requirements of § 107(2) nos. 1 or 2 and the award of a whole contract is justified for objective reasons;
2. the contract can be awarded in accordance with the provisions on the award of contracts relating to defence or security where part of the contract is covered by those provisions and the award of a whole contract is justified for objective reasons;
3. the provisions on the award of public contracts by sector contracting entities are to be applied where part of the contract is covered by those provisions and the value of that part is equal to or exceeds the applicable threshold; this shall also apply where the other part of the contract is covered by the provisions on the award of concessions;
4. the provisions on the award of public contracts by contracting authorities are to be applied where part of the contract is covered by the provisions on the award of concessions and another part of the contract by the provisions on the award of public contracts by public contracting authorities and the value of that part is equal to or exceeds the applicable threshold;
5. the provisions of this Part are to be applied where part of the contract is covered by the provisions of this Part and another part of the contract is covered by provisions outside of this Part; this shall apply irrespective of the value of the part that would be covered by other provisions outside of this Part and irrespective of their legal regime.

(4) If the various parts of a public contract that are each covered by different legal regimes cannot be objectively divided

1. the contract shall be awarded in accordance with the provisions with which the principal subject matter is associated; if the contract contains elements of a services concession and a supply contract, the principal subject matter shall be determined according to which of the estimated values of the respective services or supplies is higher.
2. the contract may be awarded without application of the provisions of this Part or pursuant to the provisions on the award of public contracts relating to defence or security where the contract contains elements to which § 107(2) nos 1 or 2 apply.

(5) The decision to award a whole contract or separate contracts may not be made for the purpose of excluding the contract award from the provisions on the award of public contracts and concessions.

(6) Paragraphs 1 and 2, paragraph 3 nos. 1 and 2 and paragraphs 4 and 5 shall apply *mutatis mutandis* to the award of concessions.

## § 112

Award of Public Contracts and Concessions  
Covering Several Activities

(1) If a public contract covers several activities of which one activity constitutes a sector activity within the meaning of § 102, separate contracts may be awarded for the purposes of each individual activity or a whole contract may be awarded.

(2) If separate contracts are awarded, each individual contract shall be awarded according to the provisions that are applicable to its characteristics.

(3) If a whole contract is awarded, that contract is covered by the provisions that apply to the activity for which the contract is primarily intended. If the contract is intended both for a sector activity within the meaning of § 102 and an activity that includes defence or security aspects, § 111(3) nos. 1 and 2 shall apply *mutatis mutandis*.

(4) The decision to award a whole contract or separate contracts may not be made for the purpose of excluding the contract award from the provisions of this Part.

(5) If it is objectively impossible to determine the activity for which the contract is principally intended, the award is subject to:

1. the provisions on the award of public contracts by public contracting authorities if one of the activities for which the contract is intended falls under those provisions;
2. the provisions on the award of public contracts by sector contracting entities if the contract is intended both for a sector activity within the meaning of § 102 and for an activity that would fall within the scope of the provisions for the award of concessions;
3. the provisions on the award of public contracts by sector contracting entities if the contract is intended both for a sector activity within the meaning of § 102 and for an activity that would fall neither within the scope of the provisions on the award of concessions nor within the scope of the provisions on the award of public contracts by public contracting authorities.

(6) If a concession covers several activities of which one activity constitutes a sector activity within the meaning of § 102, paragraphs 1 to 4 shall apply *mutatis mutandis*. If it is objectively impossible to determine the activity for which the concession is principally intended, the award is subject to:

1. the provisions on the award of concessions by their grantors within the meaning of § 101(1) no. 1 if one of the activities for which the concession is intended is covered by those provisions and the other activity by the provisions on the award of concessions by their grantors within the meaning of § 101(1) no. 1 or § 101(1) no. 3.
2. the provisions on the award of public contracts by public contracting authorities if one of the activities for which the concession is intended falls under those provisions;
3. the provisions on the award of concessions if one of the activities for which the concession is intended is covered by those provisions and the other activity is covered neither by the provisions on the award of public contracts by sector contracting entities nor by the provisions on the award of public contracts by public contracting authorities.

## § 113

## Power to Issue an Ordinance

<sup>1</sup>The Federal Government shall be empowered to regulate, through ordinances with the consent of the Bundesrat, the particulars on the award of public contracts and concessions and the organisation of design contests. This authorisation includes the power to regulate requirements for the subject matter of the contract and for the procurement procedure, particularly to regulate

1. the estimate of the order or contract value;
2. the tender specifications, the tender notice, the procurement procedures and the course of the procurement procedure, the variant tenders, the award of subcontracts as well as the award of public contracts and concessions that pertain to social and other specific services;
3. the special techniques and instruments in procurement procedures and for aggregated procurement, including central procurement;
4. the sending, receipt, forwarding and storage of data, including rules on the entry into force of the corresponding obligations;
5. the selection and review of undertakings and tenders as well as the conclusion of the contract;
6. the cancellation of the procurement procedure;
7. the defence- or security-specific requirements relating to secrecy, general rules on the protection of confidentiality, the security of supply as well as specific rules on the award of subcontracts;
8. the conditions under which sector contracting entities, concession grantors or contracting authorities under the Federal Mining Act [*Bundesberggesetz*] may be exempted from the obligation to apply the provisions of this Part, and to define the procedure to be followed in this respect, including the necessary investigatory powers of the Bundeskartellamt and the particulars of the costs to be charged; measures of clemency may be provided for.

The ordinances must be communicated to the Bundestag. The communication shall occur before the communication to the Bundesrat. The ordinances may be amended or refused by resolution of the Bundestag. The resolution of the Bundestag shall be communicated to the Federal Government. If the Bundestag has not dealt with the ordinance within three sitting weeks of receipt thereof, the unchanged ordinances shall be communicated to the Bundesrat.

## § 114

## Monitoring and Duty to Transmit Procurement Data

(1) By 15 February 2017 and by 15 February every three years thereafter, the supreme federal authorities and the *Länder* shall make a written report in their respective area of responsibility to the Federal Ministry for Economic Affairs and Energy concerning the application of the provisions of this Part and ordinances issued based on § 113.

(2) <sup>2</sup>Contracting authorities within the meaning of § 98 shall transmit to the Federal Ministry for Economic Affairs and Energy data on public contracts within the meaning of

<sup>1</sup> §§ 113 and 114(2) sentence 4 became law already on 18 April 2016 (Art. 3 of the Act on the Modernisation of Public Procurement Law [*Gesetz zur Modernisierung des Vergaberechts*] of 17 February 2016, Federal Law Gazette I p. 203)

<sup>2</sup> §§ 113 and 114(2) sentence 4 became law already on 18 April 2016 (Art. 3 of the Act on the Modernisation of Public Procurement Law [*Gesetz zur Modernisierung des Vergaberechts*] of 17 February 2016, Federal Law Gazette I p. 203)

§ 103(1) and on concessions within the meaning of § 105 for the acquisition of comprehensive data in public procurement. For public contracts within the meaning of § 103(1) and for concessions within the meaning of § 105 above the applicable thresholds, the data to be transmitted shall at most comprise data included in the tender notices on awarded public contracts and concessions. For public contracts by public contracting authorities within the meaning of § 99 under the applicable thresholds and above the *de minimis* thresholds to be set by the ordinance in accordance with sentence 4, the data to be transmitted shall comprise data on the type and quantity of the performance and on the value of the successful tender. The Federal Government shall be empowered to regulate, through ordinances with the consent of the Bundesrat, the particulars of the data transmission, including the scope of the data to be transmitted and the time the corresponding obligations come into force.

## Chapter 2

### Award of Public Contracts by Public Contracting Authorities

#### Subchapter 1

##### Scope

##### § 115

##### Scope

This chapter shall be applied to the award of public contracts and the organisation of design contests by public contracting authorities.

##### § 116

##### Special Exceptions

(1) This Part shall not apply to the award of public contracts by public contracting authorities if these contracts have the following as subject matter:

1. legal services that concern one of the following activities:
  - a) representation of a client by a lawyer in
    - aa) judicial or administrative proceedings before national or international courts, public authorities or institutions;
    - bb) national or international arbitration or conciliation proceedings;
  - b) Legal advice given by a lawyer in preparation for a proceeding within the meaning of letter a) or where there are specific indications and a high probability that the matter to which the legal representation relates will become the subject of such a proceeding;
  - c) document certification and authentication services that must be provided by notaries;
  - d) activities of court-appointed conservators, guardians, caregivers, guardians ad litem, expert witnesses, administrators or other legal services, the providers of which are appointed by a court or are designated by law to carry out specific tasks under the supervision of such courts; or



- e) activities that are at least in part concerned with the exercise of official authority;
2. research and development services, unless they involve research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 and for which
  - a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
  - b) the service is wholly remunerated by the contracting authority.
3. the acquisition, development, production or co-production of programme material for audiovisual media services or radio media services if those contracts are awarded by audiovisual or radio media service providers or contracts for broadcasting time or programme provision if those contracts are awarded to audiovisual or radio media service providers;
4. financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, central bank services and transactions conducted with the European Financial Stability Facility and the European Stability Mechanism;
5. loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments; or
6. services awarded to a public contracting authority under § 99 nos. 1 to 3 that has an exclusive statutory or regulatory right to render the services.

(2) Nor shall this Part apply to public contracts and design contests for the principal purpose of permitting the public contracting authority to provide or exploit public communications networks or to provide to the public one or more electronic communications services.

## § 117

### Special Exceptions for Awards that Include Defence or Security Aspects

This Part shall not apply to public contracts and design contests with defence or security aspects that are not public contracts relating to defence or security

1. to the extent that the protection of the essential security interests of the Federal Republic of Germany cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information made available by the contracting authority in a procurement procedure;
2. to the extent that the requirements of Article 346(1)(a) of the Treaty on the Functioning of the European Union are satisfied;
3. where the award and performance of the contract are declared to be secret or must be accompanied by special security measures in accordance with laws, regulations or administrative provisions; the prerequisite for this is a determination that the essential interests concerned cannot be guaranteed by less intrusive measures, such as by imposing requirements aimed at protecting the confidential nature of the information;
4. where the public contracting authority is obliged to carry out the award or performance in accordance with other procurement procedures that are laid down through

- a) an international accord or agreement, concluded in conformity with the EU treaties, between the Federal Republic of Germany and one or more countries that are not Contracting Parties of the Agreement on the European Economic Area or their subdivisions and covering supplies, works or services intended for the joint implementation or exploitation of a project by their signatories;
  - b) an international accord or agreement relating to the stationing of troops, which pertains to undertakings with their registered office in the Federal Republic of Germany or in a country that is not a Contracting Party of the Agreement on the European Economic Area; or
  - c) an international organisation; or
5. where the public contracting authority awards a public contract or organises a design contest in accordance with procurement rules provided by an international organisation or international financing institution and that public contract or design contest is financed wholly through that organisation or institution. In the case of co-financing for the most part by an international organisation or international financing institution the parties shall agree on applicable procurement procedures.

## § 118

### Public Contracts Reserved for Certain Contractors

(1) Public contracting authorities may reserve the right to participate in public procurement procedures to workshops for persons with disabilities and undertakings whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such public contracts to be performed in the context of sheltered employment programmes.

(2) It is required that at least 30% of the employees of those workshops or undertakings are disabled or disadvantaged workers.

## Subchapter 2

### Procurement Procedure and Contract Performance

## § 119

### Types of Procedures

(1) Public contracts shall be awarded in open procedures, restricted procedures, negotiated procedures, competitive dialogue or innovation partnerships.

(2) Contracting authorities may freely choose between the open procedure and the restricted procedure, which always requires competitive tendering. The other types of procedures are only available to the extent permitted by this Act.

(3) The open procedure is a procedure in which the contracting authority publicly invites an unlimited number of undertakings to submit tenders.

(4) The restricted procedure is a procedure in which the public contracting authority, after a previous public invitation to participate, selects a limited number of undertakings in accordance with objective, transparent and non-discriminatory criteria (competitive tender) and invites these to submit tenders.

(5) The negotiated procedure is a procedure in which the public contracting authority, with or without competitive tender, approaches selected undertakings in order to negotiate on the tenders with one or more of those undertakings.

(6) The competitive dialogue is a procedure for awarding public contracts with the objective of identifying and determining the means that best satisfy the needs of the public contracting authority. After a competitive tender, the public contracting authority shall open a dialogue with the selected undertakings to discuss all aspects of the contract award.

(7) The innovation partnership is a procedure for developing innovative supplies, works or services which are not yet available on the market and for acquisition of the services that result therefrom. After a competitive tender, the public contracting authority negotiates in several phases with the selected undertakings on the initial and subsequent tenders.

## § 120

### Special Techniques and Instruments in Procurement Procedures

(1) A dynamic purchasing system is a short-term, exclusively electronic procedure for the procurement of performances that are generally available on the market, for which the characteristics that are generally available on the market satisfy the requirements of the public contracting authority.

(2) An electronic auction is a repetitive electronic procedure for determining the most economically advantageous tender. Each electronic auction is preceded by a complete initial evaluation of all tenders.

(3) An electronic catalogue is a list of the supplies, works and services to be procured, which is prepared in an electronic format based on the tender specifications. It can be utilised particularly for concluding framework agreements and can include illustrations, price information and product descriptions.

(4) A central purchasing body is a public contracting authority that, on an ongoing basis, purchases supplies and services, awards public contracts or concludes framework agreements (centralised purchasing activities). Public contracting authorities may procure supplies and services from central purchasing bodies or award contracts for supplies, works and services through central purchasing bodies. Public contracts for carrying out central purchasing activities may be awarded to a central purchasing body without conducting a procurement procedure in accordance with the provisions of this Part. Services contracts of this type can also include consulting and support services for the preparation or execution of procurement procedures. Parts 1 to 3 shall remain unaffected.

## § 121

### Tender Specifications

(1) The subject matter of the contract shall be described as clearly and comprehensively as possible in the tender specifications so that the description is understandable in the same way for all undertakings and so that the tenders can be compared with each other. The tender specifications shall include the functional and performance requirements or a description of the task to be addressed, knowledge of which is required to prepare the tender, as well as the circumstances and conditions for provision of the performance.

(2) For all procurement which is intended for use by natural persons, the accessibility criteria for persons with disabilities or the design for all users shall be taken into account when preparing the tender specifications, except in properly justified cases.

- (3) The tender specifications shall be enclosed with the procurement documents.

## § 122

### Eligibility

(1) Public contracts shall be awarded to skilled, efficient (eligible) undertakings that have not been excluded under §§ 123 or 124.

(2) An undertaking is eligible if it meets the criteria (selection criteria) defined in detail by the public contracting authority for the proper execution of the public contract. The selection criteria may exclusively relate to:

1. Qualification and authorisation to pursue the professional activity;
2. Economic and financial standing;
3. Technical and professional ability.

(3) Proof of eligibility and the absence of grounds for exclusion under §§ 123 and 124 may be provided, entirely or in part, through participation in prequalification systems.

(4) Selection criteria must be related and proportionate to the subject matter of the contract. They shall appear in the contract notice, the prior information notice or the invitation to confirm interest.

## § 123

### Compulsory Grounds for Exclusion

(1) Public contracting authorities shall exclude an undertaking from participation at any point in the procurement procedure when they are aware that a person whose conduct is imputable to the undertaking in accordance with paragraph 3 has been convicted by final judgement or a final administrative fine has been issued against the undertaking under § 30 of the German Administrative Offences Act [*Gesetz über Ordnungswidrigkeiten*] for a criminal offence under:

1. § 129 of the German Criminal Code [*Strafgesetzbuch*] (forming criminal organisations), § 129a of the German Criminal Code (forming terrorist organisations) or § 129b of the German Criminal Code (criminal and terrorist organisations abroad);
2. § 89c of the German Criminal Code (terrorism financing) or for participation in such a crime or for the provision or collection of financial resources with knowledge that such financial resources will be used or intended to be used, wholly or in part, to commit a crime under § 89a(2) no. 2 of the German Criminal Code;
3. § 261 of the German Criminal Code (money laundering; hiding unlawfully obtained financial benefits);
4. § 263 of the German Criminal Code (fraud), provided that the criminal offence is directed against the budget of the European Union or against budgets administered by the European Union or on its behalf;
5. § 264 of the German Criminal Code (subsidy fraud), provided that the criminal offence is directed against the budget of the European Union or against budgets administered by the European Union or on its behalf;
6. § 299 of the German Criminal Code (taking and giving bribes in commercial practice);

7. § 108e of the German Criminal Code (bribing delegates);
8. §§ 333 and 334 of the German Criminal Code (granting an undue advantage and bribery), each also in conjunction with § 335a of the German Criminal Code (foreign and international officials);
9. Article 2 § 2 of the German Act on Combating International Bribery [*Gesetz zur Bekämpfung internationaler Bestechung*] (Bribery of Foreign Public Officials In International Business Transactions) or
10. §§ 232 and 233 of the German Criminal Code (human trafficking) or § 233a of the German Criminal Code (assisting in human trafficking).

(2) A conviction or the issuance of an administrative fine under the comparable provisions of other countries are the equivalent of a conviction or the issuance of an administrative fine within the meaning of paragraph 1.

(3) The conduct of a person convicted by final judgement shall be imputable to an undertaking if that person has acted as the responsible person for the management of the undertaking; this also includes supervision of management or the exercise in another manner of control in a managerial position.

(4) Public contracting authorities shall at any point in the procurement procedure exclude an undertaking from participating in the procurement procedure if

1. the undertaking has not fulfilled its obligations relating to the payment of taxes, charges or social security contributions and this has been established by a judicial or administrative decision having final and binding effect or
2. the public contracting authorities can prove the breach of an obligation under no. 1 in another suitable manner.

Sentence 1 shall not apply if the undertaking has fulfilled its obligations by making the payment or committing to pay the taxes, charges and social security contributions, including interest, fines for late payment and penalties.

(5) An exclusion under paragraph 1 may be disregarded if this is imperative for compelling reasons of the public interest. An exclusion under paragraph 4 sentence 1 may be disregarded if this is imperative for compelling reasons of the public interest or if an exclusion would be obviously disproportionate.

## § 124

### Facultative Grounds for Exclusion

(1) Taking the principle of proportionality into account, public contracting authorities may at any point in the procurement procedure exclude an undertaking from participating in the procurement procedure if

1. the undertaking has demonstrably breached applicable environmental, social or labour obligations in carrying out public contracts;
2. the undertaking is insolvent, an insolvency proceeding or a comparable proceeding over the assets of the undertaking has been filed or opened, the opening of such a proceeding has been denied for lack of assets, the undertaking is in liquidation proceedings or has ceased to do business;
3. the undertaking has demonstrably committed grave professional misconduct which renders its integrity questionable; § 123(3) shall apply *mutatis mutandis*;

4. the public contracting authority has sufficient indications that the undertaking has concluded agreements with other undertakings which have as their object or effect, the prevention, restriction or distortion of competition;
5. a conflict of interest exists in the execution of the procurement procedure which could compromise the impartiality and independence of a person working for the public contracting authority in the executing of the procurement procedure and which cannot be effectively remedied by other, less intrusive measures;
6. a distortion of competition results from the prior involvement of the undertaking in the preparation of the procurement procedure, and such distortion of competition cannot be remedied by other, less intrusive measures;
7. the undertaking has produced significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract or concession contract which led to an early termination, damages or other comparable sanctions;
8. the undertaking has committed a serious misrepresentation or withheld information or is not able to submit the required evidence with respect to the grounds for exclusion or the selection criteria; or
9. the undertaking
  - a) has undertaken to unduly influence the decision-making process of the public contracting authority;
  - b) has undertaken to obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
  - c) has negligently or intentionally provided misleading information that may have a material influence on the decision of the public contracting authority concerning the award decision, or has undertaken to provide such information.

(2) § 21 of the Posted Workers Act [*Arbeitnehmer-Entsendegesetz*], § 98c of the Residence Act [*Aufenthaltsgesetz*], § 19 of the Minimum Wage Act [*Mindestlohnengesetz*] and § 21 of the Control of Unreported Employment Act [*Schwarzarbeitsbekämpfungsgesetz*] shall remain unaffected.

## § 125

### Self-cleansing

(1) Public contracting authorities shall not exclude an undertaking for which a ground for exclusion exists under § 123 or § 124 from participation in the procurement procedure where the undertaking has proven that it

1. has paid or undertaken to pay compensation for any damage caused by the criminal offence or misconduct;
2. has comprehensively clarified the facts and circumstances associated with the criminal offence or misconduct and the damage caused thereby by actively collaborating with the investigating authorities and the public contracting authority; and
3. has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

§ 123(4) sentence 2 shall remain unaffected.

(2) The self-cleansing measures taken by the undertakings shall be evaluated by the public contracting authorities, taking into account the gravity and particular

circumstances of the criminal offence or misconduct. If the public contracting authorities consider the self-cleansing measures by the undertaking to be insufficient, they shall provide the undertaking with justification for the decision.

## § 126

### Allowable Period for Exclusions

Where an undertaking for which a ground for exclusion exists has taken no sufficient self-cleansing measures under § 125,

1. if a ground for exclusion exists under § 123, it may be excluded from participation in procurement procedures for up to five years from the day of the final conviction;
2. if a ground for exclusion exists under § 124, it may be excluded from participation in procurement procedures for up to three years following the event at issue.

## § 127

### Contract Award

(1) The contract shall be awarded to the most economically advantageous tender. The basis for this is an evaluation by the public contracting authority concerning whether and to what extent the tender meets the specified award criteria. The most economically advantageous tender is determined according to the best price-quality ratio. Apart from the price or costs, to determine this, qualitative, environmental or social aspects may also be taken into account.

(2) Binding rules on pricing shall be observed in determining the most economically advantageous tender.

(3) The award criteria must be related to the subject matter of the contract. This relationship shall also be assumed when an award criterion refers to processes relating to the production, provision or disposal of the performance, to trading with the performance or to another stage in the life cycle of the performance, even when such factors do not affect material qualities of the subject matter of the contract.

(4) The award criteria must be specified and defined in a manner that ensures the possibility of effective competition, that the contract cannot be awarded arbitrarily and that it is possible to conduct an effective review on whether and to what extent the tenders meet the award criteria. If public contracting authorities allow variant tenders, they shall define the award criteria in such a way as to apply both to main tenders and variant tenders.

(5) The award criteria and their weighting must be specified in the contract notice or the procurement documents.

## § 128

### Contract Performance

(1) In performing the public contract, undertakings must comply with all legal obligations applicable to them, in particular the obligation to pay taxes, charges and social security contributions, to comply with occupational health and safety rules and to grant employees at least those minimum working conditions, including the minimum wage, mandated for the respective performance under the Minimum Wage Act [*Mindestlohngesetz*], under a collective agreement declared to be universally applicable under the Collective Agreements Act [*Tarifvertragsgesetz*] with the effects of the Posted

Workers Act, or under an ordinance issued under § 7, § 7a or § 11 of the Posted Workers Act or under § 3a of the Personnel Leasing Act [*Arbeitnehmerüberlassungsgesetz*] .

(2) Public contracting authorities may, in addition, set special conditions for the performance of a contract (contract performance conditions), provided that they are related to the subject matter of the contract in accordance with § 127(3). The contract performance conditions must arise from the contract notice or the procurement documents. They may in particular include economic, innovation-related, environmental, social or employment-related considerations or the protection of information confidentiality.

## § 129

### Mandatory contract performance conditions

Contract performance conditions which the public contracting authority is mandated to prescribe for the commissioned undertaking may only be specified based on a federal or *Land* statute.

## § 130

### Award of Public Contracts for Social and Other Specific Services

(1) When awarding public contracts for social and other specific services within the meaning of Annex XIV of Directive 2014/24/EU, public contracting authorities may freely choose between the open procedure, the restricted procedure, the negotiated procedure with competitive tender, the competitive dialogue and the innovation partnership. A negotiated procedure without competitive tender is only available to the extent permitted by this Act.

(2) In deviation from § 132(3), it is permissible to modify a public contract for social and other specific services within the meaning of Annex XIV of Directive 2014/24/EU without conducting a new procurement procedure when the value of the modification amounts to no more than 20% of the original contract value.

## § 131

### Award of Public Contracts for Passenger Transport Services by Rail

(1) When awarding public contracts for passenger transport services by rail, public contracting authorities may freely choose between the open and the restricted procedure, the negotiated procedure with competitive tender, the competitive dialogue and the innovation partnership. A negotiated procedure without competitive tender is only available to the extent permitted by this Act.

(2) Article 5(2) of Regulation (EC) No. 1370/2007 of the European Parliament and of the Council dated 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70 of the Council (OJ L 315 of 3/12/2007, p. 1) shall be applied in place of § 108(1). Article 5(5) and Article 7(2) of Regulation (EC) No. 1370/2007 shall remain unaffected.

(3) Public contracting authorities that award public contracts within the meaning of paragraph 1 shall require pursuant to Article 4(5) of Regulation (EC) No. 1370/2007 that where there is a change of operator of passenger transport services, the selected operator shall take on the employees who were employed by the previous operator to provide those transport services and grant them the rights to which they would have been entitled if there had been a transfer pursuant to § 613a of the German Civil Code



[*Bürgerliches Gesetzbuch*]. In the event that a public contracting authority should demand that employees be taken on within the meaning of sentence 1, such demand shall be limited to those employees who are actually required for provision of the transport services being transferred. The public contracting authority shall provide provisions to exclude an improper adaptation of provisions under the collective agreement to the detriment of the new operator between the publication of the contract notice and the takeover of the operation. If requested by the public contracting authority, the previous operator is obliged to provide all information required for this.

## § 132

### Modification of Contracts during Their Term

(1) Material changes to a public contract during its term require a new procurement procedure. Changes are material if they result in the public contract differing substantially from the public contract originally awarded. A material change exists in particular where

1. the change introduces conditions which, if they had applied to the original procurement procedure,
  - a) would have made it possible to admit other candidates or tenderers;
  - b) would have made it possible to accept a different tender; or
  - c) would have drawn the interest of further participants in the procurement procedure;
2. the modification shifts the economic balance of the public contract in favour of the contractor in a manner that was not provided for in the initial contract;
3. the modification significantly extends the scope of the public contract; or
4. a new contractor replaces the contractor in cases other than those provided for in paragraph 2 no. 4.

(2) Notwithstanding paragraph 1, it is permissible to modify a public contract without conducting a new procurement procedure where

1. the initial procurement documents provide clear, precise and unequivocal review clauses or options which contain statements on the scope and nature of and requirements for possible contract modifications, and the overall nature of the contract is not altered by the modification;
2. additional supplies, works or services become necessary, which were not provided for in the initial procurement documents and a change in the contractor
  - a) cannot be made for economic or technical reasons and
  - b) would cause significant inconvenience or substantial duplication of costs for the public contracting authority;
3. the need for modification has been brought about by circumstances that a diligent public contracting authority could not foresee, and the overall nature of the contract is not altered by the modification; or
4. a new contractor replaces the previous contractor
  - a) based on a review clause within the meaning of no. 1;
  - b) based on the fact that a different undertaking that meets the requirements originally set for eligibility replaces the original contractor, wholly or in part, following corporate restructuring through, for example, takeover, merger,

acquisition or insolvency, provided that this does not entail further material modifications within the meaning of paragraph 1; or

- c) based on the fact that the public contracting authority itself assumes the main contractor's obligations towards its subcontractors.

In the cases referred to in nos 2 and 3, the price may not be increased by more than 50% of the value of the original contract. Where there are several successive modifications of the contract, this limitation applies to the value of each individual modification, provided that the modifications were not made with the aim to circumvent the provisions of this Part.

(3) It is also permissible to modify a public contract without conducting a new procurement procedure if the overall nature of the contract is not altered and the value of the modification

1. does not exceed the respective thresholds under § 106 and
2. does not amount to more than 10% of the original contract value in the case of contracts for supplies and services and not more than 15% in the case of works contracts.

Where there are several successive modifications, the total value of the modifications is applicable.

(4) Where the contract includes an indexation clause, the higher price shall be the reference value for calculating the value under paragraph 2 sentences 2 and 3 and paragraph 3.

(5) Modifications under paragraph 2 nos. 2 and 3 shall be published in the Official Journal of the European Union.

## § 133

### Termination of Public Contracts in Special Cases

(1) Notwithstanding § 135, public contracting authorities may terminate a public contract during its term where

1. a material modification was made, which would have required a new procurement procedure under § 132;
2. at the time of contract award, a mandatory ground for exclusion existed under § 123(1) through (4) or
3. the public contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaty on the Functioning of the European Union or under the provisions of this Part that has been established by the Court of Justice of the European Union in a procedure pursuant to Article 258 TFEU.

(2) If a public contract is terminated pursuant to paragraph 1, the contractor may demand a corresponding part of the remuneration for its previous efforts. In the case of paragraph 1 no. 2, the contractor is not entitled to remuneration to the extent that its previous efforts are of no interest to the public contracting authority as a result of the termination.

- (3) The right to demand damages is not excluded by the termination.

## § 134

## Information and Standstill Obligation

(1) Public contracting authorities shall inform the unsuccessful tenderers in writing and without delay of the name of the successful undertaking, the reasons for the rejection of their tenders and of the earliest date of the conclusion of the contract. This shall also apply to candidates who were not informed of the rejection of their tenders before notification of the decision on the award was sent to the successful tenderers.

(2) A contract may be concluded at the earliest 15 calendar days after the information pursuant to paragraph 1 has been sent. If the information is sent electronically or by fax, the standstill period shall be reduced to 10 calendar days. The standstill period shall begin on the day after which the contracting authority despatches the information; the date of receipt by the tenderer and candidate in question shall be irrelevant.

(3) The obligation to inform the tendering parties shall not apply in cases in which negotiated procedures without competitive tender are justified on grounds of extreme urgency. In the case of contracts relating to defence or security, public contracting authorities may decide to refrain from disclosing certain information on the contract award or the conclusion of a framework agreement if the disclosure impedes law enforcement, is contrary to the public interest, particularly defence or security interests, harms legitimate commercial interests or undertakings or might prejudice fair competition between them.

## § 135

## Ineffectiveness

(1) A public contract shall be deemed ineffective from the outset if the public contracting authority

1. has violated § 134 or
2. has awarded the contract without prior publication or announcement in the Official Journal of the European Union without this being expressly permissible in accordance with the law

and this violation has been established in review proceedings.

(2) Ineffectiveness pursuant to paragraph 1 can only be established if this is claimed in review proceedings within 30 calendar days after the public contracting authority informs the affected candidates and tenderers concerning the conclusion of the contract, but at the latest six months after conclusion of the contract. If the contracting authority has published the award of the contract in the Official Journal of the European Union, the time limit for claiming ineffectiveness shall end 30 calendar days after publication of the notice of the award in the Official Journal of the European Union.

(3) Ineffectiveness under paragraph 1 no. 2 shall not arise where

1. the public contracting authority holds the view that it is permissible to award the contract without prior publication of an announcement in the Official Journal of the European Union;
2. the public contracting authority has published an announcement in the Official Journal of the European Union, in which it expresses its intention to conclude the contract; and
3. the contract was not concluded before the expiry of a period of at least 10 calendar days from the day of publication of that announcement.

The announcement according to sentence 1 no. 2 must include the name and contact data of the public contracting authority, the description of the contract subject matter, the justification for the decision of the contracting authority to award the contract without prior publication of an announcement in the Official Journal of the European Union, and the name and contact data of the undertaking that is to be awarded the contract.

### Chapter 3

#### Award of Public Contracts in Special Areas and Award of Concessions

#### Subchapter 1

#### Award of Public Contracts by Sector Contracting Entities

#### § 136

#### Scope

This subchapter shall apply to the award of public contracts and the organisation of design contests by sector contracting entities for the purpose of conducting a sector activity.

#### § 137

#### Special Exceptions

(1) This Part shall not apply to the award of public contracts by sector contracting entities for the purpose of conducting a sector activity if these contracts have the following as subject matter:

1. legal services within the meaning of § 116 no. 1,
2. research and development services within the meaning of § 116 no. 2,
3. broadcasting time or programme provision if these contracts are awarded to audiovisual or radio media service providers;
4. financial services within the meaning of § 116 no. 4,
5. loans within the meaning of § 116 no. 5,
6. services within the meaning of § 116 no. 6, if these contracts are awarded on the basis of an exclusive right,
7. the procurement of water in relation to the supply of drinking water,
8. the procurement of energy or fuels for the production of energy in relation to the supply of energy or
9. the resale or lease to third parties, provided that
  - a) the sector contracting entity has no special or exclusive right to sell or lease the subject of such contracts and
  - b) other undertakings are free to sell or lease the subject matter of the contract under the same conditions as the relevant sector contracting entity.

(2) Nor shall this Part apply to the award of public contracts and the organisation of design contests having the following as subject matter:

1. supplies, works and services as well as the organisation of design contests by sector contracting entities under § 100(1) no. 2, if they serve purposes other than for a sector activity, or
2. the carrying out of sector activities outside the territory of the European Union, where the contract is awarded in a way that does not involve the actual use of a network or facility within the European Union.

### § 138

#### Special Exception for Awards to Affiliated Undertakings

(1) This Part shall not apply to the award of public contracts

1. that are granted by a sector contracting entity to an affiliated undertaking or
2. that are granted by a joint venture, formed exclusively by several sector contracting entities to carry out a sector activity, to an undertaking that is associated with one of these sector contracting entities.

(2) Within the meaning of paragraph 1, an affiliated undertaking is

1. an undertaking the annual accounts of which are to be included with those of the contracting entity in a consolidated financial statement of a parent undertaking in accordance with § 271(2) of the German Commercial Code [*Handelsgesetzbuch*] in line with the provisions on full consolidation, or
2. an undertaking that
  - a) can be subject to a direct or indirect controlling influence under § 100(3) of the sector contracting entity,
  - b) can exercise a controlling influence under § 100(3) on the sector contracting entity or
  - c) in conjunction with the contracting entity is, by virtue of the ownership structures, financial participation or rules governing said undertaking, subject to the controlling influence under § 100(3) of another undertaking.

(3) Paragraph 1 shall apply to contracts relating to supplies, works or services, if taking into account all supplies, works or services provided by the affiliated undertaking in the preceding three years in the European Union, at least 80% of the overall average turnover achieved by said undertaking in the particular sector derives from the provision of supplies, works or services for the sector contracting entity or other undertakings with which it is affiliated.

(4) If the same or similar supplies, works or services are provided by more than one undertaking affiliated and economically aligned with the sector contracting entity, the percentage figures shall be calculated in accordance with paragraph 3, taking into account the total turnover achieved by these affiliated undertakings from the provision of the relevant supplies, works or services.

(5) If no turnover figures are available for the three preceding years, it shall be sufficient for the undertaking to show, by means of business activity projections for example, that the turnover target required under paragraph 3 can be credibly achieved.

## § 139

Special Exception for Awards  
by or to a Joint Venture

(1) This Part shall not apply to the award of public contracts

1. that are granted by a joint venture, formed exclusively by several sector contracting entities to carry out sector activities, to one of these sector contracting entities or
2. that are granted by a sector contracting entity that is part of a joint venture within the meaning of no. 1 to said joint venture,

(2) It is required that

1. the joint venture within the meaning of paragraph 1 no. 1 has been formed to carry out the relevant sector activity over a period of at least three years, and
2. the instrument setting up the joint venture stipulates that the sector contracting entities forming the joint venture will be part of the joint venture for at least the same period.

## § 140

## Special Exception for Activities that are Directly Exposed to Competition

(1) This Part shall not apply to public contracts awarded for the purpose of conducting a sector activity if the sector activity is directly exposed to competition on unrestricted markets. The same applies to design contests organised in connection with the sector activity.

(2) The Bundeskartellamt charges costs (fees and disbursements) to cover the administrative expenses involved in the preparation of expert opinions and observations made based on the ordinance issued under § 113 sentence 2 no. 8, § 80(1) sentence 3 and (2) sentence 1, sentence 2 no. 1, sentence 3 and 4, (5) sentence 1 and (6) sentence 1 no. 2, sentence 2 and 3 shall apply accordingly. § 63(1) and (4) shall apply *mutatis mutandis* to the possibility of filing an appeal against the cost decision.

## § 141

## Types of Procedures

(1) Sector contracting entities may freely choose between the open procedure, the restricted procedure, the negotiated procedure with competitive tender and the competitive dialogue.

(2) The negotiated procedure without competitive tender and the innovation partnership are only available to the extent permitted by this Act.

## § 142

## Other Applicable Provisions

As for other matters, for the award of public contracts by sector contracting entities for the purpose of sector activity, § 118 and § 119 shall apply, unless otherwise specified in § 141, as well as §§ 120 through 129, § 130 in conjunction with Annex XVII of Directive 2014/25/EU and §§ 131 through 135 subject to the proviso that

1. sector contracting entities in deviation from § 122(1) and 2 shall select the undertakings on the basis of objective criteria that can be accessed by all interested undertakings,
2. sector contracting entities under § 100(1) no. 2 can exclude an undertaking under § 123, but are not obliged to do so,
3. § 132(2) sentence 2 and 3 shall not apply.

## § 143

### Provision for Contracting Entities under the Federal Mining Act

(1) In the award of contracts relating to supplies, works or services exceeding the contract thresholds under § 106(2) no. 2, sector contracting entities that are entitled under the German Federal Mining Act to explore for or extract oil, gas, coal or other solid fuels, must observe the principles of non-discrimination and competitive procurement in the award of contracts for the exploration for or extraction of oil, gas, coal or other solid fuels. In particular, they must provide adequate information to undertakings that could be interested in such a contract and apply objective criteria in the award of the contract. Sentence 1 and 2 shall not apply to the award of contracts for the purchase of energy or fuels for the production of energy.

(2) The contracting entities under paragraph 1 shall inform the European Commission via the Federal Ministry for Economic Affairs and Energy of the award of the contracts covered by this provision in accordance with Commission Decision 93/327/EEC of 13 May 1993 defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the Commission information relating to the contracts they award (OJ EU no. L 129, p. 25). They may be exempted from the obligation to apply this provision under the procedure stipulated by the ordinance issued in accordance with § 113 sentence 2 no. 8.

## Subchapter 2

### Award of Public Contracts Relating to Defence or Security

## § 144

### Scope

This subchapter shall be applied to the award of public contracts relating to defence or security by public contracting authorities and sector contracting entities.

## § 145

### Special Exceptions for the Award of Public Contracts Relating to Defence or Security

This Part shall not apply to the award of public contracts relating to defence or security that

1. are used for the purpose of intelligence operations,
2. are awarded as part of a cooperation programme that
  - a) is based on research and development and

- b) is conducted together with at least one other EU Member State for the development of a new product and, where applicable, the later phases of the entire or part of that product's life cycle;

upon the conclusion of such an agreement, the European Commission shall indicate the share of research and development expenditure relative to the overall costs of the programme, the cost-sharing arrangement and, if applicable, the planned share of purchases per Member State,

- 3. are awarded in a country outside the European Union; these contracts also include procurements for civilian purposes as part of a deployment of armed forces or of federal police or police forces of the *Länder* outside the territory of the European Union if the operation requires the relevant contract to be concluded with undertakings that are domiciled in the area of operation; procurements for civilian purposes means the procurement of non-military products, works or services for logistical purposes,
- 4. are awarded by the Federal government, the government of a *Land* or a local authority to another government or to a local authority of another state, and cover any of the following subject matters:
  - a) the supply of military equipment within the meaning of § 104(2) or the supply of equipment awarded under a classified contract within the meaning of § 104(3),
  - b) construction works and services directly connected to such equipment,
  - c) construction works and services specifically for military purposes, or
  - d) construction works and services awarded under a classified contract within the meaning of § 104(3),
- 5. have financial services as their subject matter, excluding insurance services,
- 6. have research and development services as their subject matter, unless the results of such services become the sole property of the contracting authority for its use in the conduct of its own activities and the service is fully remunerated by the contracting authority, or
- 7. are subject to special procedural rules
  - a) arising under an international convention or international agreement concluded between one or more Member States on the one hand and one or more States that are not party to the Agreement on the European Economic Area on the other,
  - b) arising under an international convention or an international agreement in connection with a stationing of troops affecting undertakings of a Member State or a non-Member State, or
  - c) applicable to an international organisation if such organisation effects procurements for its own purposes or if a Member State must award public contracts based on such rules.

## § 146

### Types of Procedures

When awarding public contracts relating to defence or security, public contracting authorities and sector contracting entities may freely choose between the restricted procedure and the negotiated procedure with competitive tender. The negotiated



procedure without competitive tender and the competitive dialogue are only available to the extent permitted by this Act.

## § 147

### Other Applicable Provisions

As for other matters, §§ 119, 120, 121(1) and (3) as well as §§ 122 through 135 shall apply for the award of public contracts relating to defence or security subject to the proviso that an undertaking under § 124(1) can also be excluded from participating in a procurement procedure if said undertaking does not possess the required trustworthiness to exclude risks to national security. Protected data sources may be used as proof that risks to national security cannot be excluded.

## Subchapter 3

### Award of concessions

## § 148

### Scope

This subchapter shall be applied to the award of concessions by their grantors.

## § 149

### Special Exceptions

This Part shall not apply to the award of:

1. concessions for legal services within the meaning of § 116(1) no. 1,
2. concessions for research and development services within the meaning of § 116(1) no. 2,
3. concessions for audiovisual or radio media services within the meaning of § 116(1) no. 3,
4. concessions for financial services within the meaning of § 116(1) no. 4,
5. concessions for loans within the meaning of § 116(1) no. 5,
6. services concessions awarded to a concession grantor under § 101(1) no. 1 or § 101(1) no. 2 on the basis of an exclusive right established by an Act or ordinance,
7. services concessions that are awarded to an undertaking on the basis of an exclusive right granted to said undertaking in accordance with national and European Union law regulating market access for activities under § 102(2) through (6); this excludes services concessions for activities for which European Union provisions impose no sector-specific transparency obligations; contracting authorities that grant an exclusive right to an undertaking within the meaning of this provision shall inform the European Commission thereof within one month of granting this right,

8. concessions with the main purpose of allowing the concession grantor under § 101(1) no. 1 to provide or exploit public communications networks or to provide to the public one or more electronic communications services.
9. concessions in the field of water that
  - a) relate to the provision or operation of fixed networks intended to provide a service to the public in connection with the collection, transport or distribution of drinking water or the supply of drinking water to such networks or
  - b) are related to an activity under letter a) and have as their subject matter one of the following:
    - aa) hydraulic engineering, irrigation and land drainage projects, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations, or
    - bb) the disposal or treatment of sewage,
10. services concessions for lottery services that are covered by the Common Procurement Vocabulary reference number 92351100-7 and that are granted to an undertaking on the basis of an exclusive right,
11. concessions awarded by grantors within the meaning of § 101(1) no. 2 and no. 3 to carry out their activities in a country outside the European Union in a way that does not involve the physical use of a network or geographical territory within the European Union, or
12. concessions awarded in the field of air services on the basis of an operating licence issued within the meaning of Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293 of 31 October 2008, p. 3), or concessions relating to the transport of persons within the meaning of § 1 of the Passenger Transport Act [*Personenbeförderungsgesetz*].

## § 150

### Special Exceptions for the Award of Concessions in the Fields of Defence and Security

This Part shall not apply to the award of concessions in the fields of defence and security,

1. where application of the provisions of this Part would oblige the concession grantor to supply information, the disclosure of which it considers contrary to the essential interests of the security of the Federal Republic of Germany, or where the award and performance of the concession are to be declared secret or must be accompanied by special security measures in accordance with the applicable laws, regulations or administrative provisions, provided that the grantor of the concession has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as by imposing requirements aimed at protecting the confidential nature of the information made available by the concession grantors in a concession award procedure,
2. that are awarded as part of a cooperation programme that
  - a) is based on research and development and
  - b) is conducted together with at least one other EU Member State for the development of a new product and, where applicable, the later phases of the entire or part of that product's life cycle,

3. that are awarded by the Federal Government to another government for construction works and services directly connected to military or sensitive equipment or for construction works and services specifically for military purposes or for sensitive construction works and services,
4. that are awarded in a country that is not a Contracting Party of the Agreement on the European Economic Area as part of the deployment of troops outside the territory of the European Union, if the deployment requires these concessions to be awarded to undertakings domiciled in the area of operation,
5. that are covered by other exception provisions in this Part,
6. that are not already excluded in accordance with nos. 1 through 5, when the protection of essential security interests of the Federal Republic of Germany cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information made available by the concession grantors in a concession award procedure;
7. that are subject to special procedural rules
  - a) arising under an international convention or international agreement concluded between one or more Member States on the one hand and one or more States that are not party to the Agreement on the European Economic Area on the other,
  - b) arising under an international convention or an international agreement in connection with a stationing of troops affecting undertakings of a Member State or a non-Member State, or
  - c) applicable to an international organisation if such organisation effects procurements for its own purposes or if a Member State of the European Union must award contracts based on such rules.

## § 151

### Procedure

Concession grantors shall declare their intention to award a concession. The obligation to publish notice of the intention to award a concession may only be waived to the extent permitted by this Act. As for other matters, concession grantors may organise the procedure for awarding concessions subject to the Ordinance, issued in connection with this Act, on the details of the procurement procedure.

## § 152

### Requirements of the Concession Award Procedure

- (1) For the tender specifications, § 121(1) and (3) shall be applied accordingly.
- (2) Concessions shall be awarded to eligible undertakings within the meaning of § 122.
- (3) The award shall be made on the basis of objective criteria used to ensure that the tenders are assessed in competitive conditions and that an overall economic advantage can thus be identified for the concession grantor. The award criteria must be related to the subject matter of the concession and must not allow the grantor complete freedom of choice. They may comprise qualitative, environmental or social concerns. The award criteria must be accompanied by a description that allows the information submitted by the tenderers to be reviewed effectively and an evaluation to be carried out as to whether and the extent to which the tenders meet the award criteria.

(4) The provisions on contract performance under § 128 and on the mandatory contract performance conditions under § 129 shall apply *mutatis mutandis*.

## § 153

### Award of Concessions for Social and Other Specific Services

For the procedure for awarding concessions relating to social and other specific services within the meaning of Annex IV of Directive 2014/23/EU, §§ 151 and 152 shall apply.

## § 154

### Other Applicable Provisions

As for other matters, the following provisions shall apply for the award of concessions, including the concessions under § 153:

1. § 118 relating to reserved concessions,
2. §§ 123 through 126, provided that
  - a) concession grantors under § 101(1) no. 3 can exclude an undertaking under the requirements of § 123, but are not obliged to do so,
  - b) In the case of a concession in the fields of defence and security, concession grantors can exclude an undertaking from participating in a procurement procedure, if said undertaking does not possess the required trustworthiness to exclude risks to national security; protected data sources may be used as proof,
3. § 131(2) and (3) and § 132 provided that
  - a) § 132(2) sentence 2 and 3 for the award of concessions relating to activities under § 102(2) through (6) shall not apply and
  - b) the upper limit in § 132(3) no. 2 for works and services concessions uniformly amounts to 10% of the value of the original concession,
4. §§ 133 through 135,
5. § 138 relating to the award of concessions by grantors within the meaning of § 101(1) nos. 2 and 3 to affiliated undertakings,
6. § 139 relating to the award of concessions by grantors within the meaning of § 101(1) nos. 2 and 3 to a joint venture or by joint ventures to a grantor of concessions within the meaning of § 101(1) nos. 2 and 3 and
7. § 140 relating to the award of concessions by grantors within the meaning of § 101(1) no. 2 and 3 for activities that are directly exposed to competition.

## Division 2

### Review Procedures

#### Chapter 1

#### Reviewing Authorities

### § 155

#### Principle

Without prejudice to review by the supervisory authorities, any award of public contracts or concessions shall be subject to review by the public procurement tribunals.

### § 156

#### Public Procurement Tribunals

(1) The federal public procurement tribunals shall review the award of public contracts and concessions for public contracts and concessions attributable to the Federation, while the *Land* public procurement tribunals shall review public contracts and concessions attributable to the *Länder*.

(2) Rights under § 97(6) as well as other claims against public contracting authorities for the performance or omission of an act in procurement procedures may only be asserted before the public procurement tribunals and the appellate court.

(3) The jurisdiction of the civil courts over damage claims and the powers of the competition authorities to prosecute infringements, especially of §§ 19 and 20, remains unaffected.

### § 157

#### Composition, Independence

(1) The public procurement tribunals shall exercise their functions independently and under their own responsibility within the limits of the law.

(2) The public procurement tribunals shall take their decisions through a chairman and two associate members of which one shall serve in an honorary capacity (honorary associate member). The chairman and the regular associate member must be civil servants appointed for life with the qualification to serve in the senior civil service, or comparable expert employees. Either the chairman or the regular associate member must be qualified to serve as a judge; generally this should be the chairman. The associate members should have in-depth knowledge of public procurement; the honorary associate members should additionally have several years of practical experience in the field of public procurement. Where the awarding of contracts relevant under defence or security aspects within the meaning of § 104 is reviewed, the public procurement tribunals may, in deviation from sentence 1, also take their decisions through a chairman and two regular associate members.

(3) The tribunal may assign the case to the chairman or to the regular associate member without a hearing by unappealable decision, for him/her to decide alone. Such an assignment shall be possible only if the case involves no major factual or legal difficulties, and provided that the decision will not be of fundamental importance.

(4) The members of the tribunal shall be appointed for a term of office of five years. They take their decisions independently and are bound only by the law.

## § 158

### Establishment, Organisation

(1) The Federation shall establish the necessary number of public procurement tribunals at the Bundeskartellamt. The establishment and composition of the public procurement tribunals as well as the allocation of duties shall be determined by the President of the Bundeskartellamt. Honorary associate members and their substitute members shall be appointed by the President upon a proposal by the central organisations of the chambers under public law. Having obtained approval from the Federal Ministry for Economic Affairs and Energy, the President of the Bundeskartellamt shall issue rules of procedure and publish these in the Federal Gazette.

(2) The establishment, organisation and composition of the entities (reviewing authorities) of the *Länder* mentioned in this Chapter shall be determined by the authorities competent under the laws of the *Länder* or, in the absence of any such determination, by the *Land* government that may delegate this power. The *Länder* may establish joint reviewing authorities.

## § 159

### Delimitation of Competence of the Public Procurement Tribunals

(1) The federal public procurement tribunal shall be responsible for reviewing the procurement procedures

1. of the Federation;
2. of contracting authorities within the meaning of § 98 no. 2, of sector contracting entities within the meaning of § 100(1) no. 1 in conjunction with § 99 no. 2 and concession grantors within the meaning of § 101(1) no. 1 in conjunction with § 99 no. 2, so far as the Federation for the most part manages the participation, or has otherwise predominantly provided means of financing or predominantly supervises management or has appointed the majority of the members of the management or supervisory board, unless the undertakings that are part of the contracting authority have agreed that another public procurement tribunal shall be competent;
3. of sector contracting entities within the meaning of § 100(1) no. 2 and of concession grantors within the meaning of § 101(1) no. 3, so far as the Federation exercises a controlling influence on them; a controlling influence exists if the Federation directly or indirectly owns the majority of the subscribed capital of the contracting authority or holds the majority of the voting rights attached to the shares of the contracting authority or can appoint more than half of the members of the administrative, management or supervisory board of the contracting authority;
4. of contracting authorities within the meaning of § 99 no. 4, so far as funding has been granted for the most part by the Federation;

5. that are performed for the Federation by way of an official delegation of powers;
6. in cases where both the federal public procurement tribunals and one or more *Land* public procurement tribunals are the competent authorities.

(2) If the procurement procedure is carried out for the Federation by a *Land* acting on federal commission, the public procurement tribunal of the *Land* shall be the competent authority. If, in application of paragraph 1 numbers 2 to 5, a contracting authority is attributable to a *Land*, the public procurement tribunal of the respective *Land* shall be the competent authority.

(3) In all other cases the competence of the public procurement tribunals shall be determined according to the seat of the contracting authority. In the case of procurements involving more than one *Land*, the contracting authorities shall name only one competent public procurement tribunal in the publication of the contract notice.

## Chapter 2

### Proceedings before the Public Procurement Tribunal

#### § 160

##### Initiation of Proceedings, Application

(1) The public procurement tribunal shall initiate review proceedings only upon application.

(2) Every undertaking that has an interest in the public contract or the concession and claims that its rights under § 97(6) were violated by non-compliance with the provisions governing the awarding of public contracts has the right to file an application. In doing so, it must show that it has been or risks being harmed by the alleged violation of public procurement provisions.

(3) The application is inadmissible if

1. the applicant became aware of the claimed violation of public procurement provisions before filing the application for review, but did not complain to the contracting authority within a time limit of 10 calendar days; the expiry of the time limit under § 134(2) remains unaffected,
2. violations of public procurement provisions which become apparent from the tender notice are not notified to the contracting authority by the end of the time limit for the application or the submission of a tender specified in the notice
3. violations of public procurement provisions which only become apparent from the procurement documents are not notified to the contracting authority by the end of the time limit for the application or the submission of a tender specified in the notice,
4. more than 15 calendar days have expired since receipt of notification from the contracting authority that it is unwilling to redress the objection.

Sentence 1 shall not apply to an application under § 135(1) no. 2 to have the contract declared ineffective. § 134(1) sentence 2 shall remain unaffected.

## § 161

## Form, Content

(1) The application shall be submitted in writing to the public procurement tribunal and substantiated without delay. It should state a specific request. An applicant without a domicile or habitual residence, seat or headquarters within the scope of application of this Act shall appoint an authorised receiving agent within the scope of application of this Act.

(2) The substantiation must designate the respondent, contain a description of the alleged violation of rights with a description of the facts, as well as a list of the available evidence, and show that an objection was made to the contracting authority; it should name the other parties, if known.

## § 162

## Parties to the Proceedings, Admission to the Proceedings

The parties to the proceedings are the applicant, the contracting authority and the undertakings the interests of which are severely affected by the decision and which are therefore admitted by the public procurement tribunal to the proceedings. The decision to admit a party to the proceedings shall be incontestable.

## § 163

## Principle of Investigation

(1) The public procurement tribunal shall investigate the facts *ex officio*. In doing so, it may limit itself to the facts presented by the parties or those of which it can be reasonably expected to be aware. The public procurement tribunal shall not be obliged to review extensively the lawfulness of the procurement procedure. In its entire activities, it shall take care to not unduly impede the course of the procurement procedure.

(2) The public procurement tribunal shall review the application for manifest inadmissibility or unfoundedness. In doing so, it shall also consider a written statement lodged by the contracting authority as a precautionary measure (protective writ). Unless the application is clearly inadmissible or unfounded, the public procurement tribunal shall serve a copy thereof upon the contracting authority and request from the contracting authority the files documenting the procurement procedure (award files). The contracting authority shall immediately make the award files available to the tribunal. §§ 57 to 59(1) to (5) and § 61 shall apply *mutatis mutandis*.

## § 164

## Storing of Confidential Documents

(1) The public procurement tribunal ensures the confidentiality of classified information and other confidential information contained in the documents transmitted by the parties.

(2) The members of the public procurement tribunal are subject to a duty of confidentiality; the type and content of the deeds, files, electronic documents and information kept confidential must not be recognisable from the reasons given for the decision.



## § 165

## Access to Files

(1) The parties may access the files at the public procurement tribunal and may obtain executed copies, excerpts or transcripts from the clerk's office at their own expense.

(2) The public procurement tribunal shall refuse access to documents where this is necessary for important reasons, in particular for the protection of secrets or to protect business or trade secrets.

(3) Every party shall indicate the secrets named in paragraph 2 when sending its files or representations and shall mark them accordingly in the documents. If this is not done, the public procurement tribunal may assume that the party consents to access being granted.

(4) Refusal to grant access to the files may be challenged only in connection with an immediate appeal on the merits of the case.

## § 166

## Hearing

(1) The public procurement tribunal shall decide on the basis of a hearing, which should be limited to one date. All parties shall have an opportunity to state their case. With the consent of the parties or in the case of the inadmissibility or manifest unfoundedness of the application, a decision may be taken on the basis of the files.

(2) The case may be discussed and decided also if the parties do not appear or are not duly represented at the hearing.

## § 167

## Expedition

(1) The public procurement tribunal shall take its decision and give reasons in writing within a period of five weeks of receipt of the application. In the case of particular factual or legal difficulties, the chairman may in exceptional cases by notice to the parties extend this period by the required time. The extended period shall not exceed two weeks. The chairman shall give reasons in writing for this order.

(2) The parties shall co-operate in clarifying the facts in a manner appropriate to a course of action designed to further and speedily conclude the proceedings. Time limits may be set for the parties, after the expiry of which further submissions may be disregarded.

## § 168

## Decision of the Public Procurement Tribunal

(1) The public procurement tribunal shall decide whether the applicant's rights were violated, and shall take suitable measures to remedy a violation of rights, and to prevent any impairment of the interests affected. It shall not be bound by the applications and may also independently intervene to ensure the lawfulness of the procurement procedure.

(2) Once an award has been made, it cannot be revoked. If the review procedure becomes obsolete by the granting of the award, cancellation, discontinuance of the procurement procedure or in any other way, the public procurement tribunal shall determine, upon the application of a party, whether there has been a violation of rights. § 167(1) shall be inapplicable in this case.

(3) The public procurement tribunal shall decide by way of an administrative act. Decisions shall be enforced, also against public authorities, in accordance with the administrative enforcement acts of the Federation and the *Länder*. §§ 61 and 86a sentence 2 shall apply *mutatis mutandis*.

## § 169

### Suspension of the Procurement Procedure

(1) If the public procurement tribunal informs the contracting authority in writing about the application for review, the latter must not make the award prior to the decision of the public procurement tribunal and before the expiry of the time limit for a complaint pursuant to § 172(1).

(2) The public procurement tribunal may allow the contracting authority, upon its application or upon application by the undertaking named by the contracting authority pursuant to § 134 as the undertaking to be awarded the contract, to award the contract after the expiry of two weeks after the announcement of this decision if, taking into account all interests that may be impaired as well as the interest of the general public in the quick conclusion of the award procedure, the negative consequences of delaying the award until the end of the review outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting authority carrying out its tasks efficiently; where contracts relevant to defence or security within the meaning of Section 104 are concerned, special defence and security interests must additionally be taken into account. The public procurement tribunal shall also consider the overall prospects of the applicant of winning the award in the procurement procedure. The prospects of success of the application for review need not be taken into account in every case. The appellate court may, upon application, reinstate the prohibition of the award pursuant to paragraph 1; § 168(2) sentence 1 remains unaffected. If the public procurement tribunal does not allow the award, the appellate court may, upon application by the contracting authority, allow the immediate award subject to the conditions in sentences 1 to 4. § 176(2) sentence 1 and 2 and § 176(3) shall apply *mutatis mutandis* to the proceedings before the appellate court. An immediate appeal pursuant to § 171(1) shall not be admissible against decisions taken by the public procurement tribunal under this paragraph.

(3) If during the procurement procedure any rights of the applicant under § 97(6) are jeopardised in another way than by the imminent award, the tribunal may, upon specific application, intervene in the procurement procedure through further preliminary measures. In doing so, it shall apply the evaluation criterion of paragraph 2 sentence 1. This decision shall not be separately challengeable. The public procurement tribunal may enforce its additional preliminary measures under the administrative enforcement acts of the Federation and the *Länder*; the measures shall be immediately enforceable. § 86a sentence 2 shall apply *mutatis mutandis*.

(4) If the contracting authority claims that the requirements of § 117 nos. 1 to 3 or § 150 no. 1 or 6 are fulfilled, the prohibition of the award pursuant to paragraph 1 shall lapse five business days after service of a corresponding brief to the applicant; the public procurement tribunal shall serve the brief without delay after its receipt. The appellate court may, upon application, reinstate the prohibition of the award. § 176(1) sentence 1, (2) sentence 1 and § 176(3) and (4) shall apply *mutatis mutandis*.

## § 170

Exclusion of Divergent *Land* Law

Any deviation under *Land* law from the provisions on the administrative procedure contained in this subchapter of the Act shall not be admissible.

## Chapter 3

## Immediate Appeal

## § 171

## Admissibility, Jurisdiction

(1) Immediate appeals shall be admissible against decisions of a public procurement tribunal. An immediate appeal may be filed by the parties to the proceedings before the public procurement tribunal.

(2) An immediate appeal shall also be admissible if the public procurement tribunal does not decide upon an application for review within the period set out in § 167(1); in this case the application shall be deemed to have been rejected.

(3) The immediate appeal shall be decided exclusively by the Higher Regional Court having jurisdiction at the seat of the public procurement tribunal. An award division shall be established at the Higher Regional Courts.

(4) Legal matters pursuant to paragraph 1 and 2 may be assigned to other Higher Regional Courts or the Supreme Court of a *Land* by an ordinance issued by the *Land* governments. The *Land* governments may delegate this authority to their judicial administrations.

## § 172

## Time Limit, Formal Requirements, Content

(1) An immediate appeal shall be filed in writing with the appellate court within a non-extendable period of two weeks beginning upon service of the decision or, in the case of § 171(2), upon the expiry of the time period.

(2) Reasons for the immediate appeal shall be given when it is filed. The statement of reasons for the appeal shall contain:

1. a statement as to the extent to which the decision of the public procurement tribunal is challenged and a deviating decision is applied for,
2. details of the facts and evidence on which the appeal is based.

(3) The notice of appeal must be signed by a lawyer admitted to practise before a German court. This shall not apply to appeals lodged by legal persons under public law.

(4) When the appeal is filed, the other parties to the proceedings before the public procurement tribunal shall be informed by the appellant by way of transmission of a copy of the appeal.

## § 173

### Effect

(1) The immediate appeal shall have a suspensive effect upon the decision of the public procurement tribunal. The suspensive effect shall lapse two weeks after the expiry of the time limit for the appeal. If the public procurement tribunal rejects the application to review the award, the appellate court may, upon application by the appellant, extend the suspensive effect up to the time of the decision on the appeal.

(2) The court shall reject the application pursuant to paragraph 1 sentence 3 if, taking into account all interests that may be impaired, the negative consequences of delaying the award up to the time of the decision on the appeal outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting authority carrying out its tasks efficiently; where contracts relevant under defence or security aspects within the meaning of § 104 are concerned, special defence and security interests must additionally be taken into account. In its decision, the court shall also consider the appeal's prospects of success, the applicant's overall prospects of winning the public contract or concession in the procurement procedure and the interests of the general public in the quick conclusion of the procurement procedure.

(3) If the public procurement tribunal grants the application for review by prohibiting the award, the award shall not be made unless the appellate court annuls the decision of the public procurement tribunal pursuant to § 176 or § 178.

## § 174

### Parties to the Appeal Proceedings

The parties to the proceedings before the public procurement tribunal are the parties to the proceedings before the appellate court.

## § 175

### Procedural Provisions

(1) The parties shall be represented before the appellate court by a lawyer admitted to practise before a German court who acts as their authorised representative. Legal persons under public law may be represented by civil servants or by employees qualified to serve as a judge.

(2) §§ 69, 70(1) to (3), § 71 (1) and (6), §§ 71a, 72, 73 with the exception of the reference to § 227(3) of the German Code of Civil Procedure [*Zivilprozessordnung*], §§ 78, 165 and 167(2) sentence 1 shall apply *mutatis mutandis*.

## § 176

### Preliminary Decision on the Award

(1) Upon application by the contracting authority or upon application by the undertaking named in accordance with § 134 by the contracting authority as the undertaking to be awarded the contract, the court may allow the continuation of the procurement procedure and the award if, taking into account all interests that may be impaired, the negative consequences of delaying the award up to the time of the decision on the appeal outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interest of the general public in the contracting authority carrying out its tasks efficiently; where contracts relevant

under defence or security aspects within the meaning of § 104 are concerned, special defence and security interests must additionally be taken into account. In its decision, the court shall also consider the immediate appeal's prospects of success, the applicant's overall prospects of winning the public contract or concession in the procurement procedure and the interests of the general public in the quick conclusion of the procurement procedure.

(2) The application shall be made in writing, stating the reasons. The facts to be put forward as reasons for the application as well as the reason for the urgency of the matter shall be substantiated. The appeal proceedings may be suspended until a decision is made on the application.

(3) The decision shall be made and reasons shall be given without delay and in no event later than five weeks after receipt of the application; in the event of particular factual or legal difficulties, the chairman may, in exceptional cases, extend the period for the required amount of time by declaration to the parties stating the reasons for the extension. The decision may be made without a hearing. The reasons shall explain the lawfulness or unlawfulness of the procurement procedure. § 175 shall apply.

(4) No appeal is admissible against a decision made pursuant to this provision.

### § 177

#### End of the Procurement Procedure after the Decision of the Appellate Court

If an application of the contracting authority pursuant to § 176 is rejected by the appellate court, the procurement procedure shall be deemed to have ended upon the expiry of ten days after service of the decision unless the contracting authority takes the measures following from the decision in order to restore the lawfulness of the procedure; the procedure must not be continued.

### § 178

#### Decision on the appeal

If the court considers the appeal to be well founded, it shall reverse the decision of the public procurement tribunal. In this case, the court shall decide on the matter itself or oblige the public procurement tribunal to decide again on the matter with due consideration of the legal opinion of the court. Upon application, it shall state whether the rights of the undertaking having applied for the review were violated by the contracting authority. § 168(2) applies *mutatis mutandis*.

### § 179

#### Binding Effect and Duty to Refer the Matter

(1) If damages are claimed because of a violation of the provisions governing the award of public contracts, and proceedings were conducted before the public procurement tribunal, the court of general jurisdiction shall be bound by the final decision of the public procurement tribunal and the decision of the Higher Regional Court, as well as, where applicable, by the decision of the Federal Court of Justice on the appeal in the case of a referral pursuant to paragraph 2.

(2) If a Higher Regional Court wishes to deviate from a decision taken by another Higher Regional Court or the Federal Court of Justice, it shall refer the matter to the Federal Court of Justice. The Federal Court of Justice shall decide in lieu of the Higher Regional Court. The Federal Court of Justice may confine itself to

deciding only on the matter of divergence and assigning the decision on the merits of the case to the court of appeal, if this seems appropriate based on the factual and legal context of the appeal proceedings. The duty to refer the matter shall not apply to proceedings pursuant to § 173(1) sentence 3 and § 176.

## § 180

### Damages in the Event of an Abuse of Law

(1) If an application pursuant to § 160 or the immediate appeal pursuant to § 171 proves to have been unjustified from the outset, the applicant or the appellant shall be obliged to compensate the opponent and the parties for the damage incurred by them due to the abuse of the right to file an application or an appeal.

(2) An abuse of the right to file an application or an appeal shall exist in particular

1. if a suspension or further suspension of the procurement procedure is achieved through incorrect statements made intentionally or with gross negligence;
2. if the review is applied for with the intention of obstructing the procurement procedure or harming competitors;
3. if an application is made with the intention of subsequently withdrawing it in return for payment of money or other benefits.

(3) If the preliminary measures taken by the public procurement tribunal in accordance with a specific application pursuant to § 169(3) prove to have been unjustified from the outset, the applicant shall compensate the contracting authority for the damage arising from the enforcement of the measures that were ordered.

## § 181

### Claim for Damages Arising from Reliance

If the contracting authority has violated a provision intended to protect undertakings, the undertaking may claim damages for the costs incurred in connection with the preparation of the tender or the participation in a procurement procedure if, without such violation, the undertaking would have had a real chance of being awarded the contract after assessment of the tenders, and provided that such chance was impaired as a consequence of the violation. Further claims for damages shall remain unaffected.

## § 182

### Costs of Proceedings before the Public Procurement Tribunal

(1) Costs (fees and expenses) to cover the administrative expense shall be charged for official acts of the public procurement tribunals. The German Administrative Costs Act [*Verwaltungskostengesetz*] of 23 June 1970 (Federal Law Gazette I p. 821) as amended on 14 August 2013 shall apply.

(2) The fee shall amount to at least EUR 2,500; this amount may, for reasons of equity, be reduced to a minimum of one tenth. The fee should not exceed the amount of EUR 50,000, but may be increased up to an amount of EUR 100,000 in individual cases if the expense involved or the economic significance is unusually high.

(3) If a party to the proceedings is unsuccessful, said party shall bear the costs. Several debtors shall be jointly and severally liable. Costs caused by the fault of a party may be imposed upon said party. If the application becomes obsolete by withdrawal or otherwise before the decision of the public procurement tribunal, half of the fee shall be payable. The decision as to which party has to bear the costs shall be based on reasonable discretion. For reasons of equity, payment of the fee may be waived entirely or partially.

(4) If a party to the review proceedings is unsuccessful, said party shall bear the respondent's expenses necessary for appropriately pursuing the matter or legally defending itself. Any expenses of third parties admitted to the proceedings shall only be reimbursable if the public procurement tribunal imposes them on the unsuccessful party for reasons of equity. If the application is withdrawn or otherwise becomes obsolete, the decision as to who will bear another party's expenses necessary for appropriately pursuing the matter or securing legal defence shall be based on reasonable discretion; sentence 2 shall otherwise apply *mutatis mutandis* in relation to reimbursing expenses of third parties. § 80(1), (2) and (3) sentence 2 of the German Administrative Procedure Act [*Verwaltungsverfahrensgesetz*] and the corresponding provisions of the administrative procedure acts of the *Länder* apply *mutatis mutandis*. No separate proceedings for the taxation of costs shall take place.

## § 183

### Corrective Mechanism of the Commission

(1) If, in the course of a procurement procedure before the conclusion of a contract, the Federal Government receives a notice from the European Commission informing it of a severe violation of EU law in the area of awarding public contracts or concessions which must be remedied, the Federal Ministry for Economic Affairs and Energy shall inform the contracting authority accordingly.

(2) Within 14 calendar days from receipt of this notice, the contracting authority is obliged to submit to the Federal Ministry for Economic Affairs and Energy a detailed description of the facts of the case and state whether the alleged violation has been remedied or provide reasons why it has not been remedied, and whether the procurement procedure is subject to review proceedings or has been suspended for other reasons.

(3) If the procurement procedure is subject to review proceedings or has been suspended, the contracting authority shall inform the Federal Ministry for Economic Affairs and Energy without delay of the outcome of said proceedings.

## § 184

### Information duties of the Review Bodies

The public procurement tribunals and the higher regional courts shall inform the Federal Ministry for Economic Affairs and Energy by 31 January of each year of the number of review proceedings conducted in the previous year and their results.