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When & how to challenge Defence single source contracts

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As announced mid-January, BLOMSTEIN is publishing a series of briefings introducing into European and German legal defence matters. In our last briefing, we discussed the far-reaching impact CBAM will have on the defence industry in Europe.

"Faster, more effective and less bureaucratic" is the motto proclaimed by German Defence Minister Boris Pistorius when outlining his goals for defence procurement. One method – the so-called "direct award" – has always been an attractive option for contracting authorities interested in accelerating its procurement. Companies covet such awards because they avoid complicated and time-consuming procedures. On the other hand, those businesses that come away empty-handed often seek a way to challenge the legality of direct awards. This briefing will give an introduction to the strict conditions under which the law allows contracting authorities in Europe and Germany in particular to dispense with competitive tendering, and the particularities of the remedies available to competitors.

The Legality of direct awards in German Public Procurement Law

German law stipulates a limited number of cases, in which contracting authorities may award contracts to a company without involving competitors. For procurements in the defense sector, Award awards can be divided into two major sub-categories.

Generally, direct awards take the form of a **negotiated procedure without a call for competition,** in which only one company is invited to submit a bid. The contracting authority – usually the Federal Office of Bundeswehr Equipment, Information Technology and In-Service Support (*BAAINBw*) – selects an adequate supplier and negotiates the contract with that company. Due to its negative impact on competition, this type of procedure may only be used in a very specific and limited set of circumstances.

For defence procurement, the conferral of a direct award is allowed particularly in the following three types of cases:

1. **urgent reasons** linked to crises or unforeseeable events;
2. only one undertaking can perform the contract because of its **technical characteristics** or because of **exclusive rights** of that company; or
3. the contract matter relates to **research and development purposes**.

Notably, the courts have interpretated these categories narrowly. Nevertheless, the second category has a substantial practical importance, largely due to the complicated technical nature of the equipment and their limited interoperability.

The second type of direct award occurs, where public authorities are not bound by public procurement law at all, for example due to the **national security exception of Article 346 TFEU** (we will follow up on other legal possibilities – multinational collaboration and acquisitions from another state – in coming briefings). Under this provision (that was recently subject to two landmark decisions) the BAAINBw may fully disregard the complex web of German and EU legislation surrounding procurement law, if a competitive procedure would endanger "essential interests of (...) security" of Germany. However, a direct award under this provision is rare. For one, the fact that EU and German law both foresee a specific regime for contracts with military and national security implications, results in a high threshold of when Article 346 AEUV applies. Secondly, despite their liberties to bestow a direct award, German authorities generally choose to carry out competition procedures with a few selected (German) suppliers, which follow the principles of public procurement law even though the law regime is not applicable.

How to challenge direct awards?

If the BAAINBw decides to make a direct award, competitors generally have the right to initiate judicial review proceedings to challenge the grounds on which the direct award is based. The competent court is the Vergabekammer des Bundes (Federal Procurement Chamber) in Bonn, with the possibility of appeal to the Oberlandesgericht (Higher Regional Court) in Düsseldorf. The only exception to the jurisdiction of the Federal Procurement Chamber is if, in the course of an informal procedure pursuant to Article 346 TFEU, a competitor alleges a breach of the tender specifications or of the general principle of equal treatment. In such cases, the competitor will have to bring his claim before the civil courts because - due to the accepted applicability of Article 346 TFEU - the dispute does not fall within the jurisdiction of the Public Procurement Chambers.

Competitors can challenge illegal direct awards before and after the award. However, if they challenge an award before it has been made, they must first lodge a complaint with the contracting authority about breaches of public procurement law. Failure to do so renders the challenge before the Procurement Chambers inadmissible. On the other hand, this obligation does not apply if an award is challenged after it has been made. This curious contradiction is the result of the case law of the Düsseldorf Higher Regional Court. A competitor must file a complaint with the public authority within ten days of becoming aware of a breach of public procurement law. Knowledge of an infringement requires knowledge of the facts and an understanding that these circumstances constitute an infringement of the law. In theory, this means that the 10-day period does not start to run until the competitor has sought legal advice. In practice, Tribunals often

focus on sufficient knowledge of the facts as a starting point. However, mere suspicions, doubts or grossly negligent ignorance do not constitute sufficient (factual) knowledge. In any event, competitors should err on the side of caution and challenge the authority's direct award decision as soon as they become aware of its existence.

Who to turn to

BLOMSTEIN is constantly advising its clients in the defence industry in all aspects of defense procurement. We will be happy to answer and share their insights regarding any general questions or in connection with a specific procurement process.

Stay tuned: In our next defence briefing - to be published on 3 April - we will provide some insight into the Bundestag's ominous requirement (and its legality) to separately approve any defense procurement with a volume above EUR 25 Mio.