

# Public procurement in Germany: determining the extent of guarantees and thresholds

**Jost de Jager, Emily Haentschel**

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# Structure

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1. Background information
2. Overview on legal provisions for guarantees and thresholds in the German procurement law
3. Defining procurement provisions in a dialogue with business associations

# 1. Background information

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- In the follow-up to the workshop on 09 Dec 2021, we provide more information on the way the extent of a guarantee in the German procurement system is determined (under 2.)
- It should be stressed that: **in Germany, guarantees are used only in very specific cases** – particularly in construction projects – and by the contracting authority's choice. By and large, the financial capacity of bidders is evaluated by the following indicators:
  - Turnover
  - Capital structure
  - Holdings
  - Financial reporting
  - Additionally, it might be asked for business liability insurances etc.
- Guarantees are not seen to mitigate the risk of bankruptcy of the contractor. The indicators are chosen to not exclude any legal form of enterprise – as they could be subject to legal challenges – and encourage participation in tenders.

## 2. Legal provisions for guarantees in the German procurement law

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- Legal provisions on guarantees are found in German procurement law in the following regulations:
  - ***Ordinance on the Award of Public Contracts for Construction*** (above EU-threshold)
    - 5% surety on overall financial capacity
    - 3% surety on defective service (below EU-threshold)

The surety is to be deposited on a bank account or as a bank guarantee (see GWB).

- ***Ordinance on the Award of Public Contracts for Service Provisions*** (above EU-threshold)
  - No regulation for sureties at all
  - Bank declarations as a provision for the financial capacity of bidders as one instrument among others
- For service provisions below the threshold, there are no regulations on guarantees; provisions for above threshold procurements will be a blueprint for contracting authorities but they can decide without legal restrictions (***Regulation on sub-threshold procurement UVgO***)

## 2. Legal provisions for thresholds in the German procurement law

### – *Act against Restraints on Competition (GWB)*

- Binding procedures for tenders and appeals for all federal and administrative levels; provides for the obligatory use of legal provisions of the act for all procurements above the EU-threshold
- The threshold according to EU Directive 14/24 is updated by the commission every two years and determined for the different currencies of member states. It is binding for all member states without individual national legislation. The example below shows the figures for the Polish Zloty.
- The current thresholds for the period 2022/23 are the following:

Type of contract	Contracting authority/entity	Old threshold (EUR)	New threshold (EUR)	New threshold (PLN)
Supplies and services	public finance sector	139,000	140,000	623,504
	local government	214,000	215,000	957,524
	sectoral + defence and security	428,000	431,000	1,919,502
Social services and other specific services	classic	750,000	750,000	3,340,200
	sectoral + defence and security	1,000,000	1,000,000	4,453,600
Construction works	all contracting authorities/entities	5,350,000	5,382,000	23,969,275

Source: <https://litigationportal.com/en/p/new-procurement-thresholds-in-2022>

### 3. Defining procurement provisions in a dialogue

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- Interview partners pointed out that the legal provisions for public procurement in Germany (in particular the *Ordinance on the Award of Public Contracts*) are determined in dialogue with market participants respective business associations and are evaluated commonly on a regular basis.
- To ensure market conformity of legal procurement provisions in Armenia, we recommend engaging in such a dialogue.
- Further, we recommend choosing a legislative approach that leaves contracting authorities with a variety of instruments for the proof of the financial capacity of bidders and thus with the flexibility to react to the market.

# About the German Economic Team



Financed by the Federal Ministry for Economic Affairs and Climate Action, the German Economic Team (GET) advises the governments of Moldova, Georgia, Ukraine, Belarus, Kosovo, Armenia and Uzbekistan on economic policy matters. Berlin Economics has been commissioned with the implementation of the consultancy.

## CONTACT

**Emily Haentschel**, Project Manager Armenia  
[haentschel@berlin-economics.com](mailto:haentschel@berlin-economics.com)

German Economic Team  
c/o BE Berlin Economics GmbH  
Schillerstraße 59  
10627 Berlin

Tel: +49 30 / 20 61 34 64 0  
[info@german-economic-team.com](mailto:info@german-economic-team.com)  
[www.german-economic-team.com](http://www.german-economic-team.com)

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