

Leaflet

PUBLIC CONTRACTS IN GERMANY

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Public Contracts in Germany

Every year public contracts worth 360 billion Euros are awarded in the Federal Republic of Germany, while for the EU as a whole the figure is more than 2 trillion Euros. Public contracts are contracts with the public authorities to provide goods or services. They are paid from taxes and charges collected by national and local governments and other public law institutions, in other words from public funds. 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 in their performance of the contract by the State, unitary authorities or their public law institutions (e.g. hospitals, publicly-funded theatres, fire brigades, etc.).

Contracting entities in the water, energy, transport and telecommunications sectors (known as sectoral contracting entities) are governed by special rules.

Legal bases for public procurement

In Germany the legal bases for public procurement are:

- the Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB);
- the Regulation on the award of public contracts (*Vergabeverordnung*, VgV);
- the contracting rules for the award of public work contracts (*Vergabe- und Vertragsordnung für Bauleistungen*, VOB), service contracts (*Vergabe- und Vertragsordnung für Leistungen*, VOL), contracts for freelance professions (*Vergabe- und Vertragsordnung für freiberufliche Leistungen*, VOF) and the new Sectoral Regulation (*Sektorenverordnung*, SektVO);
- budgetary law;

and various legal provisions at *Land* level.

The national legislation is also shaped by EU requirements. Part 4 of the GWB and the Regulation on the award of public contracts are examples of how EU directives have been transposed into national law. The GWB provides that with contracts worth more than the defined thresholds, public authorities must issue an EU-wide invitation to tender. These thresholds (VAT excluded) currently amount to € 207.000 for goods and services (€ 134.000 for supreme federal authorities) and € 5.186.000 for construction work. For sector authorities, the threshold concerning goods and services amounts to € 414.000.

The GWB also regulates the setting up of Public Procurement Complaint Boards, which provide legal protection for tenderers involved in EU-wide procurement procedures, and it stipulates that contracts must be divided into trade-specific and partial lots in order to protect the interests of small and medium-sized companies (SMEs).

The VgV (Regulation on the award of public contracts) and the GWB (Act against Restraints on Competition) require contracting entities to comply with the contracting rules for the award of public contracts above the thresholds, and to inform all unsuccessful bidders of the planned decision at least 15 days (10 days with electronic communication) before the contract is awarded.

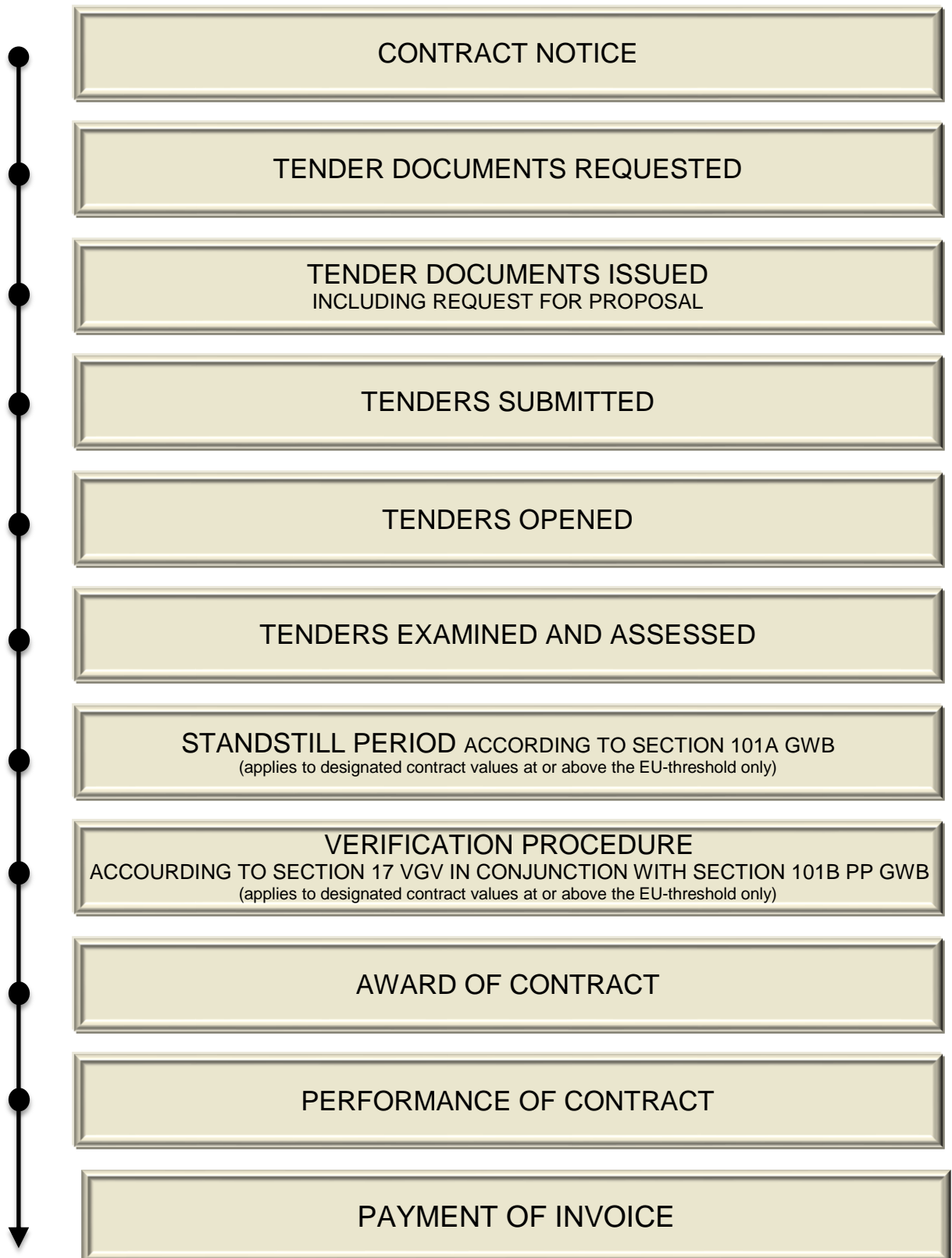
Types of award procedures

The legislation on public procurement provides for a number of different procedures for awarding contracts. For national calls for tenders below the minimum threshold the procedures are: public invitations to tender (öffentliche Ausschreibung), restricted invitations to tender (beschränkte Ausschreibung) and the negotiated procedure (freihändige Vergabe). For EU-wide procurement above the threshold the procedures are the open procedure (offenes Verfahren), the non-open procedure (nicht offenes Verfahren), competitive dialogue (Wettbewerblicher Dialog) and the negotiated procedure (Verhandlungsverfahren). The GWB, the VgV, the VOB, VOL and VOF and the SektVO determine which procedure is to be applied in each case.

- Public invitation to tender / open procedure

With this procedure a public notice informs an unlimited pool of companies that a contract for a particular purchase is to be awarded. The contract should be awarded to the economically most advantageous tender in unrestricted competition. Potential bidders must request the tender documents from the contracting entity and can then submit a tender using those documents.

Fig. 1: Stages of a public invitation to tender / open procedure



- *Restricted invitation to tender / non-open procedure*

Restricted procedures are used in certain justified exceptions and involve a limited pool of companies. In that case, competitive tendering is restricted, and often only companies known to the contracting authority can take part. If the authority knows only a few potential suppliers, it may ask the relevant Contract Advisory Unit (in Bavaria this is the Auftragsberatungszentrum Bayern e.V.) to nominate suitable companies. Non-open procedures above the thresholds are advertised by means of advance notices, as with public invitations to tender. In competitive tendering, however, 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*

This procedure for EU-wide awards is subordinate to the open and non-open procedures and 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 then 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 (Freihändige Vergabe / Verhandlungsverfahren)*

Here the contract is awarded without a mandatory formal procedure. The contracting entity can invite potential candidates to submit tenders and negotiate the individual contract conditions with them even after their bids have been submitted. In order to ensure a minimum degree of competition, reasons must be given for the award procedure chosen and this must be documented.

The EU-wide negotiation procedure basically corresponds to the national private tender procedure, although in most cases prior notification of the award must be given.

In many states/regions there is a limit up to which private tenders may be conducted without having to state the reasons for choosing this procedure. In Bavaria the limit is usually € 25.000 for authorities at *Land* level or € 30.000 for local authorities (VAT excluded).

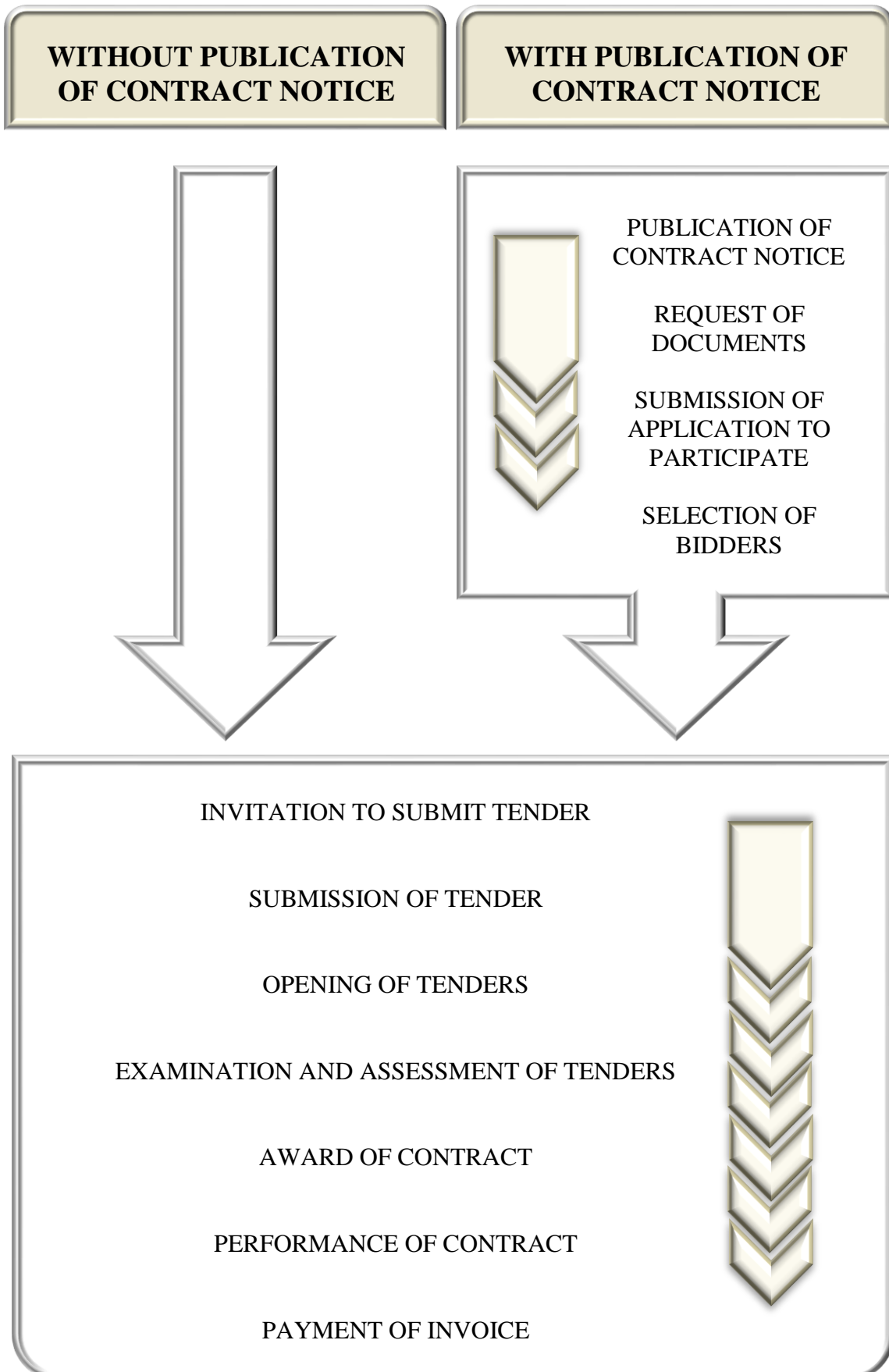
- *Special conditions concerning local authorities in Bavaria¹*

Since January 1st 2012, a restricted invitation to tender concerning construction works is acceptable with thresholds no higher than € 500.000 for civil and underground engineering, no higher than € 125.000 for structural system works (power as well as building service engineering excluded) as well as landscape building and street furniture, and no higher than € 250.000 for all other assembly sections. Concerning tenders of goods and services, restricted invitations are acceptable up to a threshold no higher than € 100.000. Negotiated procedures are

¹ Bekanntmachung des Bayerischen Staatsministeriums des Innern über die Vergabe von Aufträgen im kommunalen Bereich vom 14. Oktober 2005 in der Fassung vom 12. Dezember 2012 (Az. IB3-1512.4-138).

allowed up to a threshold of € 30.000 (all VAT excluded). Apart from that, the local authorities have to obey pre- and post-transparency in certain tender processes.

Fig. 2: Stages of a restricted invitation to tender



The awarding of public contracts

There are strict rules governing how decisions are made, such as that tenders must not be opened before the appointed date.

- Opening of tenders

Once the time-limit for bids has expired the tenders are opened. With contracts covered by the VOL this is not done in public, while with procedures governed by the VOB (construction, public works) a public date is fixed on which it is established which tenders have been submitted in good time and what elements, including the total bid, they contain.

- Assessment of tenders

The first step is to eliminate tenders with formal errors (e.g. late submission, not signed, changes to the tender documents, etc.).

In the remaining tenders the suitability of the bidders (expertise, efficiency, reliability and probity) is then assessed from the documents submitted. If they are not conclusive, the tender is eliminated.

In a third phase tenders with inadequate prices are eliminated.

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. All documented decisions must be summarised in the contract award notice.

This must also include the reasons for the individual decisions. The contract award notice must be drawn up in writing.

- 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.

It must notify them in writing of the name of the successful bidder and the reasons why their tenders were not taken into account. Following notification it 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 null and void.

- 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. This request should be submitted with the tender.

Remedies

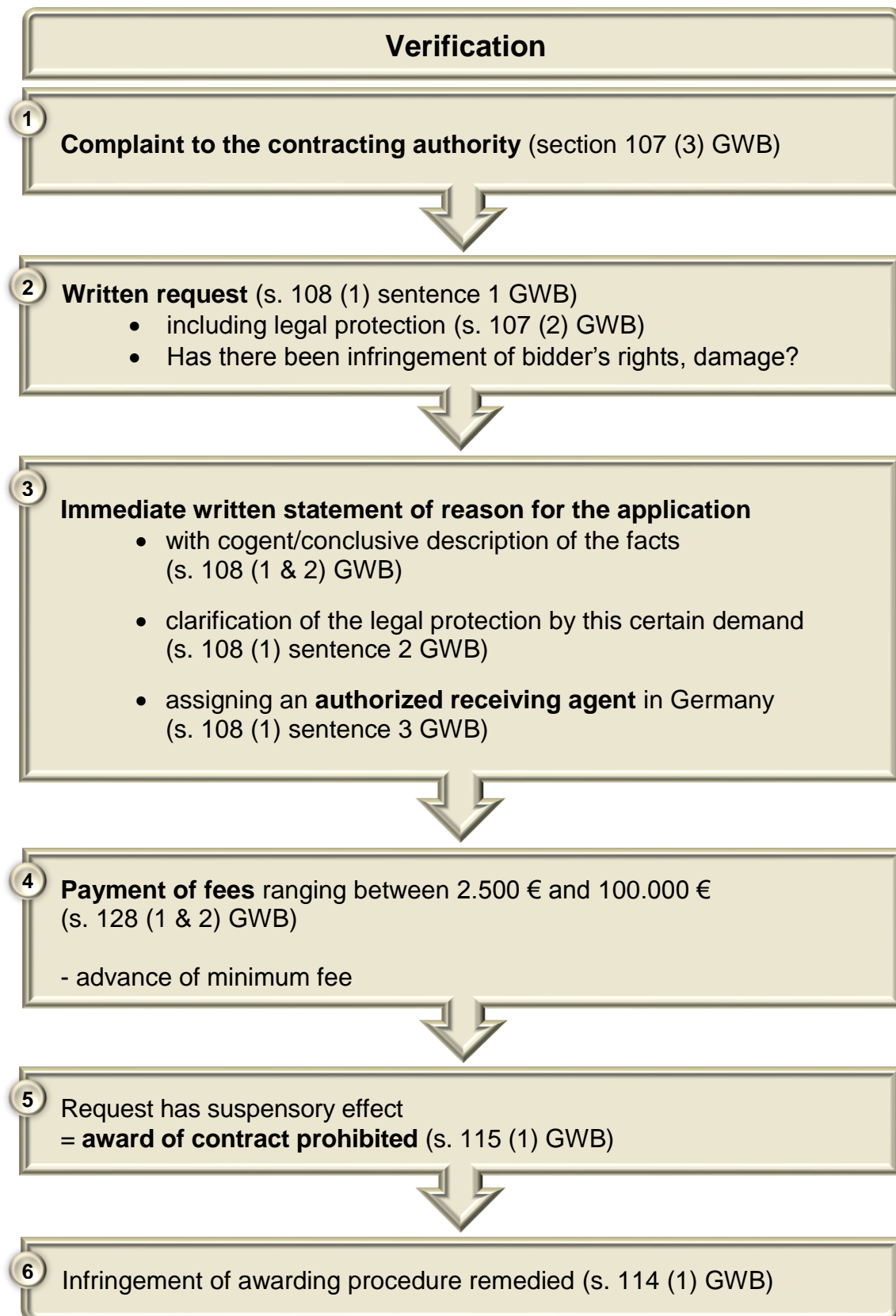
With contracts below the EU thresholds the only options are to appeal to the regulatory authority responsible for the contracting entity or to seek a temporary injunction from the civil courts.

The situation is quite different with contracts above the EU thresholds. As explained earlier, the contracting entity is required to send unsuccessful bidders 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 Section 107 et seq. of the GWB of lodging an appeal with the competent Public Procurement Complaint Board (Vergabekammer), if they have adequate grounds for doing so. The first condition for such an appeal is that the contract must not yet have been awarded. The company in question must also have immediately complained of the alleged defects in the procedure to the contracting entity, which must then have failed to respond or to respond adequately. Where the contracting entity rejects the complaint, an application must be lodged within 15 days of that rejection. The application must be made in writing, and it must be borne in mind that any official action by the Public Procurement Complaint Board will incur costs.

Under Section 113 of the GWB the Public Procurement Complaint Board must reach a decision within five weeks of receiving the application.

Parties involved in the contract award procedure may lodge an immediate appeal against the decision of the Public Procurement Complaint Board to the competent Court of Appeal within two weeks. Immediate appeal has the effect of suspending the Public Procurement Complaint Board's decision. However, once the time-limit for appeals has expired the suspension continues for only up to another 14 days, when a decision must be taken.

Fig. 3: Review by the Public Procurement Complaint Board



Winning public contracts

Winning public contracts takes preparation, just like any business investment. Despite the generally strict legal conditions there are valuable business opportunities for interested companies.

- *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 not neglect the relevant contracting entities. 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 (www.ted.europa.eu), 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.

Note

This description is, understandably, only able to cover a few aspects of public procurement. For more detailed information, please contact the Bavaria Contract Advisory Centre:

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