

Public Contracts in Germany

Every year public contracts worth 360 billion Euros are awarded in the Federal Republic of Germany. For the EU as a whole the figure is more than 2 trillion Euros. Public contracts are contracts with public authorities to provide goods or services. The contracts cover goods and services in almost all sectors.

Contracting entities include all national, regional and local government departments, local authority associations and other public law institutions such as universities, pension insurance institutions, etc. Private law bodies are also included if they are institutions with their own legal personality providing services of general interest and mainly funded or supervised by the State (e.g. hospitals, publicly-funded theatres, fire brigades, etc.).

Contracting entities in the water, energy, transport and telecommunications sectors (utilities) are governed by special rules.

The number of public buyers in Germany is appr. 30.000.

Legal bases for public procurement

As in all EU member states the public procurement laws depend on whether the estimated contract value is above and below the EU-procurement thresholds. These thresholds are adapted every two years: here are the ones that are valid for 2016 / 2017:

THRESHOLDS

For public authorities that procure according to the Classical Directive 2014/24 EU

- 135.000 Euro: Procurement of services and supplies contracts awarded by **Central Government authorities (Bundesbehörden)**.
- 209.000 Euro Procurement of other **service contracts**, all design contests, subsidised service contracts, all **supplies contracts** (Sub-central contracting authorities – Nicht-Bundesbehörden)
- 5.225.000 Euro **Works contracts**
- 750.000 Euro All services concerning **social and other specific services** according to Annex XIV.

There are different legal frames for contracts above and below the EU-thresholds (Schwellenwerte)

Public procurement laws for contracts above the EU-thresholds (Oberschwellenwertausschreibungen / EU-Ausschreibungen)

In Germany the legal regulations for public procurement are:

- **GWB** the Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB);
- **VgV** the Regulation on the award of public contracts (*Vergabeverordnung*, VgV);
- **VOB/A** the contracting rules for the award of public work contracts (*Vergabe- und Vertragsordnung für Bauleistungen*, VOB),
- **SektVO** the new Sectoral Regulation for contracts in the utilities sector (*Sektorenverordnung*, SektVO)
- **VSVgV** the contracting rules for tenders in the defense and security sector (*Vergabeverordnung Verteidigung und Sicherheit – VSVgV*)
- **KonzVgV** the contracting rules for concessions (*Konzessionsvergabeverordnung*, KonzVgV)

As general terms and conditions for the fulfillment of the contract there are two set of rules **VOL/B** for delivery and service contracts and **VOB/B** for construction/public works contracts.

The GWB also regulates the setting up of Public Procurement Complaint Boards, which provide legal protection for tenderers involved in procurement procedures,

Public procurement laws for contracts below the EU-thresholds

For contracts below the EU-thresholds only national i.e. budgetary law applies. There are different regulations depending on the Land where the public authority is situated. This can be:

- VOB/A for construction tenders
- VOL/A for delivery and service tenders
- Ländervergabegesetze (special regulations as per Bundesland)
- A new law for the procurement of deliveries and services “Unterschwellenvergabordnung” (UvgO) will replace VOL/A in 2017 and 2018.
- There are no major differences between the regulations. Some regulations require additional information on sustainability, minimum wages, number of female employees, originate from various Lander laws and have to be specified in the tender documents.

All the requirements and references to legislation have to be indicated in the tender documents.

Basic principles

- Equal treatment
- Non-discrimination
- Proportionality
- Transparency

Types of award procedures

The legislation on public procurement provides for a number of different procedures for awarding contracts. There are different names for the procedures depending on whether the contracts are above or below the EU-thresholds.

Which procedures can be chosen by the public authorities is regulated in the procurement legislation.

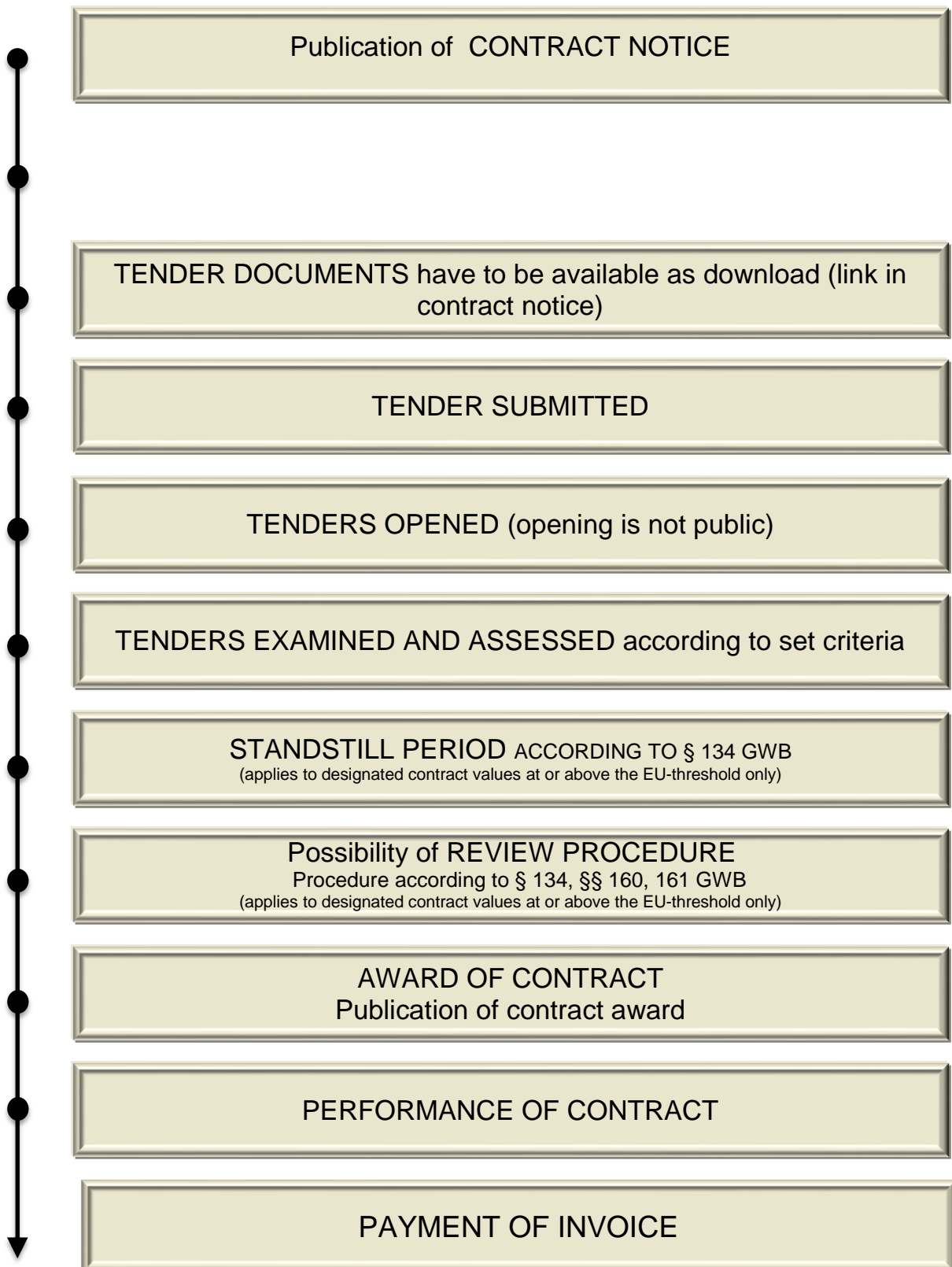
Below the thresholds the choice of a restricted (beschränkte Ausschreibung or negotiated procedure (freihändige Vergabe) might simply depend on the contract value.

Here an overview of the various procedures:

Below EU threshold	Above EU threshold (choice of procedure according to GWB)	Explanation
Öffentliche Ausschreibung	Offenes Verfahren	Open procedure <ul style="list-style-type: none"> - publication of tender notice - unlimited number of bidders - unrestricted competition - Download of tender documents or request for tender documents to be sent by public buyer.
Beschränkte Ausschreibung Usually there is a request for participation. In justified cases (lower contract values) companies are asked directly to hand in a bid without further publication.	Nicht offenes Verfahren	Non open procedure <ul style="list-style-type: none"> - restricted participation (choice of bidders after a published request for participation) - same tender assessing procedure as for open procedure

	Wettbewerblicher Dialog	Competitive Dialogue - only for complex contracts - dialogue to define the future object, basis of the tenders
<p>Freihändige Vergabe</p> <p>Verhandlungsvergabe</p> <p>Usually companies are contacted directly without further publication.</p> <p>Usually for lower contract values or supplies or services with a .creative input required from the bidders.</p>	Verhandlungsverfahren	Negotiated procedure - Choice of this procedure rather restricted. - negotiation possible also after tender submission

Fig. 1: Steps of an open procedure above the EU thresholds



- *Non-open procedure / Nicht-offenes Verfahren / Beschränkte Ausschreibung*

Restricted procedures involve only a limited number of companies. In that case, companies are elected within a request to participate (Teilnahmewettbewerb) according to the indicated criteria. Only a limited number of companies is selected to submit bids. For assessing the tenders the same strict formal requirements apply as with public invitations to tender / open procedures.

- *Competitive dialogue / Wettbewerblicher Dialog*

This procedure for tenders above the EU-thresholds may only be used for particularly complex contracts that cannot be clearly defined. The contracting entity publishes a notice giving a functional description of the subject of the procurement and the planned conduct of the procedure. In order to determine the solution which best meets the contracting entity's needs, there is a dialogue phase between the entity and the companies. The description of the service developed during this dialogue phase then forms the basis of the tenders.

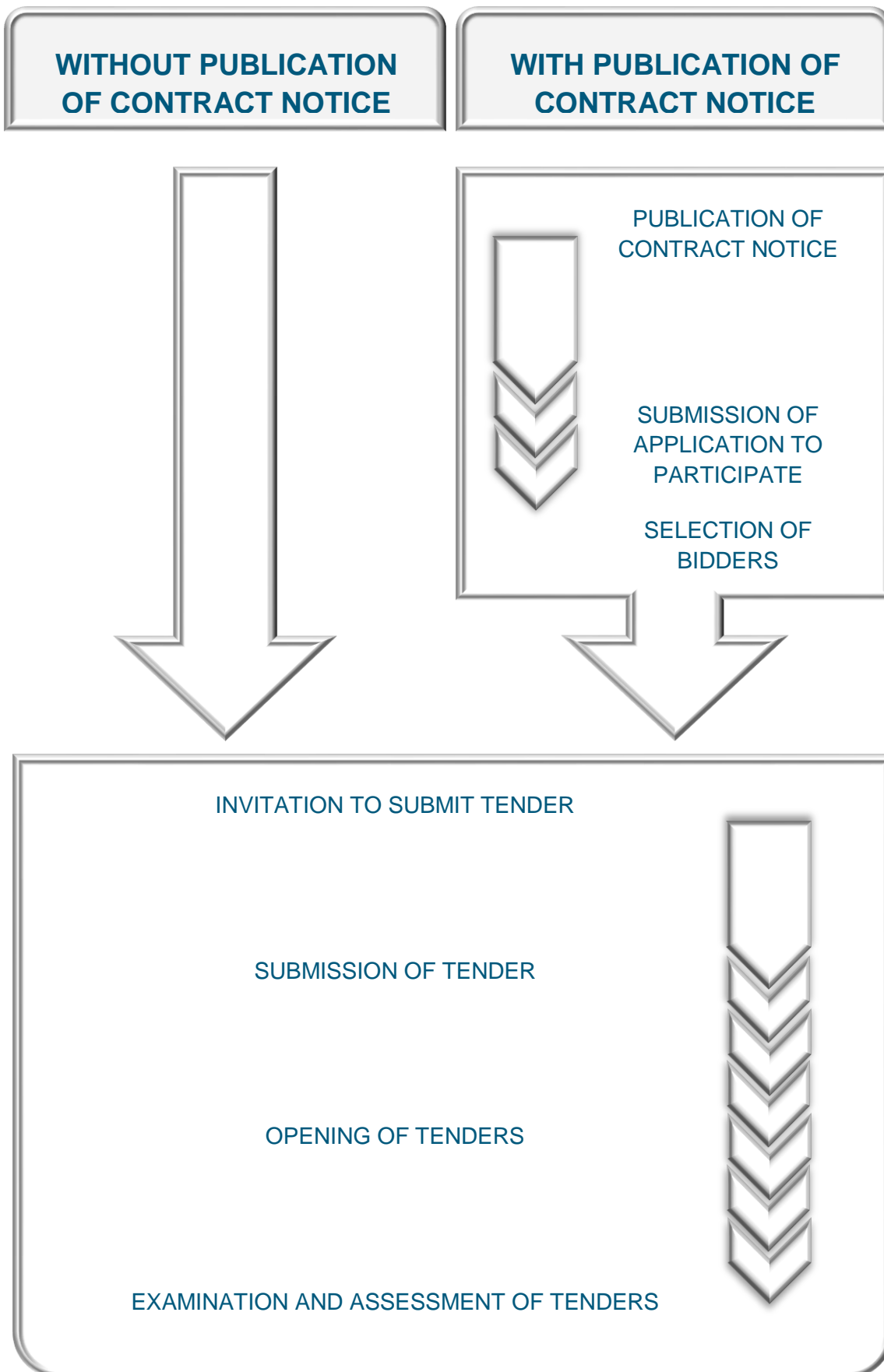
- *Negotiated procedure (Verhandlungsverfahren / Freihändige Vergabe)*

Only procedure in which negotiation is possible. Usually there is a publication of a request to participate and after the choice of participant bidders are asked to hand in an offer. The contracting entity can invite potential candidates to submit tenders and negotiate the individual contract conditions with them. The choice of this procedure is restricted and the reasons for the choice have to be documented.

Below the thresholds in many Länder/regions there exist certain contract values up to which tenders may be awarded within such a negotiated procedure.. In Bavaria the threshold for a "Freihändige Vergabe" is € 50.000 (net).

After a contract award within a Freihändige Vergabe the result has to be published above a contract value of 25.000 €.

Fig. 2: Steps of a restricted procedure / Below the threshold



The awarding of public contracts

There are strict rules with regard to the opening of bids and their evaluation.

- *Opening of bids*

Once the time-limit for bids has expired the tenders are opened. For delivery or service the opening of bids is not public. The same applies to public work contracts below the threshold. For public works contracts above the thresholds there is a public opening of bids. Date and time have to be indicated in the tender documents.

- *Evaluation of tenders*

The first step is the exclusion of bids with formal mistakes (e.g. late submission, not signed, changes to the tender documents, etc.).

The next step is to check the suitability of the bidders (expertise, efficiency, reliability and probity) according to the required documents or declaration of the tender documents submitted. In some cases the public buyer might ask bidders to hand in missing documents at a fixed date.

In a third phase bids with inadequate prices are eliminated. If a price seems to be inadequately low the bidder has to be given the opportunity to explain their prices.

Finally the contracting entity selects the economically most advantageous of the remaining tenders, using only the criteria set out in the tender documents.

- *Contract award notice*

Documentation of all phases and decisions in the award procedure is important. Above the thresholds the public buyer has to publish a contract award notice. This is also the case for some negotiated and restricted tenders below the thresholds.

- *Advance notification of intended award (for tenders at or above EU-threshold only)*

Once it has been decided which bidder is to be awarded the contract, the contracting entity must inform those bidders whose bid won't be accepted or won't be taken into account.

This pre-award notification must include the name of the successful bidder and the reasons why their bids were not successful. After this notification the public buyer must wait at least another 15 days (ten days with electronic communication) before finally awarding the contract. This period begins on the day after the notification is sent. If it fails to notify the bidders or to wait until the end of the notification period, the contract is invalid.

- *Other ways that unsuccessful candidates / bidders can obtain information*

Any unsuccessful candidate or bidder can obtain information on the outcome of the procedure upon request.

Legal protection / Review procedures

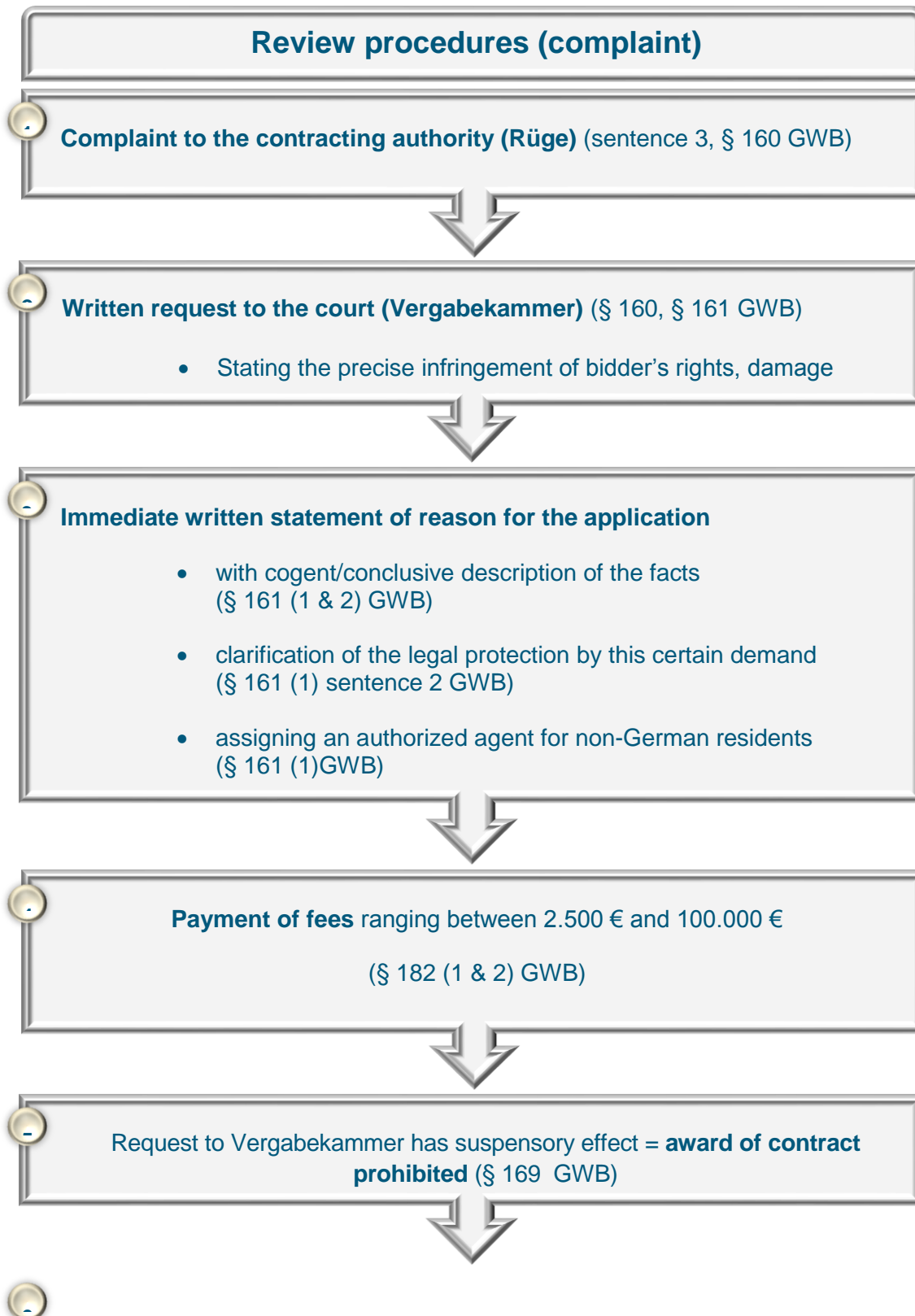
With regard to contracts below the EU thresholds the only options to seek legal protection are to appeal to the regulatory authority responsible for the contracting entity or to seek a temporary injunction from the civil courts.

The situation is quite different with regard to contracts above the EU thresholds. As explained earlier, the contracting entity is required to inform unsuccessful bidders in advance notification at least 15 days (or 10 for electronic communication) before finally awarding the contract. Within that period unsuccessful bidders have the possibility under § 160 et seq.GWB of lodging an appeal with the appropriate Public Procurement Complaint Board (Vergabekammer), which has to be named in the contract notice. The Vergabekammer will first check the legitimacy of the review procedures. The company in question must also have immediately complained of an infringement of its rights during the tender procedure. The public authority must then have failed to respond adequately to the complaint. If the contracting entity rejects the complaint, a review procedure must be started within 15 days of that rejection.

The name of the relevant Public Procurement Complaint Board (Vergabekammer) is named in the contract notice. Most Complaint Boards provide information on the complaint procedure on their website.

An immediate appeal against the decision of the Vergabekammer is possible (§ 171 GWB et seq.)

Fig. 3: Review by the Public Procurement Complaint Board (§ 155 - § 170 GWB)



Winning public contracts

Winning public contracts takes preparation, just like any business investment.

- *Market research*

One way of finding out about potential public clients is to analyse notices of invitation to tender. Companies which have identified their target groups in advance and have assessed their chances on the public market have a definite advantage. Information on contracting entities can be obtained from official directories, procurement platforms and authorities' websites. Advertising and direct marketing initiatives should include the relevant contracting entities, but take into consideration that public authorities have very strict compliance rules. It may also be worth studying budgets and preliminary information notices about longer-term procurement measures.

- *Seek and cultivate contact with clients*

Personal contact with relevant contracting entities is essential. The purpose of this is to demonstrate the undertaking's expertise, efficiency and reliability, and also to provide advice, information and product presentation for impending procurements.

- *Pricing and product policy*

Because public contracts are usually awarded on a competitive basis, prices and products are in direct competition with rival bids. For this reason price levels and product quality on public markets must be analysed.

One useful source here is the supplement to the EU Official Journal (<http://ted.europa.eu/TED/misc/chooseLanguage.do>), which publishes the results of EU-wide invitations to tender. Also, any bidder, as we mentioned earlier, can request information on the outcome of a particular invitation to tender.

Useful Links

Public procurement laws: <http://www.bmwi.de/Redaktion/DE/Artikel/Wirtschaft/vergabe-uebersicht-und-rechtsgrundlagen.html>

Please note that for tender below the EU-thresholds there might be special legislation of the “Land” in which the tender is awarded.

Publication platforms:

The most comprehensive database which is free of charge

<http://www.bund.de/Content/DE/Ausschreibungen/Suche/Formular.html?view=processForm&nn=4641514>

<https://www.evergabe-online.de/search.html?1>

<http://www.vergabe.bayern.de/>

<http://www.bundestag.de/>

<https://vergabe.vmstart.de/NetServer/>

<http://www.auftraege.bayern.de/portal/default.aspx?Portal=BAYERN>

<http://ted.europa.eu/TED/misc/chooseLanguage.do>

Note

This fact sheet only covers a few aspects of public procurement in Germany. For more detailed information, please contact:

Auftragsberatungszentrum Bayern e. V.

Balanstraße 55-59

81541 Munich – Germany

Tel.: 0049-89-5116-3171

Fax: 0049/89/5116-3663

E-mail: info@abz-bayern.de