

3rd PUBLIC PROCUREMENT Ph. D. CONFERENCE

21-22 June 2007

PUBLIC PROCUREMENT RESEARCH GROUP

SCHOOL OF LAW

UNIVERSITY OF NOTTINGHAM

“Contract and adaptation of Contracts in the European Public Procurement Law – A comparative study on the German and English Law of Public Procurement”

by Erik Marschner, LL.M.

PhD Candidate at the University of Rostock (Germany), School of Law

1. Introduction

Traditionally Public Procurement Law is based on Contract Law both in England and in Germany. Nevertheless, the procedures to enter into a contract and especially to enter into a public procurement contract are different.

The German system is mainly influenced by the continental civil law system. That means that there is a more systematic approach (codification), including a lot of rules and regulations as well as judicial decisions. It is also important to bear in mind that the continental civil law system recognises a special Administrative Law, which is used to a greater or lesser extent, whenever public authorities act. One could say that Administrative law is more appropriate to public procurement because it is designed to consider more interests than only those of the potential parties of the contract. Public contracts constitute a complex area where economic, legal and political aspects converge. Sometimes it is necessary to take into account the interests of aggrieved bidders or participants which are generally not fully protected in the case of infringement of procedural rules. But the general concept of public procurement contracts in Germany is - surprisingly - neither of administrative nor of public nature. For a long time it was considered only as part of the law of public expenditures. Fiscal activities of public entities like the purchase of goods, are still not administrative law acts today. Contracts of public authorities are regarded as private law contracts and they are concluded under private law.

The English system is based on Common Law. Although public authorities act, the common law system does not really recognise special public contracts. That is why Public Procurement Law in England is based on Civil Contract Law primarily. The Civil Contract Law provides a lot of judicial decisions (Case Law) and rules concerning the formation and conclusion of usual civil contracts, e. g. contracts with consumers. Unfortunately, there were neither rules nor sufficient decisions which concern public contract issues in the past. Instead, the administration has created many internal guidelines to manage the procedure(s). The Law of Public Procurement has been ignored for quite a long time.

In context with the Europeanisation national Public Procurement Law underwent a revolution. Directly or indirectly, it caused a lot of changes. This is the case in relation to the procedure and the formation of public procurement contracts in England as well as in Germany, as a matter of course.

The first purpose of this PhD thesis is to answer the question of the relationship between usual contract law and special public procurement matters. There are numerous examples of it. Is it still possible and appropriate to apply the Law of Civil Contract in the same way as for usual contracts, like consumer contracts for instance? More precisely, what about the freedom of contract in Public Procurement Law? What about the Civil Contract Law rules and conditions and their application to public procurement contracts, or what about the protection of concluded contracts (*pacta sunt servanda*)?

European Law has influenced the formation and the different mechanisms of the conclusion of public procurement contracts in both EU member states. The process of Europeanisation has not been completed yet. It is necessary to know more about the structure and the problems caused by that process in both systems in order to overcome the difficulties and to find a better approach. Therefore it is useful to describe their similarities and differences. The aim could also be to find the “better” one, the one that offers more flexibility. Recent developments in the European Law of Contract will also be taken into consideration. The improvement of the European Contract Law has been on the agenda of the European Commission for quite a long time. The Commission has launched a process to create a common frame of reference. Public Procurement Law was also mentioned in the Commission Communication on European Contract Law.

This being said, I have decided to address only problems arising from these circumstances in relation to the German procurement system with this paper.

2. Relationship between traditional Public Procurement Law and Contract Law in Germany

Public procurement has its roots in the 17th century. In the beginning of the 20th century a non-parliamental committee with representatives from the government, the administration, the business sector and several lobbyists created contracting rules for the award of public contracts (e. g. VOB/A for Public Works Contracts¹). These rules which govern the procedure of public purchasing do still exist in Germany today. They are the most important “legal platform” for contracts below the thresholds.

Although - after its definite Europeanisation - the so-called Law of “Öffentliche Auftragsvergabe” found recently its way into the German Antitrust Code (GWB sec. 97 et seq.), the VOB/A plays also an important role above the thresholds. The VOB/A complements the GWB. Because of its lack of democratic elements the legal classification of the VOB/A has been disputed.

The VOB/A modifies and adds to the German Civil Contract Law as part of the German Code of Civil (German CC). This is possible because most of the German CC Rules are amendable. But the general contractual sequence, or better the usual mechanism of formation and conclusion of a contract (e. g. invitation ad offerendum – offer – acceptance of the offer and conclusion of the contract), is preserved. It is a special element of the German Law that the award of a contract (“Zuschlag”) traditionally corresponds with its conclusion. The acceptance of an offer in traditional contract law is called the award. With the award the contract is concluded (monistic system). The term “award” is also used in other contractual relationships like compulsory auctions.

The VOB/A includes three different procedures and the one that is used the most is the open procedure.

¹ There are also the VOF and the VOL/A which include similar regulations for other contracts, especially service contracts. To simplify matters the following essay is limited to the rules of the VOB/A which have the most practical importance.

The rules of the VOB/A (especially the procedural rules connected with the open and restricted procedure) restrict the freedom of contract, especially the bidder's freedom. They are very detailed and strict. Usually there is not so much space for flexibility and innovation. Any mistake or infringement of the rules by a bidder could lead to an elimination of the bid. It is also not so easy - almost impossible - to obtain all required information from the authority within the procedure. Transparency is not always granted. One of the most obvious limitations of the bidders' freedom to act is the prohibition of post-tender negotiations. All these limitations shall grant best value for money and equal treatment.

Moreover, concluded contracts cannot be set aside. This limitation was justified with the general civil law dogma of the existence of concluded contracts (*pacta sunt servanda / fait accompli*) and the predominant interests of the parties of the contract.

Public authorities are traditionally obliged to adapt these rules by virtue of the German Budget Law. But this obligation is only an internal and administrative one. The VOB/A does not provide aggrieved bidders' substantive law. Because of the civil law origin of Public Procurement Law in Germany bidders have to apply civil law remedies in the case of an alleged infringement of these rules. But in most of the cases it is too late to claim because bidders do not have all required information and the contract is concluded already. If so, it is only possible to bring a civil law action for damages against the authority but, not surprisingly, this damage claim does not fulfil the real interests and expectations of the bidders.

This short introduction made clear that, traditionally and still today, Public Procurement Law sometimes neglects the interest and position of bidders for contracts below the thresholds. Civil Contract Law is suitable to promote this approach.

3. Recent developments in Public Procurement Law below the thresholds

Considering the comments above it is not an unexpected result that the traditional German approach has caused a lot of discussions among legal experts. The background of this debate lies not only in Germany but also in the EU.

Since the middle of the 20th century some commentators have been demanding to turn away from this old-fashioned civil law approach. Instead of that they recommended to follow the so-called “two-steps doctrine” (“2-Stufen Theorie”), which the German Law has already recognised in relation to other relationships between the administration and private persons. The first step is seen as a public law matter which is achieved with the sovereign (internal) decision of the authority which bid the contract should be awarded to. Any claims against this decision are public law disputes. According to that, the award procedure is a matter of Public Law. Administrative Courts are more suited to provide substantive reviews of public procurement decisions and to grant effective legal protection. They act *ex officio* in contrast to Civil Courts, where the claimant must prove his claim. They are allowed to make their own inquiries and have the right to access all documents, which is necessary to guarantee effective legal protection. The second stage is reached with the (external) award and the corresponding conclusion of civil contracts. This is a matter of Private Law.

It is clear that the administration has always denied to follow these arguments because this could lead to a delay of the project. As already mentioned its interests outweigh the others. Public Procurement is traditionally not designed to secure bidders' rights.

In 2005 the first two German courts – starting with the Koblenz Administrative Court² and Koblenz Administrative Court of Appeals³ - expressed their doubts about the exclusive Private (Contract) Law classification and decided to follow the two-steps doctrine. Since then there have been a lot of decision in Germany in this context, some of them favouring the traditional approach, and others preferring the two-steps doctrine. There is a splitting of the review of public procurement cases, which has also led to legal uncertainty. In June 2006 the highest court in Germany - the Federal Constitutional Court in Karlsruhe - decided⁴ that the current system does not infringe the German constitution. With this decision the discussion seemed to be finished.

But as the recent decision of the Administrative Court North Rhine - Westphalia⁵ shows it could be a never-ending story. The court also considering the latest decision of the German

² Administrative Court Koblenz, decision of 31st January 2005, 6 L 2617/04

³ Administrative Court of Appeals Koblenz, decision of 25th May 2005, 7 B 10356/05

⁴ German Federal Constitutional Court, decision of 13th June 2006 - 1 BvR 1160/03

⁵ Administrative Court of Appeals North Rhine – Westphalia, decision of 12th January 2007, 15 E 1/07

Bundesverfassungsgericht showed itself unwilling to change its opinion based on the two-step doctrine.

But there is also another important development which should be considered and which could also have some impact on the formation and conclusion of public procurement contracts below the thresholds. Although contracts below the directives' thresholds are excluded from the scope of the directives, the contracting entities are bound to comply with the fundamental principles of the Treaty. Also the national rules must be in line with the Treaty.

There are already some important decisions of the European Court of Justice (ECJ) which deal with contracts falling outside the scope of the public procurement directives⁶. The European Commission has summarised these decisions from its point of view and issued a corresponding Communication⁷. Therein the Commission (explicitly referring to the *Telaustria* judgment of the ECJ concerning Public Service concessions⁸) requires as one of the main issues of its communication *inter alia* a sufficient "degree of transparency" for contracts below the threshold, too. It is not clear what is meant with this,⁹ but it could lead to further changes, also in relation to the formation and conclusion of a contract in Germany. In the eye of the author this fear could be the true reason which led to a claim of the German Government against the European Commission and its interpretive communication.

4. The German Public Procurement Law and the European Directives

The implementation of the Public Procurement Directives, the approach of the European Commission and several ECJ judgments has changed remarkably the Public Procurement Law in Germany. There is a clear dichotomy. Above the thresholds it is described as an ideal

⁶ see for instance Case C-324/98 decision of 7th December 2000, *Telaustria Verlags GmbH, Telefonadress GmbH vs. Telekom Austria AG, former Post & Telekom Austria AG* [2000] ECR I-10745; Case C-231/03 decision of 21st July 2005 *Consorzio Aziende Metano (Coname) vs Comune di Cingia de' Botti*; Case C-458/03 decision of 13th October 2005 *Parking Brixen GmbH vs. Gemeinde Brixen and Stadtwerke Brixen AG*

⁷ Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02), 01st August 2006

⁸ Case C-324/98 *Telaustria* [2000] ECR I-10745 paras. 61, 62: "As the Court held in Case C-275/98 *Unitron Scandinavia* and 3-S [1999] ECR I-8291, paragraph 31, that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed."

⁹ See the pending case C-195/04 *Commission vs. Finland* and the opinion of General Advocate Eleanor Sharpston, 18th January 2007

world (“Bidder’s paradise”) whereas outside the scope of the European directives¹⁰ it is described as a “dark world for bidders” and a “Lawyer’s paradise”.

This development has also had an important impact concerning the creation and conclusion of public contracts.

One of the most significant modifications occurred after the famous *Alcatel* decision held by the ECJ¹¹. In this case the ECJ ruled¹² that the award decision, prior to the conclusion of the contract, should in all cases be open to review in a procedure whereby an applicant may have that decision set aside. Consequently, member states which prohibit the setting aside of a concluded contract must provide for a period of reasonable delay between the award and conclusion of the contract to give time to challenge an award decision¹³.

This has caused a lot of discussions about the compatibility of the traditional monistic German approach with the European requirements derived from Art. 2 (6) Remedies Directive 89/665/EC. As already described, the award of a contract is traditionally equivalent to the acceptance of an offer and the conclusion of the contract. It was clear after *Alcatel* that this traditional monistic approach as a whole was no longer consistent with the Remedies Directive.

In the end this decision has introduced a reasonable time period between the notification of the decision about the contract award and the conclusion of the contract (“standstill period”). *Alcatel* was implemented with sec. 13 VgV¹⁴. Thus, Germany distinguishes between the notification of the internal award decision and the award to the contracting party itself. In other words: since then there has been a new requirement to be followed (an intermediate stage) before the final conclusion of the contract to grant effective judicial protection. Further, the award of a contract can still be congruent with the acceptance of an offer.

¹⁰ 90% of all contracts fall outside the scope of the directives.

¹¹ ECJ - decision of 28th October 1999, C-81/98 [1999] ECR I-7671 *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr*

¹² ECJ - decision of 28th October 1999, C-81/98 [1999] ECR I-7671 *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr* at para. 43

¹³ The significance of that decision is that on one hand it is of a benefit for disappointed bidders wishing to challenge the award decision, but on the other it is an additional burden on the authorities and maybe on the public interests (e.g. length of time before the final hearing, more costs incurred).

¹⁴ German Procurement Regulation

It seems to be a European contractual trend to impose more and more pre-contractual requirements to safeguard aggrieved persons.

After *Alcatel* there were also other ECJ-judgment adjudicated that attracted considerable interest in Germany, especially with regard to the contractual background. One of those court decisions was *Hospital Ingenieure*¹⁵, which concerned the issue whether Directive 89/665 requires Member States (?) to provide judicial review of an authority's decision to withdraw an invitation to tender. In its famous decision the ECJ held that

“the decision to withdraw a invitation to tender for a public service contract is one of those decisions in relation to which Member States are required under Directive 89/665 to establish review procedures for annulment, for the purpose of ensuring compliance with the rules of Community Law on public contracts and national rules implementing that law¹⁶.”

Considering this, the questions which arose in Germany was the following one: what could happen if the decision to withdraw an invitation to tender was declared unlawfully by the Court and was itself withdrawn. Some authors took the view that under special circumstances this could mean not only to follow the procedure but also to require an obligation for the entity to award the contract and to enter into a contract. Finally, this would indicate an exclusion of the freedom to contract. This debate is still at issue.

In the past there have been a lot of direct awards (*de facto*) without holding any tender procedures and without any notification or information of interested persons. Germany has chosen to use the option given to the Member States under Art. 2 (6) Directive 89/665/EC, with the result that concluded contracts cannot be set aside on the grounds of an alleged infringement of Public Procurement Law (“race to signature”). This approach was in line with the Civil Contract Law dogma of “*pacta sunt servanda*” (or concluded contract rule) as described above.

But the European Commission argued that this was a breach of European Procurement Law and sued the German government. Germany *inter alia* took the view that it was under no

¹⁵ ECJ decision of 18th June 2002 C-92/00, [2002] ECR I-5553 Hospital Ingenieure Krankenhaus-technik Planungs-Gesellschaft mbH (HI) gegen Stadt Wien

¹⁶ ECJ decision of 18th June 2002 C-92/00, [2002] ECR I-5553 Hospital Ingenieure Krankenhaus-technik Planungs-Gesellschaft mbH (HI) gegen Stadt Wien at para. 54

obligation to terminate a contract under Art. 2 (6) Directive 89/665. Moreover, there was no legal basis to terminate the contract in issue, neither under German Law nor under EU Law.

The ECJ held - contrary to the view of the German government - that such a breach of European Procurement law continues as long as the contract is still performed. Unfortunately, the ECJ did not say what had to be done. It left this, being a matter of national law, unsettled.

As the ECJ case C-503/05 made clear later it was at all events not sufficient only to call on the German Bundesländer and municipalities to comply with EU Law in future. Thus, it was a difficult situation for quite a long time in Germany and a big challenge for legal experts, too.

In December 2004 the Regional Court of Munich presented a decision which could be a possible and practical solution of such problems but with far-reaching contractual consequences. This Civil Court first stated that the contract at issue was valid. But under special circumstances there could be a right for the public authority to terminate a contract which infringed EU Procurement Law as *ultima ratio*. The right to terminate was derived from sec. 313 para. 3 sentence 2 German CC (*clausula rebus sic stantibus*). For the first time a court stated an exception from the dogma that there could not be any detraction of concluded public procurement contracts because of an infringement of Public Procurement Law.

5. Conclusion

Public Procurement Law is an interdisciplinary subject. With its Europeanisation it has increasingly come to the fore of “Contract Lawyers”, too. In contrast to the usual Law of Contract, Public Procurement Law is already harmonised. But this development was also accompanied by a change of national attitude. It was not always possible to stick to one’s principles. As described, especially the German Law could offer valuable clues. Although the European Commission originally declared not to interfere national Contract Law, the German example shows that this approach seems to be unsustainable. Moreover, the freedom of contract, as another important contractual dogma, and the formation and conclusion of contracts are directly or indirectly influenced, too. It seems to be that public contracting step by step departs from the general Civil Contract Law towards to a special Private or a more Public Contract Law. It is open to debate if Public Procurement Law should be part of the

process to create a common frame of reference, but there are a lot of lessons to learn for Contract Lawyers from public purchasing and its Europeanisation.

Rostock, 30.03.2007