DEVELOPMENTS

Court Review of Contract Awards Below Threshold Amounts – The Constitutional Court's Recent Decision

By Jost Pietzcker[*]

A. The changing shape of procurement law

The recent decision by the Federal Constitutional Court (*Bundesverfassungsgericht*)[1] should please everyone concerned with sound constitutional and administrative law doctrine and the proper exercise of judicial functions.[2] It should also please public procurement authorities and successful bidders; however, it will undoubtedly displease many attorneys and losing bidders.

In Germany, until recently, government procurement was traditionally seen as a purely private law activity. The public administration bought on the market on an equal footing with the firms that offered goods and services. The rules to be followed by the procuring authority were only meant to provide for the economical spending of public money, were internal in nature (the so called *Verwaltungsvorschriften*, administrative provisions), and were not meant to convey individual rights to the businesses. As a result, disappointed bidders or interested firms had no recourse in court against violations of the procurement rules. The situation was comparable to the one existing among private business firms today.

In the sixties the competent private law courts began to regard the purchasing government as a competitor under antitrust law so that in certain instances a court's decision might be appealed under the antitrust statute *Gesetz gegen Wettbewerbsbeschränkungen* (act against competition restraints, GWB), especially in cases of a debarment of a firm because of, for instance, illegal acts.[3]

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[*] Chair of Public and Comparative Law, Rechts- und Staatswissenschaftliche Fakultät, Bonn University. Pietzcker@jura.uni-bonn.de.

[1] BVerfG 59 Neue Juristische Wochenschrift 3701 (2006).

[2] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 NEUE JURISTISCHE WOCHENSCHRIFT 3701 (2006).

[3] Bundesgerichtshof (BGH – Federal Court of Justice), 29 NEUE JURISTISCHE WOCHENSCHRIFT 2302 (1976); Bundesgerichtshof (BGH – Federal Court of Justice), 41 NEUE JURISTISCHE WOCHENSCHRIFT 772 (1988).

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This picture changed somewhat in the seventies and eighties when it was slowly acknowledged that the government, even when acting in its proprietary function, is bound by the Constitution's basic rights; with regard to procurement law, it must treat bidders (and interested firms) equally. Law suits nevertheless remained the exception, in part because the equal protection clause is a very broad and difficult concept to handle, and partly for fear that a suit would decrease the chance of procuring future contracts.

Today the situation is quite different. There was barely any visible effect after EC regulations on government procurement (intended to open up the common market in government procurement) passed in the seventies. Things changed completely, however, when regulations on court review were passed in 1989 and finally put into domestic law in the nineties. According to an explicit provision in these regulations, bidders and interested firms were entitled to have a court review cases where a purchasing agent had failed to abide by the EC procurement rules.[4] In some member states – astonishingly not in all of them, which raises the question of whether this is due to high quality work by their procuring agencies or whether there are elements that deter bidders from suing – there has been an increase in law suits and the number of attorneys who specialize in procurement law, and several procurement law journals have popped up.[5]

The scope of this change is limited; the EC regulations regarding the impact of government procurement on the common market apply only to larger contracts which are defined by so-called threshold amounts. These regulations only affect construction contracts valued at approximately € 5.3 million or greater, and service contracts valued at over € 211,000. Accordingly, the German statute from 1998/99 provides that a court can only review awards above these threshold amounts. However, for smaller contracts the traditional rules still apply, thus the overall result is a divided regime. In 2000, Austria, which had a similarly divided regime, the *Verfassungsgerichtshof* (Constitutional Court) held that this limit on amounts was a violation of the equal protection clause. Attempts have been made to get a similar decision from our Constitutional Court.[6]

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[4] Case C-433/93, *Commission v. Germany*, 1995 ECR I-2303 (ECJ held that the regulations from the seventies on the award procedure where meant to confer individual rights on the bidders.).

[5] *See* Jost Pietzcker, *Die neue Gestalt des Vergaberechts*, 162 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 427 (1998) (treating the development from the fifties up to the new German statute from 1998/99).

[6] A more elaborate evaluation of the divided regime may be found in: Jens-Hinrich Binder, *Effektiver Rechtsschutz und neues Vergaberecht*, 113 ZEITSCHRIFT FÜR ZIVILPROZEß 195 (2000); Jost Pietzcker, *Die Zweiteilung des Vergaberechts, in* DIE VERGABE ÖFFENTLICHER AUFTRÄGE IM LICHTE DES EUROPÄISCHEN WIRTSCHAFTSRECHTS 61 (Jürgen Schwarze ed., 2000); JOST PIETZCKER, DIE ZWEITEILUNG DES

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B. The Constitutional Court's Decision

The decision on 13 June 2006, publicized in November of the same year, arose from a complaint by a construction company that had bid unsuccessfully for a construction contract below the threshold amount. It brought an action to the Procurement Tribunal (*Vergabekammer*) pursuant to Sec. 104 onwards and Sec. 107 onwards. The GWB rejected the complaint as inadmissible, as did the *Oberlandesgericht* (Higher Regional Court, OLG) on appeal because the threshold amount requirement that the act imposes was not met. Unfortunately for the complainants, the constitutional right to court review on which the complaint was based presupposed that an individual right has been violated, and the Court did not perceive an individual right to practice an occupation[7] to be restricted by the mere fact that another bidder got the contract. However, it did acknowledge that every bidder has a right to equal treatment by the contracting authority under the Equal Protection Clause,[8] so there is a right to court review if a violation of equal treatment is claimed.

Pointing to court decisions granting court review in cases of awards below threshold amounts in ordinary civil or administrative law suits, the Court found no violation of the right to court review. The fact that the effectiveness of this kind of court review is limited – the contract award cuts off primary actions of unsuccessful bidders and leaves only actions in damages – does not violate the constitution because it is due to inherent necessities. Given the special nature of the bidder's interests and the public interest involved, the constitution does not require the legislature to provide for a mechanism that applies to contract awards above threshold values according to Sec. 13 *Vergabeverordnung* (regulation on the award of contracts).[9]

A last point pertains to the Equal Protection Clause with respect to the different treatment of contracts below and above threshold amounts by the German legal

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VERGABERECHTS. SUBJEKTIVE RECHTE – RECHTSSCHUTZ – REFORM (2001); Hermann Pünder, *Zu den Vorgaben des grundgesetzlichen Gleichheitssatzes für die Vergabe öffentlicher Aufträge*, 95 VERWALTUNGSARCHIV 38 (2004).

[7] Art. 12.1 GG.

[8] Art. 3.1 GG.

[9] From February 1, 2001, BGBl. I, at 110, last amended by *Verordnung*, October 23, 2006, BGBl. I, at 2334. According to Sect. 13 *Vergabeverordnung* the contracting authority has to inform all bidders whose bids it intends not to accept about the name of the bidder whose offer it intends to accept and about the reason for this decision. The contracting authority has to give this information at least a fortnight before awarding the contract. A contract concluded in violation of this regulation is void.

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system. By leaving open the applicability of the Equal Protection Clause, the Court found that there were sufficiently important reasons that justify this difference.

C. The right to court review

I. The pertinent constitutional guarantee and recent attempts to revive a two-step doctrine of contract awards

The German Constitutional Court's 13 June 2006 decision mentioned earlier starts with a doctrinal subtlety. It is not the fundamental right for court review against violations of individual rights by the public authority acting in its governmental function that is applicable (Art. 19.4 GG), since the award of a contract is a private law activity under German law (although bound by some public law rules). However, the court held that the Constitution equally guarantees the individual right to have a private law suit decided by independent courts. This subtle and convincing distinction indicates that the Constitutional Court sees no need to consider the award of a contract, as some more recent opinions and decisions suggest, such as *Verwaltungsakt* (an administrative decision) passed under *Verwaltungsverfahrensgesetz* (the Administrative Procedure Act, VwVfG).[10]

II. The right to practice an occupation as a prerequisite to court review?

[10] Seeing the award of a contract as a two-step procedure, the first step being an administrative act under public law, is favoured *e.g.* by Georg Hermes, *Gleichheit durch Verfahren bei der staatlichen Auftragsvergabe*, JURISTENZEITUNG 915 (1997) and by *Oberverwaltungsgericht Koblenz* (OVG – Higher Administrative Court), 6 NEUE ZEITSCHRIFT FÜR BAU- UND VERGABERECHT 411 (2005); *Sächsisches Oberverwaltungsgericht* (OVG – Higher Administrative Court), 7 NEUE ZEITSCHRIFT FÜR BAU- UND VERGABERECHT 393 (2006); *Oberverwaltungsgericht Nordrhein-Westfalen* (OVG – Higher Administrative Court), 6 VERGABERECHT 771 (2006). Favouring the traditional approach and, accordingly, the jurisdiction of private law courts, *e.g. Niedersächsisches Oberverwaltungsgericht* (OVG – Higher Administrative Court), 6 VERGABERECHT 768 (2006); *Oberverwaltungsgericht Berlin-Brandenburg* (OVG – Higher Administrative Court), 121 DEUTSCHES VERWALTUNGSBLATT 1250 (2006); *Verwaltungsgericht Leipzig* (VG – Administrative Court), 5 VERGABERECHT 758 (2005); and a lot of private law court decisions, *e.g. Landgericht Heilbronn* (LG – Regional Court), 3 NEUE ZEITSCHRIFT FÜR BAU- UND VERGABERECHT 239 (2002); *Oberlandesgericht Stuttgart* (OLG – Higher Regional Court), 3 NEUE ZEITSCHRIFT FÜR BAU- UND VERGABERECHT 395 (2002); Landgericht Konstanz (LG – Regional Court), 4 O 266/03 (September 18, 2003), http://juris.de. BVerwGE 35, 103 established the up to now prevailing doctrinal view that the contract award, despite the fact that the purchasing authority has to abide by some public law rules, basically is to be seen as concluding a private law contract and that accordingly disputes belong to the jurisdiction of private law courts. The recent revival of the former discussion may be explained mainly by the fact that the administrative law courts which used to be overburdened by their case load have lost the welfare part of its jurisdiction at the same time that the huge case load arising out of asylum suits has considerably decreased.

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Both of these constitutional guarantees presuppose that the person suing can claim an individual right. The Court first turned to the right to practice an occupation (Art. 12.1 GG), and refered to its heavily disputed decision of 2002 that held that a public warning against noxious food (wine illegally mixed with glycol) was not a restriction of the basic right to freely practice an occupation, and therefore found that the authority needed no special statutory basis to issue the warning, but rather that the courts had only to assess whether the warning was correct in itself.[11] The decision of 2002 sparked a doctrinal discussion; opponents argued that the constitutional guarantee to freely practice an occupation would be unduly narrowed by the placing of market-related information by the government (even if the information was correct), but the Court found the issue to be outside the scope of the basic right.[12] The Court saw these two cases as analogous and held that awarding a contract does not restrict the individual rights of an unsuccessful bidder to practice an occupation.

In this respect, the present case is an even easier one in my opinion. It does not seem to be very convincing to qualify a contract concluded, after public bidding, with the successful bidder as a restriction of the practice of an occupation by all the unsuccessful bidders. This basic right encompasses bidding for a contract but not the award of a contract. Otherwise, as a result, the government would need statutory authority before it could purchase anything, and purchases below the threshold amount would be illegal since they would not be based on a specific statutory authority. The Court left open the question as to whether special circumstances might justify a different qualification, but recently answered it in the affirmative in the decision from 11 July 2006[13] which stated that construction contract clauses requiring the bidder to pay its employees the local prevailing wages were void. The Court further held that this amounted to a restriction of the basic right since the government wanted to influence, via the contract, the wage policy of the bidder. If this argument is taken seriously, it might require almost all subsidies to be based on statutes since they typically want to induce a specific behaviour of the recipient. But, to come back to the decision on court review, the award of a contract in itself is not such a restriction.

III. The right to equal protection as the pertinent prerequisite

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[11] BVerfGE 105, 252.

[12] *See* Wolfgang Kahl, *Vom weiten Schutzbereich zum engen Gewährleistungsgehalt*, 43 DER STAAT 167 (2004) and the reply by Wolfgang Hoffmann-Riem (who was the rapporteur of the Constitutional Court's decision from 13 June 2006), *Grundrechtsanwendung und der Rationalitätsanspruch*, 43 DER STAAT 203 (2004).

[13] Published in November 2006, a few days after the decision from 13 June 2006, 60 NEUE JURISTISCHE WOCHENSCHRIFT 51 (2007).

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Nevertheless, there is an individual right contained in our Constitution on which an unsuccessful bidder may rely to fight an award. In accordance with the now prevailing academic opinion, and some court rulings, the Constitutional Court recognizes the right of every bidder or interested firm to be treated equally according to the Equal Protection Clause (Art. 3.1 GG). Therefore a bidder arguing inequitable treatment does indeed rely on the requirement of an individual right in order to trigger court review. Therefore, even in cases where the threshold amount requirement is not met, an available avenue still remains for an unsuccessful bidder to seek enforcement of equal protection in court.

D. Court review available for small contracts under present law

Contrary to a very common conception, but in accordance with quite a few decisions from the sixties through to the eighties, and more than a dozen recent court decisions,[14] bidders may be able to get court review with regard to unequal treatment by the purchasing authority even in cases of awards below the threshold amounts. According to prevailing doctrine and court practice, a bidder who thinks the public tender (the invitation to bid) or the procedure followed by the procurement agency is unfair can ask a court to quickly hand down an injunction. But in many cases, the application for a preliminary injunction will fail because the contract has already been concluded. Under the German doctrine, this brings all claims aiming at modifying the procedure to an end and leaves only an action in damages. Given the intention of the purchasing authority and the successful bidder, and the time a court usually needs to issue even a preliminary injunction, this means that these so-called "primary actions" are often unsuccessful. Therefore, the Court of the European Community held in 1999 that, with regard to contracts above threshold limits, bidders must be given the opportunity to obtain a meaningful court review before the contract is concluded.[15] The German government complied with this controversial decision – the EC regulation on this point seemed to be more lenient – by inserting a provision that for contracts above the threshold amount, all interested firms have to be informed before the contract is concluded, and that the contract may only be concluded two weeks after this information has been given; a contract made in violation of this provision is invalid.[16] This provision effectuates the right to court review but at the same time

[14] They may be found in Jost Pietzcker, DIE ZWEITEILUNG DES VERGABERECHTS 57 (2001); Jost Pietzcker, *Defizite beim Vergaberechtsschutz unterhalb der Schwellenwerte?*, 58 NEUE JURISTISCHE WOCHENSCHRIFT 2881 (2005).

[15] Case C-81/98, *Alcatel v. Austria*, 1999 E.C.R. I-7671, paras. 29 - 43.

[16] Sec. 13 *Vergabeverordnung*.

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creates quite substantial problems, especially in cases where the procuring authority in good faith made a mistake so that weeks, months, or even years later a contract may turn out to be void.

E. The constitutionality of the limitations of court review for small contracts under present law

The main question, therefore, was whether the right to equal protection, which triggers the right to court review, might require a similar rule with regard to contracts below the threshold amounts. This seemed almost a foregone conclusion because the Court had stressed in a long line of decisions that the right to court review means the right to an effective review that guarantees the full enjoyment of the substantive right in question. In recent years there have been increasing hints that there may be limits to an ever-expanding right to effective court review, especially if countervailing rights might be impaired. A few weeks earlier, the Court acknowledged such a limitation in a case where a court had appointed an insolvency administrator and a concurring applicant had tried to have the appointed manager removed in order to get himself appointed. In the Court's view – which I think is convincing – in this specific situation the interests of the person who went bankrupt and of all their creditors would be heavily impaired if the uncertainty as to who might act as the insolvency administrator were to last weeks.[17]

Similarly in the contract award situation, the court's intervention by suspending the award for weeks might create problems for the purchasing authority as well as for the successful firm that wants to know whether it can start contract performance or will be forced to look for other opportunities. The public interest might be heavily damaged either by the disturbance of interdependent projects, (*e.g.* multiple contracts for the completion of a school building or a public road) via the loss of budget funds not spent before the end of the year, or for a variety of other causes. On the other hand, as the Court convincingly remarks, the plaintiff's interests are mainly monetary ones so that he or she may be sufficiently protected by an action in damages.

That does not mean that the right to effective court review can be balanced away every time there is an important public interest that would be hampered by granting suspensive effect or some other kind of injunctive relief that impedes the immediate realization of an administrative decision. The elaborate system of

[17] BVerfG of 23 May 2006, 59 NEUE JURISTISCHE WOCHENSCHRIFT 2613 (2006), also published in DEUTSCHE S VERWALTUNGSBLATT 1173 (2006).

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preliminary remedies in Sec. 80, 123 of the *Verwaltungsgerichtsordnung* (Administrative Court Procedure Act, VwGO) speaks to the contrary, and a lot of Constitutional Court decisions have stressed the importance of these devices.[18] But government contract awards are in many ways special. A bidder only has a rather weak individual right to equal treatment. He or she can go to court and get a preliminary injunction to enforce this right. The only problem is that the bidder might be late, but this happens in private law every day when someone applying for a job anticipates that they might be discriminated against but cannot enforce their rights in court after the contract with the competitor has been concluded. The only way around this would be to require the administrative agency not to conclude the contract before any complainant had sufficient opportunity to get a court judgment. Taking into account the often evident public interest in quick procurement and the weak individual rights of the bidders involved, it is not convincing to postulate a constitutional requirement to provide for this very particular measure.

F. Conformity with EC law

Although it was not the Court's business to rule on the conformity with EC law, it is very plausible that the requirements of primary EC law concerning the fairness and transparency of public contract awards below the threshold amounts are equally met. As we have seen, the main difference between the two regimes – the traditional approach to contracts below the threshold amounts, and the approach prescribed by EC law to contracts above the threshold amounts – in German law lies in the cutting-off of primary actions by concluding a contract below the threshold amounts. Even for the large contracts covered by the EC regulations it was by no means evident that concluding the contract would not cut off primary actions. It would overstrain reasonable interpretation of the basic freedoms guaranteed in the EC Treaty to derive a similar conclusion for small contracts.

G. Conformity of the divided regime with the equal protection clause

One additional problem is whether the different statutory treatment of contracts above and below threshold amounts violates the Equal Protection Clause (Art. 3 I GG). This raises the preliminary question of whether the Equal Protection Clause applies in a situation where one set of rules is determined by EC law and the other one only by national law. Under the traditional doctrine the Equal Protection Clause applies only with respect to one and the same legislature. But with regard to

[18] *See e.g.* BVerfGE 35, 382, 401; BVerfGE 93, 1, 13.

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EC law this view has been increasingly attacked. The Court again, as in former opinions, gives no definite answer because it holds that the difference is justified. It is still the main purpose of the procurement rules for small contracts to use public money efficiently, and it might be too expensive to have the rules apply to all contracts, especially since small contracts amount to about 90% of all contracts (though not to 90% of money awarded).[19] Again the Court underlines the fact that it is up to the legislator to balance the countervailing interests in this very special area; the law as it stands does not violate the constitutional boundaries. The dividing line might, as with any line-drawing, seem to be arbitrary to some extent, but it is justified by the fact that the EC regulations refer to these threshold amounts.

H. Admissibility of the constitutional complaint

One additional point deserves a short comment. The Court held the constitutional complaint admissible, presumably because it wanted to decide the substantial issue, but the admissibility was not beyond doubt. The complainant brought an action in the Chamber that is only competent in cases above threshold amounts, and therefore the complaint was rejected as inadmissible. Not surprisingly, the civil law court also rejected the claim on appeal. Both the Chamber and the Court of Appeal do not say explicitly that the complainant should have brought a suit or applied for a preliminary injunction in ordinary court, where he might have been successful; but that is what he could have done. Under the *Bundesverfassungsgerichtsgesetz* (Federal Constitutional Court Act, BVerfGG) and the Constitutional Court's case law, a constitutional complaint is deemed inadmissible if the complainant has not already tried all the other avenues open to him or her.

I. Drawing the line between the legislator's and the Court's role

It is now up to the legislature to decide whether the law for contract awards below threshold amounts remains as it stands or whether, as in Austria, some modification is needed in order to enhance the position of bidders. After years of neglecting bidder's rights, the change that came with the EC regulations was indeed needed, but it seems that the change went too far and that the main purpose of public purchasing has been eclipsed. At the very least, the Constitutional Court's decision reminds us of its main purpose and its legal and constitutional importance, and it did not approach the decision in a one-sided manner. The Court acknowledged the

[19] Meinrad Dreher, *Vergaberechtsschutz unterhalb der Schwellenwerte,* 3 NEUE ZEITSCHRIFT FÜR BAU- UND VERGABERECHT 419, 420 (2002).

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fact that court review of the award procedure might be a means to further the economical spending of public money, but it equally acknowledged the dangers of impairing public spending, and thereby endorsed an appreciation for the role of the legislature in finding the most convincing balance.

If the legislature decides to leave the law as it stands, the partly diverging court decisions on the competent jurisdiction for suits against contract awards below threshold amounts must be brought into line in - a consistent way. Either the *Bundesgerichtshof* (Federal Court of Justice) and the *Bundesverwaltungsgericht* (Federal Administrative Court) will have to agree upon which court has jurisdiction, or the *Gemeinsamer Senat der Obersten Gerichtshöfe* (Conjoined Senate of the Highest Federal Courts) will have to decide on the issue,[20] as it did in contracts between specialized trade and social security organizations, for example.[21] It would not be wise to ask for an isolated statutory decision as to the competent courts; the dividing line between private and public law suits is a blurred one and there will always be difficult cases even if a statutory provision tries to draw a line.

If the legislature wants to provide a simplified kind of court review in suits against contract awards below threshold amounts, it has to perform the difficult task of finding a way that lies in between the now available court review and the elaborate procedure available in suits against contracts above threshold amounts. In light of the Constitutional Court's decision, it might be a preferable option to leave the law as it now stands.

[20] *See Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bunde*s (RsprEinhG, law for the protection of the uniformity of the case law of the highest federal courts), 19 June 1968, BGBl. I, 661.

[21] BGHZ 102, 280.

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