

GERMANY ADOPTS NEW PROCUREMENT CODE

by

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On 1 January 1999, Germany—the world's third largest economy—adopted a new government procurement code, the *Vergaberechtsänderungsgesetz* (Act to Revise the Legal Basis for the Award of Public Procurement Contracts) (Act).¹ The Act will govern the way all federal and subfederal agencies in Germany will spend an estimated DM 200 billion (about \$130 billion) annually in their purchase of various governmental goods and services.² The change has been greeted as a positive step by Germany to open its lucrative procurement market to increased domestic and foreign competition. The changes establish innovative measures to provide participants in the procurement process with greater fairness and legal protection.

The change was hardly voluntary. For years, the European Community and the United States have claimed that the old German procurement system violated the General Agreement on Tariffs and Trade (GATT)³ and discriminated against foreign bidders. Threatened with sanctions, Germany knuckled under, scrapped the old procurement system, and adopted the Act, which is designed to enhance transparency and to provide bidders and other parties to a government contract with the right to independent judicial review. On its face, the Act goes far in remedying these past inequities; however, it is still too early to determine the actual effect which the Act will have in changing a procurement practice and culture that had thrived in Germany for over five decades.

This article:

- I. briefly examines the domestic German procurement market;
- II. discusses the previous German procurement system;
- III. reviews the international economic and political pressures exerted on Germany which led to passage of the Act;

¹ *Bundesgesetzblatt (BGBl) (Federal Gazette)* I p 2512, 26 August 1998.

² Source: Press Releases 34/98, 3 March 1998; 78/98, 29 May 1998, *Bundesverband der Deutschen Industrie e. V.* (BDI—German Federation of Industry). Of the total German procurement market of DM 400 billion, it is estimated that DM 200 billion will be subject to the Act. See *infra*, note 4, and accompanying text.

³ "GATT 1947" of 30 October 1947 (dBGBl. 1951 II p 173, UNTS 55 p 94) modified through the Agreement of Uruguay "GATT 1994" of 15 April 1994, *Amtsblatt der EG (Official Journal of the European Communities)*—(OJ) 1994 L336/11, 15 April 1994.

- IV. discusses the Act itself; and
- V. concludes with some general observations.

The authors also provide an English translation of the new Act in the Appendix to this article.

I. MARKET CONTEXT

As discussed in III below, one of the goals of the GATT is to unify the procurement systems of the international trading community. Among the benefits of this global harmonisation is the opening of an individual country's previously closed domestic procurement market to foreign competition. Other benefits include a more efficient allocation of global resources, enhancement of the quality of public facilities and services, job creation, and economic growth in general. Thus, because both domestic and international interests have a stake in Germany's previously protected procurement market, a brief empirical overview of the German procurement market is in order. Specifically, how large is the German market for government purchases of goods, services and construction works? What are some of its basic characteristics?

Precise figures are difficult to determine, but since 1994 the German Federation of Industry (BDI) has estimated that the public procurement market for the entire European Community was annually €720 billion Euro or about \$940 billion. Within the European Community (EC), Germany's procurement market was estimated to be about DM 400 billion, or \$270 billion annually. This comprises 30% of the overall EC procurement market. Within this German market, local authorities purchased half of all procured goods and services; the Länder (i.e. States) purchased 26%; the federal government 19%; and social security the remaining 5%. Collectively, contract awards fell into the following categories: utilities 38%; public works projects 21%; services 21% and supplies 20%.⁴

II. GERMANY'S PREVIOUS PROCUREMENT SYSTEM

Except for the years immediately preceding adoption of the Act, it would serve no illuminating purpose to discuss exhaustively the legislative origins of the former German procurement system which has now been replaced. "Procurement system" is a more appropriate designation than "procurement law", because for decades there was no discrete body of law which regulated

⁴See e.g., Lamm, Ley, Weckmüller, *VOL-Handbuch unter Berücksichtigung der Europäischen Vergaberichtlinien* (Handbook on the Contracting Rules for the Award of Public Supplies taking into account the European Procurement Directives), 1 January 1999, chapter B., A No I, p 1.

German government procurement. Essentially, until 1994 the procurement "law" of the Federal Republic was part of a broad matrix of fiscal and administrative law, which vested agencies with wide discretion in the making of contract awards. The entire framework originated from the perspective of the sovereign government agency, and not from that of a competing bidder or the wider public interest the system was to serve. Thus, the previous German procurement system treated a contract award as but the final implementing step at the end of a series of government functions: after taxes had first been levied and collected and funds appropriated, procurement officials in the agencies brought the process to finality by making awards in conformity with these fiscal and budgetary guidelines and prerogatives. There were regulations which were binding on those who awarded government contracts; however, these did not serve the interests of the bidder, but rather the interests of those awarding the contracts.⁵ Thus keeping to an efficient and economic budget was the paramount interest. The regulations did not, however, provide for any rights on the part of a bidder or for any right to commence a court action to enforce compliance with the procurement regulations. Any constraints on agency abuse of discretion or discrimination in the making of awards arose internally from within the agency, i.e. as a failure to observe budgetary and administrative procedural requirements. The purported purposes of the system were to promote administrative and fiscal efficiency, and to save taxpayers' money by eliminating wasteful bidding procedures.

Clearly, for bidders this pre-1990s system was both "opaque" (the procurement laws and legal standards were nearly impossible to ascertain) and "discriminatory" (favouring one bidder or class of bidders over another). Under the old system, disappointed bidders had no rights in the procedure and consequently had no standing to challenge agency irregularities in court.

Inevitably, domestic German contractors enjoyed enormous advantages over foreign competitors in this lucrative and closed market. There was another consequence: with government agencies content with their unbridled discretion to award contracts, with domestic German industry enjoying huge competitive advantages over foreign competition from this system, and with a quiescent public, it was unlikely that there would ever be any domestic impetus for procurement reform. Even in German legal commentaries there were very few critics who addressed the lack of legal remedies available to bidders. Accordingly, following the reunification of Germany, the procurement system was extended to the new Federal States without amendment or criticism.⁶

⁵ See Federal Court of Appeal (BGH), NJW 1980, p 180; State Supreme Court (OLG) Nürnberg, NJW 1086, p 437.

⁶ See e.g. Hochbaum, "Das öffentliche Auftragswesen—Seine Bedeutung und seine Anwendung in den neuen Bundesländern" (The System of Public Procurement—Its Significance and Application in the New German States), LKV 1991, p 148.

Any impetus for change would have had to come from outside Germany.

III. EXTERNAL PRESSURE ON GERMANY LEADING TO ADOPTION OF THE ACT

It was inevitable that international pressure would call into question this closed German procurement system. The impetus for such change came primarily from the European Community and the United States in a series of international trade cases and policy decisions.

A. The General Agreement on Tariffs and Trade⁷

In 1981, the GATT adopted a regulation requiring uniformity among member countries' procurement systems. The regulation required member countries to adopt domestic laws that would conform to the standards set forth in the GATT regulation. In conjunction with the GATT requirements, on 21 December 1989, the European Commission issued Directive 89/665 for the Coordination of the Legal and Administrative Requirements for the Application of the Review Procedures in the area of the Award of Public Supply and Construction Contracts.⁸ This required member countries to adopt implementing legislation. By 1993, the EC Council had issued additional Directives, whereby member countries were required to comply with uniform standards with respect to public procurement in a broad array of subjects.⁹ A central problem for the modification of the German procurement law was that the European Directives are not directly binding on the Member States, but contain only an obligation for the States to implement the Directives into national law. Several Member States, including Germany, failed to implement all the Directives in their entirety.¹⁰ Even after heavy criticism by the European Commission, Germany initially tried to maintain the general principles of the German procurement system prevailing at that time.

⁷ *Supra*, note 3.

⁸ OJ 1989 No L395, 30 December 1989, p 33, last amended by Directive of 18 June 1992 (92/50/EEC), OJ No L209, 24 July 1992, p 1.

⁹ See e.g. Directives of 14 June 1993 for the Coordination of Procurement Procedures with respect to Public Construction Projects, (93/37/EC); Directive with respect to the Coordination of Procurement of Public Supply Contracts (93/36/EC); Directive for the Coordination of Procurement of Public Service Contracts (92/50/EC)—all of the foregoing last amended by Directive of 13 October 1997 (97/52/EC); Directive With Respect to the Coordination of Contracts Awarded in the Fields of Water, Energy, and Transportation Supply, as well as Telecommunications, (93/38/EC), last amended by Directive of 16 February 1998 (98/4/EC).

¹⁰ See figure 1 to the Green Book of the European Commission, "Das öffentliche Auftragswesen in der Europäischen Union: Überlegungen für die Zukunft" (The System of Public Procurement in the European Union: Considerations for the Future) of 27 November 1996.

B. Germany's ill-fated "Budgetary Solution" of 1994

To comply with these Directives, the Federal Republic enacted a so-called "Budgetary Solution" (*Haushaltsrechtliche Lösung*).¹¹ This clearly manifested the continued administrative preference by the Federal Republic of keeping procurement procedures part of the budgetary process. Detailed regulations to carry out procurement procedures were contained in the formally adopted national contracting rules for the award of public construction work. (*Verdingungsordnung für Bauleistungen—VOB*), contracting rules for the award of public supplies (*Verdingungsordnung für Leistungen—VOL*), and also in the 1997 enacted contracting rules for the award of public services (*Verdingungsordnung für freiberufliche Leistungen—VOF*). To ensure compliance with these regulations, the "Budgetary Solution" essentially provided, first, for *Vergabepflichtstellen* (Procurement Review Boards), which were administrative bodies with responsibility for monitoring an agency's compliance with procurement standards; and secondly, for *Vergabeüberwachungsausschüsse* (Procurement Compliance Boards—VÜA) which would hear disputes. Significantly, a VÜA was comprised of lay persons and its decisions did not comprise final and enforceable judicial judgments, but administrative acts.

The main reason that the procurement regulations were allocated to budget law was that, from a German point of view, such rules existed exclusively for the protection of the budget. The provisions of the "Budgetary Solution" were insufficient to protect bid competitors, since they were given no standing or assertable right to demand compliance with the procurement principles. It was the federal government's objective that bidders were not to be entitled to a personal remedy which could be enforced by court action.¹²

With the amending statute of 26 November 1993, the federal government tried to fulfil its duty to implement the EC Directives without affecting the classification of procurement law as principally part of budget law.¹³ However, this approach was doomed to fail right from the beginning since the European requirements for proper procurement procedures (the recognition of subjective bidders' rights to demand compliance with the procurement regulations, effective judicial remedies for the enforcement of such rights) were incompatible with the exclusively objective aims of budget law.

¹¹ §§ 57a–57c "Haushaltsgrundsatzgesetz in der Fassung des Zweiten Gesetzes zur Änderung des Haushaltsgrundsatzgesetzes" (Basic Law of the Budget as amended by the Second Act to Amend the Basic Laws of the Budget) of 26 November 1993 (BGBl I p 1928). Among other statutory changes, this legislation: (1) amended the *Haushaltsgrundsatzgesetz* (HGrG) (Basic Laws of the Budget) § 57(a)–(c); (2) provided for the issuance of regulations which governed procurement generally (*Vergabeverordnung*) and review of procurement decisions (*Nachprüfungsverordnung*); and (3) formally adopted the national contracting rules for public procurement (VOB/A, VOL/A and VOF). For a discussion, W Heiermann and T Ax, *The New German Procurement Law?* [1997] ICLR 318.

¹² BR-Drucksache (Printed Matter of the German Federal Council) of 4 January 1993, No 5/93, s 21.

¹³ *Vorlage des Bundesministerium für Wirtschaft* (Submission of the Federal Ministry of Economy) of 23 September 1996 (ref no I B 3–260500/16).

On 31 July 1996, the European Commission rejected Germany's "Budgetary Solution" as "not in compliance" with the 1989 Directive (89/665/EC). The Commission criticised the new procedure as not adequately protecting private rights in the procurement process, and for denying judicial review, since the VÜA did not have the stature of a court. The Commission gave Germany two months to respond to these deficiencies with new curative proposals.¹⁴ At this point, a judgment of the European Court of Justice¹⁵ should be mentioned, which is often wrongly interpreted and which in another connection held that the VÜA did have the stature of a court. However, this decision concerned only whether the VÜA was entitled to submit a question to the European Court of Justice for a preliminary ruling in accordance with Article 177 EEC Treaty; the European Court of Justice expressly left open whether the VÜA satisfied the requirements of the 1989 Directive (89/665).

C. US actions

In this already charged atmosphere, a major trade dispute between Germany and the United States erupted, arising from the unfair treatment which two prominent American bidders—General Electric and Westinghouse—experienced at the hands of the German procurement system. These incidents only illustrated the very inadequacies which the "Budgetary Solution" was intended to cure.

For years, American bidders on public construction and supply contracts in Germany had criticised the German procurement system's lack of transparency and absence of judicial review. Thus, at the same time that Germany attempted (unsuccessfully) to comply with Directive 89/665, General Electric and Westinghouse were denied contract awards for large electrical power generation facilities at Lippendorf and Cottbus, respectively. Each of these contracts was worth several hundred million dollars. The attempts by these disappointed American bidders to challenge the awards in court revealed the continuing deficiencies in the German procurement

¹⁴ See "Mit Gründen versehene Stellungnahme der EG-Kommission gerichtet an die Bundesrepublik Deutschland gemäß Artikel 169 des EG-Vertrates betreffend die Umsetzung der Richtlinie 89/665/EWG" (The Reasoned Opinion of the EC Commission addressed to the Federal Republic of Germany pursuant to Art. 169 of the EEC Treaty on the Implementation of Directive 89/665/EEC) of July 31, 1996, in *Vergaberechtsänderungsgesetz 1998 mit Materialien und Gesetz gegen Wettbewerbsbeschränkungen* (Act to Revise the Legal Basis for the Award of Public Procurement Contracts 1998 with Materials and the German Act Against Restraints of Trade), published by Schriftreihe des Forum Vergabe e.V., Book 6, Chapter 10.1. (hereafter "Forum Vergabe Heft"). Included in this work are original legislative texts of the Act as it appeared in bill form; state (*Länder*) and federal agency reports and commentary on the Act. Copies of this valuable German language resource are available from: Forum Vergabe e.V. Gustav-Heinemann-Ufer 84-88 D-50968 Cologne, Germany, telephone (0221) 3708-631.

¹⁵ ECJ, Judgment of 17 September 1997, Rs. C-54/96 (*Dorsch Consult Ingenieurgesellschaft mbH/Bundesbaugesellschaft Berlin mbH*), NJW 1997, p 3365.

system.¹⁶ Thus, in its judgment on the General Electric case,¹⁷ the Court of Appeal of Berlin (*Kammergericht*) confirmed that the legal duties imposed by the EC Directives on contract awarders also applied in relation to bidders from the United States. However, at the same time the Court of Appeal of Berlin held that the German procurement regulations did not give rise to general, individual and assertable rights on the part of a bidder to enforce the procurement regulations. The court decision revealed the profound difference between the requirements of the EC Directive and Germany's legislative response.

As a consequence of these two incidents, in the spring of 1996 the Clinton Administration, through Acting US Trade Representative Charlene Barshefsky and as part of that year's review under Title VII of the 1988 Omnibus Trade and Competitiveness Act as amended by the 1994 Uruguay Round Agreements Act, identified Germany "for a significant pattern or practice of discrimination" in the heavy electrical equipment sector.¹⁸ Barshefsky later noted that the United States had "long sought changes" to the German remedies system and assurances that US firms would receive equitable treatment in the German heavy electrical equipment procurement market. Under the 1993 US-European Union Memorandum of Understanding on Government Procurement, Germany had been obligated to provide an effective remedy system under the World Trade Organisation Government Procurement Agreement (GPA).¹⁹ The European Community had also complained that Germany's procurement system did not conform with EC procurement guidelines under the EC's Remedies for Utilities Directive, which requires that decisions of awarding agencies be subject to judicial review.²⁰ Identification under Title VII triggered a 60-day consultation period during which the two countries sought to resolve the problem.

Under such combined pressure from both the European Community and the United States, Germany passed the new Act.

¹⁶ US Firms Blast Germany for Failing to Pry Open Public Procurement Market, *The Bureau of National Affairs, Inc. International Trade Reporter*, Vol 13, No 10 p 378.

¹⁷ Court of Appeal of Berlin (*Kammergericht*), Judgment of 10 April 1995, NJW 1995, p 2797.

¹⁸ Fact Sheet 1996 Title VII *Decisions on Discrimination in Foreign Government Procurement*, Office of the US Trade Representative, 30 April 1996:

"General Electric was inexplicably excluded from a final stage of bidding in which two German manufacturers were permitted to present best and final offers on price. When GE sought to challenge the procedure before an impartial German review body, it experienced substantial difficulties in identifying a forum, despite the fact that Germany is obligated under the 1993 US-European Union (EU) Memorandum of Understanding (MOU) to provide a remedy mechanism."

See *Forum Vergabe Heft*, Chapter 10.2, footnote 8.

¹⁹ GPA of 15 April 1994 (OJ C256/2 of 3 September 1996; English Version: OJ 1994 L336/273).

²⁰ Press Release, Office of US Trade Representative, 1 October 1996.

IV. THE NEW ACT

Faced with this pressure, the German Bundestag (German Federal Parliament) responded by enacting the Act to Revise the Legal Basis for the Award of Public Contracts (Procurement Reform Act, or the Act—(*Gesetz zur Änderung der Rechtsgrundlage für die Vergabe öffentlicher Aufträge*),²¹ which took effect on 1 January 1999.

Generally speaking, the Act provides for many of the procedures familiar to American contractors on US projects: safeguards against discrimination, fairness in the evaluation of bids, the right to file bid protests, judicial review, and protection for trade secrets and other confidential data. The Bundestag designated this new Act as a new title within Germany's Antitrust Code (i.e. Act Against Restraints of Trade).²² However, the Act differs from American practice in its establishment of two unique quasi-judicial entities which have different bases of initial jurisdiction over procurement disputes, before an appeal may be heard before the Procurement Division of the State Supreme Court (OLG). These two entities are an administrative agency, the Procurement Review Board (*Vergabepflichtstelle*)²³ and a quasi-judicial panel, the Procurement Chamber (*Vergabekammer*).²⁴

A. General framework

The Act applies to public purchases of goods, services, and construction and specifically to contracts pertaining to drinking water facilities, energy production, transportation, communications, mining, hospitals, sport and recreation facilities, and education and administrative buildings.²⁵ Proposed regulations provide for threshold contract amounts to which the Act applies. These thresholds are, for contracts which do not fall within the sector for the supply of water, energy or transport or the telecommunications sector (so-called "sectors"), €200,000 for contracts for the supply of goods or services and €5 million for construction contracts. Within the sectors the following thresholds apply: for construction contracts €5 million, for contracts for the supply of goods or services in the sectors for water, energy or transport €400,000 and for the supply of goods or services in the telecommunications sector €200,000. Below these thresholds, the Act does not apply; such contracts are mainly still subject to the principles of the "Budgetary Solution". (See III.B. above.)

Contract awarders for the purposes of the Act are, in addition to the federal, regional and local government bodies corporate (federal

²¹ VgRÄG (in this article, "the Act").

²² *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) (Act Against Restraints of Trade).

²³ GWB, § 103; (Act, § 113).

²⁴ GWB, § 104; (Act, § 114).

²⁵ GWB, § 98; (Act, § 107).

government, state government, local government) also private enterprises which (at least also) act in the interests of the general public on a non-commercial basis, if they are controlled by the federal, regional or local government bodies corporate either through their financing or through their supervision. Private individuals and enterprises within the sectors are also contract awarders for the purposes of the Act if they are controlled by the federal, regional or local government bodies corporate or the latter are given special rights which remove them as free market competitors under antitrust laws.²⁶

Three modes of procurement procedure are recognised: open (generally open to an unlimited number of bidders), selective (selected pool of bidders is limited), and negotiated (bidders are individually contacted for negotiation, if so permitted by the Act).²⁷

Unlike American practice, which makes a (frequently confused) distinction between bid "responsiveness" and bidder "responsibility"²⁸ in the evaluation process the Act simply states that bidders "shall be treated equally".²⁹ Contracts are to be awarded to "expert, capable and reliable" bidders who submit the most "economic" bids.³⁰ It remains for future case law to determine the application of these terms and how closely they will functionally approximate the well-settled American concept of "lowest responsible bidder".

In assessing which bidder has submitted the most economic bid, the contract awarder is given much leeway based on the criteria set by the contract awarder itself, but the criteria may not include factors which have no connection with the procurement. Examples would be the requirements for apprentices, support for women, the payment of tariff wages or the subcontracting of parts of contracts to local enterprises. As of 1 July 2000 such aspects may only be considered if so provided by formal federal or state statutes. Previous experience showed that American enterprises were usually unable to meet such criteria or could meet them only with great difficulty, thus diminishing their chances of being awarded a contract. In this respect, the new bid evaluation requirements are a big step forward for American enterprises.

The new procurement procedure under the Act is characterised by the principle of transparency.³¹ This means that all of the major steps which are of significance for the contract awarder's decision must be reduced to writing in a procurement record. These documents are then used in any review procedure to check whether the procurement procedure complied with all relevant procurement regulations. This transparency is a basic prerequisite

²⁶ GWB, § 98; (Act, § 107).

²⁷ GWB, § 101; (Act, § 110).

²⁸ Ralph C. Nash, Jr and John Cibinic, Jr, *Federal Procurement Law*, 3rd edn (1977), vol I, chapter 4, § 1; Chapter 5 § 3.

²⁹ GWB, § 97(2); (Act, § 106(2)).

³⁰ GWB, § 97(4) and (5), (Act, § 106(4) and (5)).

³¹ GWB, § 97(1); (Act, § 106(1)).

in order to make any legal remedy effective. For bidders, this constitutes a vast improvement, disclosing and opening for review what had previously been "opaque" procedures and decisions.

An equally central new provision, in addition to the judicial review of the procurement procedure, is the recognition of subjective rights for the bidder.³² Thus, for the first time in German procurement law, a bidder is granted standing and individual rights which it can assert in court to enforce and challenge compliance with the Act.

B. Procurement Review Boards (*Vergabepflichtstellen*)

The Act provides for the creation of administrative Procurement Review Boards at the federal (*Bund*) and state (*Länder*) levels.³³ Administratively, these Boards may be established as part of an appropriate government or other regulatory agency. At the request of a bidder, a contract awarder, or (on their own initiative), the Boards are authorised to provide pre-bid guidance with respect to whether the whole procurement procedure or a single procurement practice conforms to the Act and to mediate nascent bidding disputes. A decision of a Board may be appealed to the appropriate Procurement Chamber. It is not required that an appeal be made to the Procurement Review Board; this is at the bidder's discretion. An appeal to the Procurement Review Board is not a prerequisite for an appeal to the Procurement Chamber.³⁴

C. Procurement Chambers (*Vergabekammer*)

The Procurement Chambers sit as administrative law courts to hear procurement disputes. The Act permits the federal government and the states to establish as many such chambers as may be needed. The chambers are composed of three persons, one of whom must have the qualifications of a judge, the other two must be high civil servants with subject-matter expertise. A chamber member's term is five years.³⁵ Any "enterprise having an interest in the contract" has standing to file a written bid protest or other claim arising from a violation of the Act.³⁶ A bid protester or claimant must immediately notify the contract awarder of the violation of the Act or of the contracting rules for the award before an application for review may be made.³⁷ Awards of contracts are automatically stayed, pending the outcome of a protest. During the pendency of a protest before a chamber and after the issuance of a decision, for the following two-week period in which appeals must be filed, the contract awarder may not award the contract.³⁸ The

³² GWB, § 97(7); (Act, § 106(7)).

³³ GWB, § 103(1); (Act, § 113(1)).

³⁴ GWB, § 103(2) and (3), (Act, § 113(2) and (3)).

³⁵ GWB, §§ 105 and 106; (Act, §§ 115 and 116).

³⁶ GWB, § 107(2); (Act, § 117(2)).

³⁷ GWB, § 107(3); (Act, § 117(3)).

³⁸ GWB, §§ 115(1) and 117(1); (Act, §§ 125(1) and 127(1)).

awarder of the contract may, however, apply for permission to award the contract.³⁹ The Act determines time limits for each stage of a protest, thus ensuring that the merits of a claim will not be indefinitely delayed.

D. Procurement Division within the State Supreme Court (OLG)

A Chamber's decision is subject to review by the State Supreme Court (*Oberlandesgericht*) in which the Procurement Chamber sits. The petition for appeal must be filed in writing within two weeks following the decision of the Procurement Chamber. This again has the effect of a stay, preventing the awarder of the contract from awarding the contract.

This suspensive effect ceases two weeks after expiry of the period allowed for filing an appeal.⁴⁰ The bidder can, however, apply for the suspensive period to be extended until the end of the appeal proceedings. The court's decision on any such application will depend largely on the chances of the appeal succeeding. On the other hand, the awarder of the contract can also apply for permission to award the contract while the appeal proceedings are still pending.⁴¹ The court can allow such an application if the interest in a contract being awarded immediately outweighs the possible damage thereby caused to the bidder. If the contract awarder thereupon awards the contract, the appeal proceedings are nevertheless continued, on the application of the bidder. The award—and the contract formation which, under German law, is simultaneous—cannot, however, be reversed. However, since the bidder may have a claim for damages against the awarder of the contract, the State Supreme Court (OLG) establishes whether there was a violation of the procurement regulations. This decision is binding upon the court which later decides upon the damages.⁴²

In order to ensure that case law is uniform, the State Supreme Court (OLG) is under a duty to submit a case to the Federal Court of Appeal (BGH) if it wants to deviate from a decision of another State Supreme Court.⁴³ If that is not the case, the State Supreme Court (OLG) is the court of last resort.⁴⁴

E. Other innovations

The Act provides other innovations as well, which were in part already contained in the former "Budgetary Solution" (see II.B. above). An American bidder will find the following innovations without clear parallel to American law or practice. These include the following:

³⁹ GWB, § 115(2); (Act, § 125(2)).

⁴⁰ GWB, § 118(1) 2; (Act, § 128(1)2).

⁴¹ GWB, § 121; (Act, § 131).

⁴² GWB, § 124(1); (Act, § 133(1)).

⁴³ GWB, § 124(2); (Act, § 133(2)).

⁴⁴ GWB, §§ 116 and 124, (Act, §§ 126 and 133).

1. A requirement that large projects, insofar as possible, be split up, so as to permit small and middle-sized bidders a competitive chance.⁴⁵
2. The requirements of the Act apply also to private organisations and entities, which are substantially managed or controlled by public agencies, or for which public agencies have extended substantial guarantees.⁴⁶
3. Broad standing is given to "any enterprise having an interest in the contract and asserting a violation of its rights" to file a petition protesting an award.⁴⁷
4. A waiver of a party's right to protest, if the party knew of the alleged irregularity during the procurement procedure, and failed to notify the awarding agency.⁴⁸
5. In submitting documents and records to an agency, a bidder may designate in advance any trade secrets; failure to do so creates a presumption that no such secrets exist.⁴⁹
6. A Procurement Chamber may award ancillary relief not specifically requested in the petition.⁵⁰
7. An unsuccessful protestor—whose petition is found to be without substantiation—is required to reimburse the prevailing party for its attorney's fees and other costs.⁵¹

F. US concerns

The US government has praised these reforms, but has also expressed concern in a number of areas as follows⁵²:

1. *The Act may in fact discourage bid challenges*: Petitioners unfairly deprived of contract awards appear to be entitled only to bid preparation costs, but are exposed to "open-ended counterclaims of tendering agencies for 'losses suffered ... due to the rights to petition and challenge.'" The Act also requires protesters to warn agencies about violations before they may file protest claims against an agency. Taken together, these measures, according to the US government, may have an adverse chilling effect on a bidder's willingness to file legitimate protest claims.
2. *The Act contains undefined award and bidder selection criteria*: According to the US government, the Act does not differentiate clearly enough between bidder selection and award criteria. "Price" is not clearly

⁴⁵ GWB, § 97(3); (Act, § 106(3)).

⁴⁶ GWB, § 98 No 2; (Act, § 107 No 2); § 57(a) No 2 Basic Laws of the Budget ("HGrG"), old version.

⁴⁷ GWB, § 107(2); (Act, § 117(2)); § 57(b)(3) 2 HGrG, old version.

⁴⁸ GWB, § 107(3); (Act, § 117(3)).

⁴⁹ GWB, § 111(3); (Act, § 121(3)).

⁵⁰ GWB, § 114(1); (Act, § 124(1)).

⁵¹ GWB, §§ 125(1); 128(3); (Act, §§ 134(1) and 137(3)).

⁵² US Department of Commerce; "US Government Comments on Proposed German Procurement Reform", 8 April 1997.

mentioned as an award criteria, as is otherwise required by EC standards. Also, according to the US position, local content preferences and use of technical specifications not consistent with international or EU norms should be prohibited under the Act.

3. *Objectivity of the Procurement Chambers.* The US government has stated that the qualification criteria for the Chamber members is loose enough to permit the appointment of persons closely associated with industry, who may not give claimants a fair hearing. Also, there are no provisions safeguarding against impartiality or bias of the Chamber members.

V. CONCLUSION

The Act constitutes a major positive change in how the German federal, state and local governments, as well as publicly owned or controlled private enterprises, purchase their goods and services. Germany essentially overcame its earlier reluctance for change, and has enacted a new comprehensive procurement code that is in compliance with international standards under the GATT, and innovatively establishes transparent norms and fairness safeguards for procurement participants. For foreign construction contractors, the new law is a welcome, if untested, change from the previous system, which enabled contract awarders to favour domestic industry and inadequately provided for independent judicial review of procurement disputes.

Through the new system of judicial relief and the recognition of subjective rights for the bidders, the prohibition of discrimination (which in theory was already recognised in the "Budgetary Solution") can at last be effectively enforced. The same applies to the prohibition against criteria which have no connection with the procurement. Thus domestic and foreign bidders are, as far as the merits are concerned, given an equal opportunity.

Nevertheless the public bodies and contract awarders, who for years have been accustomed to immunity from scrutiny or challenge, must accept and adapt to the Act. Only after their attitudes have changed will competition be truly fair and judicial enforcement minimised.

APPENDIX

Act to Revise the Legal Basis for the Award of Public Procurement
Contracts (Procurement Revision Act—VgRÄG)¹**Article 1 Amendment of the Act Against Restrictions on Competition²**

The Act Against Restrictions on Competition in the version as amended and adopted 20 February 1990 (BGBl³ I, p 235), most recently amended by Article 2 of the Act of 24 April 1998 (BGBl p 730), is amended as follows:

1. Part Four shall provide as follows:Part Four.
Procurement of Public Contracts**Chapter One
Procurement Procedure⁴***Section 97**(Section 106)⁵**General Principles*

(1) Public contract awarders⁶ shall procure goods, construction services and other services in compliance with the following provisions through competition and by means of transparent procurement procedures.

(2) The participants in such a procurement procedure shall be treated equally, unless this Act otherwise expressly requires or permits discrimination.

(3) The interests of medium-sized enterprises shall be duly considered mainly by splitting up contracts by subject matter and into smaller parts.

(4) Contracts shall be awarded to expert, capable, and reliable enterprises;⁷ other or additional qualifications shall be required of contract awardees⁸ only if provided by federal or state law.

¹ Translated by Barbara E Lawson under editorship of William Karl Wilburn and Dr Ingrid Reichling. This translation has retained the spacing, organisation, and punctuation of the German original. "Abschnitt" is translated as "Chapter", "Section" as Section, and "Absatz" as "Paragraph". Footnotes are those of the translators. This translation is from the German original appearing in *Vergaberechtsänderungsgesetz 1998 mit Materialien und Gesetz gegen Wettbewerbsbeschränkungen*, Schriftenreihe des Forum Vergabe e.v. Heft 6, Heider Druck GmbH, Bergisch Gladbach.

² *Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (GWB)*. This is literally translated as Revisions to the Act Against Restrictions on Competition, i.e. the Antitrust Act.

³ *Federal Gazette*.

⁴ *Vergabeverfahren*.

⁵ The references in parentheses are to citations in the original legislation.

⁶ Literally translated, the German original calls these agencies "public contract awarders".

⁷ *Unternehmen*. This is not limited to commercial businesses.

⁸ Literally translated, the German original calls these entities "contract awardees".

(5) The contract award shall be granted to the most economic⁹ bid.

(6) The Federal Government, with the approval of the Bundesrat, may adopt appropriate regulations governing procurement procedures, especially with respect to announcements of invitations to bid, the course and nature of the procurement, the selection and evaluation of the contract bidders and bids, the execution of the contract, and other issues relating to the procurement procedures.

(7) Enterprises have the right that contract awarders comply with the requirements of the procurement procedures.

Section 98

(Section 107)

Contract Awarders

Public contract awarders within the meaning of this Part are:

1. Federal, regional, and local governments, bodies corporate, and their special funds.
2. Other legal entities under public or private law, which were organized for the specific purpose of fulfilling non-commercial duties in the public interest, if bodies or associations under Nos. 1 or 3 of this section individually or jointly, by participation or through other means, provide most of the financial support, supervise the management, or have designated more than half of the supervisory or managing members of such an entity. This also applies if a body individually or jointly guarantees most of the financing, or if it designates a majority of the supervisory or managing members of such an entity and thus falls under sentence 1.
3. Associations whose members fall under Nos 1 or 2.
4. Natural or legal entities under private law engaged in the supply of drinking water, energy, transportation, or telecommunications, if these activities are exercised on the basis of special or exclusive rights, having been granted by a competent agency, or if any public contract awarder under Nos 1 through 3 individually or jointly can exercise a controlling influence on such entities.
5. Natural or legal entities under private law, in cases for which they receive funds from organisations under Nos 1 through 3 for excavation work, the construction of hospitals or sports, convalescent, or recreational facilities, schools, universities, higher education or administrative buildings or for services and bid procedures¹⁰ in connection with any of the aforementioned if more than 50% of such projects are financed by said funds.
6. Natural or legal entities under private law, who have entered into a contract with entities under Nos 1 through 3, involving the performance of construction services, where the consideration for such construction work is in the form of a right to use the facilities, rather than in remuneration, and possibly also the payment of a charge in respect of (sub) contracts with third parties (building concessions).¹¹

Section 99

(Section 108)

Public Contracts

(1) Public Contracts are contracts for consideration between public contract awarders and enterprises engaged in the supply of goods, construction services, or the performance of other services, and bid procedures¹² which lead to service contracts.

(2) Supply Contracts are contracts for the procurement of goods, mainly with respect to

⁹ *Wirtschaftlichste.*

¹⁰ *Auslobungsverfahren.*

¹¹ *Baukonzession.*

¹² *Auslobungsverfahren.*

purchase or instalment purchases, leasing, or rental or leases (with or without usufruct).¹³ The contract may also include ancillary services.

(3) Construction Contracts are contracts, for either the design of, or the simultaneous design and construction of a project, or a project excavation or construction, which serves a commercial or technical function, or a construction service by third parties pursuant to requirements specified by the contract awardee.

(4) Service Contracts are contracts dealing with the performance of services not covered by Paragraphs 2 or 3 and which do not constitute contract award or bid procedures.¹⁴

(5) Contract award or bid procedures within the meaning of this Part are only such contract award or bid procedures which are designed to aid the contract awardee in devising a plan based on a comparative examination by a prize panel,¹⁵ whether or not prizes are awarded.

Section 100

(Section 109)

Scope of Application

(1) This Part applies only to such contracts as meet or exceed the contract values laid down by regulation pursuant to Section 127 (thresholds).¹⁶

(2) This Part does not apply to contract of employment and contracts,

- (a) which are awarded on the basis of an international agreement in conjunction with the stationing of armed forces, which are subject to special procedural rules;
- (b) which are awarded on the basis of an international agreement between the Federal Republic of Germany and one or more countries, which are not party to the Agreement on the European Community Economic Area,¹⁷ for a project to be performed and supported jointly by the signatory countries, which is subject to other procedural rules;
- (c) which are awarded on the basis of the special procedure of an international organisation;
- (d) which were declared secret and classified in conformity with statutory and administrative provisions of the Federal Republic of Germany, or the performance of which would require specific security measures or if the protection of major national security interests is warranted;
- (e) which fall under the scope of Article 233, Para. 1, letter b of the Treaty Establishing the European Community;
- (f) which are awarded by contract awarders engaged in the supply of drinking water, energy, transportation or telecommunications, in accordance with any specific regulation in this field adopted under Section 127;
- (g) which are awarded to an entity which is a contract awardee under Section 98 Nos 1, 2 or 3, and which by statute or regulation has the exclusive right to provide the contract performance;
- (h) for the purchase or lease of, or rights in real property or existing buildings or other immovable property, regardless of their financing;
- (i) for the performance of services by affiliated enterprises, defined in further detail by regulation adopted under Section 127, and performed for contract awarders engaged in the supply of drinking water, energy, transportation or telecommunications;
- (j) for the broadcasting of programs;
- (k) for telephone, telex and mobile telecommunication services, radio communication services and satellite communications;

¹³ *Pacht* (lease with usufruct).

¹⁴ *Auslobungsverfahren*.

¹⁵ *Preisgericht*.

¹⁶ *Schwellenwerte*.

¹⁷ *Übereinkommen über den Europäischen Wirtschaftsraum*.

- (l) for arbitration and conciliation services;
- (m) for the performance of financial services in connection with the issuance, sale, acquisition or transfer of securities or other financing instruments as well as the services performed by central banks;
- (n) for the performance of research and development services, unless their results become the exclusive property of the contract awardee for its use during the performance of its own activities and such services are paid for in full by the contract awardee.

Section 101

(Section 110)

Types of Procurement

(1) Public contracts for the supply of goods, construction services or other services shall be procured by means of Open Procedures, Selective Procedures or Negotiated Procedures.

(2) Open Procedures are procedures in which an unrestricted number of enterprises are publicly invited to submit bids.

(3) Selected Procedures are those in which participation is invited publicly, and a limited number of enterprises is subsequently requested to submit bids.

(4) Negotiated Procedures are procedures in which the contract awarders, either with or without prior public invitation for participation, contact selected enterprises in order to negotiate with one or several participants on the contract terms.

(5) Public contract awarders shall use the Open Procedure, unless otherwise permitted by this Act. Contract awarders who fall only under Section 98 No. 4 may use any of the three procedures.

Chapter Two

Review Procedures¹⁸

I. Review Agencies¹⁹

Section 102

(Section 112)

Governing Principle

Notwithstanding the review authority of supervisory agencies²⁰ and Procurement Review Boards²¹ procurement of public contracts is subject to review by the Procurement Chamber.²²

Section 103

(Section 113)

Procurement Review Boards

(1) The Federal Republic and its States²³ may establish Procurement Review Boards responsible for verifying compliance with the procurement provisions by contract awarders

¹⁸ *Nachprüfungsverfahren.*

¹⁹ *Nachprüfungsbehörden.*

²⁰ *Aufsichtsbehörden.*

²¹ *Vergabepflichtenstellen.*

²² *Vergabekammern.*

²³ *Länder.*

as provided in Section 98 Nos 1 through 3. These may also be constituted under technical and legal government supervisory agencies.

(2) The Procurement Review Board shall, upon request or *ex officio*, review the compliance with the procurement provisions by contract awarders as provided in Section 98 Nos. 1 through 3. It may require the organisation administering the procurement procedure to cancel unlawful measures and institute lawful ones, provide advice to such organisations and business enterprises with respect to procurement requirements, and serve as a dispute mediator.

(3) An appeal against a decision of the Procurement Review Board to safeguard rights under Section 97 Para. 7, may be filed only with the Procurement Chamber. Review by the Procurement Review Board is not a prerequisite for an appeal to the Procurement Chamber.

Section 104

(Section 114)

Procurement Chambers

(1) The review of the procurement of public contracts may be performed by Procurement Chambers of the Federal Government for contracts attributable to the Federal Government, and Procurement Chambers of the States for contracts attributable to the States.

(2) Rights under Section 97 Para. 7, and other claims against contract awarders for acts or omissions in a procurement procedure can be asserted only before the Procurement Chambers and the Appeal Court, in addition to before the Procurement Review Boards. The jurisdiction of the ordinary courts for the assertion of claims for damages and the jurisdiction and authority of the Federal Antitrust Agency²⁴ remain unaffected.

Section 105

(Section 115)

Compositions; Independence

(1) The Procurement Chambers shall perform their duties independently within the framework of the law and at their sole responsibility.

(2) The Procurement Chamber's decisions shall be rendered by a chairman and two associates, one of whom shall serve in a lay capacity. The chairman and full-time associate must be life-tenured civil servants²⁵ with the qualification to serve in the higher grade of civil service, or be an expert employee with comparable qualifications. The chairman or the full-time associate must have the qualifications of a judge; as a rule, the chairman should be so qualified. The associates should have thorough knowledge of procurement procedures, the lay associate should also have several years of practical experience in procurement procedures.

(3) The Chamber may delegate the procedure to the chairman or the full-time associate for him/her to decide alone without the need for an oral hearing by means of a decision (*Beschluß*) which cannot be challenged. This delegation of power is possible only if the matter does not present any major factual or legal complications and the decision is not of fundamental importance.

(4) The Chamber members shall be appointed for a period of five years. Their decisions shall be independent and shall be subject only to the law.

²⁴ Bundeskartellamt.

²⁵ Beamte auf Lebenszeit.

Section 106
(Section 116)
Establishment; Organisation

(1) The Federal Government shall establish the requisite number of Procurement Chambers under the Federal Antitrust Agency. Establishment and staffing as well as the allocation of duties shall be the responsibility of the President of the Federal Antitrust Agency. Lay associates and their deputies shall be appointed by the President upon the recommendation of the central organisation of the body corporate²⁶ Chambers. Upon approval by the Minister of Economic Affairs, the President of the Federal Antitrust Agency shall issue standing orders and shall publish them in the German Federal Gazette.

(2) The establishment, organisation and staffing of the entities named in this paragraph (Review Agencies) for the States shall be determined by the agencies responsible under State law, and in the absence of such, determination shall be made by the State Government, which may delegate the authority further. The composition of the Procurement Chambers must ensure that at least one member has the qualification of a judge and if possible that member(s) have a thorough knowledge of procurement procedures. The States may establish joint Review Agencies.

II. Procedures before the Procurement Chambers

Section 107
(Section 117)
Initiation; Petition

(1) The Procurement Chambers shall initiate a review procedure only upon petition.

(2) Any enterprise having an interest in the Contract and asserting a violation of its rights under Section 97 Para. 7 for non-compliance with procurement provisions may file a petition. In so doing the enterprise must show that it has suffered damage, or that there is a threat of damage, arising from the alleged violation of the procurement regulations.

(3) The petition is inadmissible if the petitioning party knew of the alleged violation of the procurement regulations during the procurement procedure, and failed to notify the contract awarder promptly thereof. Further, the petition is inadmissible if the contract awarder was not notified of violations of procurement regulations which are evident from the solicitation of bids before expiry of the deadline given in the solicitation of bids for the submission of bids or for applying to the contract awarder.

Section 108
(Section 118)
Form

(1) The petition to the Procurement Chamber shall be made in writing and shall be promptly substantiated. It shall contain a specific demand. A petitioner without residence, or without regular abode, domicile or business presence within the scope of this Act shall designate an authorised person to accept delivery in conformity with this Act.

(2) The substantiation shall contain the name of the opposing party, a description of the alleged breach or violation, with a recital of the facts, and the evidence available, and it shall also state that the contract awarder has been notified; it shall also name any and all additional parties, if known.

²⁶ öffentlich-rechtlich.

Section 109
(Section 119)
Participants, Third Party Summons

Participants to the action are the petitioner, the contract awarder, and the enterprises whose interests will be adversely affected by the decision, and who have been summoned as third parties for this purpose by the Procurement Chamber. The decision regarding the third party summons is not appealable.

Section 110
(Section 120)
Investigation Principle

(1) The Procurement Chamber shall research the facts *ex officio*. During its entire operation it shall take care not to unduly affect the procurement procedure.

(2) Unless the petition is obviously inadmissible or unsubstantiated, the Procurement Chamber shall serve it on the contract awarder after receipt and shall request from the contract awarder all records documenting the bidding procedure (Procurement Records). If a Procurement Review Board has been established, the Procurement Chamber shall provide it with a copy of the petition. The contract awarder shall provide the Procurement Records to the Chamber promptly. Sections 57 to 59 Paras. 1 through 5 apply *mutatis mutandis*.

Section 111
(Section 121)
Inspection of Records

(1) The participants may inspect the records on file with the Procurement Chamber and may, at their own expense, obtain certified copies, excerpts or copies from the administration office.

(2) The Procurement Chamber shall deny inspection of the records if there are important reasons, in particular if they are classified or if required to preserve trade, industry or business secrets.

(3) Any participant submitting records or statements shall identify secrets named in Para. 2, and shall mark the secrets clearly in these records. In case of failure to do so, the Chamber will presume the participant's implied consent to inspection of the records.

(4) A refusal to inspect records may be challenged only by a prompt objection on the merits made in the course of the case-in-chief.

Section 112
(Section 122)
Oral Hearing

(1) The Procurement Chamber shall render a decision on the basis of an oral hearing, which should be restricted to one hearing. All participants are afforded the opportunity to be heard. With the participants' approval, or in case of inadmissibility, or in case the claim is obviously unsubstantiated, a decision may be rendered on the basis of the documents submitted.

(2) Even if the participants did not appear at the hearing, or are not represented properly, the action may be heard and decided upon.

Section 113
(Section 123)
Acceleration

(1) The Procurement Chamber shall issue and substantiate its decision in writing within five weeks from receipt of the petition. In cases of particular factual or legal complexities the chairman may, as an exception, extend the term by the requisite time period by notifying the participants thereof. The chairman shall substantiate this decision in writing.

(2) The participants shall co-operate in the disclosure of facts, in a manner appropriate for the progress and prompt resolution of the proceeding. Deadlines may be imposed on participants, after the expiry of which, if not met, further submissions may be disregarded.

Section 114
(Section 124)
Decision by the Procurement Chamber

(1) The Procurement Chamber shall issue a decision whether the petitioner's rights were violated and shall render the most appropriate measures, in order to remove the violation, and to prevent injury to the interests concerned. The Chamber is not bound by the petitions and may rule on the legality of the procurement procedure independent from the petition.

(2) An award already granted cannot be reversed. If the review procedure has become resolved by the making of an award, by revocation or cessation of the procurement procedure or termination in any other manner, the Procurement Chamber shall determine, upon motion of one of the participants, whether a breach has occurred. Section 113 Para. 1 does not apply in this case.

(3) The decision of the Procurement Chamber shall be issued by administrative act. Even in case of a sovereign, the enforcement of a decision is governed by the Act on the Execution of Administrative Judgments²⁷ of the respective Federal or State government. Section 61 shall apply *mutatis mutandis*.

Section 115
(Section 125)
Stay of the Procurement Procedure

(1) After the contract awarder has been served with a petition for review, it may not award the contract until after the Procurement Chamber has rendered a decision and the deadline for protests under Section 117 Para. 1 has expired.

(2) Upon the request of the contract awarder, the Procurement Chamber may consent to the award of the contract after the expiration of two weeks following notification of the decision, if after consideration of all possibly affected interests as well as the interest of the public in a swift conclusion, the disadvantages of delaying the contract award until the review is concluded outweigh its advantages. The protest appeals court may, upon petition, re-impose the prohibition against awarding the contract under Para. 1; Section 114 Para. 2 Sentence 1 remains unaffected. If the Procurement Chamber does not consent to the contract being awarded, the protest appeals court may, upon petition by the contract awarder, under the provisions of Sentence 1, permit the immediate award of the contract. For the procedures before the protest appeals court Section 121 Para. 2, Sentences 1 and 2 shall apply. An immediate protest under Section 116 Para. 1 of decisions of the Procurement Chamber is not permissible under this Paragraph.

(3) If the petitioner's rights under Section 97 Para. 7 in the procurement procedure are jeopardised in a manner other than by an impending contract award, the Chamber may,

²⁷ *Verwaltungsvollstreckungsgesetz.*

upon motion, intervene in the procurement procedure with further preliminary measures. It shall hereby apply the standard for decision established in Para. 2, Sentence 1. This decision is not independently contestable.

III. Immediate Protest

Section 116

(Section 126)

Admissibility; Jurisdiction

(1) An immediate protest is permitted against a decision rendered by the Procurement Chamber. The persons entitled to make such a protest are the participants in the action before the Procurement Chamber.

(2) An immediate protest is permitted also if the Procurement Chamber has not rendered a decision on a petition for review within the period specified in Section 113 Para. 1; in such a case, the petition shall be considered denied.

(3) The State Supreme Court²⁸ in the jurisdiction in which the Procurement Chamber is located shall be the exclusive forum for relief for immediate protests. Each State Supreme Court shall establish a Procurement Division as part of the court.²⁹

(4) The State Governments may refer matters under Paras. 1 and 2 to other State Supreme Courts or to the highest State Court.³⁰ The State Governments may delegate this authority to the respective State Ministries of Justice.

Section 117

(Section 127)

Deadlines; Form

(1) An immediate protest shall be filed in writing with the appeals court hearing the protest within a strict term of two weeks (which cannot be extended), beginning on the date of service of the decision, or beginning after expiration of the term in Section 116 Para. 2.

(2) The immediate protest must be substantiated at the time of its filing. The substantiation of the protest shall contain the following:

1. an explanation as to the extent to which the decision of the Procurement Chamber is appealed against and a deviating decision applied for.
2. a listing of facts and evidence supporting the protest.

(3) The notice of protest must be signed by an attorney admitted before a German court. This does not apply to protests from judicial entities governed by public law.

(4) At the time the protest is filed, the other participants to the action before the Procurement Chamber shall be notified by the protester by the delivery of a copy of the protest.

Section 118

(Section 128)

Effect

(1) An immediate protest shall have the effect of staying the decision of the Procurement Chamber. The stay is lifted two weeks after expiration of the protest period. If the

²⁸ *Oberlandesgericht.*

²⁹ *Vergabesenat.*

³⁰ *Oberstes Landesgericht.*

Procurement Chamber has denied the petition for review, then the protest appeals court, upon request of the protester, may extend the stay until the decision on the protest has been issued.

(2) The court shall consider the chances of success of the protest when arriving at its decision under Paragraph 1 Sentence 3. It shall deny the petition if after consideration of all possible interests as well as the interest of the public in a swift conclusion of the procurement proceedings, the disadvantages of delaying the contract award until a decision on the protest is rendered outweigh its advantages.

(3) If the Procurement Chamber has granted a petition for review by denying the award of the contract, then the contract may not be awarded, unless or until the protest appeals court reverses the Procurement Chamber's decision under Section 121 or Section 123.

Section 119

(Section 129)

Participants in the Protest Procedure

Participants in the procedure before the protest appeals court are the participants in the proceeding before the Procurement Chamber.

Section 120

(Section 130)

Rules of Procedure

(1) In the protest appeals court, the participants must be represented by an attorney admitted before German courts, who has been granted power to act on behalf of the instructing participant. Legal entities governed by public law may be represented by civil servants or employees who have the qualification as a judge.

(2) Sections 69, 70 Paras. 1 to 3, Section 71 Paras. 1 and 6, Sections 72, 73 with the exception of the reference to Section 227 Para. 3 of the Code of Civil Procedure, Section 111 and 113 Para. 2 Sentence 1 shall apply *mutatis mutandis*.

Section 121

(Section 131)

Preliminary Ruling on a Contract Award

(1) At the petition of the contract awarder, the court may, after considering the chances of the immediate protest succeeding, permit the bidding process and contract award to proceed. The court may also permit the award of the contract, if after consideration of all possible interests as well as the interest of the public in a swift conclusion of the procurement procedure, the disadvantages of delaying the contract award until a decision on the protest is rendered outweigh its advantages.

(2) The petition shall be filed in writing and must be substantiated at the same time. *Prima facie* evidence of the substantiating facts and the reason for urgency must be given. The proceeding on the protest may be stayed until the petition has been decided upon.

(3) The decision shall be rendered promptly and no later than five weeks after receipt of the petition; in cases of particular factual or legal complexity the chairman may, as an exception, extend the term by the requisite time period by providing the parties with a substantiated notification thereof. The decision may be rendered without an oral hearing. Its ruling shall explain the legitimacy or the illegality of the procurement procedure. Section 120 shall apply.

(4) Further legal remedies against a decision under this provision are inadmissible.

Section 122

(Section 131a)

Termination of the Procurement Procedure after Decision by the Protest Appeals Court

If the contract awarder is unsuccessful with a petition under Section 121 in the protest appeals court, the procurement procedure is considered terminated after ten days from the date of service of the decision, if the contract awarder fails to take measures for the restoration of the legitimacy of the procedure, ensuing from the decision; the procedure may not be continued.

Section 123

(Section 132)

Protest Decision

If the court considers the protest justified, it shall set aside the decision of the Procurement Chamber. In such case, the court shall decide itself in the matter or declare it the duty of the Procurement Chamber to render a new decision, consistent with the court's opinion. It will decide, upon motion, whether the enterprise requesting the review was violated in its rights by the contract awarder. Section 114 Para. 2 shall apply *mutatis mutandis*.

Section 124

(Section 124)

Binding Effect and Required Submission

(1) If a claim for damages is asserted arising from a violation of procurement procedures, and if a proceeding has taken place before the Procurement Chamber, then an ordinary court is bound by the final decision of the Procurement Chamber, by the final decision of the State Supreme Court, as well as, if appropriate, by the Federal Supreme Court³¹ under Para. 2 on the protest.

(2) If a State Supreme Court seeks to deviate from a decision of another State Supreme Court, or from the Federal Supreme Court, it is required to submit the matter to the Federal Supreme Court. The Federal Supreme Court shall render the decision instead of the State Supreme Court. Such requirement of submission does not apply in procedures under Section 118 Para. 1 Sentence 3 and under Section 121.

Chapter Three

Other Provisions

Section 125

(Section 134)

Damages for Misuse of Rights

(1) If the petition under Section 107 or the immediate protest under Section 116 proves to be unjustified from the outset, the petitioner or protester shall pay to the opponent and the participants damages suffered by them due to the misuse of the right to petition or to protest.

³¹ *Bundesgerichtshof.*

(2) A misuse is, in particular:

1. To effect a stay or continuation of a stay of the procurement procedure by intentional or grossly negligent presentation of false facts;
2. To request a review for the purpose of hindering the procurement procedure or to damage competitors;
3. To file a petition with the intention of later withdrawing it in return for payment of monies or other favours.

(3) If the Procurement Chamber's preliminary measures on the basis of a particular request under Section 115 Para. 3 prove to have been unsubstantiated from the outset, the petitioner shall be required to pay to the contract awardee the damages suffered by it due to the execution of the measures imposed.

Section 126

(Section 135)

Evidence in Case of Demands for Damages

If the contract awardee has violated a provision intended for the protection of enterprises and if, in the absence of this violation, the enterprise would have had a genuine chance of receiving the award, which chance was, however, thwarted by the violation, then the enterprise may claim damages for the costs of preparation of the bid or for the costs of participating in the procurement procedure. More extensive claims for damages remain unaffected.

Section 127

(Section 136)

Authorisations

The Federal Government may, with the consent of the Bundesrat (Senate of the Federal Parliament), pass regulations:

1. To adopt into German Law the threshold values of the Directives of the European Communities on the Co-ordination of Procedures on the Procurement of Public Contracts.
2. To further determine activities in the areas of the supply of drinking water, energy, transportation, or telecommunications, to the extent required for the fulfillment of obligations under the Directives of the European Communities;
3. To further determine associated enterprises, to whose services towards contract awarders engaged in the supply of drinking water, energy, transportation, or telecommunications this Part does not apply pursuant to the Directives of the European Communities;
4. To further determine contracts by enterprises engaged in the supply of drinking water, energy, transportation, or telecommunications which are not subject to this Part under the Directives of the European Communities;
5. To determine precisely the responsibilities of the Federal Procurement Chambers and the State Procurement Chambers, as well as to determine the responsibilities as between the individual State Procurement Chambers.
6. On the procedure under which public contract awarders may receive clearance from an independent examiner, stating that their actions during the procurement process complied with this Act and other provisions enacted under authority of this Act;
7. On the remedial mechanism under Chapter 3 and on a voluntary mediation procedure of the European Commission under Chapter 4 of Directive 92/13/EEC of the Council of the European Communities dated 25 February 1992 (OJ EC No. L 76 p. 14).³²

³² *Official Journal of the European Communities.*

8. On the information to be transmitted to the Ministry of Economics by the contract awarders, the Procurement Chambers, and the appellate courts, in order to meet the obligations under the Directives of the European Communities.

Section 128

(Section 137)

Costs of Proceedings Before the Procurement Chambers

(1) Certain costs (fees and expenses) shall be charged by the Procurement Chambers, in order to defray administrative expenses incurred. The Act Governing Administrative Costs shall apply.

(2) The amount of the fees shall depend upon the personnel and material expenditures of the Procurement Chambers, and shall take into account the financial importance of the matter under review. The minimum fee shall be DM 5,000 and may be reduced to one-tenth of that amount for reasons of equity. The fee should not exceed DM 50,000, but may, in individual cases, be raised to DM 100,000 if warranted by the efforts expended or the financial importance of the matter under review.

(3) If a participant to a proceeding is unsuccessful, it shall bear the costs of the proceeding. Multiple cost debtors are jointly and severally liable. If the petition is resolved by means of withdrawal or otherwise prior to a decision of the Procurement Chamber, half of the fee shall be payable. For reasons of equity, fees may be waived partially or in full.

(4) If the proceeding before the Procurement Chamber is successful, or the petition was remedied by the Procurement Review Board, the expenditures required for the appropriate prosecution of the action shall be reimbursed. If a participant in a proceeding is unsuccessful, it shall bear the opponent's expenditures required for the appropriate prosecution or defense of the action. Section 80 of the Act Governing Administrative Procedures³³ as well as the respective regulations of the Federal States shall apply *mutatis mutandis*.

Section 129

(Section 138)

Costs Incurred By the Procurement Review Board

In cases of official actions by Federal Procurement Review Boards which exceed the review activity mentioned in Section 103 Para. 2, first sentence and the related measures of the Procurement Review Board, certain costs shall be charged for the purpose of defraying administrative expenses. Section 128 shall apply *mutatis mutandis*. The fee shall be 20% of the minimum fee under Section 128 Para. 2; if the efforts expended or the financial importance of the matter under review in an individual case is unusually high, the fee may be raised to the entire amount of the minimum fee.

2. The previous Part Six shall become Part Seven; Sections 106 and 107 shall become Sections 139 and 140.

Article 2 Amendments to Regulations on Costs

(1) The Act Governing Court Costs³⁴ as amended and adopted on 15 December 1975 (*Federal Gazette I* page 3047), most recently amended by Articles 8 of the Act of 25 August 1998 (*Federal Gazette I* page 2489), is amended as follows:

³³ *Verwaltungsverfahrensgesetz*.

³⁴ *Gerichtskostengesetz*.

1. In Section 1 Para. 1 letter a, the words "and the Act Governing Sentencing Guidelines ..." ³⁵ shall be replaced by "the Act Governing Sentencing Guidelines and the Act Against Restrictions on Competition ...". ³⁶
2. In the caption of the second section after the term "(Section 1 Para. 2) family matters" ³⁷, a comma and the words "protest procedure under the Act Against Restrictions on Competition ..." ³⁸ shall be inserted.
3. After Section 12, the following Section 12a shall be inserted:

Section 12a

Assessment of Value in Protest Proceedings under the Act Against Restrictions on Competition

(1) In the procedure for protests against decisions by the Federal Antitrust Agency, and in the appeal on points of law (Sections 62 and 73 of the Act Against Restrictions on Competition) the value in issue shall be determined by Section 3 of the Code of Civil Procedure. In the procedure for protests by a summoned third party (Section 51, Para. 2, No. 4 of the Act Against Restrictions on Competition), the value in issue shall be determined in a discretionary manner by the importance of the issue to the summoned third party upon its petition, however not to exceed DM 500,000.

(2) In the procedure for protests against decisions by the Procurement Chamber (Section 116 of the Act Against Restrictions on Competition) including proceedings on petitions under Section 115 Para. 2, Sentences 2 and 3, Section 118 Para. 1 Sentence 3 and under Section 121 of the Act Against Restrictions on Competition, the value in issue shall be 5% of the contract amount.

4. The cost schedule (Attachment 1 to the Act Governing Court Costs) shall be amended as follows:
 - (a) The caption of the outline of Part 1 and the caption of Part 1, respectively, shall be worded as follows:

"Civil disputes, family matters (Section 1 Para. 2) and protest procedures under the Act Against Restrictions on Competition before ordinary courts except foreclosure auctions and receivership procedures."³⁹
 - (b) In the caption of Chapter II.2 of Part 1, a comma and the phrase "Section 62 and 116 GWB"⁴⁰ shall be inserted.
 - (c) After Number 1221, the following Number 1222 shall be inserted:

³⁵ und dem Strafvollzugsgesetz.

³⁶ dem Strafvollzugsgesetz und dem Gesetz gegen Wettbewerbsbeschränkungen.

³⁷ Familiensachen.

³⁸ Beschwerdeverfahren nach dem Gesetz gegen Wettbewerbsbeschränkungen.

³⁹ Bürgerliche Rechtsstreitigkeiten, Familiensachen (1 Abs. 2) und Beschwerdeverfahren nach dem Gesetz gegen Wettbewerbsbeschränkungen vor den ordentlichen Gerichten außer Verfahren der Zwangsversteigerung und Zwangsverwaltung.

⁴⁰ GWB = Act Against Restrictions on Competition.

"No.	Fee Item	Fee Amount or Rate of Fee under Section 1 para. 2 GKR ⁴¹
1222	Decision on a Petition under Section 125 para. 2 sents. 2 and 3, Section 118 para. 1 sent. 3 GWB or under Section 121 GWB ...	3.0"

- (d) In the preliminary remarks to Numbers 1224 and 1225 the colon shall be replaced by a semicolon, and the words "decision ending the appeal phase in the procedure on protests under Section 116 GWB, if fee number 122 has been incurred:"⁴² shall be added.
- (e) In the fee item of Number 1224, a semicolon and the word "decision"⁴³ shall be added.
- (f) The second part of the sentence of the preliminary remarks to Numbers 1226 and 1227 shall be worded as follows:
 "decision ending the appeal phase in the family matters under Section 1 para. 2 Sentence 2 GKG and in the procedure on protests under Sections 62 and 116 GWB".⁴⁴
- (g) In the caption of Chapter II.3 of Part 1, a comma and the phrase "appeals on points of law under Section 73 GWB"⁴⁵ shall be added.
- (h) The preliminary remarks to Numbers 1236 and 1237 shall be worded as follows:
 "... decision ending the appeal phase; decision in the proceeding on appeal on points of law under Section 73 GWB ending the appeal."⁴⁶
- (i) In the fee item of Number 1236, a semicolon and the word "decision"⁴⁷ shall be added.

(2) In Section 65a of the German Federal Act Regulating Attorneys' Fees,⁴⁸ adopted in its revised form in the Federal Gazette, most recently amended by Article 9 of the Act of August 25, 1998 (I p 2489, *Federal Gazette*), the following sentence shall be inserted after Sentence 1:

"If a petition is filed under Section 115 para. 2 sentences 2 and 3, Section 118 para. 1 sentence 3 or under Section 121 of the Act Against Restrictions on Competition, the court costs will be increased by one-half."⁴⁹

(3) Section 78 of the Act Against Restrictions on Competition as amended and

⁴¹ GKR = Court Cost Regulations.

⁴² *Beschluß, der die Instanz abschließt, in den Verfahren über Beschwerden nach 116 GWB, wenn die Gebühr 1222 entstanden ist.*

⁴³ *Beschluß.*

⁴⁴ *Beschluß, der die Instanz abschließt, in den in 1 Abs. 2 Satz 2 GKG genannten Familiensachen und in den Verfahren über Beschwerden nach den 62 und 126 GWB.*

⁴⁵ *Rechtsbeschwerden nach 73 GWB.*

⁴⁶ *Urteil, das die Instanz abschließt; Beschluß im Verfahren über Rechtsbeschwerden nach 73 GWB, der Instanz abschließt.*

⁴⁷ *Beschluß.*

⁴⁸ *Bundesgebührenordnung für Rechtsanwälte.*

⁴⁹ *Wird ein Antrag nach 115 Abs. 2 Satz 2 und 3, 118 Abs. 1 Satz 3 oder nach 121 des Gesetzes gegen Wettbewerbsbeschränkungen gestellt, erhöht sich die Prozeßgebühr um die Hälfte.*

promulgated on February 29, 1990 (*Federal Gazette I p 235*), most recently amended by Article 1 of the Act of August 26, 1998 (*Federal Gazette I p 2512*), is rescinded.

(3) After reenactment of the Act Against Restrictions on Competition pursuant to Article 3 of the Sixth Act Governing the amendment of the Act Against Restrictions on Competition of August 26, 1998 (*Federal Gazette I p 2512*), as well as the related renumbering, the references in paragraphs 1 and 2 refer to the provisions the wording of which corresponds to the intended provisions.

Article 3 Transitional and Concluding Provisions

1. Sections 57a through 57c of the Basic Laws of the Budget,⁵⁰ and the Review Provision (NpV)⁵¹ of February 1994 (*Federal Gazette I page 324*) are rescinded.

2. Review procedures pending through December 1998 shall be concluded subject to laws applicable at that time. Section 113 Para. 1 and Section 116 Para. 2 shall not apply to activities by the Procurement Compliance Boards⁵² until finalisation of installation and staffing of the Procurement Chambers. If the contract has not been awarded, the parties have the option to appeal to the State Supreme Court within two weeks after decision by the Procurement Compliance Boards. Costs and fees for procedures before the Procurement Compliance Boards under the old Act shall no longer be charged.

3. The Procurement Compliance Boards shall act as Procurement Chambers until the Procurement Chambers are established and staffed, however until no later than July 30, 1999.

4. The Third Statute Book of the Social Welfare Legislation⁵³ (*Civil Code I page 594*) shall be amended as follows:

- (a) The present wording of Section 262 shall become its paragraph 1.
- (b) The following para. 2 shall be added:

"(2) If the award of a public procurement contract to a business enterprise takes place during the implementation of a measure, it may be stipulated as a part of the contract that the preferred employees shall be employed, but that this shall not be nondiscriminatory as to other employment applicants."

5. Regulations in existence on the day of adoption of this Act which impose other or further requirements in the meaning of Section 97 para. 4 of the Act Against Restrictions on Competition, as amended by Article 1 No. 1 of the Act governing contract awardees, shall be valid through 30 June 2000, even if they do not constitute Federal or State law.

Article 4 Effective Date

Article 1 No. 1 Section 116 para. 4 of this Act shall come into effect in the month following the adoption of the Act. The rest of this Act shall take effect on 1 January 1999.

⁵⁰ *Haushaltsgrundsatzgesetz.*

⁵¹ *Nachprüfungsverordnung = NpV.*

⁵² *Vergabeüberwachungsausschüsse.*

⁵³ *Sozialgesetzbuch.*