

Dissertation

The determination of qualification criteria in public procurement law:

A comparative analysis between South Africa and Germany

by student

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Abstract

This dissertation compares South African and German public procurement law and their definitions of qualification criteria. In order to compare the two systems, it is essential to understand both procurement law systems with regard to their application, basic principles, objectives and challenges.

Qualification criteria are essential in the procurement procedure and seek to determine the suitability of bidders. This involves checking whether the bidder is able to properly perform the subsequent contract. The criteria relate to, for example, the bidder's experience, personnel, technical capacities or company values.

In addition to the primary objectives of the specific contract, secondary objectives can also be pursued using the award procedure, particularly when defining qualification criteria. Secondary objectives are, for example, social or sustainability objectives. In South Africa, this applies particularly to the area of black economic empowerment. In Germany, secondary objectives may be climate and environmental protection.

Both procurement law regimes are subject to constant change, especially at present. In South Africa, the draft Procurement Bill was adopted on 16 May 2024 and became law as the Public Procurement Act on 23 July 2024. There will be a review process over the next two years that may bring changes. In Germany, the reform of procurement law is being discussed.

The determination of qualification criteria plays an important role in the proper performance of the specific contract, while also achieving other objectives. The determination of qualification criteria is therefore an important aspect of the procurement system which must always be taken into account when changes are made to the procurement system.

List of abbreviations

| | |
|------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| AABFJ | Australasian Accounting, Business and Finance Journal |
| AJ | Acta Juridica |
| AJPA | African Journal of Public Affairs |
| ANBest-P | General Auxiliary Conditions for Grants for Project Funding (Allgemeine Nebenbestimmungen für Zuwendungen zur Projektförderung), published on 13 June 2019 |
| APPLJ | African Public Procurement Law Journal |
| AVV Klima | General administrative regulation on the procurement of climate-friendly services (Allgemeine Verwaltungsvorschrift zur Beschaffung klimafreundlicher Leistungen), published on 19 October 2021 |
| BBBEEA | Broad-Based Black Economic Empowerment Act 53 of 2003 |
| BBBEEAA | Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 |
| BEE | black economic empowerment |
| BerlAVG | Berlin Tendering and Award Act (Berliner Ausschreibungs- und Vergabegesetz), published on 22 April 2020 |
| BMWK | Federal Ministry for Economic Affairs and Climate Protection (Bundesministerium für Wirtschaft und Klimaschutz) |
| BMWSB | Federal Ministry of Housing, Urban Development and Building (Bundesministerium für Wohnen, Stadtentwicklung und Bauwesen) |
| CLP | Current Legal Problems |
| Constitution | Constitution of the Republic of South Africa, 1996 |
| Draft Public Procurement Bill 2020 | Draft Public Procurement Bill, published on 19 February 2020 |
| Draft Public Procurement Bill 2023 | Draft Public Procurement Bill, published on 22 May 2023 |

| | |
|------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Draft Public Procurement Bill 2024 | Draft Public Procurement Bill, published on 6 February 2024, updated on 13 May 2024, adopted on 16 May 2024 and sent for assent on 16 May 2024. The Draft became law as the Public Procurement Act 28 of 2024 on 23 July 2024 |
| ECJ | European Court of Justice |
| EDS | Environment Development and Sustainability |
| EEA | Employment Equity Act 55 of 1998 |
| EEAA | Employment Equity Amendment Act of 2022 |
| EU-VOB/A | Construction Tendering and Contract Regulations, Part A, published on 31 January 2019 |
| GDP | gross domestic product |
| GPA | World Trade Organization Government Procurement Agreement, published on 30 March 2012 |
| Grundgesetz | German Constitution, published on 23 May 1949 |
| GWB | Competition Act (Gesetz gegen Wettbewerbsbeschränkungen), published on 26 June 2013 |
| HmbVgG | Hamburgisches Vergabegesetz, published on 13 February 2006 |
| ILO | International Labour Organisation |
| JABR | Journal of Applied Business Research |
| JAL | Journal of African Law |
| JSAL | Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg |
| JSAS | Journal of Southern African Studies |
| JSDA | Journal of Social Development in Africa |
| JTSCM | Journal of Transport and Supply Chain Management |
| JOPA | Journal of Public Administration |
| KlimR | Klima und Recht |
| KonzVgV | Ordinance on the Award of Concession Contracts (Konzessionsvergabeverordnung), published on 2 April 2016 |

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|------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| LDD | Law, Democracy & Development |
| LkSG | Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz), published on 16 July 2021 |
| MFMA | Municipal Finance Management Act 56 of 2003 |
| MSA | Municipal Systems Act 32 of 2000 |
| NJW | Neue Juristische Wochenschrift |
| NRF | Natural Resources Forum |
| NZBau | Neue Zeitschrift für Baurecht und Vergaberecht |
| OECD | Organisation for Economic Co-operation and Development |
| PAIA | Promotion of Access to Information Act 2 of 2000 |
| PAJA | Promotion of Administrative Justice Act 3 of 2000 |
| PCCA | Prevention and Combating of Corrupt Activities Act 12 of 2004 |
| PELJ | Potchefstroom Electronic Law Journal |
| PCLJ | Public Contract Law Journal |
| PFMA | Public Finance Management Act 1 of 1999 |
| PPPFA | Preferential Public Procurement Framework Act 5 of 2000 |
| Procurement Regulations 2001 | Preferential Procurement Regulations 2001, <i>Government Gazette</i> No. 22549 of 10 August 2001 |
| Procurement Regulations 2011 | Preferential Procurement Regulations 2011, <i>Government Gazette</i> No. 34350 of 8 June 2011 |
| Procurement Regulations 2017 | Preferential Procurement Regulations 2017, <i>Government Gazette</i> No. 40553 of 20 January 2017 |
| Procurement Regulations 2022 | Preferential Procurement Regulations 2022, <i>Government Gazette</i> No. 47452 of 4 November 2022 |
| Public Procurement Act | Public Procurement Act 28 of 2024 |
| R | South African rand |
| RJBM | Research Journal of Business and Management |

| | |
|----------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| SABS | South African Bureau of Standards |
| SACU | South Africa Customs Union |
| SADC | Southern African Development Community |
| SALJ | South African Law Journal |
| SJ | Speculum Juris |
| SCA | Supreme Court of Appeal |
| SektVO | Ordinance on the Award of Public Contracts in the Field of Transport, Drinking Water Supply and Energy Supply (Sektorenverordnung), published on 12 April 2016 |
| SME | small and medium-sized enterprise |
| SPLJ | Swedish Procurement Law Journal (Upphandlingsrättslig Tidskrift) |
| TFEU | Treaty on the Functioning of the European Union, published on 26 October 2012 |
| TVgG NRW | Act on ensuring compliance with collective agreements and minimum wages in the award of public contracts in North Rhine-Westphalia (Tariftreue- und Vergabegesetz Nordrhein-Westfalen), published on 22 March 2018 |
| UNCITRAL | United Nations Commission on International Trade Law |
| UVgO | Rules of Procedure for the Award of Public Supply and Service Contracts below the EU Thresholds (Unterschwelvenvergabeordnung), published on 2 February 2017 |
| VAT | valued-added tax |
| VerwArch | Verwaltungsarchiv |
| VgRÄG | Act against Restraints of Competition by the Act Amending the Legal Basis for the Award of Public Contracts (Vergaberechtsänderungsgesetz), published on 26 August 1998 |
| VgV | Ordinance on the Award of Public Contracts (Vergabeverordnung), published on 12 April 2016 |

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|-------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| VOB/A | Part A of the Construction Tendering and Contract Regulations, published on 31 January 2019 |
| VOF | Public procurement regulations for freelance services, published on 18 November 2009 |
| VOL/A | Procurement and contract regulations for services, published on 20 November 2009 |
| VSVgV | Defence and Security Procurement Ordinance (Vergabeverordnung Verteidigung und Sicherheit), published on 12 July 2012 |
| WRegG | Act on the establishment and operation of a register for the protection of competition for public contracts and concessions (Gesetz zur Einrichtung und zum Betrieb eines Registers zum Schutz des Wettbewerbs um öffentliche Aufträge und Konzessionen), published on 18 July 2017 |
| ZfBR | Zeitschrift für deutsches und internationales Bau- und Vergaberecht |

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CHAPTER ONE: Introduction

1.1 Introduction to the topic

This dissertation provides a comparative analysis of South African and German public procurement law and focuses on a comparison of the requirements for determining qualification criteria.

Both the South African and German public procurement law systems are fundamentally concerned with the purchase of goods by the public sector; the state needs these goods to fulfil its public tasks. Public award procedures are carried out for this purpose. To ensure the proper fulfilment of the contract in the context of public procurement procedures, it is essential to find the 'right' contractor. This is done by using qualification criteria. Determining these criteria is therefore essential for a properly functioning award procedure and the subsequent execution of the contract.

1.2 Key concepts

Qualification criteria are determined by the public contracting authority before the start of the public award procedure. These criteria set out the requirements that must be met by the bidders and are essential for determining whether a tenderer will be able to successfully execute the planned procurement contract.¹ These criteria may, for example, relate to references in relation to contracts already performed that are similar to the contract to be awarded, but may also relate to personnel or technical capacities that must be demonstrated. In this context, the concept of eligibility also plays a decisive role. Eligibility means that the public contracting authority will examine whether the potential contractor can guarantee that the contract will be executed properly. Eligibility is an essential feature of public procurement law and is also a tool used to ensure that a procurement contract can meet its objectives. If a tenderer meets the qualification criteria, its eligibility has been proven, and it is therefore suitable.²

Qualification criteria are the means used to verify eligibility, and a key factor in the successful implementation of an award procedure and the subsequent execution of the contract. If the qualification criteria are not correctly defined for the specific contract, this can lead to problems during the execution of the contract. For example, if no comparable references were requested,

¹ G Quinot 'The role of quality in the adjudication of public tenders' (2014) 17(3) *PELJ* 1109 at 1111 <http://dx.doi.org/10.4314/pelj.v17i3.08> (accessed 09-01-2024).

² P Friton in M Gabriel, S Mertens, H-J Prieß & RM Stein (eds) *BeckOK Vergaberecht* section 122 para 2.

the contracting authority will only discover later that the bidder does not have the required experience to fulfil the contract.

In addition to identifying a suitable bidder for the specific contract, however, qualification criteria can also be used to pursue other (secondary) objectives, which are not specifically related to the contract. These are concrete objectives that are sought beyond the specific procedure within the framework of tender procedures.³ The secondary objectives are specifically socio-political objectives, such as the promotion of locally produced goods.⁴ These requirements must also be met in order for the bidders to participate further in the tendering process. If these requirements are not fulfilled, the bidders can no longer participate in the tendering process. This means that broad-based political objectives can be realised with the help of public procurement law.

Qualification criteria therefore have two objectives. They relate specifically to the contract to be awarded – they are essential for ensuring proper service delivery and for the success of the project as a whole. They can also be used to pursue secondary objectives. In this context, public procurement law has long proven to be a useful tool for implementing policy objectives.⁵ Qualification criteria are thus a means to implement these objectives.⁶

Another concept is pre-qualification criteria. These criteria are used in different ways. In some cases, as in South Africa, this is a preliminary suitability test. Only those bidders who fulfil the requirements can participate further in the award procedure. If the requirements are not met, the bidder is automatically excluded from the award procedure. This system is used particularly to achieve secondary objectives. In some cases, as in Europe and Germany, this is understood to mean a system whereby bidders can provide certain evidence that is relevant to the suitability test, such as references or certificates. Bidders no longer have to submit extensive documents to prove their eligibility, but can simply refer to the pre-qualification system where all documents are stored.

³ R Watermeyer ‘Project synthesis report: Unpacking transparency in government procurement – Rethinking WTO government procurement agreements’ in CUTS Centre for International Trade, Economics and Environment (eds) *Unpacking Transparency in Government Procurement* (2004) 1 at 6.

⁴ G Quinot ‘Promotion of social policy through public procurement in Africa’ in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 370 at 382ff.

⁵ Quinot ‘Promotion of social policy’ in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 370 at 371. See also A Maritz ‘Gender-responsive public procurement under the Broad-Based Black Economic Empowerment Act: Benefits and challenges’ (2022) 9 *APPLJ* 76 at 77; IM Ambe ‘Public procurement trends and developments in South Africa’ (2016) 3(4) *RJBM* 277 at 277; C McCrudden ‘Social policy choices and the international and national law of government procurement: South Africa as a case study’ (2009) *AJ* 123 at 123.

⁶ Quinot ‘Promotion of social policy’ in *Public Procurement Regulation* 375.

Finally, the grounds for exclusion play an important role in connection with the eligibility and qualification criteria. In some cases, certain grounds can lead directly to exclusion from the award procedure without any discretionary decision by the public contracting authority and irrespective of proof of suitability, as the grounds irrefutably establish that the bidder is not suitable. Other grounds for exclusion may be facultative and indicate exclusion, but are not mandatory. The public contracting authority will have to decide in specific individual cases whether to exclude the bidder from the award procedure.

1.3 Differences between qualification and award criteria

In contrast to qualification criteria, award criteria are used to compare the bids submitted by the tenderers and to establish a ranking on the basis of defined criteria.⁷

It is important to distinguish between qualification and award criteria, because the two sets of criteria have different objectives in the context of the award. As already mentioned, award criteria are used to compare bids and to determine the most financially advantageous offer on the basis of the award criteria.⁸ Qualification criteria, on the other hand, are company-related⁹ and refer to assessing the suitability of the tenderers. Qualification criteria, such as experience,¹⁰ company values,¹¹ references,¹² storage capacity,¹³ personnel or equipment, and staff qualifications,¹⁴ are therefore performance-related.¹⁵ Suitability is often a prerequisite for the bid to be evaluated.¹⁶ There is therefore a graded relationship in the assessment. If a bidder is already unsuitable to perform the contract, there is no point in evaluating its bid.

⁷ Quinot (2014) *PELJ* 1111.

⁸ ECJ, decision of 12 November 2009 – C-199/07 *Greece* para 52, 55; ECJ, decision of 24 January 2008 – C-532/06 *Lianakis* para 30; Higher Regional Court Naumburg, decision of 12 April 2012 – 2 Verg 1/12; I Lausen in *Beck'scher Vergaberechtskommentar* section 58 VgV para 35.

⁹ ECJ, decision of 24 January 2008 – C-532/06 *Lianakis* para 27; Higher Regional Court Düsseldorf, decision of 29 April 2015 – Verg 35/4 para 56; I Lausen in *Beck'scher Vergaberechtskommentar* section 58 VgV para 35.

¹⁰ ECJ, decision of 12 November 2009 – C-199/07 *Greece* para 55ff; Higher Regional Court Düsseldorf, decision of 10 September 2009 – Verg 12/09.

¹¹ Higher Regional Court Düsseldorf, decision of 21 May 2008 – VII-Verg 19/08.

¹² Higher Regional Court Karlsruhe, decision of 20 July 2011 – 15 Verg 6/11; Higher Regional Court Munich, decision of 29 July 2010 – Verg 9/10.

¹³ Procurement Chamber Münster, decision of 21 August 2003 – VK 18/03.

¹⁴ ECJ, decision of 12 November 2009 – C-199/07 *Greece* para 56; Higher Regional Court Düsseldorf, decision of 28 April 2008 – Verg 1/08.

¹⁵ Procurement Chamber Baden-Württemberg, decision of 12 April 2011 – 1 VK 13/11.

¹⁶ F Budde in H Pünder & M Schellenberg (eds) *Vergaberecht* (2019) section 16d VOB/A para 18.

Separating qualification and award criteria is not always easy, and it can be very difficult to draw a clear line between the two.¹⁷ The determining factor for the delimitation is whether the individual evaluation criteria are qualification criteria or award criteria, based on whether they are mainly (essentially) related to the assessment of the technical suitability of the tenderers for the execution of the contract in question or to the determination of the most financially advantageous tender.¹⁸ A minimum requirement that must be met relates to a qualification criterion, while a higher score and thus a higher evaluation relates to an award criterion.¹⁹ The award criteria do not always specify minimum requirements that must be met. It is also possible in principle to set a minimum score, but this will automatically lead to exclusion if it is not achieved.²⁰

However, award criteria normally serve to determine how the bids will be evaluated in concrete terms. From these specifications, the tenderer can see what is important to the public contracting authority in the evaluation of the tender, what weighting will be applied to the individual criteria, and how its tender will be evaluated on the basis of the individual criteria. The tenderer can then adjust its bid according to the specified criteria.²¹ If greater weight is accorded to performance-related award criteria, for example, the submission of an implementation concept for the contract, it makes sense to invest more time in this area. However, the tenderer can also exploit the potential for improvement in a pure price evaluation. If, for example, the basic price accounts for a high proportion of the overall evaluation, it makes sense to set it lower and then use additional services or maintenance contracts to make the bid more affordable for the tenderer. The tenderer is thus in a position to design its offer on the basis of the award criteria in such a way that it is financially viable, but at the same time the tenderer has a realistic chance of being awarded the contract.²² The public contracting authority then assesses in the context of the award decision whether and to what extent the tenderer meets the award criteria. Within the framework of a value decision, the public contracting authority selects the best bid. In contrast, this does not happen when assessing eligibility, because only an absolute assessment is made as to whether a bidder is suitable or not.²³

¹⁷ See on this topic and the difficulties of demarcation M Pauka „Ein bisschen „Mehr an Eignung“ – Personenbezogene Zuschlagskriterien nach der 7. ÄVOVgV“ (‘A little “more suitability” – person-related award criteria according to the 7th ÄVOVgV’) (2015) 1 *NZBau* 18.

¹⁸ ECJ, decision of 12 November 2009 – C-199/07 *Greece* para 55; Higher Regional Court Celle, decision of 12 January 2012 – 13 *Verg* 9/11.

¹⁹ von Bechtolsheim in *BeckOK Vergaberecht* section 127 para 7.

²⁰ ECJ, decision of 20 September 2018 – C-546/18 *Montte* para 27; von Bechtolsheim in *BeckOK Vergaberecht* section 127 para 7.

²¹ von Bechtolsheim in *BeckOK Vergaberecht* section 127 para 7.

²² von Bechtolsheim in *BeckOK Vergaberecht* section 127 para 7.

²³ von Bechtolsheim in *BeckOK Vergaberecht* section 127 para 7.

Qualification criteria are used to evaluate the company at the time of the bid submission. A prognosis is made to assess whether the company fulfils the qualification criteria and has thus demonstrated its ability to execute the contract given its human, material and financial resources.²⁴ Qualification criteria are thus used differently to award criteria. They are not used to compare different offers, but simply to determine whether the tenderer is suitable or not.²⁵ If it is determined that performance commitments by the tenderer are unlikely to be fulfilled in the subsequent performance of the contract, the company will be excluded from the award procedure for lack of suitability.²⁶

In some cases, qualification and award criteria are not separated. If the quality of the staff used will have a significant influence on the level of contract performance, the organisation, qualifications and experience of the staff entrusted with the performance of the contract can also be taken into account.²⁷ The prerequisite for this is that the commitment of certain personnel resources must be promised as part of the offer, or a certain procedure for the execution of the contract must be part of the offer and is thus taken into account when the contract is awarded, and also becomes the subject matter of the contract.²⁸ However, it is important to distinguish between the different evaluation levels and the qualification and award criteria. Even if a characteristic is assessed at both the level of suitability and the level of the award decision, they are still different levels.²⁹

1.4 Reasons for comparing South Africa and Germany

The public procurement law systems in South Africa and Germany adhere to the same basic principles, which are cost-effectiveness, competitiveness, fairness, transparency and equitability. Some of the basic principles are slightly different, but the basic understanding is the same. Because of this common basis, the procurement law systems are very well suited for a comparison with each other.

At the same time, there are differences between the two systems with regard to the qualification criteria, which makes it particularly interesting to compare them. This is because conclusions

²⁴ Higher Regional Court Frankfurt, decision of 28 September 2023 – 11 Verg 2/23; Higher Regional Court Düsseldorf, decision of 19 June 2013 – Verg 4/13; von Bechtolsheim in *BeckOK Vergaberecht* section 127 para 7.

²⁵ Quinot (2014) *PELJ* 1111.

²⁶ Opitz in *Beck'scher Vergaberechtskommentar* section 127 GWB para 79.

²⁷ Opitz in *Beck'scher Vergaberechtskommentar* section 127 GWB paras 72, 100; Ziekow in *Vergaberecht* section 122 GWB para 16.

²⁸ Opitz in *Beck'scher Vergaberechtskommentar* section 16d VOB/A-EU para 62.

²⁹ Quinot (2014) *PELJ* 1112.

can be drawn from the design and experience with these different designs for the further design of the requirements for the determination of qualification criteria in the procurement law systems of both countries. In Germany, there is a different system of regulations and case law with regard to qualification criteria. The legal requirements are regulated in detail. There are many categories and individual cases that may or may not be admissible as qualification criteria. In some cases, however, this makes them complicated and not very user-friendly. In South Africa, the public contracting authority has more freedom to determine the qualification criteria. At the same time, the procurement law system is in a state of flux, as reflected in the draft Public Procurement Bill. The final version of the Bill has now been adopted and became law as the Public Procurement Act on 23 July 2024, but there will still be a review process over the next two years which may bring changes, and decisions of the Constitutional Court may also have an impact.³⁰ This makes the area of qualification criteria particularly interesting.

For public procurement law in general, it has become increasingly important to pursue other, secondary objectives beyond the specific contract. This is especially true since the number of public procurement contracts is extremely high. On average, public procurement amounts to 11 to 14 per cent of the gross domestic product (GDP).³¹ This means that public procurement law has the potential to steer and control the achievement of certain secondary objectives and therefore can be used as a policy instrument. Achieving certain objectives may be even more important than ensuring more cost-effective procurement.³² South Africa has already gained some experience with using qualification criteria to achieve secondary objectives, particularly in the area of black economic empowerment (BEE). German public procurement law also has experience with regard to the promotion of small and medium-sized enterprises (SMEs) and is taking the first steps in other areas, particularly climate and environmental protection.

Analysing and comparing the methods for determining qualification criteria for achieving secondary objectives is also useful to ensure that these criteria are designed in such a way that the secondary objectives are actually achieved. This dissertation also identifies how the

³⁰ See Parliament of the Republic of South Africa 'Public Procurement Bill' <https://www.parliament.gov.za/bill/2310365> (accessed 13-06-2024); *Mail & Guardian* 'Parliament adopting Public Procurement Bill a sign that state corruption is being fought' <https://mg.co.za/thought-leader/opinion/2024-05-24-parliament-adopting-public-procurement-bill-a-sign-that-state-corruption-is-being-fought/> (accessed 13-06-2024); P Volmink 'Deviations and variations in South African public procurement' (2022) 9 *APPLJ* 52 at 52ff.

³¹ OECD 'Government at a glance – 2021 edition: Public procurement' <https://stats.oecd.org/Index.aspx?QueryId=107598> (accessed 05-01-2024). Public procurement may even amount to 20 per cent of the GDP: see U Kollamparambil 'The amended government procurement agreement: Challenges and opportunities for South Africa' (2014) 18 *LDD* 202 at 202.

³² Kollamparambil (2014) *LDD* 203.

problems faced by the South African and German procurement law systems, such as discrimination, corruption or bureaucracy, can be addressed with the help of qualification criteria. The challenge here is that these secondary objectives sometimes conflict with the basic principles of public procurement law; this challenge should ideally be resolved.

1.5 Research question(s)

This dissertation's research question is the following: what are the 'best' rules for the qualification criteria to find the 'best' contractor? This also raises the question of what the 'best' rules are for achieving secondary objectives. The aim of the dissertation is to improve the way in which the qualification criteria are determined so that the objectives of using the qualification criteria can be achieved.

The starting point for answering the research question is to identify the rules for determining qualification criteria in both South Africa and Germany. Furthermore, it is necessary to identify the differences and the similarities, why the differences exist, and what conclusions can be drawn from them.

1.6 Structure of the dissertation

In order to answer the above question(s), the dissertation proceeds as follows. Firstly, the underlying procurement law systems of both countries are considered in chapters 2 and 3. This forms the basis for the entire investigation. What is crucial is which regulations apply, to whom they apply and to whom they do not apply, the essential principles of the individual procurement law systems, and finally the different types of procurement methods. These chapters serve to create a basic understanding of the procurement law systems and are also important for understanding the regulations regarding the qualification criteria. This is because these criteria are subject to the principles of procurement law, are integrated into the various types of procurement, and form an overall system. The objectives and current challenges facing both legal systems are also crucial for determining the qualification criteria and are reviewed in chapter 4. These challenges play a role, particularly when updating or redesigning the requirements of the qualification criteria, as the design is intended to offer solutions to the corresponding challenges. After these basic explanations, chapter 5 addresses the qualification criteria in detail, with the different facets already mentioned. Chapter 5 deals with the requirements that both the South African and German procurement law systems have put in place to determine the qualification criteria. In addition, an important component is the achievement of secondary objectives through the definition of qualification criteria and, finally,

the reasons for exclusion, which may, despite the bidder's fulfilment of the qualification criteria, still lead to the bidder being excluded from the award procedure.

A comparison of the previously presented requirements for the qualification criteria in the context of the respective procurement law systems is essential. In chapter 6 conclusions are drawn from this comparison in order to be able to define the requirements for determining qualification criteria even more precisely. This applies both to the specific task that must be carried out properly, and to the secondary objectives that must be achieved with the qualification criteria. The chapter will also highlight which design makes sense and which design, based on experience, is less promising in achieving the specific objectives. The different approach to the aspect of pre-qualification and the reasons for exclusion are also examined and conclusions are made about their design.

CHAPTER TWO: Public procurement law in South Africa

It is essential to understand the legal framework, the principles of procurement law and the applicability of public procurement law in South Africa. Only then is it possible to consider the determination of qualification criteria. This understanding is the basis for the further examination of and recommendations to determine qualification criteria which are part of the whole procurement system and therefore must be in line with it.

South Africa is a constitutional democracy with three levels of government: national, provincial and local. South Africa has nine provinces and many local municipalities. The legal system in South Africa is based on Roman-Dutch law and the English common law.³³ Public procurement law applies at all three levels of government. Depending on the level, certain special regulations must be observed.

2.1 Definition and development of South African public procurement law

Public procurement law provides the legal framework for the acquiring of goods and services that the government needs to fulfil its public functions.³⁴ Therefore, public procurement plays an important role both economically and politically. As mentioned in chapter 1, this is particularly due to public procurement's share of the total GDP. In South Africa, public procurement's share of the GDP is 11 to 12 per cent.³⁵

South African public procurement is subject to both public law (administrative law) and private law regulation.³⁶ Public procurement law is basically private law in nature, but modified by various public law provisions, as public contracting authorities award the contracts. These provisions are intended to help ensure that public procurement law meets the specific requirements and needs of the state and its institutions.³⁷

³³ P Bolton 'The regulatory framework for public procurement in South Africa' in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 178 at 178.

³⁴ G Mathiba 'Corruption, public sector procurement and Covid-19 in South Africa: Negotiating the new normal' (2020) 55 *JOPA* 642 at 648; G Quinot & S Arrowsmith 'Introduction' in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 1 at 1; IM Ambe & JA Badenhorst-Weiss 'Procurement challenges in the South African public sector' (2012) 6(1) *JTSCM* 242 at 244; S Arrowsmith, J Linarelli & D Wallace *Regulating Public Procurement – National and International Perspectives* (2000) 1; S Arrowsmith *The Law of Public and Utilities Procurement* (2005) 1.

³⁵ OECD 'Government at a glance - 2021 edition: Public procurement' <https://stats.oecd.org/Index.aspx?QueryId=107598> (accessed 09-01-2024).

³⁶ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 178.

³⁷ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 183.

In this context, it is sometimes said that the procurement function encompasses the entire process from the identification of a supplier to the implementation of the procurement in the form of the fulfilment, administration and also termination of the concluded contract.³⁸ However, a line must be drawn here between public procurement law and contract law. Contract law begins as soon as the contract has been concluded and is executed. However, procurement law may also become relevant again during the execution of the contract, for example, if an extension of the contract triggers a new tendering obligation. Public procurement law and its regulations are therefore particularly relevant in the process leading up to the conclusion of the contract and the process by which the contractual partner for the public contract is sought by the public contracting authority and the contract is awarded to it.³⁹

Procurement law is also relevant in the private sector. For example, private companies organise their procurement on the basis of specific procurement regulations. However, unlike in the private sector, public procurement law is subject to specific regulations. Different regulations must be observed by public contracting authorities. This area of law is referred to as public procurement law.⁴⁰

Finally, before public procurement law was enshrined in the Constitution, it was regulated at the national and provincial government levels by the State Tender Board Act.⁴¹ In addition, various provincial ordinances regulated the procurement of goods and services at the local level.⁴²

Today, the main point of reference for South African public procurement law is the Constitution of the Republic of South Africa, 1996 (the Constitution), which was significantly shaped by the experiences of the apartheid era and by past discriminatory practices and experiences.⁴³

2.2 Structure of public procurement law

Different regulations exist at the various levels of government for the conducting of procurement projects.

³⁸ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation 1*; Arrowsmith *The Law of Public and Utilities Procurement 1*; Arrowsmith, Linarelli & Wallace *Regulating Public Procurement 1ff.*

³⁹ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation 1*.

⁴⁰ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation 1*.

⁴¹ Act 86 of 1968.

⁴² Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa 181*.

⁴³ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa 178*.

For classification in the international context, the following applies. South Africa is not a member of the World Trade Organization's Government Procurement Agreement (GPA),⁴⁴ nor does South Africa have observer status.⁴⁵ However, the UNCITRAL Model Law on Procurement of Goods, Construction and Services had a major influence in South Africa, and the design of the regulations of public procurement law was particularly influenced by it.⁴⁶ Furthermore, South Africa is a party to various trade agreements, for example, the South African Customs Union (SACU) and the Southern African Development Community (SADC) Trade Protocol. However, these agreements do not contain specific obligations on procurement that have a particular impact on South Africa's use of procurement for domestic political purposes.⁴⁷

A distinction must be made between the national, provincial and local government levels.⁴⁸ Different regulations apply to different users who have different objectives.

2.2.1 Constitution

In terms of section 217(1) of the Constitution, organs of state at all political levels must observe the following fundamental principles: fairness, equitability, transparency, competitiveness and cost-effectiveness.⁴⁹

Furthermore, section 217(2) of the Constitution states that procurement may be used as an empowerment instrument.⁵⁰ This anchoring in the Constitution further emphasises the importance of this function for public procurement law.⁵¹ Appropriately, section 217(2) of the Constitution empowers organs of state or institutions to implement a procurement policy providing for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.⁵² This provision stems from the discriminatory policies and practices that occurred in South Africa's past.⁵³

⁴⁴ Published on 30 March 2012.

⁴⁵ Kollamparambil (2014) *LDD* 203; Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation* 16; P Bolton 'The public procurement system in South Africa: Main characteristics' (2008) 37 *PCLJ* 781 at 795.

⁴⁶ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 16.

⁴⁷ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 180.

⁴⁸ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 181.

⁴⁹ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 184; Ambe & Badenhorst-Weiss (2012) *JTSCM* 256; Bolton (2008) *PCLJ* 782, 802.

⁵⁰ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 184.

⁵¹ Kollamparambil (2014) *LDD* 210.

⁵² Kollamparambil (2014) *LDD* 210; SO Migiro 'Public sector procurement and black economic empowerment in South Africa: Challenges of preferential procurement and decentralisation of the provincial tender board' (2010) 25(2) *JSDA* 177 at 177.

⁵³ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 179.

Section 217(3) of the Constitution further states that national legislation must prescribe a framework within which the policy described in section 217(2) of the Constitution must be implemented. This provision is a mandate to Parliament to enact a law that will achieve the aforementioned objectives and eliminate existing inequalities.⁵⁴

These requirements have been incorporated into a framework for preferential procurement, specifically the Preferential Public Procurement Framework Act (PPPFA).⁵⁵ The PPPFA is the essential foundation for redressing the inequality created by past discriminatory policies and practices in South Africa.⁵⁶ On this basis preferential procurement policies may be established.⁵⁷ Various ordinances have been issued based on the PPPFA. These concretise the principles laid down in the PPPFA and take into account the mandate of the Constitution.⁵⁸

In addition to the main provisions in section 217 of the Constitution, some other provisions in the Constitution relate to public procurement law.

Section 9 of the Constitution establishes the right to equality. Section 9(2) provides that ‘[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken’.

Furthermore, section 33 of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Furthermore, if a person’s rights have been impaired by an administrative action, they have the right to receive a written statement of reasons. To this end, national provisions must be adopted which, in particular, enable administrative measures to be reviewed by the courts. In addition, the regulations should promote efficient administration. The regulations also govern the review of administrative procedures and the rights that exist therein.⁵⁹ Section 195 of the Constitution defines the basic values and principles governing public administration, for example, that services must be

⁵⁴ Mathiba (2020) *JOPA* 650.

⁵⁵ Act 5 of 2000. See Kollamparambil (2014) *LDD* 210; Ambe & Badenhorst-Weiss (2012) *JTSCM* 247.

⁵⁶ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 185.

⁵⁷ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 179.

⁵⁸ G Quinot ‘The third wave of preferential procurement regulations in South Africa’ (2018) *JSAL* 856 at 856; Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 180. See also R Watermeyer *Regulating Public Procurement in Southern Africa through International and National Standards* (2011) 3.

⁵⁹ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 184.

provided impartially, fairly, equitably and without bias, and that the efficient, economic and effective use of resources must be promoted.⁶⁰

2.2.2 Legislation at the national level

2.2.2.1 Preferential Public Procurement Framework Act (PPPFA)

At the national level, the PPPFA has already been mentioned as particularly relevant. The PPPFA implements the requirements of section 217(3) of the Constitution, which requires national legislation establishing a legal framework for a preferential procurement policy.⁶¹ Overall, the PPPFA aims to support and promote previously disadvantaged persons and groups in public procurement.⁶² The PPPFA does this by, among other things, allowing organs of state to give preference to certain persons and groups of persons in the procurement process.⁶³ This is particularly relevant to the promotion of BEE in South Africa.⁶⁴

Further regulations concretise the provisions of the PPPFA. The first regulations were the Preferential Procurement Regulations (Procurement Regulations 2001).⁶⁵ New regulations were enacted in June 2011 and came into force on 7 December 2011, repealing the Procurement Regulations 2001 (Procurement Regulations 2011).⁶⁶ New regulations were passed in 2013 to comply with the Broad-Based Black Economic Empowerment Act (BBBEEA).⁶⁷ The BBBEEA, discussed further below, was amended by the Broad-Based Black Economic Empowerment Amendment Act (BBBEEAA).⁶⁸ The Preferential Procurement Regulations 2017 (Procurement Regulations 2017)⁶⁹ repealed the Procurement Regulations 2011. Finally, the Preferential Procurement Regulations 2022 (Procurement Regulations 2022)⁷⁰ were enacted.⁷¹

The PPPFA applies to organs of state. Organs of state refer to national or provincial departments as defined in the Public Finance Management Act (PFMA),⁷² a municipality as contemplated

⁶⁰ S Williams-Elegbe 'The use of exclusions for corruption in developing country procurement: The case of South Africa' (2007) 51 *JAL* 1 at 5.

⁶¹ Mathiba (2020) *JOPA* 651; Bolton (2008) *PCLJ* 786.

⁶² Mathiba (2020) *JOPA* 651.

⁶³ Bolton (2008) *PCLJ* 782.

⁶⁴ Maritz (2022) *APPLJ* 77; Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 180.

⁶⁵ *Government Gazette* No. 22549 of 10 August 2001.

⁶⁶ *Government Gazette* No. 34350 of 8 June 2011.

⁶⁷ Act 53 of 2003; Migiro (2010) *JSDA* 178.

⁶⁸ Act 46 of 2013.

⁶⁹ *Government Gazette* No. 40553 of 20 January 2017.

⁷⁰ *Government Gazette* No. 47452 of 4 November 2022.

⁷¹ For the developments up to the Procurement Regulations 2017, see Quinot (2018) *JSAL* 856.

⁷² Act 1 of 1999.

in the Constitution, a constitutional institution as defined in the PFMA, Parliament, a provincial legislature, and any other institution or category of institutions included in the definition of 'organ of state' in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which the PPPFA applies.

It has not been conclusively clarified whether other organs and institutions fall within the definition of 'organ of state' and thus within the scope of application of the PPPFA. This concerns particularly municipal entities and public entities, but also parastatals like Transnet in the area of ports, rails and pipelines, Eskom in the area of energy supply, or Telkom in the area of telecommunication services. It has been argued that the PPPFA should not apply because these institutions are involved in the implementation of strategic development policies, and being bound by the requirements of the PPPFA would hinder such implementation. It is also argued that such institutions have flexibility in implementing their preferred procurement strategies.⁷³ The courts have a different view, and have held that parastatal institutions are bound by procurement law and the PPPFA.⁷⁴

In certain circumstances, an exemption from the applicability of the PPPFA may be applied for and granted by the Minister of Finance.⁷⁵ This is possible particularly if national security is at stake, if the tenderers are likely to be international due to the subject matter of the tender, or if there is a public interest.⁷⁶ An exemption may then be granted for a specific case. However, a general exemption from the requirements of the PPPFA would contradict the basic notion of a fundamentally applicable legal framework.⁷⁷

The PPPFA has introduced a points system to implement the objective of empowering previously disadvantaged persons. The PPPFA specifies a certain point value that must be established as an award criterion, in addition to the price.

Section 2 of the PPPFA states that an organ of state must determine its preferential procurement policy, and a preference points system must be implemented. A distinction must be made between contracts above a rand value and contracts equal to or below a rand value. Above the rand value, a maximum of ten points may be allocated for specific goals. The value is currently

⁷³ Bolton (2008) *PCLJ* 787.

⁷⁴ *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2021 (1) SA 853 (SCA) para 8ff; *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) para 23; P Bolton 'The regulation of preferential procurement in state-owned enterprises' (2010) *JSAL* 101 at 101, with reference to *Fidelity Springbok Security Services (Pty) Ltd v South Africa Post Office Ltd* [2004] JOL 13215 (T); Bolton (2008) *PCLJ* 787.

⁷⁵ Section 3 of the PPPFA.

⁷⁶ Kollamparambil (2014) *LDD* 211.

⁷⁷ Bolton (2008) *PCLJ* 787.

50 million rand.⁷⁸ According to section 2(1)(d) of the PPPFA, these goals include contracting with persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability and implementing the programmes of the Reconstruction and Development Programme.⁷⁹ The lowest acceptable tender must score 90 points for price. In the case of a contract with a rand value equal to or below the prescribed amount, a maximum of 20 points may be allocated for the aforementioned specific goals. The lowest acceptable tender must score 80 points for price.

Finally, section 2(1)(f) of the PPPFA specifies that the contract must usually be awarded to the tenderer who scores the highest points, but there is an exception to this rule. Objective criteria, in addition to the aforementioned specific objectives, can justify awarding the contract to another tenderer. These criteria are not defined in the PPPFA. However, according to section 2(1)(e) of the PPPFA, they must be clearly specified in the invitation to submit a tender.⁸⁰

2.2.2.2 Broad-Based Black Economic Empowerment Act (BBBEEA)

The BBBEEA and the BBBEEAA set the framework for the economic empowerment of black South Africans.⁸¹ The background to the BBBEEA is that in the past, under apartheid, race was used to control South Africa's productive resources and access to skills. Even today, large parts of the population are still not involved in the South African economy. Therefore, the BBBEEA is intended to strengthen the right to equality in the Constitution.⁸² Furthermore, the BBBEEA aims to support black South Africans in participating in the economy. In the area of public procurement, the BBBEEA helps to ensure the preferential treatment of black South Africans in tenders and the awarding of government contracts.⁸³ The Codes of Good Practice on Broad-Based Black Economic Empowerment and specific Sector Codes, for example, for the financial sector or the construction sector, ensure the practical implementation of the BBBEEA.⁸⁴ The BEE strategy helps to achieve the objects of BEE. Instruments to achieve this goal include, for

⁷⁸ Regulations 4 and 5 of the Procurement Regulations 2022.

⁷⁹ *Government Gazette* No. 16085 of 23 November 1994.

⁸⁰ Kollamparambil (2014) *LDD* 211.

⁸¹ S Williams-Elegbe *Fighting Corruption in Public Procurement* (2012) 74.

⁸² Preamble of the BBBEEA.

⁸³ GT Musabayana & E Mutambara 'The implementation of the Broad-Based Black Economic Empowerment (B-BBEE) policy in South Africa: A myth or a reality in SMEs?' (2022) 16(1) *AABFJ* 73 at 75; Williams-Elegbe (2007) *JAL* 7ff; L Shai, C Molefinyana & G Quinot 'Public procurement in the context of broad-based black economic empowerment (BBBEE) in South Africa – Lessons learned for sustainable public procurement' (2019) 11(24) *Sustainability* 7164 1 at 4ff; S Schneider *Broad-based Black Economic Empowerment in der Republik Südafrika* (2008).

⁸⁴ <http://www.thedtic.gov.za/financial-and-non-financial-support/b-bbee/b-bbee-codes-b-bbee-acts-strategies-policies/> (accessed 08-02-2024).

example, a scorecard to measure progress based on specific criteria in this area, such as direct empowerment through the ownership and control of enterprises and assets, or preferential procurement by the government.⁸⁵

2.2.2.3 Public Finance Management Act (PFMA)

The PFMA, as amended by the Public Finance Management Amendment Act,⁸⁶ and the regulations thereto, addresses financial management in the national and provincial governments.⁸⁷ The Act therefore also plays a role in public procurement law. The PFMA aims to modernise financial management through greater transparency, accountability and the proper management of state revenue, expenditure, and the assets and liabilities of state organs.⁸⁸ The PFMA ensures that all revenue, expenditure, assets and liabilities are managed efficiently and effectively.⁸⁹ Section 76(4)(c) of the PFMA empowers the National Treasury to determine ‘a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective’.⁹⁰ This framework is intended to create uniform minimum standards with regard to procurement processes.⁹¹

2.2.2.4 Local Government: Municipal Systems Act (MSA)

The Local Government: Municipal Systems Act (MSA)⁹² authorises municipalities to provide municipal services under a service delivery agreement. The service provider must be selected through a selection process which is competitive, fair, transparent, equitable and cost-effective.⁹³

2.2.2.5 Local Government: Municipal Finance Management Act (MFMA)

The Local Government: Municipal Finance Management Act (MFMA)⁹⁴ seeks to secure the sound and sustainable management of the financial affairs of municipalities and other local government institutions.⁹⁵ The principles of public procurement law are also anchored in this.

⁸⁵ BEE Strategy para 3.5.3 <http://www.thedtic.gov.za/wp-content/uploads/bee-strategy.pdf> (accessed 08-02-2024).

⁸⁶ Act 29 of 1999.

⁸⁷ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 185; Bolton (2008) *PCLJ* 783.

⁸⁸ Mathiba (2020) *JOPA* 650.

⁸⁹ Williams-Elegbe *Fighting Corruption* 73ff.

⁹⁰ See also Mathiba (2020) *JOPA* 650.

⁹¹ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 185ff; Bolton (2008) *PCLJ* 783.

⁹² Act 32 of 2000.

⁹³ Section 83 of the MSA; Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 185.

⁹⁴ Act 56 of 2003.

⁹⁵ Section 2 of the MFMA; Mathiba (2020) *JOPA* 651.

Section 112 of the MFMA stipulates the requirements for the supply chain management policy of a municipality or municipal entity. The policy must be fair, equitable, transparent, competitive and cost-effective. Furthermore, it must comply with a prescribed regulatory framework for municipal supply chain management. This framework must contain procedures and mechanisms for each type of process, an open and transparent pre-qualification process for tenders, and competitive bidding processes in which only pre-qualified tenderers may participate.

2.2.2.6 Other legislation

The Prevention and Combating of Corrupt Activities Act (PCCA)⁹⁶ also applies to public procurement procedures. The PCCA provides that corrupt acts in connection with contracts and the procurement and withdrawal of offers are criminal offences.⁹⁷

The Employment Equity Act (EEA)⁹⁸ also deals with state contracts. Section 53 of the EEA was amended by the Employment Equity Amendment Act and states that the Minister may issue a certificate of compliance only if the employer has met the sectoral numerical targets set by the Minister for the relevant sector or has demonstrated good cause for non-compliance.⁹⁹

Finally, the general rules of constitutional and administrative law apply to public procurement in South Africa. This has been confirmed by the courts.¹⁰⁰ Legal acts in the area of procurement law are considered ‘administrative acts’ within the meaning of the Constitution and the Promotion of Administrative Justice Act (PAJA).¹⁰¹

Unsuccessful or prejudiced tenderers also have the right to challenge award decisions by applying for judicial review. Award decisions may be challenged on various grounds, such as lawfulness, reasonableness and procedural fairness.¹⁰² This is accompanied by a constitutional right to information in order to be able to determine whether one’s rights have been violated.

⁹⁶ Act 12 of 2004.

⁹⁷ Bolton (2008) *PCLJ* 783.

⁹⁸ Act 55 of 1998.

⁹⁹ Act 4 of 2022.

¹⁰⁰ See, for example, *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) BCLR 300 (CC) para 21.

¹⁰¹ Act 3 of 2000; Bolton (2008) *PCLJ* 783; section 33 of the Constitution.

¹⁰² Section 33 of the Constitution; Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 183; Bolton (2008) *PCLJ* 783.

The right to information is provided for in the Promotion of Access to Information Act (PAIA).¹⁰³

Various regulations have been enacted to implement the principles enshrined in the Constitution.¹⁰⁴ These include regulations on supply chain management and public–private partnerships. For example, a PFMA SCM instruction was published to enhance compliance, transparency and accountability in supply chain management.¹⁰⁵

Moreover, there are regulations for the application of competition in the awarding of contracts and for the procedures to be followed for different types of contracts.¹⁰⁶ The Supreme Court of Appeal has stated that concessions also fall within the scope of application of public procurement law.¹⁰⁷

In addition, various instruction notes,¹⁰⁸ circulars¹⁰⁹ and guidelines¹¹⁰ have been enacted to regulate specific areas of public procurement law and to provide legal practitioners with assistance in applying the various regulations.

Finally, in 2020, a new draft Public Procurement Bill was published for public comment, but it has not yet been adopted.¹¹¹

2.3 Application of public procurement law

The public procurement law regulations, especially the procurement clause of section 217 of the Constitution, apply to organs of state at the national, provincial and local levels.¹¹² Furthermore, ‘other institutions identified in national legislation’, which exercise public authority, also fall within the scope of section 217 of the Constitution.¹¹³ All institutions and

¹⁰³ Act 2 of 2000. See P Bolton ‘Disqualification for non-compliance with public tender conditions’ (2014) 17(6) *PELJ* 2313 at 2320 <http://dx.doi.org/10.4314/pej.v17i6.03> (accessed 09-01-2024); Bolton (2008) *PCLJ* 784.

¹⁰⁴ Bolton (2008) *PCLJ* 802.

¹⁰⁵ No. 3 of 2021/2022; a detailed analysis of the instruction can be found in Volmink (2022) *APPLJ* 52.

¹⁰⁶ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 185.

¹⁰⁷ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2 (*Airports SCA*) para 26.

¹⁰⁸ National Treasury, Republic of South Africa

http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx (accessed 04-01-2023).

¹⁰⁹ National Treasury, Republic of South Africa

http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Circulars.aspx (accessed 04-01-2023).

¹¹⁰ National Treasury, Republic of South Africa

http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Guidelines.aspx (accessed 04-01-2023).

¹¹¹ See, for further discussion, M Brooks ‘The draft Public Procurement Bill’ (2020) 7 *APPLJ* 88.

¹¹² See the definition in section 239 of the Constitution.

¹¹³ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 187.

organs governed by the PFMA, the MFMA and the PPPFA therefore fall within the scope of section 217 of the Constitution.¹¹⁴

Bolton summarises the institutions and entities to which section 217 of the Constitution applies:

- departments of state or administration;
- trading entities;
- constitutional institutions (e.g. the Public Protector, the Independent Electoral Commission and the Independent Communications Authority of South Africa);
- major public entities (also sometimes referred to as parastatals or stateowned enterprises) (e.g. ESKOM, Telkom and Transnet);
- national public entities (e.g. the Accounting Standards Board, the Construction Industry Development Board and South African Revenue Services);
- national government business enterprises (e.g. SA Rail Commuter Corporation Ltd);
- provincial public entities (e.g. the Eastern Cape Liquor Board);
- provincial government business enterprises (e.g. the East London Industrial Development Zone Corporation);
- municipalities; and
- municipal entities.¹¹⁵

The area of application of the individual laws is then specifically defined again in these laws. For example, section 3 of the PFMA lists departments, named public entities, constitutional institutions and named provincial legislatures. In terms of content, both the conclusion of the contract and the prior negotiations fall within the scope of public procurement law.¹¹⁶

The draft Public Procurement Bills of 2023 and 2024 state in clause 3 that the Act applies to different applicants, namely a department, a constitutional institution and a public entity as defined in the PFMA, and a municipality or a municipal entity.

¹¹⁴ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 187.

¹¹⁵ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 187ff. See also the discussion on state-owned companies above.

¹¹⁶ Bolton (2008) *PCLJ* 786; PJJ Olivier JA in *Transnet Ltd v Goodman Brothers (Pty) Ltd* [2000] ZASCA 62 para 22: 'It may well be that the words "contracts for goods and services" must be given a wide meaning, similar to "negotiates for" etc.'

However, the purpose of the procurement plays no role in the application of public procurement law. Both procurement for the public contracting authority, such as computers for personal use, and procurement for the fulfilment of public tasks fall within the scope.¹¹⁷

In respect of contracts concluded between different governmental organs, section 217 of the Constitution does not apply, because the contract remains in the governmental sphere and therefore does not need to be tendered for in accordance with the principles of section 217.¹¹⁸ Nevertheless, the principle of transparency should be observed. This principle always applies to the actions of the state, so that the public is informed about procurement activities and the conclusion of the contracts.¹¹⁹

The principles of public procurement law laid down in section 217 of the Constitution are also anchored in individual laws.¹²⁰ These are found in sections 38(1)(a)(iii) and 51(1)(a)(iii) of the PFMA and sections 111 and 112 of the MFMA.¹²¹

Section 217 of the Constitution applies to contracts for ‘goods or services’. Even though the term ‘works’ is not explicitly covered by section 217 of the Constitution, it is suggested that it may be used synonymously with services and is therefore also included.¹²² Furthermore, Section 217 of the Constitution does not only apply to contracts in the traditional sense with regard to the exchange of a service for money. Public procurement law also applies when the state engages in income-generating transactions. This is the case when state property is leased or sold, or when a concession is awarded. For the latter the concessionaire regularly only receives the right to operate but does not receive remuneration and therefore has to bear the operating risk itself.¹²³

2.4 Exceptions from public procurement law

Public procurement law does not apply in certain circumstances. Firstly, organs of state at local government level are not required to adhere to section 217 of the Constitution when they conclude contracts with other organs of state for the delivery of municipal services.¹²⁴ The

¹¹⁷ Bolton (2008) *PCLJ* 786.

¹¹⁸ Bolton (2008) *PCLJ* 786.

¹¹⁹ Bolton (2008) *PCLJ* 786.

¹²⁰ Bolton (2008) *PCLJ* 786.

¹²¹ Bolton (2008) *PCLJ* 785; E Mantzaris ‘Public procurement, tendering and corruption: Realities, challenges and tangible solutions’ (2014) 7(2) *AJPA* 67 68.

¹²² Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 189.

¹²³ *Airports SCA* para 21ff.

¹²⁴ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 192, with reference to section 80(1) of the MSA.

background to this exception is that all the bodies involved exercise state authority. Even when municipal services are carried out by another state body, state authority and the service continue to be exercised by the state.¹²⁵

Furthermore, section 3 of the PPPFA allows for the possibility that the Minister of Finance, on request, may exempt an organ of state from any or all of the provisions of the PPPFA if it is in the interest of national security, or the likely tenderers are international suppliers, or it is in the public interest.

Finally, the draft Public Procurement Bills of 2020, 2023 and 2024 and the new Public Procurement Act should be mentioned. Section 61 of the Public Procurement Act states that an exemption from any provision of this Act may be granted by the Minister if national security could reasonably be expected to be compromised. This exemption coincides with the one in the PPPFA. An exemption is also possible if the procurement is to be funded partially or in full by donor or grant funding and such exemption will benefit the public in general or a section of the public.

2.5 Principles of public procurement law

South African public procurement law is based on the following principles: fairness, transparency, equitability, cost-effectiveness and competitiveness.¹²⁶ The principles are also explained in the official government document ‘General Procurement Guidelines’.¹²⁷ These objectives or principles largely correspond to those of procurement law systems in other countries.¹²⁸

The individual principles are both interrelated and interdependent. If one principle is no longer observed or is violated, the entire procurement law system suffers and may even collapse.¹²⁹ However, sometimes the principles conflict with each other. For example, more transparency leads to more potential bids, and therefore to more competition. On the other hand, if every rule

¹²⁵ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 192.

¹²⁶ Mathiba (2020) *JOPA* 649; Kollamparambil (2014) *LDD* 210; Watermeyer *Regulating Public Procurement* 4; JC Pauw & JS Wolvaardt ‘Multi-criteria decision analysis in public procurement – A plan from the South’ (2009) 28(1) *Politeia* 66 at 66.

¹²⁷ Government of the Republic of South Africa ‘General Procurement Guidelines’ http://ocpo.treasury.gov.za/Resource_Centre/Legislation/GENERAL%20PROCUREMENT%20GUIDELINES%20-%202.pdf (accessed 05-01-2024).

¹²⁸ Bolton ‘The regulatory framework’ in *Public Procurement Regulation in Africa* 179.

¹²⁹ Mathiba (2020) *JOPA* 649, with further proof.

is transparent and strict, more tenderers with unfulfilled bids may have to be excluded, so the level of competition decreases again.¹³⁰

2.5.1 Cost-effectiveness

Cost-effectiveness is often described as the essential principle of public procurement law.¹³¹ In this context, value for money is also an essential principle, which means that unnecessary expenditure on poor quality must be avoided.¹³² Rather, an appropriate result must be achieved in relation to the use of resources.¹³³ This is particularly important for taxpayers, because they are interested in having control over expenditure, on the one hand, and achieving as much as possible from the available resources, on the other.¹³⁴ The principle therefore applies throughout the entire procurement process, from the planning phase to the awarding of the contract, and even beyond that to the execution of the contract.¹³⁵

In particular, it should be noted that the principle of cost-effectiveness is not about purchasing the product or service at the lowest possible price. Both the quality and the conditions under which the service is provided play a key role in the principle of cost-effectiveness and the principle of value for money.¹³⁶

To summarise, the principle consists of three essential aspects. Firstly, the product or service to be procured must fulfil the public contracting authority's requirements. It is also important not to purchase a product that significantly exceeds the requirements, because the product will no longer meet the public contracting authority's requirements, will be more expensive, and the principle of cost-effectiveness will not be upheld. Secondly, it is important to define conditions that fulfil the public contracting authority's requirements, whereby other criteria, in addition to price, may and should be taken into account. Finally, it must be ensured that the contractor delivers the product in accordance with the specified conditions.¹³⁷ Only then will the principles of cost-effectiveness and value for money be met.

¹³⁰ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 17.

¹³¹ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 8.

¹³² Mathiba (2020) *JOPA* 649.

¹³³ P Bolton *The Law of Government Procurement in South Africa* (2007) 43; Watermeyer *Regulating Public Procurement* 4; C McCrudden 'Buying social justice: Equality and public procurement' (2007) 60(1) *CLP* 121 at 144.

¹³⁴ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 8ff.

¹³⁵ Bolton *The Law of Government Procurement* 43.

¹³⁶ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 9; Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* 28ff.

¹³⁷ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 9.

2.5.2 Competitiveness

The principle of competitiveness implies that the award of a public contract takes place within the framework of a selection procedure in which various potential contractors – tenderers – may submit bids and compete for the award of the contract.¹³⁸ Only when various tenderers have had the opportunity to submit a bid will the principle of section 217 of the Constitution have been respected and the effective competition for the public contract have taken place.¹³⁹

One advantage of competition is that the public contracting authority may choose from a selection of offers based on previously defined criteria and thus find the most suitable product and contracting partner for itself.¹⁴⁰ This means that the principle of competitiveness is closely linked to the principle of cost-effectiveness and value for money.¹⁴¹ Both principles endeavour to identify the best product and the best terms for the public contracting authority. This is only possible with a selection of offers.¹⁴²

Finally, competition helps to strengthen the procurement system. The various potential contractors must comply with the rules of public procurement law as part of the competition, thereby helping to strengthen trust in the regulations. This is because competition, and therefore the opportunity to bid for a public contract, only arises if the rules of public procurement law are complied with. This helps both the public contracting authorities and the contractors.¹⁴³

2.5.3 Fairness

The principle of fairness refers to procedural fairness.¹⁴⁴ Put simply, it is about treating all tenderers fairly. The principle provides that the procurement process must be free from discrimination, manipulation, bribery or corruption.¹⁴⁵ This relates to the relationship between the state and the tenderers, and also to the relationship between the tenderers themselves.¹⁴⁶

This means that the public contracting authority must apply the same rules to all tenderers; these rules must be known to all tenderers; all tenderers must be given the same time to submit an

¹³⁸ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 19.

¹³⁹ Bolton *The Law of Government Procurement* 42.

¹⁴⁰ Bolton *The Law of Government Procurement* 41.

¹⁴¹ Watermeyer *Regulating Public Procurement* 4; Bolton *The Law of Government Procurement* 40.

¹⁴² Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 11; McCrudden (2007) *CLP* 144.

¹⁴³ Similarly, Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 19.

¹⁴⁴ Bolton *The Law of Government Procurement* 47.

¹⁴⁵ Mathiba (2020) *JOPA* 649; McCrudden (2007) *CLP* 144.

¹⁴⁶ Bolton *The Law of Government Procurement* 47.

offer; and everyone must be evaluated equally.¹⁴⁷ Furthermore, all tenderers must be provided with the same information relative to each other and no tenderer must be given preferential treatment by the public contracting authority.¹⁴⁸

2.5.4 Transparency

Transparency is another main principle in the procurement system,¹⁴⁹ which contains various aspects to ensure that the procurement system is ‘open’.¹⁵⁰ Firstly, it must be made public that a public contract is to be awarded, so that all potential tenderers have a chance to make an offer. The rules which apply to the specific award procedure must also be transparent. If the tenderer knows the rules of the procurement process, it can decide whether it makes sense to participate in the award procedure. Of course, it will only do so if it can fulfil the qualification criteria and if it thinks it has a chance of winning the contract. This is because it is made transparent which qualification and award criteria apply to the procedure, so the public contracting authorities’ discretion is limited and the decision to award the contract is based on objective rules.

This does not mean that the award procedure and evaluation should be a mechanical process. It is a complex process that requires skill, expertise and the exercise of judgement. The evaluation process also requires an assessment. However, as long as the evaluator can identify and determine the criteria and their weighting on the basis of which this evaluation process is carried out, the process is transparent, objective and fair.¹⁵¹

Finally, as part of the principle of transparency, it must be possible to check compliance with public procurement rules and, if necessary, enforce them.¹⁵²

In summary, the principle means that the awarding of public contracts should not take place behind closed doors but should be comprehensible and verifiable for everyone involved in the process.¹⁵³

¹⁴⁷ Watermeyer *Regulating Public Procurement* 4; Bolton *The Law of Government Procurement* 48.

¹⁴⁸ Bolton *The Law of Government Procurement* 48.

¹⁴⁹ Quinot & Arrowsmith ‘Introduction’ in *Public Procurement Regulation in Africa* 16.

¹⁵⁰ Bolton *The Law of Government Procurement* 54.

¹⁵¹ *South African National Road Agency Ltd v The Toll Collect Consortium and Another* [2013] ZASCA 102 (SANRAL) para 20.

¹⁵² Quinot & Arrowsmith ‘Introduction’ in *Public Procurement Regulation in Africa* 17; Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* 73ff.

¹⁵³ Bolton *The Law of Government Procurement* 54. See also Mathiba (2020) *JOPA* 649.

2.5.5 Equitability

The principle of equitability is also essential in the South African public procurement system, because of the historical discrimination against specific groups and companies and disadvantaged tenderers.¹⁵⁴ Because of South Africa's past and in particular the lack of access to the procurement system, the principle of equitability in the Constitution should be seen as a positive measure to combat injustice.¹⁵⁵ The principle also includes a mandate for public contracting authorities to eliminate injustice with the help of procurement law and the possibility of awarding public contracts, and thus serves as an empowerment tool.¹⁵⁶

The principle may also help to achieve other objectives, for example, cost-effectiveness and value for money, because more tenderers participate in a fair and equitable procedure. Finally, equitability helps to fight corruption and supports competition.¹⁵⁷

2.5.6 Procurement methods

Section 217 of the Constitution does not provide any special regulations for the procurement process. Therefore, it might initially be assumed that public contracting authorities have a wide scope for assessing how they carry out procurement processes. Irrespective of the specific procurement method, the basic rule remains that suitability is determined on the basis of qualification criteria so that the contract is awarded to an eligible company. However, various statutes and official documents specify the procurement methods.¹⁵⁸

In general, the South African procurement system distinguishes between the size and value of the contract awarded. Stricter regulations and formalities must be adhered to for large-value contracts. Smaller contracts, on the other hand, may be awarded more easily.¹⁵⁹ There are different values for the procurement of goods and services. A distinction is made here between different types of procurement, namely petty cash, written price quotations and competitive bids.¹⁶⁰

¹⁵⁴ Mathiba (2020) *JOPA* 649; Bolton (2008) *PCLJ* 802.

¹⁵⁵ Bolton *The Law of Government Procurement* 52.

¹⁵⁶ Bolton *The Law of Government Procurement* 52ff; Bolton (2008) *PCLJ* 802.

¹⁵⁷ Quinot & Arrowsmith 'Introduction' in *Public Procurement Regulation in Africa* 10ff.

¹⁵⁸ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 195.

¹⁵⁹ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 199.

¹⁶⁰ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 195. See also C Rankin 'Reforming emergency procurement to protect against corrupt decision-making while ensuring swift and unencumbered procurement' (2021) 8 *APPLJ* 84 86.

For goods and services up to the value of R2,000 (inclusive of all applicable taxes), procurement by means of petty cash is allowed without inviting price quotations or following a bidding process.¹⁶¹

For goods and services up to an estimated value of R1,000,000 (inclusive of all applicable taxes), the accounting officer or authorities must invite written price quotations.¹⁶² At least three written price quotations must be obtained from three different suppliers registered on the Central Supplier Database.¹⁶³

For goods and services above the transaction value of R1,000,000 (inclusive of all applicable taxes), the accounting officer or authorities must invite open competitive bids for all procurements.¹⁶⁴

There are further distinctions and differentiations. For example, limited bidding, negotiations or two-stage bidding may be conducted under certain conditions. The government has issued guidelines for the use of these procedures.¹⁶⁵

The procedure is carried out electronically and all criteria for the procedure must be determined and published before the start of the procedure.¹⁶⁶ New invitations to tender are published electronically in the Government Tender Bulletin.¹⁶⁷

However, in certain situations, particularly emergencies, the rules of public procurement law may be deviated from.¹⁶⁸ This occurred recently in the context of the Covid-19 pandemic.¹⁶⁹

The draft Public Procurement Bill 2023, the updated version of 2024 and the Public Procurement Act also contain regulations on procurement methods. These regulations provide that the Minister must prescribe a procurement system. This system must cover the procurement and strategic sourcing of goods and services, infrastructure and capital assets, and goods and services related to them and for the disposal and letting of assets. Furthermore, the system must

¹⁶¹ Section 3.1.1. of the PFMA SCM Instruction No. 02 of 2021/22.

¹⁶² Section 3.2.1. of the PFMA SCM Instruction No. 02 of 2021/22.

¹⁶³ Section 3.2.4. of the PFMA SCM Instruction No. 02 of 2021/22.

¹⁶⁴ Section 3.3.1. of the PFMA SCM Instruction No. 02 of 2021/22.

¹⁶⁵ National Treasury, Republic of South Africa 'Supply chain management: A guide for accounting officers/authorities' February 2004.

¹⁶⁶ PFMA SCM Instruction No. 09 of 2022/2023; Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 199.

¹⁶⁷ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 198; <https://www.etenders.gov.za> (accessed 11-01-2024).

¹⁶⁸ Bolton (2008) *PCLJ* 789.

¹⁶⁹ See, for example, National Treasury Instruction No. 08 of 2019/2020: Emergency procurement in response to national state of disaster.

include types of procurement methods and methods for the disposal and letting of assets and the corresponding requirements and procedures, and finally procurement thresholds.¹⁷⁰

The main aspects of the procurement system and the methods are described in the draft Public Procurement Bills of 2023 and 2024. However, they contain fewer specific regulations. Instead, the responsibility and the concrete design are placed in the hands of the Minister of Finance.

2.6 Conclusion

The analysis in this chapter has shown that, in South Africa, the basic principles of public procurement law are enshrined in the Constitution and that public procurement law must be used to achieve secondary objectives. The principles laid down in the Constitution form the basis for the entire procurement law system and its design. Various laws apply within the framework of public procurement law. Some of these apply to all levels of government, specifically the national, provincial and municipal levels, while others have specific areas of application. However, the basic principles of fairness, cost-effectiveness and so on are the same for all laws. These must therefore always be observed when determining qualification criteria.

Furthermore, the constitutional obligation to pursue secondary objectives is also set out in more detail in specific laws such as the PPPFA, the BBEEA and the BBBEEAA. The requirements of these laws must also be observed when determining qualification criteria.

Various exceptions to public procurement law must always be observed during procurement, in which case procurement law may not apply at all.

Finally, the different procurement methods in South Africa all have one thing in common: it is always necessary to determine the suitability of the bidder.

¹⁷⁰ Clause 18 of the draft Public Procurement Bill 2023; clause 24 of the draft Public Procurement Bill 2024; section 24 of the Public Procurement Act.

CHAPTER THREE: Public procurement law in Germany

As in the case of South Africa, it is essential to understand the underlying aspects of the legal system and the public procurement system in Germany in order to determine the ‘right’ qualification criteria and the requirements for them.

In general, Germany is a parliamentary democracy.¹⁷¹ The German legal system also has its roots in Roman law. Germany is organised as a federal state, and consists of 16 federal states. There are three levels of governance: the federal level, the level of the federal states, and the municipal level.

As in South Africa, public procurement law also applies at all three levels, but sometimes there are different regulations, depending on the level and area of application.

3.1 Definition and development of German public procurement law

In Germany, public procurement law incorporates all regulations that prescribe a certain course of action for the state, its subdivisions in the form of federal states, and municipalities and institutions in the use of services or the purchase of goods on the market by means of a contract in return for payment.¹⁷²

Traditionally, German procurement regulations were only administrative regulations associated with budgetary law. The basic and sole purpose of this was to ensure that public funds were used properly and economically.¹⁷³ The primary goal was to conserve public resources.¹⁷⁴

However, German law is overlaid by influences and regulations from the continental level issued by the European Parliament and the European Commission. This is because Germany is part of the European Union (EU) and is therefore bound by the regulations at EU level. It should be noted that both regulations and directives exist at the EU level. While regulations apply directly in the member states of the EU, directives must be implemented in national law. As soon as a certain contract value, the so-called threshold value, is reached, the EU regulations apply.¹⁷⁵ The EU regulations pursue different goals. The common EU regulations are

¹⁷¹ Art. 20 of the Constitution in Germany (Grundgesetz), published on 23 May 1949.

¹⁷² J Ziekow in J Ziekow & U-C Völlink (eds) *Vergaberecht* (2020) Introduction para 1; C Koenig & A Haratsch ‚Grundzüge des deutschen und des europäischen Vergaberechts‘ (‘Main features of German and European public procurement law’) (2003) 37 *NJW* 2637 at 2637.

¹⁷³ Marx in *BeckOK Vergaberecht* section 97 para 4.

¹⁷⁴ Ziekow in *Vergaberecht* Introduction para 1.

¹⁷⁵ Ziekow in *Vergaberecht* Introduction para 1.

particularly aimed at opening up the market and deepening the internal market of the EU.¹⁷⁶ The underlying idea is to prevent the risk of domestic tenderers being favoured in the award of contracts by public contracting authorities. Furthermore, the decision to award a contract should not be made on the basis of considerations other than economic ones.¹⁷⁷ Finally, the regulations allow the public contracting authority a wider choice of tenders in order to meet the interests of the public contracting authority in a tender that is as economically favourable as possible and also satisfies its needs as optimally as possible.¹⁷⁸

The integration of the regulations of public procurement law into the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*)¹⁷⁹ makes it clear that the understanding of public procurement law has changed. Due to the EU influence, the competitive significance of public procurement law is now emphasised.¹⁸⁰ German public procurement law has developed as a result of the influences of and requirements at the EU level and is significantly shaped by them.

The insertion of the fourth part of the Act against Restraints of Competition by the Act Amending the Legal Basis for the Award of Public Contracts (*Vergaberechtsänderungsgesetz – VgRÄG*) was essential,¹⁸¹ as a result of which the public procurement regulations are no longer part of budgetary law, but are part of competition law, introducing subjective bidders' rights and an effective system of legal protection in the form of review procedures. The influence of the EU level is clear in the explanatory memorandum of the Act. According to this memorandum, the Act serves to implement various EU directives, such as Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.¹⁸²

Due to the implementation of various directives,¹⁸³ public procurement law in Germany was once again significantly restructured in 2016 in the area of the upper threshold. The scope and the number of regulations were considerably expanded. The previous procurement and contract

¹⁷⁶ Marx in *BeckOK Vergaberecht* section 97 para 13.

¹⁷⁷ ECJ, decision of 3 October 2000 – C-380/98 *University of Cambridge*; ECJ, decision of 28 January 2016 – C-50/14 *CASTA*.

¹⁷⁸ ECJ, decision of 23 December 2009 – C-305/08 *CoNISMa*.

¹⁷⁹ Published on 26 June 2013.

¹⁸⁰ Marx in *BeckOK Vergaberecht* section 97 para 22.

¹⁸¹ Published on 26 August 1998.

¹⁸² Federal Law Gazette 13/9340 1.

¹⁸³ In particular, Directives 2014/24/EU, 2014/23/EU and 2014/25/EU.

regulations for services (VOL/A)¹⁸⁴ and the public procurement regulations for freelance services (VOF)¹⁸⁵ were eliminated and integrated into the respective ordinances.¹⁸⁶

Furthermore, the EU is a member of the GPA.¹⁸⁷ Section 216(2) of the Treaty on the Functioning of the European Union (TFEU)¹⁸⁸ declares agreements concluded by the EU to be binding on both the institutions of the EU and the member states. However, the EU member states have not signed the GPA and are therefore not party to it due to the lack of ratification. The GPA thus has no independent legal effect in Germany, but its legal effect is conveyed via EU law.¹⁸⁹

The GPA was originally signed in Marrakesh on 15 April 1994. Each signatory to the GPA undertakes to respect the principles of national treatment and non-discrimination vis-à-vis the goods, services and suppliers of the other signatories. This is intended to enable fair competition for public contracts through clearly defined procedures.¹⁹⁰ After the entry into force of the GPA, the EU public procurement directives in force at the time were adapted slightly to meet the requirements of the GPA.¹⁹¹

The agreement was further developed and renegotiated, and the GPA 2012 came into force on 6 April 2014.¹⁹²

3.2 Structure of public procurement law

As already mentioned, German public procurement law and its structure are determined at the EU level. The primary law of the Treaty on European Union (TEU) and the TFEU applies. The European Court of Justice (ECJ) derives general principles from this, or the fundamental freedoms laid down therein, particularly the principle of competition, the principle of equal

¹⁸⁴ Published on 20 November 2009.

¹⁸⁵ Published on 18 November 2009.

¹⁸⁶ Marx in *BeckOK Vergaberecht* section 97 para 31.

¹⁸⁷ European Commission ‘The WTO Agreement on Government Procurement’

https://ec.europa.eu/commission/presscorner/detail/en/MEMO_03_83 (accessed 14-02-2024); Kollamparambil (2014) *LDD* 203.

¹⁸⁸ Published on 26 October 2012.

¹⁸⁹ O Dörr in M Burgi, M Dreher & M Opitz (eds) *Beck'scher Vergaberechtskommentar* (2022) Introduction para 233.

¹⁹⁰ European Commission ‘The WTO Agreement on Government Procurement’

https://ec.europa.eu/commission/presscorner/detail/en/MEMO_03_83 (accessed 14-02-2023).

¹⁹¹ Dörr in *Beck'scher Vergaberechtskommentar* Introduction para 233.

¹⁹² Dörr in *Beck'scher Vergaberechtskommentar* Introduction para 231; see also World Trade Organization ‘Agreement on Government Procurement’ https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (accessed 15-02-2023). See the text of the Agreement and related WTO legal texts here: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf (accessed 09-01-2024).

treatment and the principle of transparency. These principles apply irrespective of the application of a threshold value.¹⁹³ It should be noted, however, that in the case of below threshold awards, the primary law provisions apply only if there is a ‘clear’ cross-border interest in the contract.¹⁹⁴ This cannot exist only in a hypothetical way; rather, it must be positively established within the framework of a concrete assessment of the circumstances of the order in question.¹⁹⁵

Furthermore, as shown, various public procurement directives at EU level lay down essential basic rules for awarding contracts in the EU. These regulations harmonise public procurement law at the EU level. The member states of the EU are bound by these regulations and must implement them within a regular implementation period of two years. If there is no implementation within the implementation period, the regulation applies directly, provided that the provisions are unrestricted and sufficiently clear and unambiguous.¹⁹⁶ Infringement proceedings may be initiated against the state in the ECJ if the state has not implemented the directive.¹⁹⁷

At the federal level, the Constitution and federal legislation apply. As Germany has several federal states, each of which has its own legislative powers, there are also public procurement regulations at the state level.

3.2.1 Constitution

The Grundgesetz plays an important role in public procurement law. It sets standards for the legislature and the public contracting authorities in their dealings with the parties involved in the award procedure.¹⁹⁸ The award of a contract constitutes an act of public authority, and must therefore be carried out in accordance with fundamental rights.¹⁹⁹ Different rights may be relevant, depending on the subject matter of the contract. This may, for example, concern the freedom of contract in the entrepreneurial sphere, if the employer is given a concrete

¹⁹³ Ziekow in *Vergaberecht* Introduction para 11; ECJ, decision of 20 October 2005 – C-264/03 *French Republic*; ECJ, decision of 4 April 2019 – C-699/17 *Allianz*.

¹⁹⁴ ECJ, decision of 19 April 2018 – C-65/17 *Oftalma Hospital Srl*; Ziekow in *Vergaberecht* Introduction para 13.

¹⁹⁵ ECJ, decision of 6 October 2016 – C-318/15 *Tecnoedi Costruzioni Srl*.

¹⁹⁶ ECJ, decision of 4 December 1974 – C-41/74 *Van Duyn / Home Office*; ECJ, decision of 5 April 1979 – C-148/78 *Ratti*.

¹⁹⁷ Section 258ff TFEU.

¹⁹⁸ Ziekow in *Vergaberecht* Introduction para 16.

¹⁹⁹ Constitutional Court, decision of 13 June 2006 – 1 BvR 1160/03; Constitutional Court, decision of 11 July 2006 – 1 BvL 4/00; Ziekow in *Vergaberecht* Introduction para 16.

formulation of the labour relations.²⁰⁰ The general principle of equality under Art. 3(1) of the Grundgesetz or the requirement of granting effective legal protection under Art. 19(4) of the Grundgesetz must also be observed. These abstract rights and principles mean that recourse to a court is possible, as well as actual effective judicial review. For this reason, for example, no excessive requirements may be placed on the applicant's burden of proof in the context of review under public procurement law.²⁰¹

3.2.2 Legislation at the federal level

Due to the regulations at the EU level, German public procurement law at the federal level is now divided into two areas: procurement law below the threshold value, and procurement law above the threshold value. The threshold value itself is anchored in section 106 of the GWB and is adjusted every two years. Depending on which area of application is relevant, different regulations apply and different legal protection options are available.²⁰²

Since 1 January 2024, a threshold value of EUR5,538,000 applies to construction work, and a threshold value of EUR221,000 applies to supplies and services. A threshold value of EUR143,000 applies for supplies and services for the supreme and upper federal authorities. Concessions are subject to the upper threshold from a contract value of EUR5,538,000. Supply and service contracts in the sector and in the field of defence and security are subject to a threshold value of EUR443,000, and a threshold value of EUR1,000,000 applies to social and other special services. All threshold amounts are net values excluding VAT.²⁰³

If the contract value exceeds this threshold, public contracts must be put out to tender throughout Europe. If the contract value is below this threshold, a national invitation to tender is sufficient. This regulation is based on the principle of creating as much competition as possible.

²⁰⁰ Constitutional Court, decision of 11 July 2006 – 1 BvL 4/00; Ziekow in *Vergaberecht* Introduction para 17.

²⁰¹ Ziekow in *Vergaberecht* Introduction para 19; Constitutional Court, decision of 29 July 2014 – 2 BvR 2248/03; Higher Regional Court Düsseldorf, decision of 12 July 2017 – Verg 13/17.

²⁰² M Jularic in M Müller-Wrede (ed) *GWB – Vergaberecht einschließlich WregG* section 106 para 5ff; Ziekow in *Vergaberecht* Introduction para 1.

²⁰³ Commission delegated Regulation (EU) 2023/2495 of 15 November 2023 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests; Commission delegated Regulation (EU) 2023/2496 of 15 November 2023 amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts, and design contests; Commission delegated Regulation (EU) 2023/2510 of 15 November 2023 amending Directive 2009/81/EC of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts; Commission delegated Regulation (EU) 2023/2497 of 15 November 2023 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the thresholds for concessions.

The applicable regulations differ above and below the threshold. For all awards above the threshold value, section 97ff of the GWB must apply first. Section 113 of the GWB further contains an authorisation to issue further provisions in the form of ordinances. The Ordinance on the Award of Public Contracts in the Field of Transport, Drinking Water Supply and Energy Supply (Sektorenverordnung – SektVO)²⁰⁴ regulates the awarding of contracts in connection with activities in the fields of drinking water and energy supply as well as transport. The regulations apply to construction as well as supplies and services and professional services. The Ordinance on the Award of Concession Contracts (Konzessionsvergabeverordnung – KonzVgV) also applies across the board, covering the area of construction concessions as well as service concessions.²⁰⁵ For all services outside the sector, the Ordinance on the Award of Public Contracts (Vergabeverordnung – VgV) contains specific regulations.²⁰⁶ The Defence and Security Procurement Ordinance (Vergabeverordnung Verteidigung und Sicherheit – VSVgV) applies to the award of defence- or security-related services and supplies.²⁰⁷ Pursuant to section 2 of the VgV, only individual provisions of the VgV apply to construction works. In all other respects, the Construction Tendering and Contract Regulations, Part A (EU-VOB/A) apply.²⁰⁸

Below the threshold values, the legal basis for awarding public contracts is the budgetary law of the respective authority, according to which an invitation to tender must be issued when awarding contracts for supplies and services.²⁰⁹ This ensures the award of contracts based on uniform award principles.²¹⁰

For services and supplies, the Rules of Procedure for the Award of Public Supply and Service Contracts below the EU Thresholds (Unterschwellexvergabeordnung – UVgO) are available. These regulations take effect at the federal state level via an application order.²¹¹

The provisions of the first section of the Part A of the Construction Tendering and Contract Regulations (VOB/A) apply to construction works. These are also referred to as the basic sections.²¹²

²⁰⁴ Published on 12 April 2016.

²⁰⁵ Published on 2 April 2016. See Ziekow in *Vergaberecht* Introduction para 23.

²⁰⁶ Published on 12 April 2016.

²⁰⁷ Published on 12 July 2012.

²⁰⁸ Published on 31 January 2019.

²⁰⁹ See, for example, section 55 of the Federal Budget Code or section 55 of the Hamburg State Budget Code; Ziekow in *Vergaberecht* Introduction para 27.

²¹⁰ Ziekow in *Vergaberecht* Introduction para 27.

²¹¹ Published on 2 February 2017. See Ziekow in *Vergaberecht* Introduction para 29.

²¹² Ziekow in *Vergaberecht* Introduction para 30.

3.2.3 Federal state level

Finally, various federal states have enacted procurement laws. These regulate, for example, the consideration of social and ecological purposes in the awarding of contracts.²¹³ The public procurement laws regularly apply to awards above and below the threshold values.²¹⁴

3.3 Application of public procurement law

The application of German public procurement law is based on the concept of the public contracting authority as well as the classification of the object of performance as a public contract.

Public contracts and concessions are awarded by means of competitive and transparent tender procedures.²¹⁵ In both cases, public procurement law applies. Public contracts are defined as pecuniary contracts for the delivery of goods, the execution of works or the provision of services between a public contracting authority or a sector contracting authority and an undertaking.²¹⁶

Concessions, on the other hand, are divided into two categories: works concessions and service concessions. Works concessions are pecuniary contracts in terms of which the grantor of the concession entrusts the undertaking with the execution of works. Service concessions relate to services other than works concessions. In the case of a concession, the consideration for the services rendered consists either in the right to use the work or in this right together with remuneration.²¹⁷

A concession is different from a public contract in that, in the case of a concession, the operating risk for the use of the building or the provision of services is transferred to the concessionaire. This occurs if there is no guarantee that the investments made can be recouped or the concessionaire is exposed to the uncertainties of the market. This means that possible losses for the concessionaire may be significant.²¹⁸

²¹³ Ziekow in *Vergaberecht* Introduction para 34.

²¹⁴ See, for example, section 1 of the Hamburg Public Procurement Act (Hamburgisches Vergabegesetz – HmbVgG, published on 13 February 2006) or section 1(2) of the Act on ensuring compliance with collective agreements and minimum wages in the award of public contracts in North Rhine-Westphalia (Tariftreue- und Vergabegesetz Nordrhein-Westfalen – TVgG NRW, published on 22 March 2018).

²¹⁵ Section 97(1) of the GWB.

²¹⁶ Section 103(1) of the GWB.

²¹⁷ Section 105(1) of the GWB.

²¹⁸ Section 105(2) of the GWB.

A distinction must also be made between public contracting authorities, sector contracting entities and concession grantors with regard to the legal subject. Section 99 of the GWB defines public contracting authorities. While section 99 no. 1 of the GWB defines the classic contracting authorities with regard to regional authorities, section 99 no. 2 of the GWB defines a number of functional contracting authorities.²¹⁹ This extends the circle of subjects covered by public procurement law to other public entities, as well as units of the public sector organised under private law. These legal entities are not directly involved in the organisation of the state. Nevertheless, they perform tasks of the state and have a special closeness to the state. In order to prevent entities from privatising to circumvent public procurement law, the legal entities mentioned there are also subject to public procurement law.²²⁰ Furthermore, section 99 no. 3 of the GWB refers to associations whose members fall under nos. 1 or 2. And, finally, section 99 no. 4 of the GWB specifically includes natural persons or legal entities under private law and those under public law if they do not fall under no. 2. These are defined as contracting authorities if they receive more than 50 per cent funding for their projects in the areas of civil engineering projects, for the construction of hospitals, sports, leisure or recreational facilities, school, university or administrative buildings, or for related services and planning competitions.

Section 100 of the GWB defines sector contracting entities, which are contracting authorities that conduct a sector activity. In addition, natural and legal persons under private law are contracting entities if they conduct a sectoral activity and this activity is conducted on the basis of special or exclusive rights conferred by a competent authority, or if contracting authorities exercise a dominant influence over these persons.

The sector activities are defined in section 102 of the GWB which leads to a contracting entity being considered a sector contracting entity. The sectors covered are drinking water supply, electricity supply, gas and heat supply, transport services, ports and airports, and fossil fuels.²²¹

²¹⁹ Section 99 no. 2 provides as follows:

‘2. other legal persons under public or private law that were established for the specific purpose of meeting non-commercial needs in the general interest, if

a) they are for the most part financed through a participation or in some other way by entities within the meaning of nos 1 or 3 acting individually or jointly;

b) their management is subject to supervision by entities under nos 1 or 3; or

c) more than half of the members of their management or supervisory boards have been appointed by entities under nos 1 or 3;

the same shall apply if such legal person, individually or together with others, provides most of the financing to another legal person under public or private law, exercises supervision over its management or has appointed the majority of the members of a management or supervisory board.’

²²⁰ ECJ, decision of 12 September 2013 – C-526/11 *Ärztammer Westfalen-Lippe*; Bungenberg & Schelhaas in *BeckOK Vergaberecht* section 99 para 22.

²²¹ Wichmann in *BeckOK Vergaberecht* section 102 Introduction.

Furthermore, special or exclusive rights in the above sense are those rights which result in the exercise of this activity being reserved to one or more undertakings. At the same time, the possibility of this activity being conducted by other companies is significantly reduced. There is an exception for such rights if they have been granted in a tender procedure or in another procedure that has been announced in good time and is based on objective criteria.²²²

A controlling influence is presumed to exist where a public contracting authority directly or indirectly holds the majority of the undertaking's subscribed capital. This is also possible if a public contracting authority holds a majority of the voting rights attached to the shares of the undertaking or can appoint more than half of the members of the undertaking's administrative, management or supervisory body.²²³

Furthermore, concession grantors are contracting authorities that award a concession, and certain sectoral contracting authorities that conduct a sectoral activity and award a concession for the purpose of conducting this activity.²²⁴

In addition, the principles of public procurement law also apply to the sale of state assets, such as state property. In Germany, however, this applies less on the basis of public procurement law than on the basis of budgetary law and, in particular, state aid law. Therefore, although public procurement law does not have to be applied directly, a competitive, transparent, non-discriminatory and unconditional award procedure is regularly required. This is because an award procedure for the sale of a state asset is intended to ensure that it is sold at the market price. If the price paid for the asset is too low, the buyer would be granted an advantage and thus inadmissible state aid that distorts competition in the internal market.²²⁵

Finally, an obligation to comply with public procurement law and its principles can also be stipulated through the receipt of grants. The grant decision is usually accompanied by ancillary provisions. For certain types of grants, general ancillary provisions are made part of the grant award notice, for example, General Auxiliary Conditions for Grants for Project Funding (ANBest-P).²²⁶

According to section 3.1 of the ANBest-P, the following applies: if the grant exceeds EUR100,000, the UVgO applies to the award of goods and service contracts and the procedural

²²² Section 100(2) of the GWB.

²²³ Section 100(3) of the GWB.

²²⁴ Section 101 of the GWB.

²²⁵ Section 4 Commission Notice on the notion of State aid as referred to in Art. 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01.

²²⁶ Published on 13 June 2019.

rules of the VOB/A apply to the award of construction contracts.²²⁷ In this case, the strict regulations for public procurement generally apply, e.g. also with regard to the definition of qualification criteria. There are only individual simplifications with regard to the division into lots, the publication of contract notices, the ex-post publication obligation, the requirements for the form and transmission of requests to participate and tenders, the obligation to provide clarification in the event of unusually low tenders and the obligation to inform bidders after the contract has been awarded. These requirements do not have to be observed by the grant recipients.

If the grantor specifies a higher value limit above which public procurement law applies, the grant award notice must contain the requirement that in this case the contract must be awarded to competent and capable providers in accordance with competitive criteria on economic terms and, where possible, at least three tenders must be obtained.²²⁸ In this case, the contracting authority is much freer to define the qualification criteria in order to check suitability.

Finally, it should be noted that a breach of these provisions cannot be reviewed in the context of a review procedure under public procurement law before the public procurement chamber. This is because the recipient of the grant is generally not a contracting authority.²²⁹ Rather, the review takes place indirectly before the administrative courts. This is because a breach of the procurement regulations constitutes a breach of the obligation to apply procurement law and therefore a breach of an ancillary provision of the grant notice. This entails the risk that the grant notification will be revoked and the grant reclaimed. Grant law and public procurement law are interwoven in this context. The proper use of funds under public procurement law is ensured by the law on grants. This is especially important for private actors to remember. There is often a perception that only the state is bound by public procurement law, but the general collateral clauses also make private parties subject to the provisions of public procurement law.

The regulations show that the application of public procurement law is initially linked particularly to public authorities. However, private parties are also included in the application of public procurement law, because when public funds are used to realise certain projects, private companies are in a similar situation to public authorities and must also follow the rules that apply there.

²²⁷ Section 3.1 of the ANBest-P.

²²⁸ Section 5.3.3 of Section 44 of the Federal Budget Code.

²²⁹ Section 159(1) of the GWB. Federal Procurement Chamber, decision of 22 August 2018 – VK 1-77/18.

3.4 Exceptions to public procurement law

The provisions of the GWB contain some exceptions to public procurement law. Firstly, section 107 of the GWB defines exceptions for various subject areas. The exceptions listed there are based on international and EU law.²³⁰ They cover the areas of acquisition, the renting or leasing of real estate,²³¹ and employment contracts.²³²

Sections 108 and 109 of the GWB also contain further general exceptions to public procurement law. These concern certain relationships between contracting authorities and contractors, particularly in the public sector.²³³

Finally, there are exceptions for various areas of public procurement law. There are specific area exceptions for the concrete scope of application.²³⁴ In the sectoral area, there are also further structural exceptions for certain companies and activities.²³⁵

3.5 Principles of public procurement law

Section 97 of the GWB sets out the general and essential principles of public procurement law, which include competition, transparency, economic efficiency and proportionality,²³⁶ equal treatment,²³⁷ the consideration of strategic objectives²³⁸ and small and medium-sized enterprises (SME) interests,²³⁹ electronic communication²⁴⁰ and the objectification of company rights in the award procedure.²⁴¹

3.5.1 Competition

The principle of competition requires that as many tenderers as possible be given the opportunity to offer their services in an award procedure. For this reason, award procedures

²³⁰ M Plauth in *GWB – Vergaberecht einschließlich WRegG* section 107 para 6; Friton & Wolf in *BeckOK Vergaberecht* section 107 Introduction.

²³¹ Section 107(1) no. 2 of the GWB.

²³² Section 107(1) no. 3 of the GWB.

²³³ B von Engelhardt & H Kaelble in *GWB – Vergaberecht einschließlich WRegG* section 108 para 6ff; Friton & Wolf in *BeckOK Vergaberecht* section 107 para 2.

²³⁴ Sections 116ff, 137, 145 and 149ff of the GWB.

²³⁵ Sections 138–140 of the GWB; Friton & Wolf in *BeckOK Vergaberecht* section 107 para 2.

²³⁶ Section 97(1) of the GWB.

²³⁷ Section 97(2) of the GWB.

²³⁸ Section 97(3) of the GWB.

²³⁹ Section 97(4) of the GWB.

²⁴⁰ Section 97(5) of the GWB.

²⁴¹ Section 97(6) of the GWB; Dörr in *Beck'scher Vergaberechtskommentar* section 97 GWB para 2.

involving prior publication have, in principle, priority over procedures in which companies may be directly invited to submit an offer.²⁴²

3.5.2 Transparency

The transparency requirement aims to ensure that an award procedure is comprehensible to all tenderers and thus guarantees genuine competition. For example, all participants in the procedure must be provided with the same information, or the requirements for the award procedure must be published in advance.

3.5.3 Equal treatment and non-discrimination

The principle of equal treatment requires that all participants in an award procedure be treated equally. Therefore, competition may be restricted to individual companies or products only in exceptional cases. The principle of non-discrimination is also important in this context. In addition, the contractor cannot be selected on the basis of origin, but solely on the basis of suitability, for example, expertise, performance and reliability.

3.5.4 SME-friendly procurement

The principle of awarding contracts in a way that is friendly to small and medium-sized enterprises requires that large contracts be divided into individual specialised parts in order to give small and medium-sized enterprises the opportunity to compete for a contract for which they have capacity. Only in exceptional cases is an overall award of contracts permissible, which must be justified in writing.

3.5.5 Economic efficiency

The requirement of economic efficiency means that the contract must be awarded to the most affordable tenderer. The lowest bid price alone is not decisive; the economic efficiency of a bid should in principle be determined by the best price–performance ratio.²⁴³

²⁴² Federal Administrative Court, decision of 13 February 2013 – 3 B 58/12, para 7.

²⁴³ See in general regarding principles of procurement law in Germany, J Lux in *GWB – Vergaberecht einschließlich WRegG* section 97 para 10ff; H Schröder in G Wurzel, A Schraml & A Gaß (eds) *Rechtspraxis der kommunalen Unternehmen* (2021) section H para 173ff.

3.6 Procurement methods

Public procurement law provides for different types of procedures in the upper and lower threshold ranges; these procedures may be chosen under certain conditions. When determining the type of procedure, various aspects must be considered, such as the admissibility of the type of procedure, the duration of the procedure and the possibility of negotiation.

In the upper threshold range, the following types of procedure for supply and (professional) services may be chosen:

- open procedure in terms of section 15 of the VgV
- restricted procedure in terms of section 16 of the VgV
- negotiated procedure with competitive tender in terms of section 17 of the VgV
- negotiated procedure without competitive tender in terms of section 17 of the VgV
- competitive dialogue in terms of section 18 of the VgV
- innovation partnership in terms of section 19 of the VgV.

In the lower threshold area, the following types of procedure are available for supply and (professional) services:

- public invitation to tender in terms of section 9 of the UVgO
- limited invitation to tender after a competitive tender in terms of section 10 of the UVgO
- limited invitation to tender without a competitive tender in terms of section 11 of the UVgO
- negotiated award with a competitive tender in terms of section 12 of the UVgO
- negotiated award without a competitive tender in terms of section 12 of the UVgO
- direct order in terms of section 14 of the UVgO.

Various types of procedures are also available for the area of construction services. The following types of procedure are possible in the upper threshold range:

- open procedure in terms of section 3b(1) of the EU-VOB/A
- restricted procedure in terms of section 3b(2) of the EU-VOB/A
- negotiated procedure with competitive tender in terms of section 3b(3) of the EU-VOB/A
- negotiated procedure without competitive tender in terms of section 3b(3) of the EU-VOB/A
- competitive dialogue in terms of section 3b(4) of the EU-VOB/A
- innovation partnership in terms of section 3b(5) of the EU-VOB/A.

In the lower threshold area, the following types of procedure are available for construction services:

- public invitation to tender in terms of section 3b(1) of the VOB/A
- limited invitation to tender after a competitive tender in terms of section 3b(2) of the VOB/A
- limited invitation to tender without a competitive tender in terms of section 3b(3) of the VOB/A
- competitive bidding in terms of section 3b(4) of the VOB/A
- direct order in terms of section 3a(4) of the VOB/A.

The choice of a specific type of process depends on various factors and requirements. In general, as many tenderers as possible should be given the opportunity to offer their services. Accordingly, a public invitation to tender or a limited invitation to tender with a competitive bidding process must be given priority over a negotiated award, a direct award or a direct contract, unless these instructions or the relevant award regulations (VgV, UVgO and VOB/A) permit exceptions. For example, the negotiated procedure with a competitive tender is only available if the contract involves conceptual or innovative solutions.²⁴⁴ These exceptions must

²⁴⁴ Section 14(3) no. 2 of the VgV.

be interpreted narrowly and are conclusive.²⁴⁵ With regard to the qualification criteria, it should also be noted that there is a two-stage assessment. Initially, only the suitability of the bidders is checked at the level of the participation competition based on the qualification criteria. Only the suitable bidders then take part in the second stage, the so-called bidding phase. Irrespective of the specific type of procedure, however, suitability must be checked based on the qualification criteria for all types of procedures.

3.7 Conclusion

German public procurement law is decisively influenced by the EU level. In particular, EU directives set requirements for the member states and these must be implemented in national law. Unlike in South Africa, the main provisions of public procurement law are not enshrined in the Constitution, but in national legislation. The decisive factor is the distinction between contracts below the threshold value and contracts above the threshold value. All contracts above the threshold value must be awarded in an EU-wide procurement procedure; all contracts below the threshold value must be awarded in a national procedure. Overall, German public procurement law is characterised by a large number of regulations. On the one hand, this concerns the large number of laws, but also the number of regulations contained therein and the level of detail.

The application of public procurement law is particularly influenced by the fact that organisations at the state level award public contracts. The basic principles of public procurement law – competition and transparency – are similar to those of South African public procurement law and must be observed when determining the qualification criteria. With regard to the SANRAL decision, in South Africa it is sufficient for the evaluator to identify and determine the criteria and their weighting in the evaluation as part of the award process. German public procurement law is stricter here with regard to the principle of transparency and would consider this to be too subjective. In Germany, all evaluation criteria must be made known objectively and transparently in advance. This makes it clear to all bidders how the evaluation process works and they can align their bids accordingly. At the same time, even in Germany it is not a mechanical process, but leaves room for individual assessment, for example, when concepts are evaluated that involve a certain degree of subjective or overall assessment.

²⁴⁵ M Favier & H Schüler, 'Etablierte Regeln für das Verhandlungsverfahren mit Teilnahmewettbewerb auf dem Prüfstand des neuen Rechts' ('Established rules for the negotiated procedure with a call for competition scrutinised under the new law') (2016) 8 *ZfBR* 761 766; Federal Administrative Court, decision of 13 February 2013 – 3 B 58/12 para 7.

However, the criteria on the basis of which this is done must be published objectively and transparently. This is reasonable in order to prevent the risk of improper awarding of contracts, preferential treatment of individual bidders or nepotism.

Public procurement law does not apply in certain circumstances. In these cases, the procurement principles and the requirements for the definition of qualification criteria do not have to be observed in the context of public procurement. The exceptions are regulated in much greater detail than they are in South Africa. Many exceptions are listed as to when German public procurement law does not apply.

German public procurement law also provides for different procurement methods, for example, those with negotiations or those with a preliminary competition. There are many different methods and these are subject to very specific regulations regarding when they can be used and how they must be conducted. All award procedures have one thing in common: the suitability of the bidders must always be confirmed based on qualification criteria. The German and South African public procurement systems coincide in this respect.

CHAPTER FOUR: Objectives and challenges of public procurement law

The South African and the German public procurement systems face different challenges. The definition of procedural criteria, which includes the determination of qualification criteria, plays an important role in the objectives and challenges facing procurement law systems today. To achieve public procurement law objectives, the existing rules for setting qualification criteria must be known and constantly reconsidered. This raises the question of whether the qualification criteria are still capable of achieving the objectives of public procurement law or whether adjustments need to be made. At the same time, procurement law systems are constantly facing new challenges. The procedural criteria, particularly the qualification criteria, help to address these. In some cases, however, there are also problems with the determination of the procedural criteria themselves. In this case, the procedural criteria must be adapted. Only a stable and at the same time adaptable procurement system can achieve the objectives of public procurement and address new challenges.

4.1 South Africa

South Africa faces various challenges with regard to public procurement law and especially qualification criteria and eligibility. Corruption is a major issue in South Africa,²⁴⁶ jeopardising the essential elements of public procurement law, which are geared towards fair, transparent and equitable competition.²⁴⁷ Corruption also affects key aspects of democracy, such as social justice, equality and human dignity.²⁴⁸ Corruption is widespread in South Africa and permeates both private and state institutions.²⁴⁹ Corruption occurs especially when there is a weak system, no internal controls or a need for urgent procurement.²⁵⁰ For example, in the 2019 and 2020 financial years, only 42 per cent of all audited entities had good internal controls; the remainder had irregularities and gaps in accountability.²⁵¹ In these circumstances, officials can abuse the system for their own interests and to enrich themselves.

The Constitutional Court has stated:

²⁴⁶ S Williams & G Quinot 'Public procurement and corruption: The South African response' (2007) 124(2) *SALJ* 339 at 339.

²⁴⁷ Mathiba (2020) *JOPA* 642; Volmink (2022) *APPLJ* 54; Ambe & Badenhorst-Weiss (2012) *JTSCM* 251.

²⁴⁸ Mathiba (2020) *JOPA* 643.

²⁴⁹ Mathiba (2020) *JOPA* 643.

²⁵⁰ Mantzaris (2014) *AJPA* 71.

²⁵¹ Auditor-General of South Africa 'Consolidated general report on national and provincial audit outcomes, PFMA 2019–2020' 12, 14, 122; B Sibanda & N Tshikovhi 'Supply chain performance and preferential procurement in Gauteng government departments' (2022) 16(0) *JTSCM* 1 at 2.

Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.²⁵²

The fight against corruption is therefore one of the objectives of public procurement law in South Africa. Public procurement regulations are intended to prevent the awarding of public contracts in return for the payment of money.²⁵³

Corruption may be found both in the implementation of procurement procedures and in the execution of contracts. The award of a public contract in exchange for money is only one manifestation of this. Granting benefits to family members, supporting political campaigns or supporting a particular region also fall under this category.²⁵⁴ In the execution of contracts, corruption occurs when money is paid for services that are not provided.²⁵⁵

Behind the fight against corruption are the objectives of public procurement law. The application of public procurement law is intended to strengthen the integrity of the legal system. The principle of best value for money is also undermined by corruption, because corruption means that the tenderer with the best offer no longer wins.²⁵⁶ Corruption also means that the winner is no longer the one who is best suited to fulfil the contract. Corruption may also lead to a major loss of image for the public procurement system; tenderers are in turn discouraged from submitting a bid, which leads to less competition.²⁵⁷

Events surrounding the Covid-19 pandemic were also conducive to corruption. The pandemic presented an unprecedented situation that posed particular challenges for public procurement law. Various medical supplies had to be procured in a very short space of time, and the government developed an ‘emergency procurement strategy’.²⁵⁸ Within this framework, deviations from the strict requirements of public procurement law were permitted, provided the reasons were documented.²⁵⁹

²⁵² *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 57.

²⁵³ Quinot & Arrowsmith ‘Introduction’ in *Public Procurement Regulation in Africa* 11.

²⁵⁴ Quinot & Arrowsmith ‘Introduction’ in *Public Procurement Regulation in Africa* 12; Kollamparambil (2014) *LDD* 212; Williams & Quinot (2007) *SALJ* 341ff; Mantzaris (2014) *AJPA* 71.

²⁵⁵ Quinot & Arrowsmith ‘Introduction’ in *Public Procurement Regulation in Africa* 12.

²⁵⁶ Quinot & Arrowsmith ‘Introduction’ in *Public Procurement Regulation in Africa* 13.

²⁵⁷ Quinot & Arrowsmith ‘Introduction’ in *Public Procurement Regulation in Africa* 13.

²⁵⁸ Mathiba (2020) *JOPA* 642, 644.

²⁵⁹ Rankin (2021) *APPLJ* 86.

Nevertheless, many cases of corruption were recorded in the procurement of goods during the pandemic.²⁶⁰ There were many reasons for this. Some argue that, due to the government's extensive aid programme, people discovered that the procurement of medical supplies was a lucrative business. Others note that the procurement law system contains loopholes in the case of exceptional situations.²⁶¹

In addition, a lack of transparency and regulatory gaps are problems. This may be seen, for example, in the preferential procurement policy. In terms of the latter, the tenderer who has achieved the highest number of points must generally be selected. However, an exception must be made if there are 'objective criteria' in addition to 'specific goals'.²⁶² In addition, the effects of this preferential procurement policy need to be further analysed, with some criticising the lack of controls and the unavailability of the necessary data.²⁶³ There is currently too little data available for this. The preferential procurement policy may also lead to less competition due to the requirements imposed.²⁶⁴ Some argue that the system is inefficient, because it costs too much money and has little effect. It is further argued that one of the reasons for this is that the regulations do not create sufficient incentives for job creation, support for small businesses and support for local procurement.²⁶⁵

Finally, a major challenge is the support of SMEs through public procurement law. Eighty per cent do not manage to survive the first year of existence; a further 60 per cent of these do not survive the further second year. The procurement law requirements are viewed as too difficult and inflexible, so SMEs often do not tender for public contracts. Supporting SMEs must also be a goal of procurement policy in order to create jobs and strengthen the economy.²⁶⁶ In particular, stiff requirements in the area of secondary objectives, such as certain minimum threshold quotas, prevent SMEs from participating in tenders and thus favour larger companies.²⁶⁷ Musabayana and Mutambara also reach this conclusion, although they argue that SMEs are mainly black-owned and large companies are mainly white-owned. They therefore

²⁶⁰ Mathiba (2020) *JOPA* 642 at 644.

²⁶¹ Mathiba (2020) *JOPA* 642 at 642.

²⁶² Section 2(1)(f) of the PPPFA; Kollamparambil (2014) *LDD* 212ff.

²⁶³ Shai, Molefinyana & Quinot (2019) *Sustainability* 20.

²⁶⁴ Kollamparambil (2014) *LDD* 214; ILO 'Targeted procurement in the Republic of South Africa: An independent assessment' (April 2002) 2ff.

²⁶⁵ Ambe & Badenhorst-Weiss (2012) *JTSCM* 253.

²⁶⁶ Kollamparambil (2014) *LDD* 214; J Luiz 'Small business development, entrepreneurship and expanding the business sector in a developing economy: The case of South Africa' (2003) 18(2) *JABR* 53 at 65.

²⁶⁷ Maritz (2022) *APPLJ* 83; R Hamann, S Khagram & S Rohan 'South Africa's charter approach to post-apartheid economic transformation: Collaborative governance or hardball bargaining?' (2008) 34(1) *JSAS* 21.

suggest that the BEE policy, which aims to strengthen the black population, is a myth and needs to be rethought.²⁶⁸

4.2 Germany

Public procurement law also faces various challenges in Germany. In recent years, the biggest challenge has been dealing with the Covid-19 pandemic. The EU, the German state and the federal states reacted to the pandemic with various handouts that enabled the rapid and unbureaucratic procurement of masks and other required medical products. However, procurement law as a whole was also adjusted to crisis mode by means of handouts and decrees.²⁶⁹

German public procurement law is also currently concerned with the war in Ukraine. The Federal Ministry for Economic Affairs and Climate Protection (BMWK) issued a circular on 13 April 2022 on the application of urgent award procedures in connection with the Russian war of aggression against Ukraine. The facilitations within the framework of the implementation of award procedures are intended to enable these to be carried out quickly and efficiently in order to procure services that become necessary at short notice.²⁷⁰

Due to the war and the sanctions imposed against Russia, there have been some significant price increases for certain products and raw materials. Nevertheless, public contracts must continue or be put out to tender again. In a circular, the BMWK provided information on how to deal with price fluctuations and recommended the inclusion of price escalator clauses in individual cases.²⁷¹ The regulations for the construction sector were extended until 30 June 2023 by

²⁶⁸ Musabayana & Mutambara (2022) *AABFJ* 80.

²⁶⁹ European Union 'Covid-19' <https://eur-lex.europa.eu/content/news/Covid19.html?locale=en> (accessed 8-01-2024). See also, as an example for Bavaria, the various regulations: Bayerisches Staatsministerium für Wirtschaft, Landesentwicklung und Energie, Öffentliches Auftragswesen <https://www.stmwi.bayern.de/wirtschaft/aufsicht-und-recht/oeffentliches-auftragswesen/> (accessed 06-01-2024).

²⁷⁰ BMWK, Rundschreiben zur Anwendung von dringlichen Vergaben im Zusammenhang mit dem russischen Angriffskrieg gegen die Ukraine, 13 April 2022 <https://www.absthessen.de/pdf/2022%2004%2013%20Rundschreiben%20des%20BMWK%20-%20Anwendung%20von%20dringlichen%20Vergaben%20im%20Zusammenhang%20mit%20dem%20russischen%20Angriffskrieg%20gegen%20die%20Ukraine.pdf> (accessed 06-01-2024).

²⁷¹ BMWK, Hinweise zum Umgang mit Preissteigerungen in der öffentlichen Auftragsvergabe (Liefer- und Dienstleistungen) vor dem Hintergrund des russischen Angriffskrieges auf die Ukraine, 24 June 2022 https://www.bmwk.de/Redaktion/DE/Downloads/A/auslegungs-rundschreiben-preissteigerungen-ukrus.pdf?__blob=publicationFile&v=6 (accessed 06-01-2024). See also for the construction sector: Bundesministerium für Wohnen, Stadtentwicklung und Bauwesen, Lieferengpässe und Preissteigerungen wichtiger Baumaterialien als Folge des Ukraine-Kriegs, 25 March 2022 https://www.bmwsb.bund.de/SharedDocs/downloads/Webs/BMWSB/DE/veroeffentlichungen/bauen/baustoffpreissteigerung-erlass.pdf;jsessionid=3A3141607CB673E27A92A57664E1C17D.1_cid350?__blob=publicationFile&v=2 (accessed 06-01-2024).

decrees dated 22 June and 6 December 2022.²⁷² The federal states have largely adopted the regulations and decrees from the federal level.²⁷³

The Federal Ministry of Housing, Urban Development and Building finally announced in a decree dated 20 June 2023 that the standard procedure would apply again from 1 July 2023.²⁷⁴

At a wider level, the coalition agreement of the current federal government summarises the main challenges as follows:

We want to simplify, professionalise, digitalise and accelerate public procurement procedures. The Federal Government will make public procurement and awarding more economic, socially, ecologically and innovatively, and strengthen the binding nature of public procurement legal certainty of award decisions or raise the barriers to access for small and medium-sized for small and medium-sized enterprises. We will implement the existing requirements in accordance with European public procurement law in national public procurement law. The public sector should participate in the development of a system for calculating climate and environmental costs. We want to drive forward legally compliant digitisation in this area and to this end create a user-friendly central platform through which all public procurement contracts can be accessed and which enables and which enables companies to be pre-qualified. We want to promote quick decisions in public procurement procedures and support federal states and municipalities in simplifying, digitalising and simplification, digitalisation and sustainability.²⁷⁵

Public consultation on the transformation of public procurement law was therefore conducted. The consultation resulted in the demand to simplify, professionalise, digitalise and accelerate public procurement. At the same time, however, the social, ecological and innovative orientation must be strengthened.²⁷⁶ A Bill to transform public procurement law is currently being drafted.

²⁷² Bundesministerium für Wohnen, Stadtentwicklung und Bauwesen, Lieferengpässe und Preissteigerungen wichtiger Baumaterialien als Folge des Ukraine-Kriegs, 22 June 2022 and 6 December 2022 https://www.fib-bund.de/Inhalt/Vergabe/VHB/2022-06-22_BMWSB_BW17_Stoffpreissteigerungen_Verlaengerung_Erlass.pdf (accessed 06-01-2024).; https://www.fib-bund.de/Inhalt/Vergabe/VHB/2022-12-06_BII6_Stoffpreissteigerung_Verlaengerung_2.pdf (accessed 06-01-2024).

²⁷³ Bayerisches Staatsministerium für Wohnen, Bau und Verkehr, Lieferengpässe und Preissteigerungen wichtiger Baumaterialien als Folge des Ukraine-Kriegs, 24 June 2022 https://www.bayika.de/bayika-wAssets/docs/aktuelles/2022/2022-06-24_StMB-23-40012.1-3-2-25_Lieferengpaesse-Preissteigerungen-wichtiger-Baumaterialien-als-Folge-des-Ukraine-Kriegs.pdf (accessed 06-01-2024).

²⁷⁴ Das Bundesministerium für Wohnen, Stadtentwicklung und Bauwesen, Lieferengpässe und Preissteigerungen wichtiger Baumaterialien als Folge des Ukraine-Kriegs, 20 June 2023 https://www.abst-brandenburg.de/wp-content/uploads/2023/06/2023-06-20-BII6-70437_94-Stoffpreissteigerungen-Aufhebung.pdf (accessed 06-01-2024).

²⁷⁵ Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FDP, Mehr Fortschritt wagen, 2021 33ff (translated version).

²⁷⁶ BMWK Öffentliche Aufträge und Vergabe <https://www.bmwk.de/Redaktion/DE/Dossier/oeffentliche-auftraege-und-vergabe.html> (accessed 06-01-2024); BMWK, Öffentliche Konsultation zur Transformation des

As shown, secondary objectives, for example, social or environmental objectives are becoming increasingly relevant in public procurement law. This area is also particularly relevant at the level of qualification criteria. In addition, reducing bureaucracy to simplify and accelerate procurement procedures is a major issue, as new regulations for public procurement law, especially at the EU level, are being issued all the time. These regulations are located outside the classic public procurement laws and do not contribute to a better overview due to their dispersion.

Finally, the Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG)²⁷⁷ poses a challenge. This Act came into force on 1 January 2023 and imposes new obligations on companies in respect of human rights along the supply chain. If companies violate the requirements, they may be excluded from the award process in terms of section 22 of the LkSG and section 124(2) of the GWB. This takes place within the framework of the suitability test and poses new challenges for companies.²⁷⁸

4.3 Conclusion

Public procurement law in both South Africa and Germany is facing different challenges. South Africa is particularly concerned with the fight against corruption. If the established rules are not observed or do not offer exceptions, the procurement law system loses its good reputation and efficiency. The objectives of the procurement law system with regard to transparency also suffer as a result. Transparency helps to make decisions in the award procedure comprehensible to participants. For example, there must be transparently defined qualification criteria on the basis of which it can be understood and verified that certain companies are considered suitable. It is also suggested that the qualification criteria are sometimes too complicated, and therefore SMEs, for example, avoid participating in public procurement procedures. However, this weakens the procurement law system, particularly when pursuing secondary objectives, which are specifically aimed at strengthening SMEs.

In Germany, the challenges are to simplify the procurement law system and speed up the procedures. The rules are sometimes widely scattered and difficult to understand. This also applies to the area of qualification criteria, so companies are faced with the challenge of

Vergaberechts („Vergabetransformationspaket“)

<https://www.bmwk.de/Redaktion/DE/Artikel/Service/Gesetzesvorhaben/oeffentliche-konsultation-zur-transformation-des-vergaberechts.html#docce41d96c-90bd-499d-91c8-87b16a3a19cfbodyText4> (accessed 06-01-2024).

²⁷⁷ Published on 16 July 2021.

²⁷⁸ Opitz in *Beck'scher Vergaberechtskommentar* section 126 GWB para 24.

determining whether they are even qualified to take part in the procurement procedure. Secondary objectives play a role in the qualification criteria and in the entire procurement law system in both South Africa and Germany.

CHAPTER FIVE: Qualification criteria in detail

Qualification criteria are one of the key factors in the success of an award procedure. As already shown, the qualification criteria are used to determine whether a company has the capacity to perform the awarded contract properly. South Africa and Germany have different regulations regarding the definition of qualification criteria. On the one hand, these relate to the specific order and assess suitability based on, among other things, economic and financial as well as technical and professional performance (see sections 5.1.1, 5.1.2 and 5.2.1–5.2.4). However, achieving secondary objectives using the qualification criteria is also important (see sections 5.1.3 and 5.2.5). Finally, the regulations regarding exclusions must be taken into account (see sections 5.1.4 and 5.2.6). These are closely related to the qualification criteria and mean that even if a company otherwise meets the qualification criteria, it may still be excluded from the procurement procedure.

Understanding the regulations and the interaction of these different levels is essential for an overall understanding of the determination of qualification criteria. It is also important to understand the similarities and differences between the two systems. From this, recommendations can be made for determining the qualification criteria (see sections 5.1.5 and 5.2.7 and chapter 6).

5.1 South Africa

5.1.1 General regulations regarding qualification criteria

Eligibility plays a significant role in the fulfilment of tender procedures. As already shown, to be able to assess this, the qualification criteria must be determined. They help to decide whether a tenderer will be able to successfully execute the contract.²⁷⁹ If a tenderer meets the qualification criteria, its eligibility is proven.

In South African procurement law, the criterion of ‘functionality’ plays a decisive role in determining qualification. This includes both the narrow concept of qualification, which describes whether a tenderer has the necessary qualification to execute the contract, and the concept of substantive responsiveness, which includes the conformity of the offer with the invitation to tender.²⁸⁰

²⁷⁹ Quinot (2014) *PELJ* 1111.

²⁸⁰ *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others* 2011 (4) SA 406 (KZP); [2010] ZAKZPHC 23 paras 21 and 30; Quinot (2014) *PELJ* 1113; P Bolton ‘An analysis of the criteria used to evaluate and award public tenders’ (2014) 28(1) *SJ* 1 at 3.

First, a two-stage examination was introduced by an instruction note in 2010. At the first stage, tenderers must achieve a minimum score for functionality. Only then will they be evaluated at the second stage, based on price and preference points.²⁸¹ According to the Procurement Regulations 2017, functionality means the capability of a tenderer to deliver goods or services that meet the specifications defined in the tender documents.

The *Implementation Guide: Preferential Procurement Regulations 2017* also addresses this aspect. It depends on the specific subject matter of the tender whether tenders will be invited based on functionality. The quality, reliability, profitability and durability of a service, as well as the technical capacity and ability of the bidder to perform a contract, may be considered.

Even if the description is relatively unspecific, the two essential elements mentioned above are included. On the one hand, this is the quality of the goods or services actually procured, for example, the essential characteristics of the subject matter of the contract. In addition, it concerns the characteristics of the tenderer as far as they relate to the subject matter of the contract.²⁸² These concern, for example, the experience and track record of a tenderer, the technical knowledge and skills of a tenderer, or the qualifications and competence of the tenderer's personnel.²⁸³

In practice, this means that the public contracting authority must first determine, in the tender documents, if the tender will be evaluated based on functionality.²⁸⁴ Further requirements for the functionality criteria are that they must be objective – the criteria for measuring functionality, the points for each criterion and sub-criterion, and the minimum qualifying score for functionality must be set out in the tender documents.²⁸⁵ Regulation 5(4) of the Procurement Regulations 2017 also states that the minimum qualifying score for functionality must be determined separately for each tender. The minimum qualifying score may not be too low, as it may jeopardise the quality of the required goods or services. It may also not be too high, as it may be unreasonably restrictive. Another stipulation in regulation 5(5) of the Procurement Regulations 2017 is that the points scored for functionality must be rounded off to the nearest

²⁸¹ National Treasury, Republic of South Africa 'Instruction note on the amended guidelines in respect of bids that include functionality as a criterion for evaluation' (2010); Quinot (2014) *PELJ* 1122; Bolton (2014) *SJ* 1.

²⁸² Quinot (2014) *PELJ* 1114.

²⁸³ P Bolton 'Public procurement as a tool to drive innovation in South Africa' (2016) 19(1) *PELJ* 20 <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1286> (accessed 08-01-2024); P Bolton 'Incorporating environmental considerations into government procurement in South Africa' (2008) *JSAL* 31 at 49.

²⁸⁴ Regulation 5(1) of the Procurement Regulations 2017.

²⁸⁵ Regulation 5(2)ff of the Procurement Regulations 2017.

two decimal places. The stipulation in regulation 5(6) of the Procurement Regulations 2017 is essential:

A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents is not an acceptable tender.

This means that if the minimum qualifying score is not achieved, the bid will not be considered further in the evaluation of the bids. The eligibility has not been proven due to the non-fulfilment of the minimum functionality requirements and the tenderer is not eligible and thus may not participate any further in the award procedure.²⁸⁶

The suitability test is then carried out step-by-step. The *Implementation Guide: Preferential Procurement Regulations 2017* provides for the following order in section 5.15:

- (a) Prequalification criteria
- (b) Evaluation for mandatory criteria
- (c) Evaluation in terms of local production and content if part of the tender
- (d) Evaluation for Prequalification criteria
- (e) Evaluation in terms of Functionality if part of the tender
- (f) Evaluation in terms of 80/20 or 90/10 preference point system.

The last point includes the system that between ten and twenty points may be awarded for measurable social policy measures, namely, the achievement of secondary objectives.²⁸⁷ The rest of the points are awarded based on the price.²⁸⁸

The new Procurement Regulations 2022, which replace the Procurement Regulations 2017, do not contain any definition of functionality or further regulations regarding functionality. Furthermore, the establishment of pre-qualification criteria for the award of contracts is not permitted under the Procurement Regulations 2022.

²⁸⁶ Bolton (2014) *PELJ* 2313 at 2320.

²⁸⁷ Bolton (2010) *JSAL* 103; McCrudden (2009) *AJ* 133.

²⁸⁸ Quinot (2018) *JSAL* 857.

5.1.2 Draft Public Procurement Bill and Public Procurement Act

The draft Public Procurement Bill, published on 19 February 2020 (draft Public Procurement Bill 2020), includes provisions on qualification criteria and aims to create a summarised set of rules instead of the many individual regulations.²⁸⁹

Clause 30 of the draft Public Procurement Bill 2020 states that the public contracting authority may require bidders to fulfil certain qualification criteria. These are essential to show that the bidders are suitable, in that they can deliver the services or goods in an appropriate way. Therefore, the public contracting authority may set different qualification criteria in the bid invitation, which the bidders must meet.²⁹⁰

The possible qualification criteria are divided into various assessment categories. For example, the technical qualification may be queried as part of the suitability. This is usually done by means of references, for example, proof of previously completed contracts that are comparable to the contract being tendered for. Clause 30(2)(e) of the Draft Public Procurement Bill 2020, which refers to previous performance in similar contracts, points in the same direction. However, registration with a competent professional body may also be considered in the context of suitability. This always plays a role if a certain professional group is required for the execution of the contract, for example, an architect or a lawyer. The draft Public Procurement Bill 2020 thus sets out key aspects of the suitability test that are intended to ensure proper contract fulfilment later.

The updated version of the draft Public Procurement Bill, dated 22 May 2023 (draft Public Procurement Bill 2023) no longer contains the detailed requirements regarding suitability in the preliminary draft.²⁹¹ Instead, clause 18 simply stipulates that it is the Minister of Finance's obligation to prescribe different aspects of the procurement system, especially the requirements and procedures which must be followed for procurement methods and for the disposal and

²⁸⁹ C Maas 'The reform of public procurement remedies: A domestic and comparative analysis' (2020) 7 *APPLJ* 63 at 63.

²⁹⁰ Clause 30(2) of the draft Public Procurement Bill 2020 lists the following qualification criteria:

- '(a) Professional and technical qualifications and experience;
- (b) financial resources;
- (c) equipment and other physical facilities;
- (d) personnel and managerial capability;
- (e) record of past performance of similar contracts;
- (f) registration or licensing with the relevant professional body; or
- (g) any other criteria that the institution considers necessary.'

²⁹¹

https://www.parliament.gov.za/storage/app/media/Bills/2024/B18D_2023_public_procurement/B18D_2023_public_procurement_ag_B18D_2023_public_procurement_ag.pdf (accessed 09-06-2024).

letting of assets. This means that the detailed regulations regarding the qualification criteria have been removed from the draft and shifted, so that the Minister of Finance must issue corresponding regulations.

The draft Public Procurement Bill was updated once again, published on 6 February 2024, updated on 13 May 2024 and adopted on 16 May 2024 (draft Public Procurement Bill 2024). This draft has now been published as the Public Procurement Act. Section 24(1) of the Public Procurement Act also assigns the Minister of Finance the task of prescribing a framework, within which procuring institutions must implement a procuring system. This must include a strategic approach to procurement, types of procurement methods, and the requirements and procedure to be followed for each prescribed method. The Minister of Finance may also determine different procurement thresholds.²⁹² Furthermore, the procurement system must provide for a procurement policy.²⁹³ Like the draft Public Procurement Bill 2023 and the draft Public Procurement Bill 2024, the Public Procurement Act does not contain detailed regulations regarding qualification criteria. What is new is the distribution of roles, according to which the Minister of Finance initially sets a framework and the procuring institutions develop their own procuring system based on this. What is interesting here is how specific the requirements for qualification criteria specified by the Minister of Finance will be and how much leeway the individual procuring institutions will have.

5.1.3 Secondary objectives

Certain qualification criteria may also be used to achieve further, secondary objectives beyond the specific contract. Such qualification criteria may also be used as a policy tool to channel money to specific economic actors, such as previously disadvantaged groups in South Africa.²⁹⁴ The fulfilment of these qualification criteria is a basic prerequisite for being allowed to participate in the award procedure.

In this context, section 217(2) of the Constitution allows further objectives to be pursued within the framework of procurement policy. This shows the importance of public procurement law as a tool to address problems and inequalities and support the disadvantaged.²⁹⁵ Thereafter, public

²⁹² Section 24(2) of the Public Procurement Act.

²⁹³ Section 24(3) of the Public Procurement Act.

²⁹⁴ Ambe & Badenhorst-Weiss (2012) *JTSCM* 242; Bolton *The Law of Government Procurement* 252.

²⁹⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC) para 47ff; Sibanda & Tshikovhi (2022) *JTSCM* 1; K Reddy & R Rampersad 'Black economic empowerment, ICT, and preferential public procurement in South Africa' in N Pomazalová (eds) *Public Sector Transformation and Internet Public Procurement* (2013) 254 at 261; Watermeyer 'Project synthesis report' in *Unpacking Transparency in Government Procurement* 3.

contracting authorities may implement a procurement policy with categories of preferences within the procurement procedure and which supports persons disadvantaged by discrimination.

This provision was included in the Constitution because of South Africa's past apartheid policies.²⁹⁶ In the past, various groups were from participating in public procurement tenders due to discrimination, unfair practices and marginalisation.²⁹⁷

Furthermore, according to section 217(3) of the Constitution, national legislation must provide a framework within which the policy referred to in section 217(2) of the Constitution must be implemented.

It must be noted that these rules do not violate the right to equality in section 9 of the Constitution. Because of South Africa's history of discrimination and unfair practices, upholding equality includes redressing past inequalities and compensating for the past.²⁹⁸

The PPPFA offers a framework for the implementation of preferential procurement policies. The Act has been updated to meet the requirements and objectives of the BBBEEA, which aims to strengthen BEE in South Africa.²⁹⁹ Based on the PPPFA, the Preferential Procurement Regulations were drafted. In this context, the term 'pre-qualification criteria' is used. As a pre-qualification system, the PPPFA required potential tenderers to be able to demonstrate that they met, for example, a minimum BEE status.³⁰⁰

However, after an appeal against a ruling of the Supreme Court of Appeal (SCA),³⁰¹ the Constitutional Court in *Afribusiness CC* ruled that the regulation in the Procurement Regulations 2017 which requires companies to meet certain pre-qualification criteria is inconsistent with the PPPFA and the Constitution.³⁰² The background to the dispute was the question of how the phrase 'necessary or expedient' in section 5 of the PPPFA is to be

²⁹⁶ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 179.

²⁹⁷ Bolton *The Law of Government Procurement* 251.

²⁹⁸ Bolton *The Law of Government Procurement* 256.

²⁹⁹ Bolton 'The regulatory framework' in *Public Procurement Regulation in Africa* 180; S Williams-Elegbe 'A comparative analysis of public procurement reforms in Africa: Challenges and prospects' (2015) 1 *SPLJ* 11 at 20; Quinot 'Promotion of social policy' in *Public Procurement Regulation* 393ff.

³⁰⁰ For the procedure in detail, see Quinot (2018) *JSAL* 857ff.

³⁰¹ *Afribusiness NPC v Minister of Finance* [2021] 1 All SA 1 (SCA) (*Afribusiness SCA*).

³⁰² *Minister of Finance v Afribusiness* 2022 (9) BCLR 1108 (CC) (*Afribusiness CC*) para 96ff. See, for further discussion, J Klaaren 'Back to the drawing board?' (2021) 8 *APPLJ* 20; P Volmink & A Anthony 'A discussion of the recent ruling of the South African Supreme Court of Appeal in *Afribusiness NPC v Minister of Finance*' (2021) 8 *APPLJ* 1.

understood and how far the Minister’s authorisation to make further regulations extends, because section 5(a) of the PPPFA states:

The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.

The Constitutional Court held that

[i]f there already is provision in the Procurement Act for each Organ of State to determine and implement its preferential procurement policy, how can it ever be necessary for the Minister to make provision by regulation for the same thing? It simply cannot be. What the Minister has purported to do is a far cry from what is necessary.³⁰³

The same applies to the word ‘expedient’. The Constitutional Court held that

it can neither be necessary nor expedient for the Minister to make regulations that seek to achieve that which can already be achieved in terms of section 2(1) of the Procurement Act.³⁰⁴

This means that the public bodies are responsible for the preferential procurement policy, and not the Minister.³⁰⁵

Furthermore, the Constitutional Court held that

the two words – ‘necessary’ and ‘expedient’ – are, in fact, the limiting factor, not what the first judgment identifies as the ‘only restriction’. A regulation that does not meet the threshold of necessity or expedience is invalid for being ultra vires the empowering section. And – as I will explain – ‘necessary’ and ‘expedient’ must be read in the light of section 2(1) of the Procurement Act. That is where the curb on the Minister’s power lies.³⁰⁶

Therefore, the Constitutional Court found that the regulation in the Procurement Regulations 2017 which requires companies to meet certain pre-qualification criteria is inconsistent with the PPPFA and the Constitution.³⁰⁷ However, the court did not rule on whether it is permissible to use race or gender as pre-qualification criteria in award procedures.³⁰⁸

³⁰³ *Afribusines CC* para 114.

³⁰⁴ *Afribusines CC* para 116.

³⁰⁵ Volmink (2022) *APPLJ* 56.

³⁰⁶ *Afribusines CC* para 108; *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another* [2022] ZASCA 102 para 18.

³⁰⁷ P Volmink ‘Pre-qualification and preference in public procurement: A critical reflection on Minister of Finance v Afribusines NPC’ (2022) 9 *APPLJ* 1 at 2.

³⁰⁸ Volmink (2022) *APPLJ* 1.

Before *Afribusines CC*, the SCA had already set aside the Procurement Regulations 2017.³⁰⁹ The usual practice is to suspend the decision for one year in order to give the responsible governmental department the opportunity to enact an alternative regulation.³¹⁰ After the ruling of the Constitutional Court, South Africa's National Treasury published an instruction note on 25 February 2022, stating that it would seek guidance from the Constitutional Court about whether the invalidity of the Procurement Regulations 2017 had been and continues to be suspended. The aim was to determine whether the Procurement Regulations 2017 remained valid. In the meantime, organs of state were advised that tenders advertised before 16 February 2022 had to be finalised in terms of the Procurement Regulations 2017. With regard to tenders advertised on or after 16 February 2022, the National Treasury decided that these would be held in abeyance. Finally, no new tenders could be advertised.³¹¹

On 10 March 2022, the draft Preferential Procurement Regulations were published for public comment until 11 April 2022, in response to *Afribusines CC* and to create legal certainty.³¹² Pre-qualification criteria were not included in the draft.

The Minister of Finance brought an urgent application to the Constitutional Court, arguing that the ruling in *Afribusines CC* was ambiguous with regard to the 12-month suspension period. In a ruling on 30 May 2022, the Constitutional Court confirmed that the order of the SCA was suspended due to the filing of an appeal with the Constitutional Court.³¹³ Therefore, the 12-month suspension period resumed on 16 February 2022. The Procurement Regulations 2017 therefore remained valid until 15 February 2023 if no new rules came into force.³¹⁴ According to a media statement, the Procurement Regulations 2022 will take effect on 16 January 2023 and will remain in force until the Public Procurement Bill is finalised.³¹⁵

³⁰⁹ *Afribusines SCA* para 47.

³¹⁰ C Tucker & W Mandlana 'South Africa: Public procurement cast into uncertainty by Constitutional Court judgment' (2022) <https://bowmanslaw.com/insights/government-contracting-and-public-sector-procurement/south-africa-public-procurement-cast-into-uncertainty-by-constitutional-court-judgment/> (accessed 11-01-2024).

³¹¹ National Treasury, Republic of South Africa 'Instruction note of 25 February 2022'.

³¹² National Treasury, Republic of South Africa, Government Notices, Publication of Draft Preferential Procurement Regulations 2022 for public comment, 10 March 2022 http://www.treasury.gov.za/comm_media/press/2022/DPPR/National%20Gazette%20Draft%20Prefential%20Procurement%20Regulations%20Comment%2010-3-2022.pdf (accessed 11-01-2024).

³¹³ *Minister of Finance v Sakeliga NPC (previously known as Afribusines NPC) and Others* [2022] JOL 53607 (CC) (*Sakeliga CC*) para 16.

³¹⁴ South African Government, Treasury on Preferential Procurement Regulations, 2017 validity <https://www.gov.za/news/media-statements/treasury-preferential-procurement-regulations-2017-validity-30-may-2022> (accessed 24-03-2024); *Sakeliga CC* para 16ff; Tucker & Mandlana 'South Africa: Public procurement'.

³¹⁵ National Treasury, Republic of South Africa 'Instruction note of 8 November 2022'.

Another area that targets the secondary objectives is local production and content. The Procurement Regulations 2017 state that the Department of Trade and Industry may design policies for a sector or an industry for local production. A minimum threshold may be stipulated which must be met by the bidders. When the public contracting authority publishes a tender, it must inform the bidders that only locally produced goods in general or those meeting a minimum threshold will be considered.³¹⁶ If there is no special sector or industry, the public contracting authority may also simply stipulate that a minimum threshold for local production and content must be met.³¹⁷

The *Implementation Guide: Preferential Procurement Regulations 2017* states that only the South African Bureau of Standards (SABS)-approved technical specification number SATA 1286:201x can be used to calculate local content.³¹⁸ Furthermore, a formula for calculating the local content is included and must be disclosed in the bid documentation.³¹⁹

Therefore, if a tender fails to meet the minimum stipulated threshold for local production and content, it is an unacceptable tender and therefore not eligible.³²⁰

On the official website of the Department of Trade, Industry and Competition, specific industries, sectors and sub-sectors have been designated for local production. Furthermore, minimum local content thresholds have been determined.³²¹ For example, a minimum threshold for local content of 80 per cent has been determined for buses and 15 per cent for laminated PV modules as a solar PV component.³²²

The new Procurement Regulations 2022 do not contain any regulations on local production and content.

Furthermore, the draft Public Procurement Bill 2020 comments on secondary objectives. Clause 26 states, under the title ‘Framework for preferential treatment’, that the Minister of Finance must prescribe a framework for preferential treatment in procurement procedures. This framework must include preferential treatment for categories of preferences and the support of

³¹⁶ Regulation 8(1) and (2) of the Procurement Regulations 2017.

³¹⁷ Regulation 8(4) of the Procurement Regulations 2017.

³¹⁸ Regulation 13.1.3 of the *Implementation Guide: Preferential Procurement Regulations 2017*.

³¹⁹ Regulation 13.1.3 and 4 of the *Implementation Guide: Preferential Procurement Regulations 2017*.

³²⁰ Regulation 8(5) of the Procurement Regulations 2017 and regulation 16.1.2 of the *Implementation Guide: Preferential Procurement Regulations 2017*.

³²¹ Department of Trade, Industry and Competition ‘Industrial Procurement’ <http://www.thedtic.gov.za/sectors-and-services-2/industrial-development/industrial-procurement/> (accessed 06-01-2024).

³²² Ambe (2016) *RJBM* 286.

previously disadvantaged persons. Firstly, the framework must take the BBBEEA into account. Further aspects must also be included, for example, measures to promote and give preference in the award of contracts to certain persons, especially women, young people and people with disabilities, or goods that are produced in South Africa.³²³ This already shows the versatility of the possibilities of preferential procurement and the direction of the draft.

The updated version of the Public Procurement Bill 2023 is essentially similar to the Public Procurement Bill 2020. Reference is made to the BBBEE so that the regulations issued for a preferential procurement policy are in line with the objectives of the BBBEE. Clause 17(2) contains detailed regulations regarding the organisation of a preferential procurement policy. For example, preference point systems and thresholds must be defined, as well as measures regarding preference. According to clause 17(4), the preferential procurement policy must be aimed at citizens and permanent residents of South Africa, small enterprises, enterprises based in townships, rural or underdeveloped areas or in a particular province or municipality, and black people, people with disabilities and youth. This list is not exhaustive.

However, unlike the Public Procurement Bill 2020, the Public Procurement Bill 2023 does not require the Minister of Finance to establish a framework for a preferential procurement policy. Rather, the regulations are aimed directly at the public contracting authorities that implement a procurement policy. This detailed regulation is based on the above-mentioned decisions of the Constitutional Court. In terms of content, the Public Procurement Bill 2023 goes even further than the Public Procurement Bill 2020 and mentions not only women, young people and people with disabilities as recipients of preferential treatment, but also black people and young people.³²⁴

³²³ Specifically, clause 26(2) of the draft Public Procurement Bill 2020 lists as mandatory elements of the framework:

- (a)* a preference point system and applicable thresholds;
- (b)* measures to advance a category or categories of persons or businesses or a sector;
- (c)* measures for preference to set aside the allocation of contracts to promote
 - (i)* a category or categories of persons or businesses or a sector;
 - (ii)* goods that are manufactured in the Republic;
 - (iii)* local technology and its commercialisation;
 - (iv)* services that are provided by a citizen or citizens of the Republic;
 - (v)* the creation of jobs or intensification of labour absorption;
 - (vi)* enterprises based in townships, rural or underdeveloped areas;
 - (vii)* enterprises based in a particular province or municipality for goods, services or infrastructure based in that province or municipality;
- (d)* measures regarding the participation of a manufacturer of goods in a bid to supply the goods it manufactures;
- (e)* measures aimed at advancing industrial development; and
- (f)* measures aimed at advancing small medium and micro enterprises in high value procurement.’

³²⁴ Clause 17 of the draft Public Procurement Bill 2023.

The regulations set out in detail which categories and groups the preferential procurement policy regulations must support. Nevertheless, the design has been criticised, partly because it is not clear enough and therefore does not comply with the requirements of section 217(3) of the Constitution.³²⁵

The new draft Public Procurement Bill 2024, which has now been published as the Public Procurement Act, dedicates a separate chapter (Chapter 4) with various regulations to the area of preferential procurement, especially with regard to a preferential framework, pre-qualification criteria, measures to advance sustainable development, and contracting conditions. The scope of the regulations makes it clear that the Public Procurement Act has been significantly updated in this area of preferred procurement.

In particular, it is stipulated that the procuring institution must implement a procurement policy that provides for categories of preferential treatment in the award of contracts and the protection or promotion of persons or groups of persons who have been disadvantaged by unjust discrimination. In addition, section 17 of the Public Procurement Act requires a procuring institution to withhold a tender for certain defined categories of persons in accordance with the prescribed thresholds and conditions. The Public Procurement Act also revisits the issue of prequalification, and section 18 stipulates that a procuring institution must apply prequalification criteria in accordance with the prescribed thresholds and conditions, for example, that a bidder having a prescribed minimum percentage of preferential procurement contracts from enterprises that are owned and managed by black people. A new provision in section 19 stipulates that the obligation to subcontract to certain groups can also be provided for as a condition. Finally, support for local production is covered. The Public Procurement Act stipulates that the Minister responsible for trade, industry and competition must define certain sectors for local production and certain thresholds. If a tender is issued in this area and a company does not meet the specified thresholds, it must be excluded from the award procedure.

The new Public Procurement Act therefore contains a wide variety of starting points for promoting secondary objectives. These secondary objectives apply to disadvantaged people as well as local production and SMEs. Although the requirements are not regulated down to the last detail, they provide a basis for the specifications to be defined later by setting out concrete possibilities and limits.

³²⁵ This was already criticised in the 2020 draft by P Reyburn ‘Preliminary comments on the Draft Procurement Bill’ (2020) 7 *APPLJ* 46 at 47; G Quinot ‘Reforming procurement law in South Africa’ (2020) 7 *APPLJ* 1 at 9.

Furthermore, pre-qualification is used in a different context. According to the Supply Chain Management Guide,³²⁶ pre-qualification

is usually necessary for large or complex works, or in any other circumstances in which the high costs of preparing detailed bids could discourage competition, such as custom designed equipment, industrial plant, specialized services and contracts to be let under turnkey, design and build, or management contracting. This also ensures that invitations to bid are extended only to those who have adequate capabilities and resources. Pre-qualification may also be useful to determine eligibility for preference for domestic contractors, when appropriate.³²⁷

The Supply Chain Management Guide further specifies that pre-qualification must relate only to the capabilities and resources of the tenderers. This is to assess whether the contract can be performed satisfactorily. Aspects of capabilities related to personnel, equipment, construction or production facilities, and the tenderer's financial situation play a role.³²⁸

The Supply Chain Management Guide also stipulates that those applicants who have responded to the invitation to tender should be informed about the scope of the contract and the qualification criteria. Furthermore, all applicants who meet the specified criteria must be allowed to submit a tender and must be provided with the tender documents. All applicants must also be informed about the results of the pre-qualification. Verification of the information provided during pre-qualification takes place when the contract is awarded. If this information is no longer correct and the bidder is therefore no longer able to perform, the contract may not be awarded to this bidder.³²⁹

This further explanation makes it clear that, in this area, pre-qualification is understood as a two-step process of the award procedure. However, this is less about achieving secondary objectives and more about finding tenderers who are first assessed based on their eligibility and then invited to submit a bid in the next step. This is a normal suitability test, but it takes place before the offer is submitted. This differs from the normal procedure in which the suitability check is carried out after the tender has been submitted and before the tenders are evaluated.³³⁰

³²⁶ National Treasury 'Supply Chain Management: A Guide for Accounting Officers and Accounting Authorities' (2004).

³²⁷ Section 4.9 of the Supply Chain Management Guide.

³²⁸ Section 4.9 of the Supply Chain Management Guide.

³²⁹ Section 4.9 of the Supply Chain Management Guide.

³³⁰ Arrowsmith *The Law of Public and Utilities Procurement* 715.

Finally, another aspect of achieving secondary objectives relates to green procurement, which is also known as sustainable procurement.³³¹ Public procurement law should be used to protect the environment and to procure more sustainably.³³² Regulations have been issued at various levels, for example, the City of Cape Town's Green Procurement Action Plan.³³³ However, these regulations focus less on the definition of sustainability requirements as part of the qualification criteria and more on the award decision when achieving sustainability targets. Bolton suggests that tenderers who have violated environmental laws should be excluded from the process.³³⁴

5.1.4 Reasons for exclusion

Finally, in the area of eligibility, the exclusion or debarring of tenderers plays an important role. Exclusion or debarment is a measure in terms of which a tenderer is excluded from the tender procedure due to violations committed.³³⁵ If a tenderer is excluded from the award procedure, it is no longer a question of fulfilling the qualification criteria; the tenderer may simply no longer participate in the award procedure due to the reason for exclusion.³³⁶

Various violations of the regulations may justify an exclusion. This applies particularly to fighting corruption. The reasons why corruption is relevant in public procurement are complex. Public contracts usually have a very high value and the public contracting authorities are not financially orientated. Also, the decisions do not affect the personal finances of the decision-makers and the public budget is often not linked to concrete goals.³³⁷ Particularly in emergency situations, where contracting authorities are given greater leeway in the application of procurement law provisions, there is also a greater risk of bribery and corruption.³³⁸

An exclusion may be based on three connecting factors. One factor is past violation of rules which are independent of public procurement law. An exclusion may also be linked to the fact

³³¹ AO Agyepong & G Nhamo 'Green procurement in South Africa: Perspectives on legislative provisions in metropolitan municipalities' (2017) 19(6) *EDS* 2457 at 2457ff. See also A Breytenbach 'Green is the new gold: Goring green in public procurement in South Africa' (2023) 10 *APPLJ* 1 at 1ff, who argues that the regulations need to be amended.

³³² P Bolton 'Protecting the environment through public procurement: The case of South Africa' (2008) 32 *NRF* 1 at 1.

³³³ City of Cape Town Green Procurement Action Plan, available at https://glen-on-sp.org/fileadmin/user_upload/Cape_Town/City_of_Cape_Town_Green_Procurement_Action_Plan_-_Final_2020.pdf (accessed 09-01-2024); J Hanks, H Davies & O Perera *Sustainable Public Procurement in South Africa* (2008) 13ff.

³³⁴ Bolton (2008) *JSAL* 50; Bolton (2008) *NRF* 5.

³³⁵ S Williams-Elegbe 'An uncertain future for debarment in South Africa' (2020) 7 *APPLJ* 34 at 34.

³³⁶ Arrowsmith *The Law of Public and Utilities Procurement* 748.

³³⁷ Williams-Elegbe (2007) *JAL* 10.

³³⁸ Rankin (2021) *APPLJ* 84ff; Maas (2020) *APPLJ* 65.

that a tenderer breaks the rules of the specific award procedure. Finally, an exclusion for the future may be based on violations of public procurement law in the past.³³⁹

The background to an exclusion from the award procedure has two aspects. Firstly, it is a means within the framework of an anti-corruption policy. The exclusion is a punitive measure, because beyond excluding the company from the specific award procedure, exclusion may also damage the reputation of the company.³⁴⁰ An exclusion also has further consequences. For example, it may have a negative impact on the market price of listed shares or cause considerable uncertainty for creditors in general.³⁴¹

Secondly, exclusion helps to protect the procurement system by ensuring that contracts are concluded only with eligible companies. This protects public money.³⁴²

The exact background to the regulations in South Africa has not been conclusively clarified. However, according to Williams-Elegbe, there are two good arguments in favour of exclusion as a punitive measure:

[F]irst, under the Corruption Act, exclusions are imposed at the same time as criminal sanctions, and secondly, the fact that none of the provisions permit the possibility of derogating from the exclusion once it is imposed.³⁴³

5.1.4.1 The Prevention and Combating of Corrupt Activities Act (PCCA)

The first basis for exclusion is offered by the Prevention and Combating of Corrupt Activities Act (PCCA).³⁴⁴ Section 12 of the PCCA refers to offences in respect of corrupt activities relating to contracts, while section 13 of the PCCA refers to offences in respect of corrupt activities relating to the procuring and withdrawal of tenders. A person is guilty of the offence of corrupt activity in connection with a contract if he or she directly or indirectly accepts or agrees or offers or grants to accept gratification from another person. This applies whether this is done for one's own benefit or for the benefit of that other person or another person. This corrupt activity must occur to exert undue influence in any way. The reference point is the promotion, execution or procurement of contracts with a public body or a private organisation;

³³⁹ Williams-Elegbe (2007) *JAL* 11; in general, see for procurement sanctions on tenderers, Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* 41ff.

³⁴⁰ Williams-Elegbe (2007) *JAL* 11; Williams & Quinot (2007) *SALJ* 347.

³⁴¹ *Gonzalez v Freeman* 334 F.2d 570 (D.C. Cir. 1964) para 574.

³⁴² Williams-Elegbe (2007) *JAL* 11.

³⁴³ Williams-Elegbe (2007) *JAL* 12.

³⁴⁴ Act 12 of 2004. For the whole regime for exclusion, see Williams-Elegbe (2020) *APPLJ* 35.

or the fixing of the price, consideration or other monies that are fixed; or as a reward for the above action.³⁴⁵

In addition, a person is guilty of an offence if he or she grants gratification to another person to obtain a contract with a public body. It does not matter whether this is for the benefit of that other person or for the benefit of another person for the purpose of promoting the election of a candidate to the legislative authority in any way, or with the intention of altering the result of an election, or for the purpose of electing persons as members to influence the legislative authority in any way.³⁴⁶

Section 13 of the PCCA, on the other hand, deals with offences in respect of corrupt activities relating to the procuring and withdrawal of tenders. It deals with situations

where a person offers, agrees or accepts any gratification as an inducement to, or in order to influence another person to award a tender, make a tender or withdraw a tender for a contract.³⁴⁷

As a rule, infringements must always relate to the award or the award procedure. Any other corruption is not grounds for sanctions under public procurement law.³⁴⁸

The legal consequences of violations of sections 12 and 13 of the PCCA are closely related to the ‘Register for Tender Defaulters’ under section 28 of the PCCA. Section 28(1)(a) of the PCCA provides for the possibility, in the event of a conviction for one offence in terms of sections 12 and 13 of the PCCA, of entering the convicted person on the ‘Register for Tender Defaulters’. This means that participation in tender procedures will no longer be possible.³⁴⁹ The Register is administered by the National Treasury and is accessible online.³⁵⁰ The Register lists excluded and disqualified companies and their information.³⁵¹ Furthermore, special rules apply in the case of an ‘enterprise’, namely an individual, a corporation or other juristic person or legal entity, and a group of individuals which is not a legal entity.³⁵²

In terms of section 28(1)(b) of the PCCA, the court may also issue an order that the particulars of that undertaking or other partners or managers who exercise control over the undertaking must be entered on the Register. Finally, in terms of section 28(1)(c) of the PCCA, the court

³⁴⁵ Section 12(1) of the PCCA.

³⁴⁶ Section 12(2) of the PCCA.

³⁴⁷ Williams-Elegbe (2007) *JAL* 13.

³⁴⁸ Williams-Elegbe (2007) *JAL* 13.

³⁴⁹ Williams-Elegbe (2020) *APPLJ* 35.

³⁵⁰ Williams-Elegbe (2007) *JAL* 12.

³⁵¹ Williams-Elegbe (2007) *JAL* 12.

³⁵² Section 28(7) of the PCCA.

may also issue an order contemplated in section 28(1)(a) of the PCCA regarding other related persons and enterprises.

Entry on the register must be for a period of five to ten years in accordance with section 28(3)(a)(ii) of the PCCA. The National Treasury must determine the period for which the person or the enterprise must remain on the Register. Moreover, the National Treasury is not allowed to conclude an agreement with a previously named person or undertaking.³⁵³

The provision in section 28(3)(a)(iii) of the PCCA states that, during the determined period, the National Treasury, the purchasing authority or any government department must ignore any offer or disqualify a person or enterprise. There is no discretion or derogation from this rule, even if it is not in the public interest.³⁵⁴

Finally, it should be noted that, according to section 28(3)(a)(i) of the PCCA, the National Treasury may terminate any agreement with the person or enterprise referred to in subsection (1)(a) or (b). The specific public contracting authority may be involved in this process. In deciding whether to impose this consequence, different aspects must be considered, for example, the duration of the agreement concerned, the urgency of the services to be provided, or the costs incurred in the event of termination.³⁵⁵

The possibility of termination is known in principle in South Africa, but it is not used very often. The decision must also consider what other effects termination will have. This raises the questions of whether the company will be paid for work done, and who will bear the costs of the first award procedure and of the new award procedure that is now required.³⁵⁶

5.1.4.2 Procurement Regulations 2017

In addition, a bidder may be excluded from public contracts for up to ten years if it is found that it has provided false information about its BEE status, its level of contributions, and local production and local content, and if this affects the evaluation of a bid. Exclusion may also occur if a bidder has failed to declare a subcontracting agreement.³⁵⁷

³⁵³ Section 28(3)(a)(ii) of the PCCA.

³⁵⁴ Williams-Elegbe (2007) *JAL* 24.

³⁵⁵ Section 23(3)(a)(i)(aa) of the PCCA.

³⁵⁶ For this and further questions, see Williams-Elegbe (2007) *JAL* 22ff.

³⁵⁷ Regulation 14(1) of the Procurement Regulations 2017.

In contrast to the regulations of the PCCA, no minimum length of time is prescribed for the exclusion.³⁵⁸ Furthermore, no conviction is necessary for the exclusion. The regulations refer to ‘detecting’ that a tenderer has submitted false information. However, not every assumption is sufficient, but as soon as there is any doubt or suspicion, this may justify the process described above.³⁵⁹

Before the tenderer is excluded, it must be given a ‘second chance’ to explain the situation and why it should not be disqualified.³⁶⁰ If the situation cannot be sufficiently explained, the tenderer must be disqualified or the contract must be terminated; if applicable, damages must be claimed from the tenderer.³⁶¹

5.1.4.3 Procurement Regulations 2022

The new Procurement Regulations 2022 contain a similar rule. First, the tenderer must be informed that the public contracting authority assumes that the tenderer has provided false information, and the tenderer must be given 14 days to provide an explanation. The explanation is then examined and, if necessary, the bidder is excluded, or the current contract is terminated and damages are claimed.³⁶²

5.1.4.4 Treasury Regulations

Under the PFMA the Treasury Regulations³⁶³ apply; these provide that a proposal for the award of a contract must be rejected if the recommended tenderer has committed a corrupt or fraudulent act in competing for the particular contract.³⁶⁴ In these cases, a concluded contract must also be terminated.³⁶⁵ A bid may also be disregarded in the following cases: abuse of the institution’s supply chain management system; committing fraud or any other improper conduct in relation to such system; or failing to perform on any previous contract.³⁶⁶

³⁵⁸ Williams-Elegbe (2007) *JAL* 28ff.

³⁵⁹ Williams-Elegbe (2007) *JAL* 29.

³⁶⁰ Regulation 14(1)(b) of the Procurement Regulations 2017.

³⁶¹ Regulation 14(1)(c) of the Procurement Regulations 2017.

³⁶² Regulation 9 of the Procurement Regulations 2022.

³⁶³ *Government Gazette* No. 27388 of 2005.

³⁶⁴ Regulation 16A9.1(e) of the Treasury Regulations.

³⁶⁵ Regulation 16A9.1(f) of the Treasury Regulations.

³⁶⁶ Regulation 16A9.2 of the Treasury Regulations.

5.1.4.5 MFMA Supply Chain Management Regulations 2005

Finally, the MFMA Supply Chain Management Regulations 2005 address the issue of exclusion.³⁶⁷ They state that an offer may be rejected if the tenderer or any of its directors is more than three months in arrears to the municipality in respect of municipal taxes and levies or municipal service charges. A further ground is where the tenderer has failed to satisfactorily perform a previous contract with the local authority or other government body in the last five years, despite prior written notice. A final ground is if the recommended bidder or one of its directors has committed a corrupt or fraudulent act in competing for the contract in question.³⁶⁸

Moreover, a contract may be cancelled if the person or an official committed any corrupt or fraudulent act during the bidding process or the execution of the contract.³⁶⁹

Finally, a bid may be rejected if the tenderer has abused the supply chain management system of the municipality or an entity owned by the municipality, or has committed any improper conduct in relation to such system.³⁷⁰

5.1.4.6 Draft Public Procurement Bill and Public Procurement Act

The draft Public Procurement Bill 2020 also addresses the issue of exclusion. Various people must be automatically excluded from participating in the award. These include bidders or suppliers who are subject to an exclusion order, holders of public office, and civil servants or employees of a state body.³⁷¹

In terms of the draft Public Procurement Bill 2020 the exclusion is due to the interest in or the membership of an entity supplying or rendering goods or services.³⁷²

Clause 22(1) of the draft Public Procurement Bill 2020 lists various reasons for a debarment order, for example, (a) knowingly providing false information in a bid or any other document submitted to an institution in connection with a procurement process or contract; or (b) committing a corrupt, fraudulent, collusive or coercive practice, price fixing, a pattern of underpricing, or breach of confidentiality relating to procurement by an institution. A debarment

³⁶⁷ *Government Gazette* No. 27636 of 2005; P Bolton 'The exclusion of contractors from government contract awards' (2006) 10(1) *LDD* 25 at 27.

³⁶⁸ Regulation 38 of the MFMA Supply Chain Management Regulations 2005.

³⁶⁹ Regulation 38(1)(f) of the MFMA Supply Chain Management Regulations 2005.

³⁷⁰ Regulation 38(1)(g)(i) of the MFMA Supply Chain Management Regulations 2005. See Williams-Elegbe (2020) *APPLJ* 35ff.

³⁷¹ Clause 24 of the draft Public Procurement Bill 2020.

³⁷² Clause 24 of the draft Public Procurement Bill 2020.

order, according to clause 22(3) of the draft Public Procurement Bill 2020, for the period specified in the debarment order, prohibits the tenderer from participating in procurement generally or in circumstances specified in the order. Finally, in terms of clause 22(4) of the draft Public Procurement Bill 2020, the debarment order takes effect from the date on which it is served on the tenderer or, if the order specifies a later date, the later date. However, before making a debarment order, the tenderer must be consulted with in accordance with clause 23 of the draft Public Procurement Bill 2020 to give it an opportunity to provide reasons, within 30 days, why it must not be debarred.

These regulations are sometimes criticised on the grounds that they are difficult to apply because it is not precisely defined when an exclusion occurs and when it is, for example, temporary or mandatory. The regulations are also criticised for inconsistencies between different regulations.³⁷³

The updated version of the draft Public Procurement Bill 2023 also includes grounds for automatically excluding a person from the award procedure and grounds where the tenderer is given the opportunity to present reasons why it should not be excluded.

Firstly, the draft Public Procurement Bill 2023 lists various circumstances in which an automatic exclusion applies. This applies in particular to people who work for the state, politicians, and also members of the public contracting authority.³⁷⁴

The draft Public Procurement Bill 2023 also deals with debarment. The bidder must first be informed by the Public Procurement Office of the intention to exclude it from the procurement procedure. The bidder must also be informed of the reasons for the exclusion and must be given the opportunity to explain, within ten days, why the exclusion is not justified. In particular, the exclusion may be justified, for example, on the grounds that incorrect information was provided during the award procedure.³⁷⁵ After the bidder has submitted its explanation, the contracting

³⁷³ Williams-Elegbe (2020) *APPLJ* 40ff.

³⁷⁴ Clause 13 of the draft Public Procurement Bill 2023.

³⁷⁵ Clause 16(3) of the draft Public Procurement Bill 2023 lists various reasons for exclusion:

‘The Public Procurement Office must issue a debarment order against a bidder or supplier and may issue a debarment order against any of the directors, members, trustees or partners of that bidder or supplier, if the bidder or supplier

(a) provided false information in a bid or any other document submitted to a procuring institution in connection with a procurement process or contract;

(b) provided false information for purposes of registration in a database as envisaged in this Act;

(c) connived to interfere with the participation of other bidders;

(d) committed any offence involving corruption, fraud, collusion or coercion, price fixing, a pattern of underpricing or breach of confidentiality relating to procurement by a procuring institution;

authority must decide whether to exclude the bidder. The exclusion then generally comes into force upon notification and is valid for the time period specified in the exclusion order. It is also envisaged that the Public Procurement Office will establish a publicly accessible register in which excluded bidders are listed.

The regulations in terms of the updated draft Public Procurement Bill 2024, which now has been enacted as the Public Procurement Act, are the same regarding automatic exclusion. Only the rule that a person who is related to the listed persons may also not submit an offer has been deleted. This means that no grounds for exclusion apply to related persons.³⁷⁶ The regulation regarding debarment in the Public Procurement Act is essentially the same as that in the draft Public Procurement Bill 2023.³⁷⁷ The reasons for a debarment have been slightly modified. For example, the provision that exclusion can be based on a bidder refusing to sign a contract without reason has been deleted.

The regulations clarify that persons who hold public office and have a relationship with the state are specifically excluded from procurement procedures. The debarment occurs here to prevent even the appearance of corruption. The reasons on the basis of which it is possible to argue that no exclusion is justified are also related to procurement procedures, for example, because false information was provided. In addition to preventing corruption, the exclusion regulations also aim to enable a fair and transparent procedure in which all bidders are treated equally. The distinction between reasons that automatically lead to exclusion and those that are evaluated makes sense. From the legislature's point of view, some reasons do not allow for an evaluation, but must automatically lead to exclusion. Holding a public office cannot be reconciled with simultaneously taking part in a public contract award process. However, if the bidder has provided false information in the context of a procurement procedure, the bidder

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- (e)* accepted, delivered against, or made a claim for payment against, an order knowing that the order had not been authorised or was not in a prescribed format or had been issued by a person not authorised to do so;
 - (f)* refused to sign a contract without reasonable justification or to furnish a performance security in accordance with the terms of the bid;
 - (g)* has not performed a material contractual obligation not due to circumstances beyond the control of the supplier;
 - (h)* has been convicted of an offence relating to
 - (i) obtaining or attempting to obtain a contract or subcontract; or
 - (ii) business or professional activities;
 - (i)* attempted, or conspired with, aided, abetted, induced or incited another person to contravene a provision of this Act; or
 - (j)* contravened a provision of this Act.'

³⁷⁶ Section 13 of the Public Procurement Act.

³⁷⁷ Section 15 of the Public Procurement Act.

should at least be given the opportunity to clarify the facts before debarment, and the public contracting authority will then decide on the debarment.

5.1.5 Conclusion

The investigation in South Africa shows that public procurement law contains a wide variety of regulations regarding the qualification criteria, the achievement of secondary objectives with the help of public procurement law, and different reasons for exclusion.

The qualification criteria can be defined as criteria used to check whether the bidder is suited to performing the subsequent contract properly. Minimum criteria can be defined. If these are not met, the bidder cannot continue participating in the award procedure. The draft Public Procurement Bill 2020 contained detailed regulations on the definition of qualification criteria. The updated versions – the draft Procurement Bills of 2023 and 2024 and the Public Procurement Act – no longer contain these detailed regulations. This means that there is generally more leeway for the public contracting authority when determining qualification criteria. However, there is also a risk that the regulations will not be applied uniformly. According to the current status of the draft, the decisive factor will be how specific the requirements for qualification criteria provided by the Minister of Finance will be.

The achievement of secondary objectives is already laid down in the Constitution. This regulation is a reaction to the historical discrimination against some sections of the population. The focus of the secondary objectives is BEE and strengthening SMEs and local production. Secondary objectives are also included in the updated draft Procurement Bill 2024 and now the Public Procurement Act. Pre-qualification criteria can also be defined, whereby a bidder must have a prescribed minimum percentage of preferential procurement from enterprises that are owned and managed by black people. The draft contains different regulations. For example, the obligation to award subcontracts to certain groups can be included as a condition. Overall, the draft offers a wide variety of starting points for promoting secondary objectives and shows that this topic is particularly relevant in public procurement law in South Africa.

Possible exclusion is also present in public procurement law in South Africa. The background to the regulations is addressing corruption and ensuring that contracts are concluded only with eligible companies. Various regulations provide a starting point for exclusion. In particular, a distinction is made between automatic exclusion and exclusion where the bidder is given the opportunity to present reasons why exclusion is not justified. The draft Public Procurement Bill

2024 and the Public Procurement Act also contain a wide range of grounds for exclusion and thus, together with the qualification criteria, support the selection of the right bidder for the execution of the contract.

5.2 Germany

5.2.1 General regulations regarding qualification criteria

Qualification criteria are set to check eligibility. Section 122 of the GWB sets out the essential requirements for eligibility:

- (1) Public contracts shall be awarded to skilled and efficient (eligible) undertakings that have not been excluded under Section 123 or Section 124.
- (2) An undertaking is eligible if it meets the criteria (selection criteria) defined in detail by the public contracting authority for the proper execution of the public contract. The selection criteria may exclusively relate to:
 1. Qualification and authorisation to pursue the professional activity;
 2. Economic and financial standing;
 3. Technical and professional ability.

Therefore, eligibility is defined in relation to skills and efficiency. Section 122(2) of the GWB defines which criteria should be used to evaluate eligibility.³⁷⁸ For the below threshold sector, section 33 of the UVgO sets out the selection criteria in parallel.

The examination of eligibility applies to the tenderer and aims to determine whether a company will be able to perform the contract to be awarded according to its human, financial and technical resources.³⁷⁹ This test may only be answered with a yes or no. There is no approximate suitability.³⁸⁰ The suitability test therefore requires the determination of qualification criteria. Without this determination, a suitability test is not possible.³⁸¹ Due to the obligation to fulfil the specified qualification criteria, a tenderer who does not meet the requirements must generally be excluded from the award procedure.³⁸² As part of a pre-qualification system, proof of eligibility and the absence of grounds for exclusion in accordance with sections 123 and 124

³⁷⁸ Friton in *BeckOK Vergaberecht* section 122 para 11.

³⁷⁹ Federal Supreme Court, decision of 15 April 2008 – X ZR 129/06; Higher Regional Court Düsseldorf, decision of 6 Mai 2011 – Verg 26/11; Friton in *BeckOK Vergaberecht* section 122 para 11.

³⁸⁰ Ziekow in *Vergaberecht* section 122 GWB para 15.

³⁸¹ Ziekow in *Vergaberecht* section 122 GWB para 15.

³⁸² P Friton *Die Festlegung und Erfüllung von Eignungsparametern nach den EU-Vergaberichtlinien und die Umsetzung im GWB-Vergaberecht* ('The definition and fulfilment of qualification parameters in accordance with the EU Public Procurement Directives and their implementation in GWB procurement law') (2016) 502.

of the GWB may be provided.³⁸³ The selection criteria must be related to the subject matter of the contract. They must also be appropriate and included in the contract notice, the prior information notice, or the invitation to confirm interest.³⁸⁴

The examination of suitability is always company-related. This means that the specific company applying for the contract is examined. However, in some situations, an individual company may not be able to fulfil the qualification criteria. There are then two possibilities.³⁸⁵ First, it is possible to use the capacities of another company.³⁸⁶ This may relate to economic and financial performance as well as technical and professional performance. This requires, for example, a declaration of commitment by the other undertaking in the event of the award of the contract that the resources and capacities required for the contract are actually available.³⁸⁷ However, a candidate or tenderer may rely on the capacities of other undertakings to prove the required technical suitability only if these undertakings provide the services for which these capacities are required.³⁸⁸ During the suitability test, the public contracting authority then checks the company whose capacities the bidder is using. If a company does not meet the qualification criteria or if there are grounds for exclusion, the contracting authority may request the bidder to replace this company. The contracting authority may set a deadline for this.³⁸⁹

Secondly, several undertakings may join forces on an equal basis and act as a bidding consortium. In this case, the bidding consortium acts as the tenderer. The suitability test then relates to whether all the companies in the bidding consortium fulfil the qualification criteria together.³⁹⁰

The qualification criteria are determined by the public contracting authority. However, only those criteria that fall under the categories of section 122(2) sentence 2 of the GWB are admissible, specifically qualification and authorisation to pursue the professional activity, economic and financial standing, and technical and professional ability.³⁹¹ The qualification

³⁸³ Section 122(3) of the GWB.

³⁸⁴ Section 122(4) of the GWB.

³⁸⁵ Ziekow in *Vergaberecht* section 122 GWB para 18.

³⁸⁶ Section 47 of the VgV; Ziekow in *Vergaberecht* section 122 GWB para 18.

³⁸⁷ Bultmann in *BeckOK Vergaberecht* Section 47 VgV para 2.

³⁸⁸ Section 47(1) of the VgV.

³⁸⁹ Section 47(2) of the VgV.

³⁹⁰ Higher Regional Court Celle, decision of 12 April 2016 – 13 Verg 1/16; Higher Regional Court Düsseldorf, decision of 31 July 2007 – Verg 25/07; Ziekow in *Vergaberecht* section 122 GWB para 18.

³⁹¹ Ziekow in *Vergaberecht* section 122 GWB para 19.

criteria must always be related to the subject matter of the contract.³⁹² The ECJ has created further possibilities for establishing qualification criteria through its case law. The member states are free to enact regulations to ensure compliance with the principles of equal treatment and transparency. This goes so far as to provide that non-observance may also justify exclusion from the further award procedure. However, the regulations must comply with the principle of proportionality.³⁹³

The public contracting authority is free to determine the qualification criteria.³⁹⁴ However, the qualification criteria must be related to the contract and at the same time must be defined in abstract terms for all tenderers equally.³⁹⁵ The first step of the eligibility test is to check whether the tender contains all the required evidence of suitability or information. The second step is to check whether the evidence submitted proves the eligibility of the company (formal and material eligibility determination).³⁹⁶

Due to the principle of transparency, the qualification criteria must be known to the potential tenderers before the tender is prepared.³⁹⁷ Section 122(4) sentence 2 of the GWB states that the qualification criteria must appear in the contract notice, the prior information notice, or the invitation to confirm interest. A mere reference in the notices to the tender documents in which the qualification criteria are listed is not sufficient.³⁹⁸ If the qualification criteria are not stated in the prior information notice, this constitutes a breach of procurement regulations. However, this does not necessarily mean that, after an overall assessment, there is a serious procurement error that requires the award procedure to be postponed or restarted.³⁹⁹ However, such an assessment may be made based on an overall assessment.

³⁹² Section 122(4) of the GWB; A Fritz & J Klaedtke ‚Lieferketten im Vergabeverfahren – Sofortige und zukünftige Änderungen durch das Lieferkettensorgfaltspflichtengesetz‘ (‘Supply chains in procurement procedures – immediate and future changes due to the Supply Chain Due Diligence Act’) (2022) 3 *NZBau* 131 at 134.

³⁹³ ECJ, decision of 19 May 2009 – C-538/07 *Assitur* para 20ff; ECJ, decision of 16 December 2008 – C-213/07 *Michaniki* para 43ff; Ziekow in *Vergaberecht* section 122 GWB para 20.

³⁹⁴ Ziekow in *Vergaberecht* section 122 GWB para 21.

³⁹⁵ Friton in *BeckOK Vergaberecht* section 122 para 12.

³⁹⁶ Higher Regional Court Düsseldorf, decision of 26 November 2008 – Verg 54/08; Friton in *BeckOK Vergaberecht* section 122 para 12.; M Burgi *Vergaberecht* (2021) section 16 para 7.

³⁹⁷ Ziekow in *Vergaberecht* section 122 GWB para 22.

³⁹⁸ Federal Procurement Chamber, decision of 4 October 2019 – VK 1-73/19; Procurement Chamber Baden-Württemberg, decision of 27 August 2018 – 1 VK 35/18.

³⁹⁹ Federal Procurement Chamber, decision of 31 August 2022 – VK 2-72/22 para 78ff; A Csaki ‚Die Entwicklung des Vergaberechts seit 2022‘ (‘The development of public procurement law since 2022’) (2023) 21 *NJW* 1478 at 1482.

According to section 48(1) of the VgV, the public contracting authority must also specify with which documents the suitability and the non-existence of grounds for exclusion must be provided.

Section 122(4) of the GWB states that the qualification criteria must be related and proportionate to the subject matter of the contract. The qualification criteria must be suitable and necessary to demonstrate capability with regard to the subject matter of the contract put out to tender. In this context, the complexity of the contract and the importance for the public contracting authority of proper performance of the contract must be considered.⁴⁰⁰ In this determination and evaluation, however, the public contracting authority has a wide scope for decision-making, which can only be reviewed by the courts to a limited extent. The courts only review whether the facts of the case are correct and complete, whether general principles of evaluation have been observed and whether no improper considerations have been taken into account.⁴⁰¹ This fundamentally high standard is therefore limited. The situation is different when defining requirements for technical and professional performance. This is because the public contracting authority may only demand evidence that does not exceed what is necessary for the fulfillment of the contract. This should not place an unreasonable burden on the bidders. In this context, the courts have regularly declared excessive qualification requirements to be invalid.⁴⁰²

The qualification criteria must not violate the principle of equal treatment. This is the case, for example, if the qualification criteria regarding technical and professional capacity or professional experience place a greater burden on certain groups of tenderers than others and, as a result, only one or a few companies meet the requirements.⁴⁰³

The same applies to the evidence that must be provided to prove suitability if this can be provided only by certain companies, although the service can also be provided by other companies.⁴⁰⁴ This happens when, for example, membership of a particular association is

⁴⁰⁰ Higher Regional Court Düsseldorf, decision of 27 June 2018 – Verg 4/18; ECJ, decision of 18 October 2012 – C-218/11 *Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság*.

⁴⁰¹ Higher Regional Court Düsseldorf, decision of 27 June 2018 – Verg 4/18; Higher Regional Court Düsseldorf, decision of 21 December 2011 – VII-Verg 74/11, Higher Regional Court Munich, decision of 31 August 2010 – Verg 12/10.

⁴⁰² Higher Regional Court Düsseldorf, decision of 27 June 2018 – Verg 4/18. See also Higher Regional Court Düsseldorf, decision of 24 October 2006 – 11 Verg 8/06 and 9/06.

⁴⁰³ Higher Regional Court Düsseldorf, decision of 27 June 2018 – Verg 4/18; Ziekow in *Vergaberecht* section 122 GWB para 25.

⁴⁰⁴ Ziekow in *Vergaberecht* section 122 GWB para 26.

required without the possibility of demonstrating compliance with the standards established for the contract by other means.⁴⁰⁵

5.2.2 Qualification and authorisation to pursue the professional activity

The criterion of qualification and authorisation to pursue the professional activity is regulated in section 44 of the VgV. It is a legally defined qualification criterion.⁴⁰⁶ Contracting authorities may require tenderers to be registered in a professional or commercial register referred to in Annex XI to Directive 2014/24/EU in their member state of establishment or home member state, if this is a prerequisite for the provision of the services concerned in the home member state.⁴⁰⁷

Furthermore, where candidates or tenderers are required to hold a particular authorisation or to be a member of a particular organisation in order to be able to provide the service in question in their country of origin, the public contracting authority may require the candidates or tenderers to prove their authorisation or membership.⁴⁰⁸ The purpose of this provision is that the public contracting authority obtains reliable information on the existence and other important legal and representative relationships of the enterprise. The qualification and authorisation to practise the profession in the member state may, however, only be made a qualification criterion if this is also a prerequisite for the exercise of the profession in the home state. This prevents discrimination based on the company's registered office.⁴⁰⁹ In Germany, for example, a master craftsman's certificate may be required for construction services. If proof of an equivalent certificate is provided for EU foreigners, this is also sufficient.⁴¹⁰

With regard to the form, the submission of a copy of the entry in the commercial register or a confirmation of the entry by the local court keeping the register is usually sufficient. A simple printout or photocopy of the reproduction of the current contents of the register is also sufficient. However, the public contracting authority may also stipulate that a certified form must be submitted. This serves to increase credibility.⁴¹¹

⁴⁰⁵ Higher Regional Court Düsseldorf, decision of 20 July 2015 – Verg 37/15.

⁴⁰⁶ Friton in *BeckOK Vergaberecht* section 122 para 32.

⁴⁰⁷ FJ Hölzl in F J Säcker, M Gasnke & M Knauff (eds) *Münchener Kommentar zum Wettbewerbsrecht* (2022) section 122 para 46.

⁴⁰⁸ Section 44(2) of the VgV.

⁴⁰⁹ Hölzl in *Münchener Kommentar zum Wettbewerbsrecht* section 122 para 46.

⁴¹⁰ Burgi *Vergaberecht* section 16 para 8.

⁴¹¹ Hölzl in *Münchener Kommentar zum Wettbewerbsrecht* section 122 para 47.

In terms of time, the public contracting authority may determine whether the extract must not be older than a certain date. If only a current extract is required, the date is irrelevant, but the current circumstances of the company must be shown.⁴¹²

Overall, it must be noted that only the effectiveness of the authorisation is relevant. The public contracting authority, on the other hand, does not have to check the lawfulness of the content of the authorisation.⁴¹³

5.2.3 Economic and financial standing

Economic and financial standing concerns whether the company is able to meet its ongoing obligations to its staff, the state and other creditors.⁴¹⁴ In particular, the total turnover of the enterprise, the turnover in the field of activity which is the subject of the contract to be awarded, the creditworthiness, the equity capital resources (solvency), the means of payment (liquidity), the ratio between assets and liabilities, or the existence of liability insurance may be determined as criteria.⁴¹⁵ These qualification criteria can be derived from section 58(3) and Annex XII of the Directive 2014/24/EU. This annex specifies possible proof of eligibility for economic and financial performance.

On a federal level, section 45 of the VgV defines the requirements for economic and financial standing. It defines the objective of the qualification criteria regarding economic and financial standing as ensuring that the tenderer has the necessary economic and financial capacity to perform the contract.⁴¹⁶ Further, the regulation gives examples of criteria to check this. The public contracting authority may first require a certain minimum annual turnover from the tenderers. In addition, it may also require this in the field of activity of the contract.⁴¹⁷ However, the fixed minimum annual turnover may in principle represent a maximum of twice the estimated value of the contract. If the public contracting authority wants to require a higher minimum annual turnover, it must justify this. The justification may only be that there are special risks due to the nature of the subject matter of the contract.⁴¹⁸ The purpose of this

⁴¹² Hölzl in *Münchener Kommentar zum Wettbewerbsrecht* section 122 para 47.

⁴¹³ Higher Regional Court Munich, decision of 27 July 2018 – Verg 2/18; ECJ, decision of 7 April 2016 – C-324/14 *PARTNER Apelski Dariusz*; Friton in *BeckOK Vergaberecht* section 122 para 32ff.

⁴¹⁴ Higher Regional Court of Celle, decision of 11 June 2015 – 13 Verg 4/15.

⁴¹⁵ Opitz in *Beck'scher Vergaberechtskommentar* section 122 GWB para 64.

⁴¹⁶ Section 45(1) of the VgV.

⁴¹⁷ Section 45(1) sentence 2 no. 1 of the VgV.

⁴¹⁸ Section 45(2) of the VgV.

regulation is to avoid making excessive demands on economic and financial performance. Otherwise, these would be an obstacle for SMEs, in particular, to participate in tenders.⁴¹⁹

Another option available to the public contracting authority is to request information on the balance sheets.⁴²⁰ In doing so, the public contracting authority may consider the asset–liability ratio indicated in the balance sheets, provided that transparent, objective and non-discriminatory methods and criteria for consideration are applied and that these methods and criteria are indicated in the tender documents.

Finally, an appropriate level of professional risk indemnity insurance may be required.⁴²¹

It is true that section 45 of the VgV always refers to minimum requirements. However, the public contracting authority is not obliged to formulate the information as a minimum. It may also, for example, only request information on turnover without specifying a minimum annual turnover.⁴²² If no minimum requirements are set, the public contracting authority must decide, within the scope of its discretion, whether the information provided justifies the assumption that the tenderer has the necessary financial and economic standing for the contract in the future.⁴²³

Evidence of economic and financial standing may be provided through various documents. The public contracting authority may require bank statements, evidence of relevant professional risk indemnity insurance, financial statements or a statement of the company's total turnover and, where applicable, the turnover in the area which is the subject of the contract. Such a declaration may be requested for a maximum of the previous three financial years.⁴²⁴ The three-year rule regarding the statement of the undertaking's overall turnover ensures that newcomers also have a chance to participate in the award procedure.⁴²⁵

The public contracting authority may also require other evidence in addition to the evidence mentioned. These must only have a sufficient reference to the contract.⁴²⁶ This can, for example, be proof of available delivery capacities.⁴²⁷

⁴¹⁹ Friton in *BeckOK Vergaberecht* section 122 para 36.

⁴²⁰ Section 45(2) sentence 2 no. 2 of the VgV.

⁴²¹ Section 45(2) sentence 2 no. 3 of the VgV.

⁴²² Higher Regional Court Koblenz, decision of 25 September 2012 – 1 Verg 5/12; Goldbrunner in *Vergaberecht* Section 45 VgV para 7.

⁴²³ Goldbrunner in *Vergaberecht* section 45 VgV para 7.

⁴²⁴ Section 45(4) of the VgV.

⁴²⁵ Friton in *BeckOK Vergaberecht* section 122 para 39.

⁴²⁶ Friton in *BeckOK Vergaberecht* section 122 para 39.

⁴²⁷ Higher Regional Court Düsseldorf, decision of 19 November 2014 – VII-Verg 30/14.

If it is not possible for the tenderer to submit the documents required by the public contracting authority and if there is a legitimate reason for this, it may also provide other evidence of its economic and financial standing. This applies provided that the public contracting authority considers these documents to be suitable.⁴²⁸ High demands are made for the proof of the legitimate reason. For example, the principles of transparency and equal treatment require that a tenderer sets out the conditions why it is exempt from the need to submit certain evidence or documents.⁴²⁹ A legitimate reason may be assumed, for example, if the submission of the required evidence discloses technical or trade-related business secrets of the tenderer.⁴³⁰ If a company has only recently been founded and wants to participate in the award procedure as a so-called newcomer, this may constitute a legitimate reason.⁴³¹ Finally, it should be noted that the submission of other evidence must not undermine the established minimum requirements.⁴³²

5.2.4 Technical and professional ability

Technical and professional ability concerns the human and technical resources and experience of a company required to carry out the contract with appropriate quality.⁴³³ In addition, for supply contracts requiring laying or installation work and for service contracts, skills, efficiency, experience and reliability are also permitted as evaluation criteria.⁴³⁴ Other substantive minimum requirements for technical and professional ability must not be stipulated with a view to suitability and are thus inadmissible.⁴³⁵

Section 46(3) of the VgV lists the evidence that the public contracting authority may require to prove technical and professional ability. Specifically, references on supply and service contracts from the past are typically required by the public contracting authority.⁴³⁶ Suitable references do not necessarily have to involve the same performance. The prerequisite is that the references are comparable with the tendered service.⁴³⁷ Comparability is an indeterminate legal concept that must be interpreted according to meaning and purpose.⁴³⁸ This is the case if the service in

⁴²⁸ Section 45(5) of the VgV.

⁴²⁹ Higher Regional Court Koblenz, decision of 4 July 2007 – 1 Verg 3/07; Tomerius in *Vergaberecht* section 45 VgV para 15.

⁴³⁰ Tomerius in *Vergaberecht* section 45 VgV para 15.

⁴³¹ Tomerius in *Vergaberecht* section 45 VgV para 15.

⁴³² Tomerius in *Vergaberecht* section 45 VgV para 15.

⁴³³ Opitz in *Beck'scher Vergaberechtskommentar* section 122 GWB para 72; Ziekow in *Vergaberecht* section 122 GWB para 31.

⁴³⁴ Section 46(1) sentence 2 of the VgV.

⁴³⁵ Tomerius in *Vergaberecht* section 46 VgV para 2; Burgi *Vergaberecht* section 16 para 9a.

⁴³⁶ Section 46(3) no. 1 of the VgV.

⁴³⁷ Tomerius in *Vergaberecht* section 46 VgV para 5.

⁴³⁸ Higher Regional Court Frankfurt a.M., decision of 8 April 2014 – 11 Verg 1/14.

the technical or organisational area has an equally high or higher degree of difficulty.⁴³⁹ References are in addition comparable if the service rendered is sufficiently similar to the service put out to tender to enable a valid conclusion to be drawn about the tenderer's ability to perform the service.⁴⁴⁰ Here, too, the predictive character becomes clear. It is less about a one-to-one comparison of the references with the concrete contract. Rather, it is a question of whether it may be expected, based on the services already provided, that the professional and technical ability for the specific contract is present.⁴⁴¹

Another aspect is the temporal component. The public contracting authority may stipulate that the reference projects must be 'successfully completed'. In this case, it must define concretely what period of time it understands by this.⁴⁴² In terms of time, the requested references may only have been provided within a period of the last three years. This period may only be extended in special cases to ensure sufficient competition. This may be the case, for example, with large construction projects and the corresponding planning services. In this case, it is reasonable and necessary to extend the reference period beyond the three years, for example, to five years.⁴⁴³

A random check is sufficient to verify the references. For this purpose, the public contracting authority may speak to the referees on the telephone.⁴⁴⁴

The presentation of reference projects is permitted within the framework of the award of architectural and engineering services.⁴⁴⁵ These reference projects must also be comparable to the tendered contract matter.

Furthermore, the public contracting authority may require the specification of the technicians or the technical bodies to be used in connection with the performance of the contract.⁴⁴⁶ This applies particularly to the persons who are responsible for quality control. It is not relevant whether the persons belong to the company. This also includes all those professionals who work

⁴³⁹ Higher Regional Court Frankfurt a.M., decision of 8 April 2014 – 11 Verg 1/14; Tomerius in *Vergaberecht* section 46 VgV para 5.

⁴⁴⁰ Higher Regional Court Schleswig, decision of 28 June 2016 – 54 Verg 2/16; Tomerius in *Vergaberecht* section 46 VgV para 5.

⁴⁴¹ Higher Regional Court Schleswig, decision of 28 June 2016 – 54 Verg 2/16; Tomerius in *Vergaberecht* section 46 VgV para 5.

⁴⁴² Higher Regional Court Schleswig, decision of 28 June 2016 – 54 Verg 2/16; Tomerius in *Vergaberecht* section 46 VgV para 5.

⁴⁴³ Tomerius in *Vergaberecht* section 46 VgV para 5.

⁴⁴⁴ Tomerius in *Vergaberecht* section 46 VgV para 5.

⁴⁴⁵ Section 75(5) of the VgV.

⁴⁴⁶ Section 46(3) no. 2 of the VgV.

for the tenderer on a contractual basis or on a freelance basis.⁴⁴⁷ Information on the management staff may also be requested and, in addition to the information on the persons, proof of availability for the specific provision of services may also be requested.⁴⁴⁸

For the technical facilities it is sufficient if these are available when performance starts.⁴⁴⁹ If the necessary equipment is not the property of the tenderer, but must be rented, this must be proven by corresponding agreements.⁴⁵⁰ This also applies to permits which must be submitted.⁴⁵¹ Quality assurance measures include such measures as evidence of cooperation with universities or research projects carried out by the company in relevant contract fields.⁴⁵²

Supply chain management and tracking systems may be relevant in complex contracts involving different producers.⁴⁵³ In order to ensure the success of the delivery, the public contracting authority may therefore require the relevant information.⁴⁵⁴

In the case of complex services, a control may be set up.⁴⁵⁵ This may relate to the production capacities, technical capability, investigation and research facilities of the undertaking and the arrangements made for quality control.

The public contracting authority may also require evidence of studies and training as well as certificates of authorisation to exercise the profession for the owner or managers of the undertaking.⁴⁵⁶ This proof is mainly aimed at the performance of the responsible persons.⁴⁵⁷ Both degree certificates and professional experience from relevant projects may serve as evidence of professional competence and performance.⁴⁵⁸ However, there is a restriction. If the aforementioned evidence is already assessed as an award criterion, it may not also be specified as a selection criterion. Thus, there is a prohibition on double consideration.⁴⁵⁹ With regard to professional qualifications, these must be appropriate to the service in question. This is to be

⁴⁴⁷ Tomerius in *Vergaberecht* section 46 VgV para 8.

⁴⁴⁸ Tomerius in *Vergaberecht* section 46 VgV para 8.

⁴⁴⁹ Section 46(3) no. 3 of the VgV; Higher Regional Court Munich, decision of 17 January 2013 – Verg 30/12; Tomerius in *Vergaberecht* section 46 VgV para 9.

⁴⁵⁰ Tomerius in *Vergaberecht* section 46 VgV para 9.

⁴⁵¹ Higher Regional Court Düsseldorf, decision of 9 July 2003 – Verg 26/03; Tomerius in *Vergaberecht* section 46 VgV para 9.

⁴⁵² Tomerius in *Vergaberecht* section 46 VgV para 9.

⁴⁵³ See section 46(3) no. 4 of the VgV.

⁴⁵⁴ Tomerius in *Vergaberecht* section 46 VgV para 10.

⁴⁵⁵ Section 46(3) no. 5 of the VgV.

⁴⁵⁶ Section 46(3) no. 6 of the VgV.

⁴⁵⁷ Tomerius in *Vergaberecht* section 46 VgV para 12.

⁴⁵⁸ Tomerius in *Vergaberecht* section 46 VgV para 12.

⁴⁵⁹ Section 46(3) no. 6 of the VgV; Tomerius in *Vergaberecht* section 46 VgV para 12.

assumed if it is suitable and necessary to prove the capability with regard to the specific subject matter of the contract put out to tender.⁴⁶⁰

The public contracting authority may also require environmental management measures, a statement of the average annual number of staff overall in the undertaking, and the number of managerial staff, a statement of equipment, devices and technical equipment etc.⁴⁶¹

The determination of the specific documents depends on the type, intended use and quantity or scope of the specific order. Only the evidence specified in section 46(3) of the VgV may be required.⁴⁶²

Furthermore, it is possible to check whether a company has interests that conflict with the execution of the contract and may negatively influence it.⁴⁶³ If there are doubts as to the neutrality of the tenderer, professional capability may be denied. From this it can be partly inferred that this is an optional ground for exclusion at the discretion of the public contracting authority.⁴⁶⁴ However, this must be reliably verified. The burden of proof for this lies with the public contracting authority and it must present reliable results to deny professional ability.⁴⁶⁵

5.2.5 Secondary objectives

At a secondary level, more far-reaching goals may be pursued. These secondary objectives are explicitly regulated in section 97(3) of the GWB.⁴⁶⁶ The inclusion of secondary objectives in public procurement law is also permissible with regard to the principle of equal treatment under Art. 3(1) of the Grundgesetz, for example, for the pursuit of political objectives based on the welfare state principle or the protection of the natural basis of life under Art. 20a of the Grundgesetz.⁴⁶⁷

⁴⁶⁰ Higher Regional Court Düsseldorf, decision of 21 December 2011 – VII-Verg 74/11; Tomerius in *Vergaberecht* section 46 VgV para 12.

⁴⁶¹ Section 46(3) no. 7-11 of the VgV.

⁴⁶² Friton in *BeckOK Vergaberecht* section 122 para 40; Tomerius in *Vergaberecht* section 46 VgV para 4.

⁴⁶³ Section 46(2) of the VgV; Friton in *BeckOK Vergaberecht* section 122 para 40.

⁴⁶⁴ Federal Procurement Chamber, decision of 30 July 2018 – VK 1-61/18; Federal Procurement Chamber, decision of 14 May 2018 – VK 1-39/18; Friton in *BeckOK Vergaberecht* section 122 para 40.

⁴⁶⁵ Tomerius in *Vergaberecht* section 46 VgV para 3.

⁴⁶⁶ Burgi *Vergaberecht* section 6 para 13.

⁴⁶⁷ H Pünder, 'Zu den Vorgaben des grundgesetzlichen Gleichheitssatzes für die Vergabe öffentlicher Aufträge' ('On the requirements of the constitutional principle of equality for the award of public contracts') (2004) 95 *VerwArch* 38 at 44.

Section 97(3) of the GWB states:

In making the award, aspects of quality and innovation as well as social and environmental aspects shall be considered in accordance with this Part.

A concrete example of this is the obligation in section 97(4) of the GWB to promote the interests of SMEs in procurement.⁴⁶⁸ Section 97(4) of the GWB states:

The interests of small and medium-sized undertakings shall primarily be taken into account in public procurement procedures. Contracts shall be divided into individual lots (partial lots) and awarded separately according to the type or area of specialisation (trade-specific lots). Several partial or trade-specific lots may be awarded collectively if this is required for economic or technical reasons. If an undertaking that is not a public contracting authority or sector contracting entity is entrusted with the realisation or execution of a public assignment, it shall be obliged by the public contracting authority or sector contracting entity, so far as it subcontracts to third parties, to proceed according to sentences 1 to 3.

Behind the regulation of section 97(3) of the GWB is the idea of Directive 2014/24/EU on public procurement, which states in recital 2 that public procurement law should ‘enable procurers to make better use of public procurement in support of common societal goals’.

The directive goes on to say that it is of the utmost importance to fully exploit the potential of public procurement. The aim is to achieve smart, sustainable and inclusive growth. Crucially, public procurement is a key driver of innovation. At the same time, it is noted that there are major differences between the individual sectors and markets. The European legislature therefore does not consider it appropriate to define general binding requirements for environmental, social and innovative procurement.⁴⁶⁹ This is why public authorities should make the best use of public procurement to drive innovation.⁴⁷⁰

This means that the inclusion of social, environmental and innovative aspects in the award procedure is not mandatory for the public contracting authority, but the public contracting authority is free to take these aspects into account at any stage and in any way.⁴⁷¹

⁴⁶⁸ Burgi *Vergaberecht* section 6 para 13.

⁴⁶⁹ Recital 95 of the Directive 2014/24/EU.

⁴⁷⁰ Recital 47 of the Directive 2014/24/EU.

⁴⁷¹ Ziekow in *Vergaberecht* section 97 GWB para 61; I Lausen & A Pustal ‚Berücksichtigung von Nachhaltigkeitskriterien im Vergabeverfahren‘ (‘Consideration of sustainability criteria in the award procedure’) (2022) 1 *NZBau* 3 4.

There are two main ideas behind section 97(3) of the GWB. The one is the so-called ‘green respectively sustainable procurement’, which seeks to comply with certain standards on environmental management or to consider energy efficiency in the context of awarding contracts. The other is so-called ‘social procurement’, which provides for the payment of certain minimum wages or compliance with the core labour standards of the International Labour Organisation (ILO) to prevent child labour.⁴⁷² More generally, social aspects may be understood as all aspects that are intended to secure or improve the legal, economic and cultural living conditions of persons or groups of persons.⁴⁷³

In the context of the eligibility test, the secondary objectives play an important role. This applies for example, in the context of the grounds for exclusion pursuant to section 124(1) no. 1 of the GWB, according to which a compelling ground for exclusion is if it can be proven that applicable environmental, social and labour law obligations have been violated. Non-payment of social security contributions also leads to mandatory exclusion.⁴⁷⁴

Environmental aspects also play a decisive role within the framework of technical performance capability.⁴⁷⁵ For the environmental sector, the required evidence of technical capability may also include the specification of environmental management measures which the enterprise applies during the performance of the contract.⁴⁷⁶

Ecological and social aspects play an important role particularly in the procurement laws of the individual federal states. This concerns, for example, the obligation of public contracting authorities to award contracts only to companies that pay the minimum wage or the respective collectively agreed wage.⁴⁷⁷ A further social criterion, for example, is that efforts must be made to ensure that no services have been obtained or goods produced in violation of the minimum standards laid down in the ILO core labour standards.⁴⁷⁸ Further social aspects concern, for example, the promotion of women or equal opportunities for women and men in the bidding companies.⁴⁷⁹ Moreover, more ecological criteria and the avoidance of negative environmental

⁴⁷² Burgi *Vergaberecht* section 7 para 2ff.

⁴⁷³ Ziekow in *Vergaberecht* section 97 GWB para 64.

⁴⁷⁴ Section 123(4) of the GWB; Burgi *Vergaberecht* section 7 para 15.

⁴⁷⁵ Section 122(2) sentence 2 no. 3 of the GWB; Burgi *Vergaberecht* section 7 para 15.

⁴⁷⁶ Section 46(3) no. 7 of the VgV; Ziekow in *Vergaberecht* section 122 GWB para 33.

⁴⁷⁷ See, for example, for the federal state of Hamburg, section 3(1) and (2) of the HmbVgG, or for the federal state of Berlin, section 9(1) no. 2 and 3 of the Berlin Tendering and Award Act (Berliner Ausschreibungs- und Vergabegesetz – BerlAVG, published on 22 April 2020); Ziekow in *Vergaberecht* section 97 GWB para 63.

⁴⁷⁸ Section 3a of the HmbVgG.

⁴⁷⁹ See, for example, section 9(1) of the BerlAVG.

impacts may be specified.⁴⁸⁰ Finally, it could be stipulated that, for example, a family-friendly business concept must be pursued, a certain total amount of emissions must not be exceeded, or an environmental management system must be applied.⁴⁸¹

Another example is the general administrative regulation on the procurement of climate-friendly services (Allgemeine Verwaltungsvorschrift zur Beschaffung klimafreundlicher Leistungen – AVV Klima), which stipulates that, where possible and appropriate, aspects of sustainability, in particular the circular economy and resource conservation, must be taken into account as part of the qualification criteria.⁴⁸²

It is always important that the criterion that is set is related to the subject matter of the contract.⁴⁸³ However, there is a limit in this respect, because the required link is not necessary for criteria relating to general company policy. Therefore, contracting authorities are not permitted to require tenderers to have a specific corporate social or environmental responsibility policy.⁴⁸⁴

Other important aspects are ‘pre-qualification’ and a ‘pre-qualification system’. The contract notice or invitation to confirm interest must specify, in addition to the selection criteria, which documents (self-declarations, statements, certificates and other means of proof) must be provided by candidates or tenderers as proof of their eligibility.⁴⁸⁵ Furthermore, the public contracting authority must accept the submission of a European Single Procurement Document as preliminary proof of eligibility and of the absence of grounds for exclusion.⁴⁸⁶ Moreover, the public contracting authority must generally allow the submission of self-declarations to be sufficient as final proof.⁴⁸⁷

It is also possible to make it easier for companies to prove their eligibility and the absence of grounds for exclusion. Section 122(3) of the GWB states:

Proof of eligibility and the absence of grounds for exclusion under Sections 123 and 124 may be provided, entirely or in part, through participation in prequalification systems.

⁴⁸⁰ See, for example, section 3b of the HmbVgG.

⁴⁸¹ Ziekow in *Vergaberecht* section 97 GWB para 67.

⁴⁸² Published on 19 October 2021; section 4(7) of the AVV Klima. Regarding this topic, see A Rosenauer & J Steinthal ‘Der Umgang mit Klima- und Umweltschutzkriterien im Vergaberecht’ (‘Dealing with climate and environmental protection criteria in public procurement law’) (2022) 7 *KlimR* 202 at 202ff.

⁴⁸³ Ziekow in *Vergaberecht* section 97 GWB para 69.

⁴⁸⁴ Recital 97 of the Directive 2014/24/EU.

⁴⁸⁵ Section 48(1) of the VgV.

⁴⁸⁶ Section 48(3) of the VgV.

⁴⁸⁷ Section 48(2) sentence 1 of the VgV; Ziekow in *Vergaberecht* section 122 GWB para 46.

The details are regulated in section 48(8) of the VgV. For the construction sector, section 6b(1) sentence 1 no. 1 of the EU-VOB/A contains a similar provision regarding a pre-qualification system.

These pre-qualification systems are based on an upstream, contract-independent examination of provision and proof of eligibility. The companies submit their proof. They then receive a certificate and a certification code and are registered in an electronic pre-qualification database. In the context of a tender procedure, a public contracting authority may then use the code or the certificate to submit the evidence online.⁴⁸⁸

Pre-qualification thus plays a role in German public procurement law, in that it facilitates participation and the provision of regularly requested proof of eligibility.

5.2.6 Reasons for exclusion

Finally, reasons for exclusion are examined within the framework of eligibility. These are divided into compulsory grounds for exclusion, according to section 123 of the GWB, and facultative grounds for exclusion, according to section 124 of the GWB.

The compulsory grounds for exclusion are divided into two categories. The first category is grounds which are punishable under criminal or administrative law, and the second category is grounds that apply to breaches of the obligation to pay taxes and duties.⁴⁸⁹ Section 123 of the GWB lists different criminal offences, for example, money laundering, fraud and taking bribes in commercial practice or paying bribes to elected officials. Then there are violations of obligations to pay taxes, duties or social security contributions.⁴⁹⁰

If one of the grounds for exclusion is present, the exclusion of the company is mandatory. An exception to this is made under section 123(5) of the GWB, according to which an exclusion may not take place for compelling reasons of public interest or if it is disproportionate in certain cases.

Furthermore, there is no exclusion if the company has carried out self-cleaning measures pursuant to section 125 of the GWB, for example, by paying compensation for the damage caused by the misconduct.

⁴⁸⁸ Burgi *Vergaberecht* section 16 para 14.

⁴⁸⁹ Friton in *BeckOK Vergaberecht* section 123 Introduction.

⁴⁹⁰ Section 123(4) of the GWB; Friton in *BeckOK Vergaberecht* section 122 Introduction.

Within the framework of the facultative grounds for exclusion pursuant to section 124 of the GWB, the public contracting authority has a discretionary right to decide whether to exclude the tenderer. In doing so, it must observe the principle of proportionality. The public contracting authority must make a prognosis as to whether the tenderer may be expected to execute the public contract in a lawful, proper and diligent manner despite the existence of the factual prerequisites of an optional ground for exclusion.⁴⁹¹

Section 124(1) of the GWB covers facultative grounds for exclusion. Exclusion is justified if, for example, the undertaking has shown evidence of violating applicable environmental, social or labour law obligations in the performance of public contracts, the undertaking is insolvent, or the company has demonstrably committed serious misconduct in the course of its professional activities which calls into question the integrity of the company.

In addition, there are special legal regulations on the exclusion of companies.⁴⁹² These are listed in section 124(2) of the GWB, which states:

Section 21 of the Posted Workers Act [Arbeitnehmer-Entsendegesetz], Section 98c of the Residence Act [Aufenthaltsgesetz], Section 19 of the Minimum Wage Act [Mindestlohngesetz], Section 21 of the Act to Combat Undeclared Work and Unlawful Employment [Schwarzarbeitsbekämpfungsgesetz] and Section 22 of the Act on Corporate Due Diligence Obligations in Supply Chains [Lieferkettensorgfaltspflichtengesetz] shall remain unaffected.

The possibility of avoiding exclusion based on self-cleaning measures also exists for the optional grounds for exclusion.⁴⁹³

5.2.7 Conclusion

The objective of qualification criteria is always to determine whether a company can perform the contract properly. The provisions of public procurement law in Germany lay down specific requirements for the definition of qualification criteria. The qualification criteria relate to the qualifications and authorisations to pursue the professional activity, economic and financial standing, or technical and professional ability. German public procurement law thus provides a

⁴⁹¹ ECJ, decision of 19 June 2019 – C-41/18 *Meca*; Higher Regional Court Celle, decision of 13 May 2019 – 13 Verg 2/19; Ziekow in *Vergaberecht* section 122 GWB para 33; Friton *Die Festlegung und Erfüllung von Eignungsparametern* 503.

⁴⁹² B Stolz in *Vergaberecht* section 124 GWB para 54.

⁴⁹³ Section 125 of the GWB.

system for the definition of qualification criteria to determine the aspects that are essential for verifying suitability.

Secondary objectives also play an important role in Germany. This concerns SMEs, but also sustainable and social procurement. These can be pursued in the form of grounds for exclusion if, for example, a company has violated social and labour law obligations. At the same time, these secondary objectives can be queried through positive qualification criteria, for example, in the form of requirements for environmental management measures.

German public procurement law contains a standard catalogue of grounds for exclusion. Some of these are mandatory, while some are optional and give the contracting authority room for decision. This offers the possibility of finding an appropriate solution for the specific case. It is also possible for companies to cleanse themselves, despite having committed infringements, for example, by making a payment, and thus prevent their exclusion from the award procedure.

Overall, it can be stated that German public procurement law, similar to South African public procurement law, defines various points of reference for the determination of qualification criteria. In particular, the differentiation in the definition of qualification criteria with regard to the various sub-categories offers the possibility of defining specific criteria. In some cases, however, it should be noted that this can also lead to excessive demands on public contracting authorities. This is particularly true in light of the large number of individual court decisions and the now scattered legal regulations, for example, in the Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains. This is because smaller contracting authorities, such as local authorities, do not always have the financial resources to employ staff specially trained in public procurement law, and specific legal assistance must be sought. Overall, however, simplification is needed, and is currently being sought with the transformation of public procurement law.

CHAPTER SIX: Summary, comparison and conclusion

The determination of qualification criteria has various levels. The qualification criteria play an important role in ensuring that the tenderer can fulfil the contract. However, they also play a role in ensuring that the secondary objectives of the contract will be met. Due to the large number of public contracts, public procurement law can be used to achieve secondary objectives, for example, social or sustainability objectives.

As already shown, in South Africa and Germany, the specific structure of the provisions under public procurement law, particularly the structure of the qualification criteria, the design of the instruments of pre-qualification, and the grounds for exclusion, differ to some extent. Nevertheless, both systems follow the same basic procurement principles. As there is a fundamentally similar understanding of public procurement law, the objectives and structures of both systems can be compared. Both countries can learn from each other based on their different experiences and use these for their own benefit.

Interestingly, both systems are converging. This can be seen in the draft Public Procurement Bill 2020, which, like the German regulations, provides for specific regulations and categories for determining the qualification criteria. The updated version of the draft Public Procurement Bills of 2023 and 2024, on the other hand, is more general again and shifts the determination of eligibility criteria downstream. It is clear that public procurement law in South Africa is in a state of flux. The draft Public Procurement Bill 2024 was adopted on 16 May 2024 and became law as the Public Procurement Act on 23 July 2024. There will be a review process over the next two years that may bring changes. In Germany, too, public procurement law is constantly developing, and attempts are being made to respond to new challenges, for example, with regard to sustainable procurement and environmental protection.

South Africa already has a lot of experience with secondary objectives and their implementation in the requirements of the procurement procedure. Germany has already taken the first steps in this area, but still needs more experience. It is always crucial to analyse the effects of this instrument in concrete terms to draw conclusions about how such targets may be achieved even more successfully.

Defining qualification criteria is an important and decisive step in the procurement procedure. It is essential for the public contracting authority to find the right contractual partner who can fulfil the contract properly. At the same time, the definition of qualification criteria offers an

effective instrument for achieving secondary objectives and thus helps to achieve specific political goals. However, the procurement system must be strengthened so that effective controls and monitoring ensure that the regulations not only appear on paper, but are also applied in practice. Clear and binding guidelines for everyone help here. The definition and determination of qualification criteria must therefore always be given special attention and also offer great possibilities and opportunities.

6.1 Qualification criteria

Firstly, qualification criteria are essential to determine whether a tenderer can successfully perform the planned procurement contract.⁴⁹⁴ If a tenderer meets the qualification criteria, its eligibility is proven. One could consider whether this approach is correct. After all, whether a bidder only achieves the minimum number in the qualification criteria or demonstrates “more” suitability, for example by providing five instead of three references, no longer matters once it has crossed the suitability threshold. This could result in the risk of poorer contract performance, which means that the most cost-effective tender is not selected after all. However, this approach does not take into account the different objectives and the distinction between qualification and award criteria. As explained above (section 1.3), qualification criteria are company- and performance-related and look to the past. They can be used to clearly determine whether a company is suitable or not. In contrast, award criteria are used to compare bids and to determine the most financially advantageous offer on the basis of the award criteria. These two objectives must be clearly distinguished. If there is a concern that a poorer contract performance will be purchased because a lower quality product can be offered at a lower price, the qualification criteria should be set higher in order to make it clear that the company is suitable. In addition, a better quality bid can be rated higher in the award criteria, as the award criteria consist of a price and a quality evaluation. The clear distinction between suitability and award criteria should therefore be maintained. In South Africa, the public contracting authority is largely free to determine qualification criteria, provided the basic rules are observed. In the case of extensive and difficult procurement procedures, where the preparation of the tender is time-consuming, it is also recommended to conduct pre-qualification. This will screen the tenderers so that only suitable tenderers prepare a bid at the next stage. On the one hand, the draft Public Procurement Act 2020 provided for a differentiated system as to which criteria, such as professional and technical qualifications, may be used to assess suitability. The updated drafts of 2023 and 2024, on the other hand, provide for an authorisation to issue special

⁴⁹⁴ Quinot (2014) *PELJ* 1111.

regulations that include these aspects. This returns us to a more general rule, and the concrete definition of requirements is shifted to the next level. This means that there is generally more leeway for the public contracting authority when determining qualification criteria. However, there is also a risk that the regulations will not be applied uniformly. According to the drafts and the now adopted Public Procurement Act, the decisive factor will be the specificity of the requirements for qualification criteria provided by the Minister of Finance.

In Germany there is a differentiated system, divided into the categories of qualification and permission to practise the profession, economic and financial performance, and technical and professional performance, which may be used to test suitability. In addition, there are now more and more stipulations in other laws, outside of the actual procurement laws, for example, in the Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains. In addition to the clear regulations, there has also been a lot of case law about these categories, which clearly regulate which determinations may or may not be made. This leads to legal certainty for the award process with regard to the definition of specific qualification criteria. Precise criteria must be used to determine whether a tenderer is suitable to perform the contract or not.

The regulations go even further as to which documents may be submitted for the examination and are sufficient. However, it should be noted that the large number of regulations and the case law can be overwhelming for smaller public contracting authorities which do not have employees specially trained in procurement law.

The recognizably different approach is shown by the fact that Germany chooses the path of legal certainty and clear regulations, while South Africa offers greater scope for discretion.

Looking at the advantages and disadvantages, the first thing to consider is that overregulation is not helpful. However, there are also various solutions for dealing with it.

An attempt should be made to train public contracting authorities in procurement law so that they can deal with the requirements and also the possibilities when defining qualification criteria. Furthermore, the requirements should be simplified. This simplification is being sought with the transformation of public procurement law. For example, fragmentation into different laws should be avoided so that uniform requirements are defined in the procurement law provisions.

South Africa's more flexible approach allows for more possibilities to respond to the specific award and, if necessary, to find the right criteria and the right contractor. On the other hand, clear and transparent requirements for the definition of qualification criteria in particular guarantee that, on the one hand, procurement law is applied uniformly and, on the other hand, bidders also clearly understand how the criteria are determined and what is required of them in order to achieve a good evaluation. This makes a subsequent decision in the evaluation process more comprehensible for the bidders. Clear guidelines for defining the criteria also help companies. This is because they regularly apply for public tenders. Similar evidence of compliance with the qualification criteria, such as references, must be submitted regularly. The companies then already have these to hand in order to limit the effort involved in preparing a bid.

In addition, clear and transparent rules guarantee that a breach can be more easily identified and can be reviewed by the procurement chamber as part of a review procedure.

Finally, however, care must be taken to ensure that, despite all the legal regulations, there is still sufficient flexibility and a range of different criteria to determine the right criteria for each specific tender.

Similar to South Africa, there is also the aspect of pre-qualification in Germany. This takes place within the framework of a negotiated procedure with a preliminary competition. Only those tenderers who prove to be suitable may submit a bid at the next stage. This method, which is also used in South Africa, is particularly useful for complex and large-volume procedures.

Finally, Germany and the EU provide for a special pre-qualification system. Certain evidence may be stored in this system so that the suitability test can be carried out more quickly and easily. The evidence is stored centrally and can be accessed by public contracting authorities. However, practice in public procurement in Germany shows that the pre-qualification system has thus far been little used; the public contracting authorities check suitability based on the qualification criteria that they prefer.

Both countries show, particularly in development, that clear definitions regarding the criteria to be used when determining qualification criteria are essential. With clearly defined criteria, the public contracting authority can define their requirements for the suitability test and the tenderer knows what requirements it must meet. Clear procurement regulations also help to combat corruption, since there are no gaps or loopholes in the procurement system. In

particular, the various areas of the suitability test should be addressed with regard to the ability to practise the profession, economic and financial performance, and technical and professional performance. These allow for a concrete and comparable assessment of suitability and help to find the right contractual partner for the procurement project. It is also helpful to provide specific examples for the individual categories, such as references for the proof of technical and professional capability in accordance with section 46 (3) No. 1 VgV in Germany.

The requirements for the qualification criteria should ideally be set out in a standardised procurement provision. This makes it easier for public contracting authorities, but also for tenderers, especially those who do not have much experience with public tenders, for example, SMEs.

A database in which various documents are stored so that pre-qualification and suitability testing can take place may be more efficient. At the same time, however, this must be maintained permanently, and references must always be kept up to date. Experience in Germany shows that this option is seldom used. Therefore, such a system is useful only if it is actually used and standardised qualification requirements and evidence have been developed that may be stored in an appropriate system.

6.2 Secondary objectives

Secondary objectives can be achieved using procurement procedures. South Africa has demonstrated what determinations need to be made to achieve such goals, for example, by establishing a specific BEE status or specifying the requirement for local production. However, it is also repeatedly pointed out that there is a lack of implementation in the context of preferential procurement. There are also calls for the standardised application of definitions and criteria, as otherwise an effective preferential procurement policy cannot be implemented.⁴⁹⁵ It must also be clarified that such stipulations represent a strong interference with competition. At the same time, however, they are effective means of achieving corresponding secondary objectives, particularly at the level of suitability. Only those tenderers who meet the requirements are admitted to the procurement process. It may therefore be stated that, in order to achieve secondary objectives, clear guidelines that are applied uniformly are required. The draft Public Procurement Bill 2024 and the Public Procurement Act contain a separate chapter on preferential procurement (Chapter 4) and provide the public contracting authority with

⁴⁹⁵ Shai, Molefinyana & Quinot (2019) *Sustainability* 3, 9, 19, 21ff. See also A Simone & V Balasundharam 'Public procurement in South Africa: Issues and reform options' IMF Selected Issues Paper (2023) para B.10ff.

various options for achieving secondary objectives. For example, the bidder must prove a prescribed minimum percentage of preferential procurement from enterprises that are owned and managed by black people, or by setting up the requirement of subcontracting a prescribed minimum percentage of the contract to small enterprises, or to a small enterprise which is owned by black people. These requirements can serve as a model for Germany when setting rules on secondary objectives.

Germany has also already gained experience in defining secondary objectives through procurement law. Nevertheless, this is largely done on a voluntary basis. In particular, the inclusion of social, environmental and innovative aspects in the award procedure has until now not been mandatory for the public contracting authority. The public contracting authority is free to consider these aspects at a stage determined by it. The specific method of implementation is also generally not specified. If certain political or social goals are to be enforced, however, these must be set as binding criteria for suitability. Otherwise, there is scope for discretion on the part of the public contracting authority, which may always decide against applying the corresponding criteria, so that the achievement of the objectives is not guaranteed. Germany has some catching up to do here. The pursuit of secondary objectives as part of the definition of qualification criteria should be laid down to ensure that these objectives are effectively achieved. As part of this, it must always be determined whether the secondary objective is compatible with the principles of public procurement law. For example, the determination of local production is in principle not permitted in Germany, due to the principle of equal treatment. Nevertheless, this changes if it is justified and proportionate to the subject matter of the order.⁴⁹⁶

Public procurement law and especially the determination of qualification criteria are useful and effective instruments for achieving secondary objectives, particularly in the area of social policy.⁴⁹⁷ This area should be further expanded and strengthened in both South Africa and Germany. However, binding requirements must be defined for this. South Africa is already leading the way, and Germany has more to learn. Although the contracting authority must in principle be free to define the qualification criteria, if specific objectives are to be achieved, general binding requirements must also be defined. Either concrete specifications can be made regarding the secondary objectives that must be met, or certain objectives must be implemented, but the concrete definition of the qualification criteria for achieving these objectives is then left

⁴⁹⁶ ECJ, decision of 27 October 2005 – C-234/03 *Contse u.a.* para 53ff.

⁴⁹⁷ Bolton *The Law of Government Procurement* 253.

to the contracting authority. The first option is the most effective, while the second is also sensible and still leaves the public contracting authority room for manoeuvre. The Public Procurement Act sets out very specific requirements to be met. The requirement in section 217(3) to merely create a framework has been criticised.⁴⁹⁸ However, the scope that is awarded as a subcontract to a small enterprise which is owned by black people is freely selectable, for example. This offers the contracting authority sufficient leeway, also with regard to the constitutional requirements of a framework. This restriction does not exist in Germany. The route in South Africa also appears to make sense for Germany, if a specific goal is to be achieved in a short period of time. If the overall aim is to promote sustainable procurement, it is sufficient if the public contracting authority is only given binding specifications and is allowed to set specific qualification criteria itself. For example, proof of environmental management can be required as a qualification criterion, as well as a certain proportion of local production or, in the construction sector, references in the area of sustainable building materials. The public contracting authority can then choose from the possible stipulations. However, it should be obliged to use them at all.

The advantages are obvious: public procurement is a very large lever in terms of volume alone. Besides, public spending does not increase as a result of setting these secondary objectives and the money goes directly to where the specific goal is to be achieved.⁴⁹⁹

In South Africa, the fight against discrimination should continue to be at the centre of achieving secondary objectives in the context of defining qualification criteria. Germany must further develop the topic of sustainability and define binding regulations in this regard. Both countries can strengthen SMEs by specifying certain requirements in the qualification criteria, for example, by splitting the public contract where possible. It is important to ensure that the requirements are not set too high to enable SMEs to participate in public tenders. If this is not possible, there should be special regulations for recently established companies.

Despite the usefulness of secondary objectives, it is important not to lose sight of the fact that a suitable tenderer must always be found. The achievement of secondary objectives must not undermine the primary objective of finding the right contractor for the contract who will fulfil the contract properly and in the best possible way. It is also important to bear in mind that excessive demands in respect of secondary objectives may also prevent other objectives from

⁴⁹⁸ T Moroeng 'A constitutional review of the pre-qualification provisions under the Public Procurement Bill' (2023) 10 *APPLJ* 14 at 36.

⁴⁹⁹ Bolton *The Law of Government Procurement* 253.

being achieved, such as strengthening SMEs. Appropriate and balanced regulation must therefore always be chosen.⁵⁰⁰

Various measures could also be taken to reduce the reduction in competition as a disadvantageous consequence of secondary objectives. For example, the law could stipulate that certain secondary objectives only apply once a certain minimum number of bidders has been reached. In this case, bidders could hope that this minimum number would not be reached and that they would therefore not have to meet the requirements. However, this special condition would have to be clearly communicated. Not only to uphold the principle of transparency and fairness in the tender documents and the contract notice, but above all because otherwise bidders would read the requirements, realize that they do not meet them and would not submit a bid.

Another idea would be for exceptions to the application of the secondary objectives to be included in the law in the event that a market investigation has taken place beforehand and this proves that not enough potential candidates would meet the secondary objectives. In this case, it would seem sensible to give preference to competition and to refrain from pursuing secondary objectives. A corresponding market investigation would of course have to be properly documented in order to prevent circumvention of the regulations on secondary objectives.

Finally, when defining secondary objectives, these must always be in line with the principles of higher-ranking law, especially the Constitution, and must not violate the principles of public procurement law. In this context, the discussion about the constitutionality of the Public Procurement Act is interesting. According to section 217(2) of the Constitution, section 217(1) and the underlying procurement principles organs of state or institutions are not prevented from implementing a procurement policy providing for and thus pursuing secondary objectives. Section 217(3) of the Constitution further clarifies that national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented. It is now being discussed whether the Public Procurement Act goes beyond this and no longer only provides a 'may' and a framework, but an actual 'must' with regard to the pursuit of secondary objectives. For example when it provides in section 18 of the Public Procurement Act "a procuring institution must [...] apply the following prequalification criteria for a bid to promote preferences in the allocation of contracts". National Treasury believes that the pursuit of secondary objectives with regard to preferential procurement is mandatory and not

⁵⁰⁰ Maritz (2022) *APPLJ* 83.

discretionary. This is because this objective is laid down in the principle of equitability under public procurement law and the establishment of a corresponding mechanism to achieve this objective is also required.⁵⁰¹

Others, on the other hand, argue that the constitution does not require the establishment of such mechanisms to be mandatory in order to comply with the constitutional principle of equitability. Furthermore, there are situations in which disadvantaged bidders simply do not participate, meaning that the instrument would not achieve its objective and could also restrict competition if, for example, bidders were excluded due to non-performance. It is therefore concluded that mandatory requirements go beyond the framework and undermine the constitution.⁵⁰² The National Treasury's approach is reasonable. With the Public Procurement Act, the legislator has created a uniform framework for the achievement of secondary objectives in the area of preferential procurement, thereby simultaneously fulfills the principle of equitability, which plays a particular role in South Africa due to historical experience. Even though implementation is mandatory, the Public Procurement Act still leaves sufficient leeway in its implementation, as, for example, section 19 of the Public Procurement Act only provides for the obligation to subcontract to certain groups if this is feasible.

6.3 Reasons for exclusion

The issue of exclusion also plays an important role in the context of suitability. Even if a tenderer meets the suitability requirements, it may be excluded from participating in the award process due to exclusion.⁵⁰³ Therefore, the reasons for exclusion are closely linked to the qualification criteria and are examined at this level.

In South Africa, the issue of exclusion plays an important role, particularly in connection with corruption. This is understandable in view of the major challenges posed by corruption. The Public Procurement Act contains a range of grounds for exclusion. A distinction is made between automatic exclusion and exclusion where the bidder is given the opportunity to present reasons why exclusion is not justified. Closely connected to the qualification criteria, the reasons for exclusion support the selection of the right bidder for the execution of the contract.

Germany provides various reasons for exclusion, which are, as in the Public Procurement Act in South Africa, divided into compulsory and facultative reasons for exclusion. These reasons

⁵⁰¹ National Treasury 'Report on Comments submitted to Parliament: Public Procurement Bill [B18-2023]' 11f.

⁵⁰² See Moroeng (2023) *APPLJ* 14, 31.

⁵⁰³ Arrowsmith *The Law of Public and Utilities Procurement* 748.

cover criminal and labour law violations, and justify exclusion. The secondary objectives may also be achieved via the grounds for exclusion. For example, the LkSG requires the fulfilment of corporate due diligence obligations in the supply chain with regard to respect for human rights and may justify exclusion from the award procedure in the event of violations.⁵⁰⁴ In some cases, it is not possible to positively define obligations under public procurement law to achieve secondary objectives in the form of requirements in the qualification criteria. It is then advisable to take these into account in the context of grounds for exclusion, so that exclusion is justified in the event of a breach.

It seems sensible to create a register, such as the Register for Tender Defaulters under the PCCA. This makes it easy for public contracting authorities to check whether tenderers are excluded from contracts. Germany does not have such a central register but works with self-declarations. Further investigations are conducted only if there are existing reasons. A centralised register could assist here.

One difference is the issue of self-cleaning. Even if there is a reason for exclusion, German procurement law stipulates that the tenderer can make reparations through so-called self-cleaning measures so that it can continue to participate in the procurement process. The situation is different in South Africa where, according to the Public Procurement Act, the only possibility is to declare that there are no grounds for exclusion. However, section 15(5)(a) of the Public Procurement Act allows a procuring institution to shorten the period of debarment or revoke it under subsection (b) at the request of a debarred entity. The latter, however, only if the order was made in error of fact, error of law or fraud. A shortening does not contain any further requirements. It could be argued that such a reduction could be considered if sufficient evidence of rehabilitation or self-cleaning is provided. This would at least be consistent if these self-cleaning measures are directly linked to the reason for exclusion. This is because the exclusion is based precisely on the fact that a certain misconduct or similar has been committed. If this wrong committed is mitigated or remedied, this justifies a shortening of the exclusion.

The possibility of self-cleaning seems sensible, as injustices committed may be remedied through reparation and more competition is generated by the continued participation of a tenderer. It therefore makes sense to adopt these regulations in South Africa. Either in the interpretation of the reasons for shortening the exclusion period or directly in the Public Procurement Act. Overall, however, it can be stated that, both in South Africa and Germany,

⁵⁰⁴ Lausen & Pustal (2022) *NZBau* 6; Fritz & Klaedtke (2022) *NZBau* 131ff.

the reasons for exclusion help to find the right bidder for the contract and also help to achieve secondary objectives.

Bibliography

Primary sources

Germany

Constitution

Grundgesetz, published on 23 May 1949

Statutes

Act against Restraints of Competition by the Act Amending the Legal Basis for the Award of Public Contracts (Vergaberechtsänderungsgesetz), published on 26 August 1998

Act on Corporate Due Diligence to Prevent Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz), published on 16 July 2021

Act on ensuring compliance with collective agreements and minimum wages in the award of public contracts in North Rhine-Westphalia (Tariftreue- und Vergabegesetz Nordrhein-Westfalen), published on 22 March 2018

Act on the establishment and operation of a register for the protection of competition for public contracts and concessions (Gesetz zur Einrichtung und zum Betrieb eines Registers zum Schutz des Wettbewerbs um öffentliche Aufträge und Konzessionen), published on 18 July 2017

Berlin Tendering and Award Act (Berliner Ausschreibungs- und Vergabegesetz), published on 22 April 2020

Commission delegated Regulation (EU) 2023/2495 of 15 November 2023 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests

Commission delegated Regulation (EU) 2023/2496 of 15 November 2023 amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts, and design contests

Commission delegated Regulation (EU) 2023/2510 of 15 November 2023 amending Directive 2009/81/EC of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts

Commission delegated Regulation (EU) 2023/2497 of 15 November 2023 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the thresholds for concessions

Commission Notice on the notion of State aid as referred to in Art. 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01, published on 19 July 2016.

Competition Act (Gesetz gegen Wettbewerbsbeschränkungen), published on 26 June 2013

Construction Tendering and Contract Regulations, Part A, published on 31 January 2019

Defence and Security Procurement Ordinance (Vergabeverordnung Verteidigung und Sicherheit), published on 12 July 2012

General administrative regulation on the procurement of climate-friendly services (Allgemeine Verwaltungsvorschrift zur Beschaffung klimafreundlicher Leistungen), published on 19 October 2021

General Auxiliary Conditions for Grants for Project Funding (Allgemeine Nebenbestimmungen für Zuwendungen zur Projektförderung), published on 13 June 2019

Hamburgisches Vergabegesetz, published on 13 February 2006

Ordinance on the Award of Concession Contracts (Konzessionsvergabeverordnung), published on 2 April 2016

Ordinance on the Award of Public Contracts (Vergabeverordnung), published on 12 April 2016

Ordinance on the Award of Public Contracts in the Field of Transport, Drinking Water Supply and Energy Supply (Sektorenverordnung), published on 12 April 2016

Part A of the Construction Tendering and Contract Regulations, published on 31 January 2019

Procurement and Contract Regulations for Services, published on 20 November 2009

Public procurement regulations for freelance services, published on 18 November 2009

Rules of Procedure for the Award of Public Supply and Service Contracts below the EU Thresholds (Unterschwelvenvergabeordnung), published on 2 February 2017

Treaty on the Functioning of the European Union, published on 26 October 2012

Cases

Constitutional Court, decision of 11 July 2006 – 1 BvL 4/00

Constitutional Court, decision of 13 June 2006 – 1 BvR 1160/03

Constitutional Court, decision of 29 July 2014 – 2 BvR 2248/03

ECJ, decision of 4 December 1974 – C-41/74 *Van Duyn / Home Office*

ECJ, decision of 5 April 1979 – C-148/78 *Ratti*

ECJ, decision of 12 September 2013 – C-526/11 *Ärztammer Westfalen-Lippe*

ECJ, decision of 12 November 2009 – C-199/07 *Greece*

ECJ, decision of 16 December 2008 – C-213/07 *Michaniki*

ECJ, decision of 18 October 2012 – C-218/11 *Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság*

ECJ, decision of 19 April 2018 – C-65/17 *Oftalma Hospital Srl*

ECJ, decision of 19 June 2019 – C-41/18

ECJ, decision of 19 May 2009 – C-538/07 *Assitur*

ECJ, decision of 20 October 2005 – C-264/03 *French Republic*

ECJ, decision of 20 September 2018 – C-546/18 *Montte*

ECJ, decision of 23 December 2009 – C-305/08 *CoNISMa*

ECJ, decision of 24 January 2008 – C-532/06 *Lianakis*

ECJ, decision of 27 October 2005 – C-234/03 *Contse u.a.*

ECJ, decision of 28 January 2016 – C-50/14 *CASTA*

ECJ, decision of 3 October 2000 – C-380/98 *University of Cambridge*

ECJ, decision of 4 April 2019 – C-699/17 *Allianz*

ECJ, decision of 6 October 2016 – C-318/15 *Tecnoedi Costruzioni Srl*

ECJ, decision of 7 April 2016 – C-324/14 *PARTNER Apelski Dariusz*

Federal Administrative Court, decision of 13 February 2013 – 3 B 58/12

Federal Procurement Chamber, decision of 14 May 2018 – VK 1-39/18

Federal Procurement Chamber, decision of 30 July 2018 – VK 1-61/18

Federal Procurement Chamber, decision of 22 August 2018 – VK 1-77/18

Federal Procurement Chamber, decision of 31 August 2022 – VK 2-72/22

Federal Procurement Chamber, decision of 4 October 2019 – VK 1-73/19

Federal Supreme Court, decision of 15 April 2008 – X ZR 129/06

Higher Regional Court Celle, decision of 12 April 2016 – 13 Verg 1/16

Higher Regional Court Celle, decision of 12 January 2012 – 13 Verg 9/11

Higher Regional Court Celle, decision of 13 May 2019 – 13 Verg 2/19

Higher Regional Court Düsseldorf, decision of 24 October 2006 – 11 Verg 8/06 and 9/06

Higher Regional Court Düsseldorf, decision of 10 September 2009 – Verg 12/09

Higher Regional Court Düsseldorf, decision of 21 December 2011 – VII-Verg 74/11

Higher Regional Court Düsseldorf, decision of 12 July 2017 – Verg 13/17

Higher Regional Court Düsseldorf, decision of 19 June 2013 – Verg 4/13

Higher Regional Court Düsseldorf, decision of 20 July 2015 – Verg 37/15

Higher Regional Court Düsseldorf, decision of 21 December 2011 – VII-Verg 74/11

Higher Regional Court Düsseldorf, decision of 21 May 2008 – VII-Verg 19/08

Higher Regional Court Düsseldorf, decision of 26 November 2008 – Verg 54/08

Higher Regional Court Düsseldorf, decision of 27 June 2018 – Verg 4/18

Higher Regional Court Düsseldorf, decision of 28 April 2008 – Verg 1/08

Higher Regional Court Düsseldorf, decision of 29 April 2015 – Verg 35/4

Higher Regional Court Düsseldorf, decision of 31 July 2007 – Verg 25/07

Higher Regional Court Düsseldorf, decision of 6 May 2011 – Verg 26/11

Higher Regional Court Düsseldorf, decision of 9 July 2003 – Verg 26/03

Higher Regional Court Frankfurt a.M., decision of 8 April 2014 – 11 Verg 1/14

Higher Regional Court Frankfurt, decision of 28 September 2023 – 11 Verg 2/23

Higher Regional Court Karlsruhe, decision of 20 July 2011 – 15 Verg 6/11

Higher Regional Court Koblenz, decision of 25 September 2012 – 1 Verg 5/12

Higher Regional Court Koblenz, decision of 4 July 2007 – 1 Verg 3/07

Higher Regional Court Munich, decision of 17 January 2013 – Verg 30/12

Higher Regional Court Munich, decision of 27 July 2018 – Verg 2/18

Higher Regional Court Munich, decision of 29 July 2010 – Verg 9/10

Higher Regional Court Munich, decision of 31 August 2010 – Verg 12/10

Higher Regional Court Naumburg, decision of 12 April 2012 – 2 Verg 1/12

Higher Regional Court of Celle, decision of 11 June 2015 – 13 Verg 4/15

Higher Regional Court Schleswig, decision of 28 June 2016 – 54 Verg 2/16

Procurement Chamber Baden-Württemberg, decision of 12 April 2011 – 1 VK 13/11

Procurement Chamber Baden-Württemberg, decision of 27 August 2018 – 1 VK 35/18

Procurement Chamber Münster, decision of 21 August 2003 – VK 18/03

South Africa

Constitution

Constitution of the Republic of South Africa, 1996

Statutes

Broad-Based Black Economic Empowerment Act 53 of 2003

Broad-Based Black Economic Empowerment Amendment Act 46 of 2013

Draft Public Procurement Bill, published on 19 February 2020

Draft Public Procurement Bill, published on 22 May 2023

Draft Public Procurement Bill, published on 6 February 2024, updated 13 May 2024

Employment Equity Act 55 of 1998

Employment Equity Amendment Act 4 of 2022

Municipal Finance Management Act 56 of 2003

Municipal Systems Act 32 of 2000

Preferential Public Procurement Framework Act 5 of 2000

Prevention and Combating of Corrupt Activities Act 12 of 2004

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Public Finance Management Act 1 of 1999

Public Procurement Act 28 of 2024

Instructions

National Treasury, Instruction No. 8 of 2019/2020: Emergency procurement in response to national state of disaster

National Treasury, Republic of South Africa: Instruction note of 25 February 2022

National Treasury, Republic of South Africa: Instruction note of 8 November 2022

National Treasury, Republic of South Africa: Instruction note on the amended guidelines in respect of bids that include functionality as a criterion for evaluation, 2010

National Treasury, Report on Comments submitted to Parliament: Public Procurement Bill [B18-2023]

PFMA SCM Instruction No. 02 of 2021/22

PFMA SCM Instruction No. 03 of 2021/2022

PFMA SCM Instruction No. 09 of 2022/2023

Regulations

Preferential Procurement Regulations 2001, *Government Gazette* No. 22549 of 10 August 2001

Preferential Procurement Regulations 2011, *Government Gazette* No. 34350 of 8 June 2011

Preferential Procurement Regulations 2017, *Government Gazette* No. 40553 of 20 January 2017

Preferential Procurement Regulations 2022, *Government Gazette* No. 47452 of 4 November 2022

Cases

Afribusiness NPC v Minister of Finance [2021] 1 All SA 1 (SCA)

Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others [2020] ZASCA 2

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) BCLR 1 (CC) 42

Fidelity Springbok Security Services (Pty) Ltd v South Africa Post Office Ltd [2004] JOL 13215 (T)

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)

Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC)

Minister of Finance v Afribusiness 2022 (9) BCLR 1108 (CC)

Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others 2022 (4) SA 401 (CC)

PJJ Olivier JA in Transnet Ltd v Goodman Brothers (Pty) Ltd [2000] ZASCA 62

South African National Road Agency Ltd v The Toll Collect Consortium and Another [2013] ZASCA 102

Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others 2011 (4) SA 406 (KZP)

Transnet Ltd v Goodman Brothers (Pty) Ltd 2021 (1) SA 853 (SCA)

Secondary sources

Books

- Arrowsmith, Sue; Linarelli, John & Wallace, Don Jr *Regulating Public Procurement – National and International Perspectives* (2000)
- Arrowsmith, Sue *The Law of Public and Utilities Procurement* 2 ed (2005)
- Bolton, Phoebe *The Law of Government Procurement in South Africa* (2007)
- Burgi, Martin; Dreher, Meinrad & Opitz, Marc *Beck'scher Vergaberechtskommentar* 4 ed (2022)
- Burgi, Martin *Vergaberecht* 3 ed (2021)
- Friton, Pascal *Die Festlegung und Erfüllung von Eignungsparametern nach den EU-Vergaberichtlinien und die Umsetzung im GWB-Vergaberecht (The definition and fulfilment of qualification parameters in accordance with the EU Public Procurement Directives and their implementation in GWB procurement law)* (2016)
- Hanks, Jonathan; Davies, Helen & Perera, Oshani *Sustainable Public Procurement in South Africa* (2008)
- Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FD *Mehr Fortschritt wagen* (2021)
- Müller-Wrede, Malte *GWB – Vergaberecht einschließlich WRegG* 2 ed (2023)
- Pünder, Hermann & Schellenberg, Martin *Vergaberecht* 3 ed (2019)
- Säcker, Franz Jürgen; Gasnke, Matthias & Knauff, Matthias *Münchener Kommentar zum Wettbewerbsrecht, Bd. 3* 4 ed (2022)
- Schneider, Susanne *Broad-based Black Economic Empowerment in der Republik Südafrika* (2008)
- Williams-Elegbe, Sope *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* (2012)
- Wurzel, Gabriele; Schraml, Alexaner & Gaß, Andreas *Rechtspraxis der kommunalen Unternehmen* 4 ed (2021)

Ziekow, Jan & Völlink, Uwe-Carsten *Vergaberecht* 4 ed (2020)

Chapters in books

- Bolton, Phoebe ‘The regulatory framework for public procurement in South Africa’ in Quinot, Geo & Arrowsmith, Sue (eds) *Public Procurement Regulation in Africa* (2013) 178–199
- Quinot, Geo & Arrowsmith, Sue ‘Introduction’ in Quinot, Geo & Arrowsmith, Sue (eds) *Public Procurement Regulation in Africa* (2013) 1–22
- Quinot, Geo ‘Promotion of social policy through public procurement in Africa’ in Quinot, Geo & Arrowsmith, Sue (eds) *Public Procurement Regulation in Africa* (2013) 370–403
- Reddy, Karunanidhi & Rampersad, Renitha ‘Black economic empowerment, ICT, and preferential public procurement in South Africa’ in Pomazalová, Natasa (ed) *Public Sector Transformation and Internet Public Procurement: Decision Support Systems* (2013) 254–275
- Watermeyer, Ron ‘Project synthesis report: Unpacking transparency in government procurement – Rethinking WTO government procurement agreements’ in CUTS Centre for International Trade, Economics and Environment (eds) *Unpacking Transparency in Government Procurement* (2004) 1–50

Journal articles

- Agyepong, Adelaide Owusu & Nhamo, Godwell ‘Green procurement in South Africa: Perspectives on legislative provisions in metropolitan municipalities’ (2017) 19(6) *Environment Development and Sustainability* 2457–2474
- Ambe, Intaher M ‘Public procurement trends and developments in South Africa’ (2016) 3(4) *Research Journal of Business and Management* 277–290
- Ambe, Intaher M & Badenhorst-Weiss, Johanna A ‘Procurement challenges in the South African public sector’ (2012) 6(1) *Journal of Transport and Supply Chain Management* 242–261
- Bolton, Phoebe ‘An analysis of the criteria used to evaluate and award public tenders’ (2014) 28(1) *Speculum Juris* 1–26
- Bolton, Phoebe ‘Disqualification for non-compliance with public tender conditions’ (2014) 17(6) *Potchefstroom Electronic Law Journal* 2313–2354 <http://dx.doi.org/10.4314/pelj.v17i6.03> (accessed 09-01-2024)
- Bolton, Phoebe ‘Public procurement as a tool to drive innovation in South Africa’ (2016) 19 *Potchefstroom Electronic Law Journal* 1–35 <http://dx.doi.org/10.17159/1727-3781/2016/v19i0a1286> (accessed 09-01-2024)

- Bolton, Phoebe 'The exclusion of contractors from government contract awards' (2006) 10(1) *Law, Democracy and Development* 25–48
- Bolton, Phoebe 'The public procurement system in South Africa: Main characteristics' (2008) 37 *Public Contract Law Journal* 719–740
- Bolton, Phoebe 'Incorporating environmental considerations into government procurement in South Africa' (2008) *Journal of South African Law* 31–51
- Bolton, Phoebe 'The regulation of preferential procurement in state-owned enterprises' (2010) *Journal of South African Law* 101–118
- Bolton, Phoebe 'Protecting the environment through public procurement: The case of South Africa' (2008) 32 *Natural Resources Forum* 1–10
- Breytenbach, Anaïs 'Green is the new gold: Going green in public procurement in South Africa' (2023) 10 *African Public Procurement Law Journal* 1–13
- Brooks, Mitchell J 'The draft Public Procurement Bill' (2020) 7 *African Public Procurement Law Journal* 88–98
- Csaki, Alexander 'Die Entwicklung des Vergaberechts seit 2022' ('The development of public procurement law since 2022') (2023) 21 *Neue Juristische Wochenschrift* 1478–1485
- Favier, Michelle & Schüler, Hauke 'Etablierte Regeln für das Verhandlungsverfahren mit Teilnahmewettbewerb auf dem Prüfstand des neuen Rechts' ('Established rules for the negotiated procedure with a call for competition scrutinised under the new law') (2016) 8 *Zeitschrift für deutsches und internationales Bau- und Vergaberecht* 761–771
- Fritz, Aline & Klaedtke, Jonatan 'Lieferketten im Vergabeverfahren – Sofortige und zukünftige Änderungen durch das Lieferkettensorgfaltspflichtengesetz' ('Supply chains in procurement procedures – immediate and future changes due to the Supply Chain Due Diligence Act') (2022) 3 *Neue Zeitschrift für Baurecht und Vergaberecht* 131–137
- Hamann, Ralph; Khagram, Sanjeev & Rohan, Shannon 'South Africa's charter approach to post-apartheid economic transformation: Collaborative governance or hardball bargaining?' (2008) 34(1) *Journal of Southern African Studies* 21–37

- Klaaren, Jonathan 'Back to the drawing board? Afribusiness NPC v Minister of Finance [2020] ZASCA 140 and the potential for reconsideration of preferential procurement law and policy in South Africa' (2021) 8 *African Public Procurement Law Journal* 20–38
- Koenig, Christian & Haratsch, Andreas ‚Grundzüge des deutschen und des europäischen Vergaberechts‘ (‘Main features of German and European public procurement law’) (2003) 37 *Neue Juristische Wochenschrift* 2637–2642
- Kollamparambil, Umakrishnan ‘The amended government procurement agreement: Challenges and opportunities for South Africa’ (2014) 18 *Law, Democracy & Development* 202–223
- Lausen, Irene & Pustal, Alexander ‚Berücksichtigung von Nachhaltigkeitskriterien im Vergabeverfahren‘ (‘Consideration of sustainability criteria in the award procedure’) (2022) 1 *Neue Zeitschrift für Baurecht und Vergaberecht* 3–7
- Luiz, John ‘Small business development, entrepreneurship and expanding the business sector in a developing economy: The case of South Africa’ (2003) 18(2) *Journal of Applied Business Research* 53–69
- Maas, Chanel ‘The reform of public procurement remedies: A domestic and comparative analysis’ (2020) 7 *African Public Procurement Law Journal* 63–87
- Mantzaris, Evangelos ‘Public procurement, tendering and corruption: Realities, challenges and tangible solutions’ (2014) 7(2) *African Journal of Public Affairs* 67–79
- Maritz, Annerita ‘Gender-responsive public procurement under the Broad-Based Black Economic Empowerment Act: Benefits and challenges’ (2022) 9 *African Public Procurement Law Journal* 76–89
- Mathiba, Gaopalelwe ‘Corruption, public sector procurement and Covid-19 in South Africa: Negotiating the new normal’ (2020) 55 *Journal of Public Administration* 642–661
- McCrudden, Christopher ‘Buying social justice: Equality and public procurement’ (2007) 60(1) *Current Legal Problems* 121–147
- McCrudden, Christopher ‘Social policy choices and the international and national law of government procurement: South Africa as a case study’ (2009) *Acta Juridica* 123–167
- Migiro, Stephen O ‘Public sector procurement and black economic empowerment in South Africa: Challenges of preferential procurement and

- decentralisation of the provincial tender board' (2010) 25(2) *Journal of Social Development in Africa* 177–195
- Moroeng, Tsukudu 'A constitutional review of the pre-qualification provisions under the Public Procurement Bill' (2023) 10 *African Public Procurement Law Journal* 14–39
- Musabayana, Godfrey
Tambudzayi & Mutambara,
Emmanuel 'The implementation of the Broad-Based Black Economic Empowerment (B-BBEE) policy in South Africa: A myth or a reality in SMEs?' (2022) 16(1) *Australasian Accounting, Business and Finance Journal* 73–84
- Pauka, Marc 'Ein bisschen „Mehr an Eignung“ – Personenbezogene Zuschlagskriterien nach der 7. ÄVOVG' ('A little "more suitability" – Person-related award criteria according to the 7th ÄVOVG') (2015) 1 *Neue Zeitschrift für Baurecht und Vergaberecht* 18–23
- Pauw, Jacobus C &
Wolvaardt, Jacobus S 'Multi-criteria decision analysis in public procurement – A plan from the South' (2009) 28(1) *Politeia* 66–88
- Pünder, Hermann 'Zu den Vorgaben des grundgesetzlichen Gleichheitssatzes für die Vergabe öffentlicher Aufträge' ('On the requirements of the constitutional principle of equality for the award of public contracts') (2004) 95 *Verwaltungsarchiv* 38–62
- Quinot, Geo 'Reforming procurement law in South Africa' (2020) 7 *African Public Procurement Law Journal* 1–15
- Quinot, Geo 'The role of quality in the adjudication of public tenders' (2014) 17(3) *Potchefstroom Electronic Law Journal* 1109–1136 <http://dx.doi.org/10.4314/pelj.v17i3.08> (accessed 09-01-2024)
- Quinot, Geo 'The third wave of preferential procurement regulations in South Africa' (2018) *Journal of South African Law* 856–867
- Rankin, Claire 'Reforming emergency procurement to protect against corrupt decision-making while ensuring swift and unencumbered procurement' (2021) 8 *African Public Procurement Law Journal* 84–100
- Reyburn, Pippa 'Preliminary comments on the draft Procurement Bill' (2020) 7 *African Public Procurement Law Journal* 46–54
- Rosenauer, Andreas &
Steinthal, Jonathan 'Der Umgang mit Klima- und Umweltschutzkriterien im Vergaberecht' ('Dealing with climate and environmental protection criteria in public procurement law') (2022) 7 *Klima und Recht* 202–207

- Shai, Lerato; Molefinyana, Comfort & Quinot, Geo 'Public procurement in the context of broad-based black economic empowerment (BBBEE) in South Africa – Lessons learned for sustainable public procurement' (2019) 11(24) *Sustainability* 7164 1–27
- Sibanda, Beatah & Tshikovhi, Ndivhuho 'Supply chain performance and preferential procurement in Gauteng government departments' (2022) 16(0) *Journal of Transport and Supply Chain Management* 1–11
- Volmink, Peter & Anthony, Allison 'A discussion of the recent ruling of the South African Supreme Court of Appeal in *Afribusines NPC v Minister of Finance*' (2021) 8 *African Public Procurement Law Journal* 1–19
- Volmink, Peter 'Deviations and variations in South African public procurement' (2022) 9 *African Public Procurement Law Journal* 52–75
- Volmink, Peter 'Pre-qualification and preference in public procurement: A critical reflection on *Minister of Finance v Afribusines NPC*' (2022) 9 *African Public Procurement Law Journal* 1–19
- Williams-Elegbe, Sope 'An uncertain future for debarment in South Africa: An analysis of the debarment provisions in the 2019 draft Public Procurement Bill' (2020) 7 *African Public Procurement Law Journal* 34–44
- Williams-Elegbe, Sope 'A comparative analysis of public procurement reforms in Africa' (2015) 1 *The Swedish Procurement Law Journal (Upphandlingsrättslig Tidskrift)* 11–32
- Williams-Elegbe, Sope 'An uncertain future for debarment in South Africa' (2020) 7 *African Public Procurement Law Journal* 34–40
- Williams-Elegbe, Sope 'The use of exclusions for corruption in developing country procurement: The case of South Africa' (2007) 51 *Journal of African Law* 1–38
- Williams, Sope & Quinot, Geo 'Public procurement and corruption: The South African response' (2007) 124(2) *South African Law Journal* 339–363
- Reports/Other**
- Auditor-General of South Africa Consolidated General Report on National and Provincial Audit Outcomes, PFMA 2019–2020
- International Labour Organization 'Targeted Procurement in the Republic of South Africa: An Independent Assessment' (April 2002)
- National Treasury, Republic of South Africa 'Supply Chain Management, A Guide for Accounting Officers/Authorities' (February 2004)

- National Treasury, Republic of South Africa 'Implementation Guide: Preferential Procurement Regulations 2017'
- Simone, Alejandro & Balasundharam, Vybhavi 'Public procurement in South Africa: Issues and reform options' IMF Selected Issues Paper (2023)
- Watermeyer, Ron 'Regulating public procurement in Southern Africa through international and national standards' Paper presented at the Public Procurement Regulation in Africa Conference (2011)

Internet sources

- Bayerisches Staatsministerium für Wirtschaft, Landesentwicklung und Energie, Öffentliches Auftragswesen <https://www.stmwi.bayern.de/wirtschaft/aufsicht-und-recht/oeffentliches-auftragswesen/> (accessed 06-01-2024)
- Bayerisches Staatsministerium für Wohnen, Bau und Verkehr Lieferengpässe und Preissteigerungen wichtiger Baumaterialien als Folge des Ukraine-Kriegs, 24 June 2022 https://www.bayika.de/bayika-wAssets/docs/aktuelles/2022/2022-06-24_StMB-23-40012.1-3-2-25_Lieferengpaesse-Preissteigerungen-wichtiger-Baumaterialien-als-Folge-des-Ukraine-Kriegs.pdf (accessed 06-01-2024)
- Bundesministerium für Wirtschaft und Klimaschutz Hinweise zum Umgang mit Preissteigerungen in der öffentlichen Auftragsvergabe (Liefer- und Dienstleistungen) vor dem Hintergrund des russischen Angriffskrieges auf die Ukraine, 24 June 2022 https://www.bmwk.de/Redaktion/DE/Downloads/A/auslegungsrundschreiben-preissteigerungen-ukrus.pdf?__blob=publicationFile&v=6 (accessed 06-01-2024)
- Bundesministerium für Wirtschaft und Klimaschutz Öffentliche Aufträge und Vergabe <https://www.bmwk.de/Redaktion/DE/Dossier/oeffentliche-auftraege-und-vergabe.html> (accessed 06-01-2024)
- Bundesministerium für Wirtschaft und Klimaschutz Öffentliche Konsultation zur Transformation des Vergaberechts (Vergabetransformationspaket') <https://www.bmwk.de/Redaktion/DE/Artikel/Service/Gesetzesvorhaben/oeffentliche-konsultation-zur-transformation-des-vergaberechts.html#docce41d96c-90bd-499d-91c8-87b16a3a19cfbodyText4> (assessed 06-01-2024)
- Bundesministerium für Wirtschaft und Klimaschutz Rundschreiben zur Anwendung von dringlichen Vergaben im Zusammenhang mit dem russischen Angriffskrieg gegen die Ukraine, 13 April 2022 <https://www.absthessen.de/pdf/2022%20004%2013%20Rundschreiben%20des%20BMWK%20-%20Anwendung%20von%20dringlichen%20Vergaben%20im>

| | |
|--------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | %20Zusammenhang%20mit%20dem%20russischen%20Angriffskrieg%20gegen%20die%20Ukraine.pdf (accessed 06-01-2024) |
| Bundesministerium für Wohnen, Stadtentwicklung und Bauwesen | Lieferengpässe und Preissteigerungen wichtiger Baumaterialien als Folge des Ukraine-Kriegs, 25 March 2022 https://www.bmwsb.bund.de/SharedDocs/downloads/Webs/BMWSB/DE/veroeffentlichungen/bauen/baustoffpreissteigerung-erlass.pdf;jsessionid=3A3141607CB673E27A92A57664E1C17D.1_cid350?__blob=publicationFile&v=2 (accessed 06-01-2024) |
| Bundesministerium für Wohnen, Stadtentwicklung und Bauwesen | Lieferengpässe und Preissteigerungen wichtiger Baumaterialien als Folge des Ukraine-Kriegs, 20 June 2023 https://www.abst-brandenburg.de/wp-content/uploads/2023/06/2023-06-20-BII6-70437_94-Stoffpreissteigerungen-Aufhebung.pdf (assessed 06-01-2024) |
| Bundesministerium für Wohnen, Stadtentwicklung und Bauwesen | Lieferengpässe und Preissteigerungen wichtiger Baumaterialien als Folge des Ukraine-Kriegs, 22 June 2022 and 6 December 2022 https://www.fib-bund.de/Inhalt/Vergabe/VHB/2022-06-22_BMWSB_BWI7_Stoffpreissteigerungen_Verlaengerung_Erlass.pdf (accessed 06-01-2024); https://www.fib-bund.de/Inhalt/Vergabe/VHB/2022-12-06_BII6_Stoffpreissteigerung_Verlaengerung_2.pdf (accessed 06-01-2024) |
| City of Cape Town | ‘Green Procurement Action Plan’ https://gicn-on-sp.org/fileadmin/user_upload/Cape_Town/City_of_Cape_Town_Green_Procurement_Action_Plan_-_Final_2020.pdf (assessed 09-01-2024) |
| European Commission | ‘The WTO Agreement on Government Procurement’ https://ec.europa.eu/commission/presscorner/detail/en/MEMO_03_83 (accessed 14-02-2024) |
| European Union | ‘Covid-19’ https://eur-lex.europa.eu/content/news/Covid19.html?locale=en (accessed 8-01-2024) |
| Gabriel, Martin, Mertens, Susanne, Prieß, Hans-Joachim & Stein, Roland M | BeckOK Vergaberecht, 30th Edt 2023 (can be accessed via https://beck-online.beck.de/Home) (accessed 09-06-2024) |
| Government of the Republic of South Africa | ‘General Procurement Guidelines’ http://ocpo.treasury.gov.za/Resource_Centre/Legislation/GENERAL%20PROCUREMENT%20GUIDELINES%20-%202.pdf (accessed 05-01-2024) |

| | |
|---------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Government Tender Bulletin | https://www.etenders.gov.za (accessed 12-01-2024) |
| Mail & Guardian | ‘Parliament adopting Public Procurement Bill a sign that state corruption is being fought’ https://mg.co.za/thought-leader/opinion/2024-05-24-parliament-adopting-public-procurement-bill-a-sign-that-state-corruption-is-being-fought/ (accessed 13-06-2024) |
| National Treasury, Republic of South Africa | Government Notices, Publication of Draft Preferential Procurement Regulations 2022 for public comment, 10 March 2022 http://www.treasury.gov.za/comm_media/press/2022/DPPR/National%20Gazette%20Draft%20Preferential%20Procurement%20Regulations%20Comment%2010-3-2022.pdf (accessed 11-01-2024). |
| National Treasury, Republic of South Africa | http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Practice-Notes.aspx (accessed 04-01-2023) |
| National Treasury, Republic of South Africa | http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Circulars.aspx (accessed 04-01-2023) |
| National Treasury, Republic of South Africa | http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/Guidelines.aspx (accessed 04-01-2023) |
| OECD | ‘Government at a glance – 2021 edition: Public procurement’ https://stats.oecd.org/Index.aspx?QueryId=107598 (accessed 05-01-2024). |
| Parliament of the Republic of South Africa | Procurement Bill https://www.parliament.gov.za/bill/2310365 (accessed 13-06-2024) |
| South African Government | Treasury on Preferential Procurement Regulations, 2017 validity https://www.gov.za/news/media-statements/treasury-preferential-procurement-regulations-2017-validity-30-may-2022 (accessed 24-03-2024) |
| Tucker, Claire & Mandlana, Wandisile | ‘South Africa: Public procurement cast into uncertainty by Constitutional Court judgment’ (2022) https://bowmanslaw.com/insights/government-contracting-and-public-sector-procurement/south-africa-public-procurement-cast-into-uncertainty-by-constitutional-court-judgment/ (accessed 11-01-2024) |