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Public procurement - application for re-examination proceedings before the Procurement Chamber

You have participated as a company in a procedure for the award of a public order or a concession and you feel that your rights have been violated because a public customer has failed to comply with procurement regulations. You may request initiation of re-examination proceedings by the Procurement Chamber.

Any company that is interested in a public order that is awarded based on the provisions of the Act Against Restraints of Competition (GWB), can submit an application for re-examination under certain circumstances.

Procedure:

1. Upon written application, the Procurement Chamber of the State of Berlin will review tender procedures of public customers, whose awarding office is based in Berlin and provided that the order value for the required construction, supply or service order is at or above the relevant EU threshold value. Please note the "Information on the form of application" (see "Responsible authorities")
2. The application must include a specific request and reasons for the appeal. You must assert a violation of your rights through non-compliance with procurement regulations and declare that damage was caused or is imminent due to the alleged violation.
3. The Procurement Chamber will investigate the issue and review the public customer's tender documentation, unless the application is clearly objectionable or unfounded. The Procurement Chamber usually sets a date for an oral hearing and determines, whether your rights as an applicant were violated, and it will take suitable measures to eliminate the violation of rights or to prevent damage to the interests concerned.
4. An immediate appeal against the decision made by the Procurement Chamber of the State of Berlin can be filed with the Berlin Appellate Court within two weeks.

Prerequisites

- **Public order**

(https://www.gesetze-im-internet.de/gwb/_103.html)

Public orders are contracts between public customers and companies for the provision of services against payment, regarding the supply of goods, performance of construction work, or provision of services.

- **EU threshold values reached or exceeded**

(<https://www.bmwi.de/Redaktion/DE/Artikel/Wirtschaft/vergabe-uebersicht-und-rechtsgrundlagen.html>)

The Procurement Chamber is only responsible for tender procedures for contract values at or above the EU threshold values.

- **Information regarding the form of the application**

- Applications can be submitted electronically with a qualified electronic

signature pursuant to § 2 no. 3 Signature Law (SigG).

- The requirement of written form is also met, if a written application is sent by fax.
- Protective letters, attachments to applications for re-examination, and other written submissions and applications including their attachments can also be transmitted electronically, without an electronic signature and unencrypted.
- The parties involved in the proceedings do not need to provide multiple copies of any written submissions.

Documents required

- **Application for re-examination**

(<https://www.gesetze-im-internet.de/gwb/BJNR252110998.html#BJNR252110998BJNG019000118>)

The application must:

1. contain a specific request and
2. reasons must be provided immediately.

The explanation must include at least the following information:

- the name of the opposing party including its address,
- a description of the alleged legal infringement with an outline of the facts,
- designation of evidence available,
- information about the resulting or imminent damage,
- complaints about the infringements submitted to the public customer, and
- details of other parties involved, if available.

- **Evidence to support the application**

e.g. correspondence with the public customer, copies of tender documents, contracts, invoices or similar evidence to support your application for re-examination

Fees

EUR 2.500 – EUR 100.000, depending on the administrative effort (see ‘legal bases’ § 182 GWB)

Note:

1. The payment of an **advance of the minimum fee of EUR 2.500** is generally **not required** and is usually only due if the applicant is based outside Germany.
2. The losing party shall bear the costs of proceedings and the costs incurred by the opposing party. (see ‘legal bases’ § 180 GWB)

Legal basis

- **§ 160 Act Against Restraints of Competition (GWB) - application for re-examination**

(https://www.gesetze-im-internet.de/gwb/_160.html)

- **§§ 160-170 Act Against Restraints of Competition (GWB) -**

proceedings before the Procurement Chamber

(<https://www.gesetze-im-internet.de/gwb/BJNR252110998.html#BJNR252110998BJNG019000118>)

- **§ 180 Act Against Restraints of Competition (GWB) - compensation for abuse of rights**
(https://www.gesetze-im-internet.de/gwb/___180.html)
- **§ 182 Act Against Restraints of Competition (GWB) - costs of proceedings**
(https://www.gesetze-im-internet.de/gwb/___182.html)
- **Berlin Re-examination Regulation (BerINpVO)**
(https://www.berlin.de/sen/wirtschaft/wirtschaft/wirtschaftsrecht/vergabekammer/berlnpvo_kons_fassung.pdf)

Average time to process request

The Procurement Chamber will make and justify its decision within five weeks of receiving the application for re-examination and following an oral hearing. After expiry of this time period, the application is considered rejected.

Note:

The Procurement Chamber may extend the period in the event of particular difficulties. No appeal can be lodged against an extension of the decision-making period.

More information

- **Information from the Berlin Procurement Chamber**
(<https://www.berlin.de/sen/wirtschaft/wirtschaft/wirtschaftsrecht/vergabekammer/>)