

## II. KOMENTARZE, OPINIE I POLEMIKI

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### The Lawyer as Process and Project Manager for Infrastructure Projects

**Abstract.** In the Federal Republic of Germany, lawyers can be employed as project managers to relieve the authorities of the burden of approval procedures for large infrastructure projects. This particularly applies to procedures for the expansion of federal highways, railway lines or trams, power lines or wind turbines. This article presents the relevant legal basis, classifies it in relation to the state, and highlights the opportunities and risks of employing a lawyer as a project manager: The lawyer has a secure and large mandate for a longer period of time and can rely on a secure fee due to the solvency of the state. For the project sponsor, the use of a project manager means that the procedure can be completed more quickly, and external expertise or know-how represents additional support for the authority, which in principle cannot be detrimental. The cooperation between project manager and authority can take place under civil law on the basis of a contract or under public law via a public-law contract, in accordance with the provisions of the Administrative Procedure Act. The article concludes with a conclusion and summarizes the main findings.

**Keywords:** project manager – infrastructure – public participation – authority

#### Introduction

Major infrastructure projects such as the expansion of a motorway, railway line, power lines or wind turbines require official approval. This is preceded by extensive public and official participation. In order to speed up these procedures, the German legislator has created the possibility in numerous laws in recent years of outsourcing procedural tasks from

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the authorities to private parties. Lawyers specialising in administrative law and environmental law are often commissioned to act as so-called “procedure managers” or “project managers.” This article first presents the various laws (section 1) in which the possibility of employing a project manager is enshrined, before going into its central tasks (section 2) and drawing a distinction from the sovereign activity of the authority (section 3). After a comparison of the opportunities and risks of using a project manager (section 4), a conclusion rounds off this article.

## **1. The use of project managers in current infrastructure law**

The possibility of using a project manager is expressly stipulated in German law in some infrastructure laws. Although there are also regulations in the state law of the respective federal states,<sup>1</sup> only federal law will be considered here.

### **1.1. Lex scripta**

In federal law, the following laws and paragraphs provide for the use of a project manager:

- section 43g of the Energy Industry Act (EnWG) for high-voltage lines,
- section 29 of the Grid Expansion Acceleration Act (NABEG) for cross-border extra-high-voltage lines and offshore connection lines,
- section 17a of the General Railway Act (AEG) for operating facilities of a railway system including traction power lines,
- section 17h of the Federal Trunk Roads Act (FStrG) for the construction or modification of federal trunk roads, i.e. federal motorways and federal highways,
- section 28b of the Passenger Transport Act (PBefG) for the construction or modification of operating facilities for trams,
- section 14f of the Federal Waterways Act (WaStrG) for the expansion, new construction or removal of federal waterways,
- section 2b of the Ordinance on the Authorisation Procedure (9th BImSchV) for certain installations requiring authorisation in accordance with the Ordinance on Installations Requiring Authorisation – 4th BImSchV.

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<sup>1</sup> For example, Section 38b of the North Rhine-Westphalia Road and Paths Act.

## 1.2. Legal qualification: The lawyer as an administrative assistant

It is well known under administrative law that the administration involves third parties. For example, the public order office or the police do not tow away an illegally parked car themselves, but have this task carried out by a towing company. In these constellations, the private party acts as an “administrative assistant.” As an appointed project manager, the lawyer also acts as an administrative assistant. Classification as an authorised agent should be rejected because the project manager is not entrusted with sovereign tasks and does not issue any administrative acts in accordance with Section 35 sentence 1 VwVfG. This is because the role of the project manager is conceptualised as a coordinator, communicator and supporter of the official decision, but without participating in it and without carrying out sovereign activities.<sup>2</sup>

Such a model is also understood as a “co-operative state,” which is not surprising given the increasingly complex public tasks and the fact that the public administration has reached its personnel and financial limits.<sup>3</sup> However, this means that the project sponsor ultimately has to compensate for a shortage of administrative staff at its own expense by commissioning the project manager, which is also viewed critically in infrastructure practice.<sup>4</sup>

In energy industry law, there is even the possibility for the Federal Government to issue general administrative regulations on the implementation of the procedure in accordance with Section 43g EnWG with the approval of the Bundesrat. However, this has not yet been utilised.<sup>5</sup>

## 1.3. No entitlement to the assignment of a project manager

However, there is no entitlement to the deployment or commissioning of a project manager. The law only *enables* this, but does not oblige the

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<sup>2</sup> Dominant opinion; see S. Missling, L. Winkler, in: *Energierecht. Kommentar*, eds. C. Theobald, J. Kühling, 125th supplementary ed., München 2024, section 43g EnWG, marg. no. 5b.

<sup>3</sup> J.-C. Pielow, in: *Berliner Kommentar zum Energierecht*, ed. F.J. Säcker, 4th ed., München 2019, section 43g EnWG para. 1.

<sup>4</sup> L. Winkler, in: *AEG/ERegG. Kommentar*, eds. J. Kühling, K. Otte, 1st ed., München 2020, section 17a AEG marg. no. 2.

<sup>5</sup> M. Kment, J. Arnold, in: *Energiewirtschaftsgesetz. Kommentar*, ed. M. Kment, 3rd ed., München 2023, Section 43g EnWG, marg. no. 3.

authority to appoint one. In practice, the proposal to appoint a project manager therefore comes either from the authority or the project sponsor. Even if the project sponsor wishes to appoint a project manager and requests this from the authority, the authority is not obliged to fulfil this request.<sup>6</sup> Rather, the authority has discretionary power, in which it must consider the extent to which the procedure can be organised more professionally and effectively, and accelerated overall through the involvement of a project manager.<sup>7</sup>

The decision to appoint or not appoint a project manager must therefore be categorised as an internal procedural act in accordance with Section 44a VwGO, which cannot be contested independently, i.e. no isolated legal protection is possible against the decision.<sup>8</sup>

#### 1.4. Type of contract and award

If the authority decides to appoint a project manager and this is to be a lawyer, a civil-law service contract is concluded between the authority and the law firm in accordance with Sections 611 et seq. BGB, but a contract under public law within the meaning of Sections 54 et seq. VwVfG would also be possible.<sup>9</sup>

As a rule, no tendering procedure under European law or budgetary law is required beforehand and the contract can be awarded directly.<sup>10</sup> Law firms specialising in administrative and environmental law, in particular, so-called “boutiques,” can be considered. Lawyers specialising in administrative law are particularly suitable for this, but this additional title is not a prerequisite for being appointed as a project manager.

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<sup>6</sup> In certain constellations, however, the use of the technology is mandatory, so that the discretion may be reduced to zero; see S. Riege, *Praxisfragen zum Projektmanager*, “EnWZ” 2022, no. 5, pp. 170–172.

<sup>7</sup> M. Kment, J. Arnold, op. cit., Section 43g EnWG, marg. no. 13.

<sup>8</sup> Ibidem, Section 43g EnWG para. 44.

<sup>9</sup> Ibidem, Section 43g EnWG para. 15.

<sup>10</sup> For more details, see C. Donhauser, T. Schröck, *Ausschreibungspflichten bei der Beauftragung von Rechtsanwälten als Projektmanager in der Planfeststellung*, “VergabeR” 2020, no. 2, p. 139; S. Riege, op. cit., p. 174 et seq.

## 1.5. Cost allocation and invoicing

According to the respective laws (e.g. Section 43g EnWG, Section 29 NABEG, Section 17a AEG, Section 14f WaStrG), the project sponsor must always bear the costs of the project manager. In these cases, the consent of the project developer is required for a project manager to be commissioned (see Section 43g (1) EnWG). However, in the laws that do not stipulate the bearing of costs, such bearing of costs is regulated in accordance with the relevant cost laws, namely via so-called 'expenses of the authority'.<sup>11</sup> Contractually, this is regulated in such a way that a tripartite agreement is reached between the authority, the project sponsor and the project manager/lawyer.<sup>12</sup> In infrastructure areas in which the state is both the authorising authority and the project sponsor, e.g. railway infrastructure, federal trunk road infrastructure and federal waterway infrastructure, the costs are charged to the state budget, i.e. to the taxpayer.

Invoicing is also regulated in some laws: Section 43g para. 2 sentence 2 and sentence 3 EnWG stipulates that the project manager is obliged to submit the invoicing documents to the competent authority, which then checks whether the services invoiced by the project manager correspond to the respective order and informs the project sponsor of the result of this check without delay. The project sponsor can then instruct the payments accordingly.

## 1.6. Termination

The activities of the project manager can be terminated by the authority for objective reasons under the conditions of a cancellation of the civil-law contract. The authority then takes over the procedural steps itself again. However, it cannot be ruled out that fee payments will still have to be made to the project manager on the basis of the civil-law agreement. This must be taken into account when drafting the contract. The lawyer in particular should insist on this in order to be able to plan reliably in the long term. The project sponsor can also withdraw its consent at any time for objective reasons and thus terminate the obligation to bear the costs.<sup>13</sup>

<sup>11</sup> C. Donhauser, T. Schröck, *op. cit.*, p. 140.

<sup>12</sup> M. Kment, J. Arnold, *op. cit.*, Section 43g EnWG para. 19.

<sup>13</sup> *Ibidem*, Section 43g EnWG para. 42 f.

## 2. Tasks and services of a project manager

The tasks of a project manager relate to the preparation and implementation of procedural steps. The following procedural steps are listed by law as examples: the preparation of procedural master plans with the determination of procedural stages and interim deadlines, the monitoring of deadlines, the coordination of necessary expert opinions, the quality management of applications and documents of the project developers, the coordination of expropriation and compensation procedures, the drafting of a hearing report, the initial evaluation of the comments submitted, the organisational preparation of a discussion meeting, the management of the discussion meeting, and the drafting of decisions. However, these tasks and procedural steps are only examples and are not exhaustive; it is therefore possible to go beyond these procedural steps. The limit lies in sovereign tasks that are the sole responsibility of the authority (see below). Which tasks and procedural steps are taken over by the lawyer as project manager in individual cases is regulated in individual contracts with the lawyer.

These tasks can consume enormous resources. In this respect, the lawyer or the law firm must weigh up whether the activity as project manager is compatible with the other mandates.

## 3. Demarcation from the sovereign activity of the authority

The activities of the project manager must not affect decisions that are originally the responsibility of the authority. In some cases, the laws also explicitly stipulate that the final decision concluding the procedure, i.e. the approval or the plan approval decision, lies solely with the competent authority (see Section 29 (3) NABEG). The transferable tasks must be limited to *supporting* activities for the implementation and coordination of the procedure and, according to the explanatory memorandum to the law, may not directly penetrate the core of the balancing process, i.e. the area reserved for the authorisation decision.<sup>14</sup> The preparatory activities must also not lead to a de facto decision already having been made by the project manager ('prejudging of the

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<sup>14</sup> BT-Drs. 17/6073, p. 31.

decision').<sup>15</sup> This risk is particularly high due to the possibility that the project manager may also prepare the draft approval decision. In this respect, the project manager must not be given the blanket task of carrying out the entire authorisation or planning approval procedure. The authority must always remain "master of the procedure" and exercise the final decision-making authority.<sup>16</sup> However, if the project manager is entrusted with tasks that go beyond what is permitted by law, this infringement can be contested, though this cannot be done directly, but only as part of an appeal against the final authorisation decision.<sup>17</sup>

It should also be noted that the project manager is always bound by the instructions of the authority,<sup>18</sup> and that legal responsibility remains with the authority.<sup>19</sup> The authority must therefore review all preparatory and supporting activities.<sup>20</sup> The project manager is also not directly bound by fundamental rights because he is only assigned to the controlling administration.<sup>21</sup>

## 4. Opportunities and risks of using a project manager

### 4.1. Opportunities

The opportunities are obvious – for everyone involved. The lawyer has a secure and large mandate for a longer period of time and can rely on a secure fee due to the solvency of the state. In the end, however, the responsibility remains with the authority, thus the risks on the part of the lawyer with regard to legal liability are likely to be low. For the project sponsor, the use of a project manager means that the procedure can be completed more swiftly, and external expertise or know-how represents additional support for the authority, which in principle cannot

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<sup>15</sup> In general, C. Sellmann, *Privatisierung mit oder ohne gesetzliche Ermächtigung*, "NVwZ" 2008, no. 8, p. 821.

<sup>16</sup> J.-C. Pielow, op. cit., Section 43g EnWG para. 13, 31; M. Kment, J. Arnold, op. cit., Section 43g EnWG para. 22.

<sup>17</sup> M. Kment, J. Arnold, op. cit., Section 43g EnWG para. 45.

<sup>18</sup> L. Winkler, op. cit., Section 17a AEG para. 4 with further references.

<sup>19</sup> F. Schoch, in: *Verwaltungsrecht. Kommentar*, eds. F. Schoch, J.P. Schneider, 4th supplementary ed., München 2023, section 1 VwVfG para. 173.

<sup>20</sup> D. Greinacher, *Energieleitungsausbau: Tatsächliche Herausforderungen und rechtliche Lösungen*, "ZUR" 2011, no. 6, p. 307.

<sup>21</sup> M. Herdegen, in: *Grundgesetz. Kommentar*, vol. 1, eds. G. Dürig, T. Herzog, R. Scholz, 104th ed., München 2024, Art. 1 paras. 3, 127.

be detrimental. For the authority, the use of a project manager means a considerable reduction in time and personnel resources, especially if the project manager prepares draft decisions.<sup>22</sup> Whether the use of a project manager also increases public acceptance of the infrastructure project is questionable because the project manager only works in the background.<sup>23</sup>

## 4.2. Risks

In contrast, the risks are low. It is true that the project manager burdens the project budget and, in the case of exclusively state-owned infrastructure, also the state budget and therefore ultimately the taxpayer. The authority must also be able to rely on the lawyer. Intensive (time-consuming) cooperation requires an unrestricted relationship of trust, which should not be broken. The lawyer must be aware that the mandate will require them to work for a longer period of time. This can lead to conflicts with other clients. In this respect, the lawyer should consider employing additional staff, such as student or research assistants, to provide support.

## Conclusion

The use of a project manager offers all parties involved – authorities, lawyers and the general public – more opportunities than risks. It is an effective means of outsourcing the authority's workload in a major infrastructure project and thus taking pressure off the authority. However, this is associated with costs, in some cases, also incurred by the taxpayer. As a project manager, the legal profession is opening up new, lucrative fields of application that can also enhance its portfolio of prestigious mandates. However, it should not be forgotten that such a mandate lasts for several years and sometimes ties up considerable resources.

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<sup>22</sup> Cf. M. Kment, J. Arnold, *op. cit.*, Section 43g EnWG para. 40.

<sup>23</sup> *Ibidem*, Section 43g EnWG para. 18.



**BIBLIOGRAPHY**

- Donhauser C., Schröck T., *Ausschreibungspflichten bei der Beauftragung von Rechtsanwältinnen als Projektmanager in der Planfeststellung*, "VergabeR" 2020, no. 2, pp. 139–149.
- Greinacher D., *Energieleitungsausbau: Tatsächliche Herausforderungen und rechtliche Lösungen*, "ZUR" 2011, no. 6, pp. 305–312.
- Herdegen M., in: *Grundgesetz. Kommentar*, vol. 1, eds. G. Dürig, T. Herzog, R. Scholz, 104th ed., München 2024.
- Kment M., Arnold J., in: *Energiewirtschaftsgesetz. Kommentar*, ed. M. Kment, 3rd ed., München 2023.
- Missling S., Winkler L., in: *Energierrecht. Kommentar*, eds. C. Theobald, J. Kühling, 125th supplementary ed., München 2024.
- Pielow J.-C., in: *Berliner Kommentar zum Energierrecht*, ed. F.J. Säcker, 4th ed., München 2019.
- Riege S., *Praxisfragen zum Projektmanager*, "EnWZ" 2022, no. 5, pp. 170–176.
- Schoch F., in: *Verwaltungsrecht. Kommentar*, eds. F. Schoch, J.P. Schneider, 4th supplementary ed., München 2023.
- Sellmann C., *Privatisierung mit oder ohne gesetzliche Ermächtigung*, "NVwZ" 2008, no. 8, pp. 817–823.
- Winkler L., in: *AEG/ERegG. Kommentar*, eds. J. Kühling, K. Otte, 1st ed., München 2020.