The law of public procurement

Norman Müller

I. Introduction

The law of public procurement (Vergaberecht) regulates the terms and conditions under which public authorities award orders, that is to say, under which they are allowed to enter into remunerated contracts for goods and services.

The law of public procurement currently in force in Germany is characterized by a dualism between traditional German budgetary law and the laws of the European Union, which is in the process of assimilating.

Understanding the system is complicated by the fact that the regulations of the European Union have not completely replaced the old national regulations, but have merely supplemented or modified certain sections of them. Hence, EU directives that have been adapted by national law are only applicable when certain budgetary thresholds have been exceeded in potential order volumes, and even then there are several exceptional cases in which the traditional German law of public procurement is applicable after all.

II. The legal system of public procurement

A. Traditional German public procurement

1. Budgetary approach

Traditionally, the German law of public procurement was a part of the law of public budgets (budgetary law). The law of public procurement was devised to provide a regulated administrative process for the issuing of orders in an attempt to avoid wasting budgetary resources. It was dominated by the principles that prevailed in budgetary law: those of austerity, economy and secured procurement. Austerity and economy were served by searching for the cheapest and best offer among the bidders and thereby, fueling competition among them.

2. Applicable regulations

The legal principles of public procurement are contained according to their ranking in the Budgetary Principles Act (Haushaltsgrundsätzegesetz, § 30 HGrG) and in § 55 of both the Federal Budgetary Regulations (Bundeshaushaltsordnung, BHO) and the State Budgetary Regulations (Landeshaushaltsordnung, LHO). Local authorities added their own stamp to those guiding principles in creating
their budgetary regulations. Questions concerning the details of public procurement can be answered by resorting to special sections of the so-called standard official contracting terms (Verdingungsordnungen). There are currently two sets of standard official contracting terms for procurements based on budgetary law:

- standard building contract terms (Vertrags- und Vergabeordnung für Bauleistungen, VOB)
- standard contracting terms (Verdingungsordnung für Leistung, VOL)

As the name indicates, the standard building contract terms (VOB) contain regulations for contracting services in the building sector. On the other hand, the standard contracting terms (VOL) regulate all other types of contracts.

Section A of the VOB and the VOL contain the terms of procurement (VOB/A, VOL/A), whereas their B sections contain contractual regulations (VOB/B, VOL/B) that come into play when placing the order with the best bidder. Furthermore, the VOB contains a section C, which is comprised of technical regulations pertaining to the manner in which each of the performance tasks of the project is to be carried out. In addition, section C contains regulations concerning the manner in which the work has to be assessed and invoiced.

However, only the A sections of the VOB and VOL will be dealt with here, as only they are directly concerned with the law of public procurement.

The above-mentioned regulations are currently only applied in their standardized form in public procurement processes when the project budget is below a certain limit, that is, whenever the standard EU terms of public procurement are not applicable.

B. Standard EU terms of public procurement

1. EU directives on public procurement

Today the public procurement laws that are applicable to the majority of public orders are characterized to a very large extent by the assimilation of the following six EU directives by national law:

- Directive 92/50/EEC, enacted 06-18-1992 relating to the coordination of procedures for the award of public service contracts;
- Directive 93/37/EEC, enacted 06-14-1993 concerning the coordination of procedures for the award of public works contracts;
- Directive 93/36/EEC, enacted 06-14-1993 coordinating procedures for the award of public supply contracts;
- Directive 93/38/EEC, enacted 06-14-1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;