

GERMANY

KEY FACTS AND FIGURES

Key Facts and Figures in Germany						
Overview	Total procurement 401,730,000,000€		Procurement % GDP 15%		2013 GDP 2,809,480,000,000€	Contracting authorities 30,000
Procedures applied	Open 74%	Restricted 2%	Negotiated procedure with call 14% no call 6%		Competitive dialogue 0%	Direct award 4% Other 1%
Share of contract notices by buyer	National 8%		Regional/local 43%		Body governed by public law 20%	Other 29%
Contract type	Services 29%		Works 44%		Supplies 27%	Framework agreement 13%
Ex ante conditionality criteria as of 2014	EU rules Fully met		Transparency Fully met		Training Fully met	Admin. capacity Fully met
E-procurement adoption	E-notification Mandatory		E-access Partially mandatory		E-submission Mandatory	Uptake rate 10%
Perceived corruption	Corruption widespread in society			Corruption widespread in procurement		
	Businesses 58%		Individuals 59%		At national level 37%	At local/regional level 49%
TED indicators	Value of tenders 25,691,160,679€		Of total procurement 6%		# contract notices 24,960	# contract awards 20,734
Other indicators	Received single bid 12%		# days for decision 57.9		Price only criteria 52%	MEAT criteria 48%
	Won by foreign firms 2%		Related to EU funds 5%		Joint purchase 4%	Central purchasing Yes, multiple

For more detailed descriptions and links to sources for the above data, please see Section 4 of the report

Summary of public procurement system

Germany has a long public procurement legal tradition grounded primarily in the budgetary systems of the various municipalities, regions and ministries. As a result, the German approach to procurement is strongly focused on economic efficiency. More recently, policies aimed at fostering secondary procurement objectives such as innovation and environmental sustainability have been introduced.

The procurement system is also highly decentralised and often quite complex due to Germany's federal system. It is subject to a dispersed regulatory framework that comprises delegated acts, such as ordinances and rules by non-governmental bodies, and allows for a substantial level of autonomy to the German federal states. According to estimates, some 58% of all procurement activity is done at the municipal level, and 30% at the level of the federal states, leaving just 12% of procurement to be distributed federally.ⁱ

Irregularities in procurement are not considered to be a major concern due to strong administrative capacity on the one hand, and to adequate measures for preventing corruption on the other hand. Germany's effective anti-corruption framework is reflected in the low perception of corruption in public procurement compared to the EU average.ⁱⁱ Nevertheless, Germany does publish a disproportionately low number of tenders at EU level, which is a concern particularly given the size of government spend.

DESCRIPTION OF FEATURES

Legal features of public procurement system

In Germany, public procurement is governed by different sets of rules depending on whether a tender falls above or below the EU thresholds. Above the EU thresholds, the Act Against Restraints of Competition (*GWB*) transposes the general provisions of

Directive 2009/81 and the remedies Directives 92/50 and 89/665 into national law. Further provisions of Directive 2004/18/EC are transposed in the Public Procurement Regulation (*VgV*). Finally, additional provisions transposed from Directive 2004/18/EC are laid out in specific delegated legislation, including the Regulations on Contract Awards for Public Works (*VOB/A*), Regulations on Contract Awards for Public Supplies and Services (*VOL/A*), and the Regulations on Contract Awards for Independent Professional Services (*VOF*). In addition, the Utilities Regulation (*SektVO*) and the Defence and Security Procurement Regulation (*VSVgV*) transpose the Utilities Directive 2004/17/EC and the Directive on Defence and Security Procurement 2009/81/EC into national law and rank as *lex specialis* in the utilities and defence or security domain respectively.

By contrast, public procurement below the EU thresholds is governed by national budgetary law at the federal level. In some federal states, below threshold public procurement is governed by a system of state level legislation, while others govern via decree or administrative rules. Some municipalities also have their own laws, rules and regulations. Aspects such as green and social procurement are often included at this level.

Institutional system

The main institution responsible for public procurement policy is the Federal Ministry of Economy and Energy (*BMWi*), as it decides on the principles of public procurement and drafts primary legislation. The *BMWi* is also the main contact point for the European Commission and other international bodies regarding the regulatory framework for public procurement. In the area of public works procurement, the Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (*BMUB*) is the institution in charge. The Federal States Committee on public procurement further ensures regular exchange with the Federal States on the latest aspects of procurement policy and practice, including procurement in the context of EU Funds.

A unique element of Germany's public procurement institutional set-up are the so-called Public Procurement Committees. These bodies are a forum for stakeholders from federal, federal state and local administrations, public-private organisations such as Chambers of Industry and Commerce, and the private sector. They contribute to the drafting of procurement rules taking into account private and public sector needs. The German Committee for Supplies and Services Tendering and Contract Regulations (*DVAL*) works on procurement rules for supplies and services, while the German Committee for Construction Tendering and Contract Regulations (*DVA*) contributes to procurement rules for public works.

Germany has not one, but four central purchasing bodies at the federal level, which are thematically specialised. The Federal Financial Directorate Southwest (*BFD Südwest*) procures for the tax administration. The Federal Institute for Materials Research and Testing concludes framework agreements for specific technical product groups. The Federal Office for Equipment, IT Technology, and Use of the German Armed Forces is mainly responsible for procurement for the German military. Finally, the Central Purchasing Body of the Ministry of the Interior plays the most important role as it procures for all federal agencies, manages the main e-procurement platform and carries out other supportive functions. Furthermore, there are central purchasing bodies at regional level, too, such as the Central Purchasing Body in Rheinland Pfalz.

The distinction between procurement above and below EU thresholds is also reflected in the review system and their related bodies. Above EU thresholds, the procurement review chambers are administrative review bodies in charge of the first instance review procedure. Each Federal State has such a procurement review chamber in addition to the federal procurement review chamber, which is located within the Federal Competition Authority. Appeals of procurement review chambers' decisions

can be made to a specialised procurement-senate in the respective Higher Regional Courts. In contrast, below the EU thresholds bidders who wish to dispute a decision need to file a suit for damages before the civil courts. Furthermore, most federal states have introduced review bodies for contracts below EU thresholds called *VOB* or *VOL* Offices.

Supervision of procurement in terms of cost effectiveness and compliance is carried out by the Audit Courts of the German Federal States, as well as by the Federal Court of Auditors.

Key issues that have a bearing on administrative capacity

Human resources: Despite the decentralised nature of procurement responsibilities and institutions in Germany, contracting authorities typically devote substantial resources to salaries and training, resulting in a relatively strong administrative capacity. In organisational terms, procurement at the municipal level is organised as a mixture of centralised and decentralised structures, but is rarely entirely centralised.

Structures: Germany has a well-developed system of support to tenderers that comprises dedicated advisory structures and training institutions. Notably, contracting authorities frequently collaborate with local and regional Chambers of Commerce via so-called Procurement Advisory Offices, joint public-private ventures that provide support functions to both potential suppliers and contracting authorities. For instance, in 2013 Procurement Advisory Offices organised 306 seminars and provided over 25,000 consultancy services nationallyⁱⁱⁱ. Importantly, they also help businesses to acquire certification as a pre-qualification to tender. The pre-qualification allows economic operators to submit paperwork in advance to the Procurement Advisory Office. If approved, the supplier receives a certification valid for one year that substitutes the submission of paperwork to the contracting authority.

Following the recent implementation of provisions regarding environmental compatibility, sustainability and life-cycle costing in the *VgV*, the central purchasing body of the Ministry of the Interior has set up a Competence Centre for Sustainable Public Procurement^{iv} that maintains an information platform, gives advice and organises trainings. Similarly, the Centre of Excellence on Public Procurement^v has been established in order to strengthen the influence of public procurement on innovation.

Training: Training on public procurement is primarily available from specialised private providers of continuing education. These courses cover a wide range of topics such as EU structural policies and German procurement law.

The Federal Academy of Public Administration, the Federal Government's central institution for further training, offers specialised training and seminars for contracting authorities regarding procurement matters via its interactive training system and virtual learning platform. Moreover, some public universities, including the University of Hannover and the Academy of European Law in Trier also offer procurement-specific coursework.

Systems/tools: The central purchasing body of the Ministry of the Interior publishes specific guidelines for IT purchases. These guidelines were introduced in the 1980s in order to guarantee maximum consistency in IT purchases of the German public administration.^{vi} Other guidance material is available on strategic public procurement, such as the EC Guide on Socially Responsible Public Procurement (SRPP)^{vii}, the administrative regulation on the procurement of energy efficient goods and services^{viii}, and the Federal Government's Procurement Manual.

E-procurement

E-procurement policy is largely defined by the Ministry of the Interior as part of the digitalisation of government programme 'Digital Administration 2020'. Though fragmented, the German e-procurement system is relatively advanced, particularly at the federal level.

E-notification is mandatory at federal level and in some federal states. Federal agencies are required to publish their calls for tenders on the federal portal, which is also available to regional and municipal authorities on a voluntary basis. E-submission is mandatory for federal agencies via the e-procurement platform¹. The four central purchasing bodies make use of the main centralised e-procurement platform. There are also a number of e-procurement platforms available at the regional level. As a result of a number of federal state laws,^{ix} the acceptance and usage of those platforms is increasing, particularly for tenders below the EU thresholds. On the federal level, e-submission uptake is even higher.

The central purchasing body of the Ministry of the interior also operates an e-catalogue and e-ordering platform that manages large framework contracts for standardised goods and services and acts as a virtual department store for contracting authorities². About 480 registered federal authorities can buy over 70,000 standardised goods and services.^x Germany's four federal central purchasing bodies are responsible for the framework agreements in their respective area of competence.

In order to guarantee interoperability among the various platforms, the German government has developed a common e-procurement standard called *XVergabe*, which ensures the compatibility of data processed by diverse procurement platforms through all stages of the procurement cycle from e-notification to e-award. The technical feasibility and the framework conditions for *XVergabe* have been established and implementation is due shortly.

Corruption

Germany has a strong anti-corruption system relying on adequate administrative capacity, effective oversight mechanisms and law enforcement. The success of this anti-corruption approach also covers public procurement. The perception of corruption in public procurement is low, even though some weaknesses persist notably in the area of major construction works.^{xi}

The 2004 Guidelines for the Prevention of Corruption introduced several preventive measures in public procurement that apply to federal bodies. These include the separation of the three phases of the procurement process, i.e. the preparation and planning phase, the actual purchasing, and the billing and settlement phase. Also the 'four-eyes principle' and the regular rotation of personnel were implemented.^{xii} If the contracting authority opts for any procedure other than the open procedure, the decision has to be documented. In addition, some federal states keep track of bidders that have been excluded from procurement procedures.

While public procurement remains an area of vulnerability according to the 2013 Report on the Prevention of Corruption in the Federal Administration, no actual cases of procurement-related corruption were reported in that year.^{xiii}

In fact, many efforts are made at the federal level to prevent corruption. For instance, a corruption risk monitoring tool is used to assess corruption risks of a given activity,

¹ <https://www.evergabe-online.de>

² <http://www.kdb.bund.de/>

notably procurement. If an activity qualifies as vulnerable, risk mitigation measures are adopted, e.g. background checks of newly hired employees. Moreover, the Ministry of the Interior regularly performs checks of on-going tender procedures both at random and based on tip-offs from whistle-blowers. In order to maximise the effectiveness of oversight, it is empowered to directly access procurement records without having to notify, and indeed without being detected by, the contracting authority.

Europe 2020 Agenda

Germany's public procurement system has been recognised as an efficient instrument to attain the objectives of the single Market and the current political objectives, such as socio-economic goals with respect to SME and sustainability requirements. To this end, several legal initiatives have been implemented to strengthen ecologically and innovative aspects in the award procedures for more sustainable products.

The federal, regional and communal authorities are working together within the Alliance for Sustainable Procurement in order to increase the percentage of sustainable goods purchased. Energy efficiency is a major issue in Germany's public procurement framework, expressed as a mandatory criterion in the award procedure. An administrative regulation has been published in order to facilitate the inclusion of energy efficiency in the award of contracts.^{viii} Other guidelines that promote the Europe 2020 objectives have been issued, notably an inter-ministerial decree for the procurement of wood products.^{xiv} The Competence Centre for Sustainable Procurement also supports contracting authorities by centralising useful information and providing specific advice. Sustainable IT purchases are supported via the *ITK* project.^{xv}

Innovation procurement is fostered by the Centre of Excellence on Public Procurement run by the Federal Materials Management, Purchasing and Logistics Association. Contracting authorities compete for the "Innovation Creates a Lead" prize each year, awarded to the most innovative procurement procedure or the most innovative product. Current proposals for the modernisation of the procurement law framework are concentrated on integrating innovation criteria in procurement procedures.

The *GWB* already foresees that the interests of SMEs shall be taken into account in the procurement process through the splitting of contracts into various lots. As this requirement can be challenging for contracting authorities, the *BMWi* has developed an electronic tool that supports the generation of lots.^{xvi}

Irregularities and findings of national Audit Authorities

Irregularities in public procurement are sporadic in nature, as shown by the 2013 annual report of the German Court of Audits. Most of the irregularities were related to public works. Findings included that prevention of corruption was weakly implemented in a construction project at the federal state level. On the other hand, the Court of Audits noted for example that the Federal Agency for Real Estate Management introduced new procurement guidelines safeguarding transparency and economic efficiency of its procurement.^{xvii}

The public procurement tribunals decided on 817 review procedures in 2013 worth a total volume of EUR 3 billion. The tribunals decided on matters such as the applicability of procurement law, in particular the European framework for in-house operations the lawfulness of joint bidding and the contract award criteria.^{xviii}

Outlook

Germany is taking advantage of the opportunities deriving from the transposition of the new EU public procurement Directives. On 8 July 2015, the federal cabinet passed the Draft bill for the Modernisation of Public Procurement Law, which would reform the

public procurement framework to be simpler and better harmonised. The reform plan includes the consolidation of the *VOL/A* and the *VOF* regulations into the *VgV* law. However, the general regulatory framework of the *GWB* and several procurement regulations, as well as additional legislation on the federal state level will be maintained. The new legislation is intended to improve data collection and harmonisation over a range of procurement related topics, including the use of green and social award criteria, in order to provide a more accurate and comprehensive picture of procurement nationwide.

Subsequent reforms are intended to address the regulatory framework specific to public procurement below EU thresholds.

ANALYSIS

Strengths

Overall, the public procurement framework in Germany is effective to achieve the primary goals of realising value for money and promoting open and fair competition, and the subordinated goals such as the Europe 2020 priorities. This is due in large part to the high degree of competition, a solid anti-corruption framework and a continuous development of skills.

Germany's procurement system is characterised by a relative high use of open procedures. This is engrained in the understanding of public procurement as part of competition law on the one hand, and on the other is anchored in its legal system through the so-called 'principle of preference for the open procedure'. The average level of competition for contracts is above the EU average, with 7.5 bids submitted per tender compared to 5.1 EU-wide. More competition usually leads to stronger market efficiency and more economic purchases. The singular emphasis on open procedures is expected to recede with the transposition of the 2014 Directives, which promote the use of other competition compatible procedures.

German procurement law requires the division of contracts into lots in order to facilitate the participation of SMEs in the procurement process. The implementation of this provision is challenging for contracting authorities and therefore requires particular attention in terms of assistance in the design of tenders. Nevertheless, the legal requirements result in an increasing participation of SMEs.

Germany's review system introduced by the remedies Directive is considered a strength of the procurement system. In fact, prior to the remedies Directive, legal protection for public procurement was not specifically regulated. Thus, the introduction of specialised public procurement review chambers institutionalised legal protections and ensures legal certainty with respect to the interpretation of procurement law. Another positive development has been the professionalization and specialisation of both the legal profession and the tribunals resulting in high quality judgements and overall high legal certainty. However, a comparable specialised review system is not available below EU thresholds. Expanding the use of specialised review tribunals to include below threshold contracts could result in further gains in transparency, non-discrimination and equal treatment.

A further strength of the German procurement system is the strong anti-corruption framework at federal level. In the procurement field, this includes the preference for the open procedure, 'four-eyes' and transparency, the separation of planning, award and billing, as well as the accurate and prompt documentation of the procurement procedure.

Dedicated competence centres develop specialised skills in some specific area of public procurement and therefore contribute both to achieve the strategic goals, such as

green, social, innovation policy, as well as the improvement of public procurement skills of the relevant officials.

Weaknesses

The most significant weaknesses in the German procurement system are the inefficiencies resulting from the separation of legal and institutional structures both among and between the various federal and regional administrations. Duplication of efforts, e.g. among the four federal level centralised purchasing bodies and their numerous regional counterparts, creates substantial costs for administrations and economic operators. Potential bidders are forced to monitor multiple platforms for potential contracts in a given region, and a cottage industry of specialised service providers has sprung up just to help economic operators navigate the maze of sites. From the perspective of the buyers, regional and local contracting authorities are legally barred from taking advantage of the federal e-marketplace, cutting them off from the benefit of its stronger market position. Incongruities in procedures and requirements among product categories and between the various kinds of contracting authorities impose additional management and compliance costs.

Lack of harmonisation is also a key barrier to better data collection. The German system currently impedes the collection of comprehensive, nationwide statistics on procurement, and on the implementation and effectiveness of procurement policies. The *BMWi* has launched a study addressing the relevant issues, including e-procurement¹. However, the costs and complexity of data collection and compilation would be considerably reduced by also addressing the complexity of the system.

Finally, the fact that Germany submits a disproportionately low number of tenders for publication in TED is also a weakness. At 1.1% of GDP, or 6.4% of public expenditure (excluding utilities), Germany registers the lowest values of contracts published under EU rules. The average value of contracts published under EU procurement Directives amounts to 3.2% of the GDP or 19.1% of the public expenditure.^{xix} DG REGIO audits have identified factors which could contribute to the low publication rate. For example, the way that some professional services are classified under the VOF may allow for greater use of restricted and negotiated procedures. However, the estimated magnitude of the factors identified is not sufficient to explain the low publication rate. The federal government has launched a study examining the underlying causes of this issue.

Recommendations

- **Improve Coordination:** Germany's federal system results in redundancies and conflicts among institutions at the federal and federal state levels, and among the federal states, resulting in inefficiencies, particularly for economic operators.
 - Incentivise greater coordination between the federal and federal state level governments to improve harmonisation of rules and systems.
 - Develop interoperability among the various e-procurement platforms to facilitate searching for and bidding on tenders.
- **Improve data collection:** Germany currently does not have a system for collecting comparable procurement data at the national level.
 - Implement standardised data collection rules and a central collection point to produce accurate, timely and comparable procurement data nationwide.
- **EU tenders:** Germany has the lowest value of contracts published under EU procurement Directives (1.1% of GDP, against an EU average of 3.2%), which limits competition and access to markets.
 - Incentivise increased publication of tenders on EU-wide platforms.

- ⁱ Kienbaum (2014), *Zwischenbericht, Statistik der öffentlichen Beschaffung in Deutschland – Grundlagen und Methodik (Arbeitstitel)* (Interim Report, Statistics of public procurement in Germany - Basic concepts and methodology).
- ⁱⁱ Flash Eurobarometer (2013), Business' attitudes towards corruption in the EU
- ⁱⁱⁱ Available at: <http://www.abst.de/>
- ^{iv} *Beschaffungssamt des BMI - Kompetenzstelle für nachhaltige Beschaffung* (Procurement Office of BMI - Competence Centre for Sustainable Procurement), available at: <http://www.nachhaltige-beschaffung.info>
- ^v *Kompetenzzentrum Innovative Beschaffung* (Competence Center for Innovative procurement), Available at: <http://www.koinno-bmwi.de>
- ^{vi} *Unterlage für Ausschreibung und Bewertung von IT-Leistungen* (Document for tender and evaluation of IT services), currently: UfAB V Version 2.0.
- ^{vii} European Commission (2010), *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*.
- ^{viii} Federal Gazette of Germany (2013), *Allgemeine Verwaltungsvorschrift zur Beschaffung energieeffizienter Produkte und Dienstleistungen (AVV-EnEff)* (General administrative regulation for the procurement of energy efficient products and services).
- ^{ix} Public Procurement Law of the state Northrhine Westfalia, available at: <https://www.vergabe.nrw.de/faq/tariftreue-und-vergabegesetz-nrw>
- ^x European Commission (2015) DG MARKT, E-procurement Uptake.
- ^{xi} Transparency International (2012), *Nationaler Integritätsbericht Deutschland* (National integrity report), p.72–75.
- ^{xii} *Bundesministerium des Inneren* (Federal Ministry of the Interior) (2004), *Richtlinie der Bundesregierung zur Korruptionsprävention in der Bundesverwaltung* (Federal Government Directive to prevent corruption in the federal government).
- ^{xiii} *Bundesministerium des Inneren* (Federal Ministry of the Interior) (2014), *Korruptionsprävention in der Bundesverwaltung: Jahresbericht 2013* (Prevention of Corruption in the Federal Administration: Annual Report-2013)
- ^{xiv} Available at: http://www.bmel.de/DE/Wald-Fischerei/02_Internationale-Waldpolitik/texte/HolzbeschaffungErlass.html
- ^{xv} The *ITK-Beschaffung* project, available at: <https://www.itk-beschaffung.de/>
- ^{xvi} Bearing Point, et Orrick (2014), Background study for the development of the tool: *Auftragsberatungsstellen(job consulting services), Wie kann § 97 Abs. 3 GWB hinsichtlich der Pflicht zur Aufteilung eines öffentlichen Auftrags in Teillose rechtssicher in die Beschaffungspraxis überführt werden?* (How the ARC deals with the obligation of division of a public contract into partial lots in the procurement practice?), available at: <http://www.bmwi.de/DE/Themen/Wirtschaft/Wettbewerbspolitik/oeffentliche-auftraege.did=640804.html>
- ^{xvii} *Bundesrechnungshof, Bemerkungen 2014 zur Haushalts- und Wirtschaftsführung des Bundes* (Federal Court remarks on budget and financial management of Federal institutions), p. 44, 52.
- ^{xviii} *Das Bundeskartellamt* (German competition authority), *Jahresbericht 2013* (Annual report 2013), available at: http://www.bundeskartellamt.de/DE/UeberUns/Publikationen/Jahresbericht/jahresbericht_node.html
- ^{xix} European Commission (2015), Country Report Germany Including an In-Depth Review on the prevention and correction of macroeconomic imbalances.