Damages in Defence Procurements

Dawn of a new era thanks to recent ECJ ruling?

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A recent decision brings new life to the question of compensation for unlawful conduct by the German MOD in Defence Procurements. As the German lawmakers decided in February 2022 to reduce the effectivity and the possibilities to seek the prevention of awards by way of single source procurements, competitors were effectively left to claim damages. However, chances of succeeding therein have always been difficult low. A recent ECJ decision might change that.

Current Legal Situation in Germany

In Germany, compensation claims for violations of procurement laws are asserted before ordinary courts, not specialised procurement tribunals or commissions (section 13 of the Courts Constitution Act, section 87 of the Act against restraints of competition (*ARC*)). German civil law primarily recognizes two types of damages: negative damages (for losses incurred due to reliance on the procurement process) and positive damages (lost profits). The latter – more substantial – category is notoriously difficult to claim, as German courts require proof that the bidder would have been awarded the contract under normal circumstances. There are different grounds on which economic operators can claim damages in case of violations of public procurement law by contracting authorities:

Compensation under section 181 ARC

Economic operators can claim compensation on the grounds of section 181 ARC if a contracting authority violates a public procurement law provision that protects the economic operators' interests. If successfully claimed, compensation under section 181 sentence 1 ARC covers only negative damages, such as the costs of preparing a bid or pursuing the claim, but not positive damages. No fault on the part of the contracting authority is required. However, the economic operator must have had a "real chance" of being awarded the contract. According to established case law, this is only the case if the contracting authority could have awarded the contract to the bidder. Courts will also consider whether the bidder could have prevented or mitigated the damage through available (primary) remedies such as review procedures aimed at preventing the award altogether or an annulment of the award. If it finds that such remedies were available, it will reduce compensation for contributory negligence.

Compensation under *culpa in contrahendo*

Claims can also be based on the legal concept of *culpa in contrahendo* (c.i.c.), which covers violations of pre-contractual obligations. Accordingly, this ground for damages is only available if the claimant participated in any form of competition for the underlying contract. Compared to section 181 ARC, the pre-contractual obligations can arise not just from public procurement law but also informal procurement procedures under different legal regimes (e.g. if bidders participate in an award procedure that is exempt from public procurement law based on Art. 346 TFEU). As with section 181 sentence 1 ARC, proving causality between the damage incurred and the public procurement law violation is in general the most difficult element of pursuing such a claim. Also, compensation typically covers only negative damages, with lost profits granted only if the bidder can make the (near-impossible-to-prove) case of being awarded the contract had the violation not occurred. Contributory negligence may also reduce compensation.

Compensation under torts law

Further grounds for compensation claims stem from German torts law. They include those under section 823 (1) of the German Civil Code (***GCC***) and, alternatively, section 823 (2) GCC in conjunction with public procurement law. The former is highly challenging, requiring proof of a targeted intervention against the company *as such* – an argument recognised in case law only for procurement bans. The latter claim is more viable but, for a claim of lost profits, still requires near-impossible evidence that in the course of a legally compliant procurement process, the claimant would have been awarded the contract.

ECJ Judgment of June 6, 2024 – C-547/22

In its judgment of June 6, 2024, the ECJ ruled that Union law obliges Member States to compensate persons harmed by breaches of (EU) public procurement law for all forms of damage incurred, including the unlawful deprivation of the chance of being awarded the contract. The compensation for such damages may neither be excluded nor made effectively impossible by national substantive or procedural law. If necessary, national (case) law to that effect must be amended by Member States. The specifics of how compensation may be pursued or quantified is for Member States to determine.

Implications of the Ruling

Given the similarity between the Slovakian statutory and case law that was subject to the ECJ's case and Germany, the ruling is highly relevant for procurements here. There is a good chance that the German courts' restrictive approach to damages for breaches of public procurement law – as shown above – will be overturned. As the vast majority of acquisitions of main weapon systems in Germany now take place outside any (real) competition, economic operators – against that backdrop – might feel inclined to seek damages rather than pursuing the lost cause of getting the contract award itself.

BLOMSTEIN will continue to monitor developments in national and EU procurement law. We are at your disposal at any time to answer questions on its content and implications. Please do not hesitate to contact BLOMSTEIN's defence team in case of queries.