

European Tender for the Sale of Public Land

by Matthias Durst and Kim Delphine Weber, P+P Pöllath + Partners, Berlin

Introduction

The obligation to put a contract out to public tender according to the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) only exists for contracts regarding the procurement of goods, building work and services from or by public authorities / the state (sec. 97 para. 1 GWB). Under this concept, it seems obvious that no obligation to put out to public tender exists in case of the sale of public land, because the state does not procure services (but rather money) through the sale; therefore, it is primarily a budgetary matter. However, although this holds true for straightforward contracts for the sale of land, the conclusion may change in cases where the purchaser assumes further obligations, e.g. an obligation to build. In this case the entire transaction may be legally regarded as constituting a building order or a building concession – and thereby be subject to the obligation to put out to public tender according to the GWB.

Previous legal opinion

It was common understanding that a tender was only required in real estate transactions if core services of public interest were concerned and the state/government had directly acquired goods or services. For example, this is the case if, within the scope of a real estate transaction, the purchaser is obliged to develop infrastructure (cf. sec. 127 para. 2 German Building Code, *Baugesetzbuch*, BauGB), e.g. a public street. A general interest in construction work on a (private) property, however, was not considered sufficient because, in this case, the state does not procure goods to meet a public demand but merely pursues other interests – namely interests of urban planning – on the occasion of a contract for the sale of land. Therefore, in particular all such contracts which are mandatory in connection with zoning plans for a certain project pursuant to sec. 12 BauGB, as well as contracts that combine the sale of land with an urban development contract or the obligation to build, would generally not fall within the scope of the GWB (cf. Highest Bavarian Regional Court (*Bayerisches Oberstes Landgericht*, BayObLG), NZBau 2002, p. 108; Higher Administrative Court (*Verwaltungsgerichtshof*, VGH) Kassel, ZfBR 2006, p. 806, 807).

Change in juridical position through the Ahlhorn decision

The Higher Regional Court (*Oberlandesgericht*) of Düsseldorf renounced this case law for the first time in its decision of 13 June 2007 (NZBau 2007, p. 530, 531 – “*Fliegerhorst Ahlhorn*”) and introduced a very broad interpretation of the scope of sec. 97 et seq. GWB. It confirmed and further developed this notion in the decisions of 12 December 2007 (NZBau 2008, p. 138 et seq. – “*Wuppertal-Vohwinkel*”), 6 February 2008 (NZBau 2008, p. 271 et seq. – “*Oer-Erkenschwick*”) and 30 April 2008 (BeckRS 2008, 08870). In summary, OLG Düsseldorf regards any combination of the sale of land by the state with an obligation of the purchaser to develop and use the property according to requirements of urban planning as a public building concession (*öffentliche Baukonzession*) in terms of sec. 99 para. 1 and 3 GWB (as sub-category of a building order); therefore such contract is subject to the obligation to put out to tender.

In the light of these rulings, all agreements concerning the purchase of land from the state combined with an obligation to build or the implementation of other public interests are currently in a legal “grey area” and must therefore either be put up for tender or – without prejudice to the cases of nullity – can only be relied upon when the rights to appeal of all potential competitors have been forfeited (cf. *OLG Düsseldorf*, 30 April 2008, BeckRS 2008, 08870, with further references). The right to appeal, however, is only forfeited if, with knowledge of the obligation to put out for public tender, the competitor does not exercise his rights over a substantial period of time. A certain time period can only be determined on a case-by-case basis (cf. *OLG Düsseldorf*, BeckRS 2008, 08870).

Reaction of the legislature

In the meantime, the established case law of the *OLG Düsseldorf* caused the German legislature to act. The Federal Government is of the opinion that the obligation to put to tender requires a case of procurement and that solely the implementation of concepts of urban planning pursued by the state does not represent such a procurement requirement. Moreover, the building concession only gives a right of use that is limited in time and therefore the (permanent) sale of properties does

not fall within the scope of sec. 99 GWB. The amendment to the GWB was initialized by a cabinet decision of the Federal Government on May 21, 2008 in order to revoke the case law established by the *OLG Düsseldorf* by, *inter alia*, clarifying legal wording. The German Federal Council (Bundesrat) has consented to the amendment of the GWB on 13 February 2009. The amendment will presumably enter into force in March 2009.

Problems related to European law

One could say: All’s well that ends well. However, it remains uncertain whether the discussions regarding tender for purchases of land from the state have come to an end. The *OLG Düsseldorf* has based its decisions primarily on the so-called “Roanne” decision of the European *Court of Justice* of January 18, 2007 (NZBau 2007, p. 185 et seq. – “*City of Roanne*”) and interpreted this decision – in our opinion wrongly – as if its broad opinion were stipulated with regard to European law by the purpose of the tender procedure and its applicability, even without a direct procurement case.

The subject matter of the “Roanne” decision was, however, a procurement case: The city of Roanne intended to commission a contractor (another public authority) to plan and build a recreation center, in order to reevaluate and revitalize the neighborhood around a train station. The subject matter of the contract was to buy the respective properties, to organize a selection procedure for architects and/or planning offices, to allow plans to be made, to implement the construction work and to obtain financing. The whole project was to be financed in part from the revenue, partially from the sale of properties to third parties and partly from funds of the city of Roanne. The city of Roanne would be entitled to any profit at the end of the project, just as it would have to bear any resulting losses. In other words, the city of Roanne acted as a developer and thereby pursued a public interest by assigning public funds to reevaluate a city neighborhood. Without any question, this case allows its subsumption under the procurement by the state for fulfillment of public responsibilities on the buyer’s side. The aspect of procurement is evident in this case since public funds were used to buy (not to sell) properties.

Thus, the “Roanne” case is not suitable to support the much broader opinion of the *OLG Düsseldorf*. Especially in cases in which the selling municipality also pursues public interests but ultimately sells public land, there is no case of procurement. The *OLG Düsseldorf* concentrates on one identical aspect of the case (revaluation of the train station neighborhood) with disregard for the complete case constellation and the purpose of the law on tender – including the European law on tender – and thereby justifies its rulings. In fact, this legal opinion is not supported by either the “Roanne”

decision or by other European law. The element of procurement forms the basis of the relevant directives (Directives 2004/17/EC and 2004/18/EC). According to the European Court of Justice (ECJ) a public order to build presumes a respective service in return for payment as consideration on the part of the contractor (ECJ, NZBau 2001, p. 512, 516 – “*Teatro alla Bicocca*”; ECJ, NZBau 2005, p. 49, 50 – “*Heizkraftwerk München Nord*”). Similarly, the concept of concession is only used in cases in which a time limit is imposed (announcement of the commission on the interpretation of the concession

concept, EC no. C 121 of 29 April 2000, p. 2 et seq.; ECJ, NZBau, 2001, 148 – “*Te-leaustria*”). The “Roanne” decision does not deviate from this.

Outlook

It remains to be seen how the courts will react after the German Federal Government reform comes into force. Right after the beginning of the legislative procedure, the *OLG Düsseldorf* has already submitted the question to the European Court of Justice for a preliminary ruling pursuant to art 234 EC (cf. *OLG Düsseldorf*, NZBau 2008, p. 727).



Dr. Matthias Durst



Kim Delphine
Weber

P+P PÖLLATH + PARTNERS

Dr. Matthias Durst (Partner) and **Kim Delphine Weber** (Senior Associate) are attorneys with P+P Pöllath + Partners in the Berlin office. Dr. Durst and Ms. Weber advise solely on real estate law, primarily on project development, real estate transactions, commercial leasing contracts, joint ventures and financing. Dr. Durst is the chairman of the board of the postgraduate degree program (LL.M) in Real Estate Law of the Wilhelms University in Münster.

P+P advisors have been consistently ranked at the top of professional listings in national and international surveys. Further information and articles on current topics in real estate law: www.pplaw.com. Additional contacts in real estate law: Dr. Carsten Führling, Dr. Stefan Lebek.