Public Procurement World - Austria

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# 1. The Laws

## a. What is the applicable legislation?

Austrian procurement law is guided by rules contained in three different regulations: first of all, in the Federal Procurement Act (*Bundesvergabegesetz – "BVergG"*) which sets out regulations for general procurement procedures (works, supplies, services) including the sectors of water, energy and transports (utility sectors); secondly, in the Federal Procurement Act for Concessions (*Bundesvergabegesetz Konzessionen*) which sets out regulations for procurement procedures regarding concessions and thirdly, in the Federal Procurement Act Defence and Security (*Bundesvergabegesetz Verteidigung und Sicherheit – "BVergGVS"*) which sets out regulations for the sector of defence and security (see below point 1.d.).

Public procurement regulations also apply in case the thresholds regarding the contract values contained in the European Directives are not equalled or exceeded. There are, however, slight simplifications for public authorities in this area.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

Austrian procurement law is based largely on the EU Directives on public procurement. These in turn are influenced by the WTO Government Procurement Agreement (GPA) as the European Union and each of its 28 Member States are signatories to the GPA. The scope of the GPA covers any law, regulation, procedure or practice regarding any procurement by any contractual means as soon as the procuring entity and the type of contract are listed in Appendix I to the GPA and the thresholds stated there are exceeded.

## c. What are the basic underlying principles of the legal framework?

As Austrian procurement law aims largely at implementing the EU Directives on public procurement, it concentrates on principles resulting from European primary law. Thus, public contracts may only be awarded on the basis of a competitive award procedure, which must be transparent and non-discriminatory and respect the principles of economic procurement and proportionality. Additionally, the promotion of small business’ interests should be considered. Aspects of quality and innovation as well as social and environmental aspects have to be taken into account, too. These principles have to be observed during every step of the procurement process and are further detailed in Austrian procurement laws and regulations.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

While, in principle, government procurement in the field of defence and security falls under the general EU procurement rules (Directive 2014/24/EU), these general rules do not accommodate the specificities of defence-related procurement contracts. Consequently, in the past, most EU Member States have opted to derogate from the general EU procurement rules for practically all defence and security related contracts by invoking Art. 346 TFEU (former Art. 296 EC Treaty), which allows for a derogation for national security reasons. The respective contracts were awarded to national rules which in many cases do not reflect European principles. Against that background EU Directive 2009/81/EC was introduced which offers tailor-made procurement rules for contracts in the defence sector and aimed at preventing derogation from procurement law based on Art. 346 TFEU. Consequently, under the regime of EU Directive 2009/81/EC derogation is only possible in very exceptional cases.

In Austria the procurement in the defence and security sector is guided by the Federal Procurement Act Defence and Security (*Bundesvergabegesetz Verteidigung und Sicherheit – "BVergGVS"*) that transposes Directive 2009/81/EC. The BVergGVS sets forth procurement rules specifically tailored to the defence and security market. Thus, the BVergGVS applies to sensitive public supply contracts and public service contracts, in the fields of defence and security and stipulates a number of specific procedural features tailored to the characteristics of sensitive public defence and security supply contracts. The applicable threshold value for this sector is € 418,000. As for works contracts in the defence and security area, the threshold value is €5,225,000.

However, reflecting Art. 346 TFEU Austrian procurement law does not apply to the procurement of hard military equipment, civil goods and dual-use goods that are related to interests of national security.

In contrast, there are no special regulations applicable to aerospace procurement. The award of contracts in this field is governed by general Austrian procurement laws (see above under a).

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

Contracting authorities that have to observe the procurement provisions include all classic public authorities, especially the Federal Government, the State Governments and municipalities, as well as co-operations thereof.

Additionally, other legal entities under public law which are established for the specific purpose of meeting non-commercial needs in the general interest are subject to Austrian procurement law if they are controlled by the aforementioned classic public authorities. Control in this sense is executed if the entity is mainly financed or supervised by a public authority or associations of such. An entity is mainly financed by a public authority if it is for the most part individually or jointly through participation or in some other way financed by classic public authorities and their special funds or associations. Supervisory control is executed if public authorities supervise the management or appoint more than half of the members of the management or supervisory boards of the entity. Examples of such entities covered by the procurement laws are the Austrian Railways (ÖBB), the Autobahnen- und Schnellstraßen-Finanzierungs-AG (ASFINAG; responsible for the Austrian motorway and expressway network), as well as universities.

## b. Which private entities are covered by the laws?

Procurement provisions might also apply to a limited extent to legal entities predominantly financed or supervised by private entities. Private entities have to observe public procurement law if their activities are funded by a public authority by more than 50 percent. Examples for such tender-related activities would be: construction and operation of hospitals, construction and operation of sport facilities sports, schools, leisure facilities, universities, waste management or regional development.

Additionally, public procurement law applies to any natural or legal person which executes activities in the sectors of water, energy and transports (utility sectors) as well as natural or legal persons providing specific postal services or operating (air-)ports if the execution of this activity is based on special or exclusive rights granted by a competent public authority.

One example of a private entity partly covered by Austrian procurement laws of the Utility Sector is OMV AG, one of the largest Austrian enterprises operating in the petrochemicals sector.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

Exceptions from the scope of application derive from the jurisprudence of the ECJ.

Co-operations between contracting authorities are exempted from public procurement law if strict legally defined conditions are met. This is the case if the contract is awarded to an entity that is predominantly controlled by the contracting authority awarding the contract (or controls the contracting authority), the contractor carries out the essential part of its activities for the controlling contracting authority and no private equity investment in the contractor’s entity exists.

Furthermore, Austrian procurement law does not apply to public-public co-operations which (i) aim of to ensure that public services they have to perform are provided with a view to achieving objectives they have in common (ii) the implementation of that cooperation is governed solely by considerations relating to the public interest; and (iii) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

## d. Which types of contracts are covered?

Austrian procurement law only covers written public contracts which are defined as contracts for pecuniary interest concluded between contracting authorities and undertakings regarding works, supplies or services. Thus, Austrian law distinguishes between works, supply and service contracts:

Works contracts are contracts either for the execution or the simultaneous design and execution of works or a work which is the result of civil engineering or building construction work and is to fulfil a commercial or technical function, or for the execution of a work by a third party corresponding to the requirements specified by the contracting entity.

Supply contracts are contracts for the procurement of goods including in particular a purchase or hire purchase or leasing, or a lease with or without a purchase option. The contracts may also include ancillary services.

Service contracts are contracts for performances which do not fall under the definition of supply or works contracts.For framework agreements please refer to f. below.

Transposing the EU Directives 2014/24/EU and 2014/25/EU, framework agreements and design contests are now included in the scope of public procurement law. Design contests are procedures which enable the contracting public authority to acquire a plan or a design selected by a jury after being put out to competition with or without the award of prizes.

For framework agreements please refer to f. below.

For concession contracts please refer to h. below.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

Austrian procurement law transposes Art. 72 of the Directive 2014/24/EU which differentiates between changes which require a new procurement procedure and those which do not.

In a nutshell, a new procurement procedure is required if the change to the contract is substantial. This is the case if new conditions are introduced under which:

different bidders could have been admitted to the procurement procedure; or

a different bid could have been accepted; or

more bidders could have been attracted.

A new procurement procedure is further required if:

the change modifies the contractual economic balance in favour of the bidder; or

the contract is substantially extended; or

the contractor is replaced.

However, the transfer to a new contractor does not require a new procurement procedure where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of:

an unequivocal review clause or option; or

universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established and it is provided that the transfer does not entail other substantial modifications to the contract; or

in the event that the contracting authority itself assumes the main contractor’s obligations towards its subcontractors.

Additionally, a new procurement procedure is not required if:

the original procurement documents contain unequivocal review clauses or options which provide information regarding the conditions, the scope and the type of admissible changes and do not modify the overall economic characteristics of the contract; or

unforeseen additional supplies, works or services become necessary and the current contractor cannot be replaced for economic or technical reasons and if the costs of the original procurement are not increased by more than 50%; or

the change becomes necessary due to unforeseeable events, the overall characteristics of the contract are not modified and the costs of the original procurement are not increased by more than 50%;

A change in the existing contract does not require a new procurement procedure if the overall characteristics of the contract are not modified and the value of the contractual change:

does not equal the threshold values contained in the European Directives; and

does not exceed 10% of the original supplies and services, or – in case of works – does not exceed a 15% margin.

The contracting authorities have the right to terminate the contract with immediate effect in case a substantial contractual change has been made without a new procurement procedure.

## f. What is the applicable regime for framework agreements?

Framework agreements are also subject to Austrian public procurement law. They are designed to set out the general conditions for future procurements during a given period of time and especially the maximum compensation and other major conditions and specifications of such procurements. The main difference to common contracts is that the contracting authority is not obliged to make use of a framework agreement and purchase works, supplies or services from its partner(s).

The contracting authority has to conduct an open, restricted or competitive award procedure to award a framework agreement. The contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified. As a general rule, the length of a framework agreement is limited to four years. Exceptionally, a longer duration may be permissible. Framework agreements with up to three partners are admissible. Contracts based on a framework agreement can only be awarded under the conditions laid down in the framework agreement. The contracting authority may conduct a competitive procedure for the award of single orders under the framework agreement with up to three partners if this possibility has been stipulated by the contracting authority in the procurement documents for the framework agreement. The award decision must be based on objective reasons that have been transparently set out in the procurement documents for the framework agreement.

## g. What is the applicable regime for public-private partnerships (PPPs)?

Austrian public procurement laws apply if a PPP is established based on an operating or a concession agreement. As a general rule, operating agreements will be considered as works or service contracts, which are subjected to public procurement law. Consequently, the selection of the private partner for the PPP regularly requires a public tender procedure. As a general rule, PPP agreements are regularly awarded in a negotiated procedure under the conditions set out by the contracting authority in the procurement documents in accordance with Austrian public procurement laws.

In case of an institutional PPP, i.e. the formation of a separate legal entity in which the contracting authority holds shares, procurement law applies on the formation of the legal entity if - from an economic perspective - with the formation the contracting authority simultaneously awards a procurement contract e.g. by providing the newly formed company the right to provide certain works and gain compensation from third parties therefore (concession model) on the property of the contracting authority. Accordingly, the award of the actual works or service contract does not require a second award procedure if the formation of the legal entity has already been conducted pursuant to procurement law and the scope of the contract to be awarded to this legal entity has been sufficiently disclosed in said procedure.

## h. How are concessions dealt with?

On 26 February 2014 the European Parliament and the Council adopted an all new directive creating specialized procurement law provisions on the award of concessions (Directive 2014/23/EU). Concessions are now submitted to the separate regime of the Bundesvergabegesetz Konzessionen. Accordingly, contracting authorities are obliged to address the award of a concession by way of publication of a concession notice (which is an equivalent to a contract notice) in the Official Journal of the European Union and have to comply with a differentiated (facilitated) procurement regulation. However, the contracting authority has some discretion regarding the organization of the procedure leading to the choice of concessionaire as far as this procedure is transparent , non-discriminatory and proportionate. For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

In the course of tender procedures in Austria also provisions of antitrust law have to be complied with which in particular prohibits agreements between competing enterprises that would effect the prevention, restriction or distortion of competition. Consequently, bidders are excluded from procurement procedures who are or were a party to anti-competitive agreements regarding bidding. Anti-competitive agreements in this context are all practices capable of restricting or distorting competition. The term anti-competitive agreement is therefore not restricted to illegal practices, but also includes any other agreements and practices which do not comply with the principles of competition.

Furthermore, bid rigging (including taking and giving bribes in the context of public procurement) may also result in criminal charges according to Austrian criminal laws.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

When transposing the EU-Directives, Austrian public procurement law offers several different ways to award a contract. Contracting authorities may employ the following procedures:

open procedure, in which all interested contractors may submit a bid;

restricted procedure (two-step-procedure), in which, first, a call for competition is published and the contracting authority selects a limited number of the interested economic operators to submit a bid subsequently;

restricted procedure without a prior call for competition in which the contracting authority selects directly a limited number of appropriate economic operators to submit a bid; because of its lowered transparency this procedure is only applicable under certain circumstances within the sub-threshold area;

negotiated procedure (two-step-procedure) with call for competition, in which, first, a call for competition is published and the contracting authority selects a limited number of the interested economic operators to submit a first bid and subsequently negotiates the terms of the contract based on the first bids with a call for final bids when negotiations have been concluded;

negotiated procedure without prior call for competition in which the contracting authority selects directly a limited number of appropriate economic operators to submit a first bid and subsequently negotiates the terms of the contract based on the first bids with a call for final bids when negotiations have been concluded

award of a framework agreement (see above under 2. f.)

dynamic procurement system which is structurally comparable to the framework agreement; in contrast, however, this is a fully electronic procurement system exclusively for commercial services;

competitive dialogue, in which a contract notice is published and the contracting authority conducts a dialogue with the candidates admitted to that procedure with the aim of developing one or more suitable alternatives capable of meeting its requirements and on the basis of which the chosen candidates are invited to bid;

innovation partnership, in which the procedure is structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products and in a second phase the provision of the services or the completion of the works; and

in exceptional cases: direct awards, i.e. award of a contract with or without publishing a contract notice and without conducting a formal competitive procedure; direct awards are only applicable under certain circumstances within the sub-threshold area because of its freedom of form and its vulnerability to adverse influences (see below under point 7.a.);

furthermore, there is the possibility to carry out an electronic auction for standardized services; in combination with another procurement procedure, the electronic auction can be used to determine the offer which is to be awarded.

As a general rule, the open procedure as well as the restricted procedure are always permissible. In the Utilities sector, contracting authorities can also always choose a negotiated procedure (two-step-procedure) with call for competition. Circumstances which exceptionally permit the negotiated procedure, the competitive dialogue or the innovation partnership are determined in the procurement provisions. Direct awards, as the only non-competitive option, are only admissible in very exceptional cases and if an estimated contract value of (currently) 100.000 euros is not reached (please refer to 7. below).

## b. What status do electronic means/procedures have?

In implementation of Art. 22 of the Directive 2014/24/EU, Austrian procurement law obliges contracting authorities to use electronic means for the entire procurement procedure by 18 October 2018 if the threshold values contained in the European Directives are equalled or exceeded.

Additionally, Austrian procurement law list electronic methods and tools for procurement procedures which are at present already available (see above point 3. a. "dynamic procurement system" and "electronic auction").

Meanwhile, central purchasing bodies (e.g. Austrian Ministries) already have to use electronic means for the entire procurement procedure by 2017.
For public procurement procedures below the threshold values, the use of electronic means is not mandatory by 18 October 2018.

## c. Where are contract notices, i.e. calls for bid, published?

EU-wide calls for bids are published on the website Bids Electronic Daily (TED):

<http://ted.europa.eu/>

TED is the online version of the Supplement to the Official Journal of the EU, dedicated to European public procurement.

In Austria, procurement procedures can be viewed on the websites:

[www.auftrag.at](http://www.auftrag.at/) (for bidders), or

[www.lieferanzeiger.at](http://www.lieferanzeiger.at/) (for contracting authorities).

## c. Can certain prospective bidders be excluded from the competition?

Yes, certain prospective bidders can be excluded from the competition in case they are lacking sufficient reliability. According to provisions in the BVergG, bidders who have been convicted of any of the offences listed therein have to be excluded from the competition. The relevant offences include, in particular, forming criminal organizations, money laundering, fraud and giving bribes as an incentive to the recipient’s violating his official duties.

The contracting authority may furthermore exclude a bidder in cases of anticompetitive behaviour (e.g. if the respective bidder has entered into an agreement with other bidders aimed at distorting competition or if the respective bidder has made attempts to unduly influence the contracting authority), bankruptcy or upcoming insolvency, a grave professional misconduct, a conflict of interest, a prior involvement in the preparation of the tender procedure which grants the respective bidder an competitive advantage which cannot be balanced otherwise (see also below under e.), or supplying misleading information during the procurement procedure. In any case the exclusion has to be proportionate, the respective bidder always has to be given the right to be heard upfront.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Contracts have to be awarded to economic operators that are suitability to pursue the professional activity, have sufficient economic and financial standing and technical and professional ability with regard to the subject-matter of the contract.

With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be registered in the Austrian Trade register or enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI of the Directive.

With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance. The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies.

With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

Contracting authorities shall set out the required conditions of participation which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the tender documents.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Proof of suitability may, as a general rule, be provided in a facilitated manner, but in tender procedures of classic contracting authorities not by abstract prequalification procedure (to be distinguished from the prequalification phase of an individual tender procedure).

Only in the utility sector an abstract prequalification is a possible tool often used by Utilities.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

There is no unified blacklist in Austria. However, bidders might be classified as not reliable in case of a registered breach of the Foreigners' Employment Act (*Ausländerbeschäftigungsgesetz - AuslBG*) or the Wage and Social Dumping Control Act (*Lohn- und Sozialdumping-Bekämpfungsgesetz - LSD-BG*). For these breaches lists are kept with the Ministry of Finance (for the *AuslBG*) and with the *Wiener Gebietskrankenkasse* (for the *LSD-BG*). These lists have to be checked by the contracting authorities during the suitability assessment.

Following Art. 57 of Directive 2014/24/EU, Austrian procurement law makes it possible for bidders to self-clean in order to not be excluded from the competition. In this perspective, evidence has to be provided that:

the bidder has compensated all damages caused by the law infringement or has engaged itself to do so;

the bidder has actively helped to solve the committed offense; and

the bidder has taken adequate technical, organisational and personnel-wise measures to prevent future law infringements.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

In order to prevent conflicts of interest, a company that was involved in the set-up of a procurement procedure (i.e. drafting of or advising on the tender specifications) can be excluded from said procedure if the involvement of the company in the set-up has led to a competitive distortion that cannot be remediated by other, less incisive measures (e.g. longer deadlines to submit a bid).

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

As a general rule, bidders can combine to submit a bid and form a bidder consortium (*"Bewerber- oder Bietergemeinschaft"*). However, the contracting authority may specify restrictions in its procurement documents.

According to Austrian procurement law bidder consortia may submit bids or requests to participate, unless the participation of consortia has been declared inadmissible for objective reasons. The contracting authority may also foresee a limitation of the number of members or the composition of the admissible consortia on the basis of objective reasons.

The contracting authority can not oblige consortia to adopt a specific legal form for the purpose of the tender procedure. But, as a general rule, bidders prefer to establish a consortium in form of a civil partnership (*Gesellschaft bürgerlichen Rechts*). However, after the award of the contract the contracting authority may require that the consortium assumes a specific legal form if this is required for the proper execution of the contract. If awarded, the members of  the consortium are jointly responsible and liable for the performance of the contractual obligations.

Under Austrian national procurement law a bidder consortium is treated as one individual bidder. Consequently, individual members of bidding consortia are not entitled to file an appeal for review. Only the consortium itself can have a legitimate “interest in the contract”, but not individual members who did not submit an offer and therefore could not be awarded the contract. Bidder consortia have to name all of their members in the submitted bid and nominate one member as the authorised representative for the tender procedure and the potential execution of the contract to be awarded.

The bidding consortium as a whole has to prove the required suitability criteria. Every member of the consortium has to prove individually that it does not fulfil the grounds for an exclusion from the tender procedure (see above under 4 c.). If deemed necessary, the contracting authority may set up specific requirements as to how a bidder consortium provides the proof of suitability and how the contract should be executed by the bidder consortium. Such requirements have to be justified by objective grounds (e.g. the contractual subject-matter) as well as proportionate.

Bidder consortia may be excluded from the tender procedure if the formation of the bidder consortium itself is considered anti-competitive und thus could potentially distort free competition. This might be the case if the participating companies are competitors on the same (tight) market. However, a bidder consortium cannot be excluded on such grounds if the combined bidding is justified. It is up to the members of a bidding consortium to justify this and convince the contracting authority that their consortium does not present grounds for exclusion. In contrast, for companies which are not competitors on the same market it is much easier to form a bidder consortium without raising the general suspicion of a competitive distortion.

## g. Can members of a bidder consortium be changed during a procurement procedure?

Generally speaking, in open tender procedures it is commonly accepted judicial practice that the establishment of bidding consortium or a change in their composition is only permissible until the bid submission. In restricted procedures as well as negotiated procedure with call for competition, a change of the composition or the establishment of a new bidding consortia is generally prohibited after submitting a request for participation and the invitation to bid.

Please note that pursuant to the case Højgaard und Züblin decision of the European Court of Justice dated 24 May 2016 the contracting authorities may exceptionally allow a (alone suitable) member of a prequalified consortium to submit a bid even if the original bidder consortium does not exist anymore. This decision has not been reflected by the national case law, yet.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

As a basic rule in Austria, limitations for participation of related bidders in the same procedure apply as long as one entity has substantial influence on more than one bid.

Related bidders are those which belong to the same group or holding or are otherwise related by corporate means. It is refutably assumed that the participation of related bidders in the same procurement procedure with competitive bids is an anti-trust law violation because it is refutably assumed that information relevant for drafting the bids is exchanged between entities of the same group or holding. However, this assumption can be reversed if the bidders succeed to prove that they have taken appropriate measures to ensure that their bids are drafted independently and confidentially. Therefore, the bidders have to disclose:

if and to what extent the parent company or affiliates may have influenced their bidding;

if the bidding companies are subjected to a certain group structure/policy which may have influence on their bidding;

if and on what company level coordination agreements exist;

if and to what extent technical, organisational and personnel-wise interrelations exist between the companies; and

if the companies operate spatially divided.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

Yes, there are in particular special regulations in place for regulated activities under the Austrian Industrial Code (*Gewerbeordnung - "GewO"*).

For example, according to the Austrian Industrial Code, a foreign company that wants to to participate in a tender procedure for regulated services in Austria (e.g. trade with medical devices) has to notify the Federal Minister of Economics and Labor in writing of the activity prior to submitting the bid at the latest. Otherwise, this service provider would have to be excluded procurement procedure.

# 5. Specifications

## a. Are there any rules on the specifications?

Specifications have to be adequate and proportionate and relate to the subject-matter of the procurement procedure. Thus, unduly burdensome or risky requirements are not permissible if they are considered disproportionate.

The contracting authority may set out technical specifications with the obligation to basically use (and deviate just reasonably and individually) set national standards and European standards. Alternatively, the contracting authority can set forth performance or functional requirements for the required works, services or supplies instead of specific technical specifications. Additionally, the contracting authority may combine technical specifications with performance and functional requirements as far as the subject-matter of the procured contract allows this.

The bid has to comply with technical requirements set forth by the contracting authority. This rule applies for open and restricted procedure. In case of a negotiated procedure bidders are expected to also submit a first binding offer in compliance with the specifications set out in the tender documents but might also negotiate technical specification with the contracting authority.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

In principle, bidders are not allowed to change the specifications. In case of non-compliance, the contracting authority has to exclude them from the procedure. The submission of own standard terms of business is not allowed either and regularly results in exclusion from the procurement procedure. Both, the change of specifications as well as the submission of own standard terms of business, are just allowed if the contracting authority allows alternative offers (beside a basic offer in compliance with the specifications set).

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

As the protection of Small and Medium Enterprises is one of the main objectives of the Directive 2014/24/EU, Austrian procurement law also provides that the interests of Small and Medium Enterprises (SMEs) shall be considered in procurement procedures. As a main consequence of this requirement, the contracting authority shall divide contracts into lots as far as feasible in order to guarantee an award chance for SMEs. A deviation from the principle of lot division requires an economic or technical justification resulting form the subject-matter of the contract that has to be documented by the contracting authority in writing. However, the contracting authority may reserve the right to award several lots to one bidder. This has to be reflected in the contract notice.

Additionally, following article 58 of the Directive 2014/14/EU, under national procurement law the contracting authority can as a suitability criterion only request a minimum annual turnover twice as high as the value of the bid, except if the risks of the bid require a higher amount. This limitation is also aimed at guaranteeing a reasonable chance to participate for SMEs.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

According to Austrian procurement law the contract notice or the tender documents shall state whether the contract is to be awarded to the technically and economically most advantageous bid (best-bidder principle or *"Bestbieterprinzip"*) or to the bid with the lowest price (lowest-price bidder principle or *"Billigstbieterprinzip"*). As a guideline the lowest-price bidder principle is only permissible if the quality standard of the service is clearly and unambiguously defined in the procurement documents. In certain scenarios contracting authorities have to choose an award to the technically and economically most advantageous bid (e.g. services awarded in a negotiated procedure, works contracts worth more than 1 million euros and in case performance or functional requirements are set out for the required works, services or supplies instead of specific technical specifications) .

Following Directive 2014/24/EU, Austrian procurement law provides that the aspects of quality, innovation as well as social and environmental aspects have to be stronger taken into account when setting forth award criteria and awarding a contract.

In fact, contracting authorities can establish award criteria at their discretion provided that they are linked to the subject-matter of the procurement contract. The award criteria and their weighting have to be set out in the contract notice or in the tender documents.

## b. Are there any limitations regarding the offered bid price?

The contracting authority has to request clarification from a bidder if his bid price (total price or unit prices) appears to be abnormally low or not reasonable. If this clarification does not lead to a satisfactory result, i.e. an economic justification for the offered low price, the contracting authority can exclude the bid.

## c. Are there any rules on alternative bids?

The contracting authority may only accept alternative bids beside main bids if this is set out in the tender documents. In the invitation to bid the contracting authority shall specify whether and to what extent alternative offers are allowed. If the contracting authority has not provided any information on the admissibility of alternative offers, the submission of alternative offers is not permitted.

If they are admitted, an alternative bid has to be linked to the subject-matter of the procurement contract. In any case, submitted alternative bids have to be assessed in the same way as main bids. In this perspective, award criteria have to be established in a manner that they are applicable to both main bids and alternative bids. Additionally, the contracting authority has to set out minimum requirements for alternative bids in the procurement documents and set out in what manner they have to be submitted.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

As mentioned above under 3 a., Austrian public procurement regulations permit direct awards, in the meaning of negotiated procedure without a prior call for competition exceptionally only to a very restricted extent. This procedure differs from all other award procedures as it generally does not provide for any competition. The use of this procedure is limited to certain determined cases which are enlisted in the BVergG. Accordingly, negotiated procedure without a prior call for competition are permissible

where no bids or no suitable bids or no applications have been submitted in an previous open procedure or a previous restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests.

where the products involved are manufactured purely for the purpose of research, experimentation, study or development; this exemption does not extend to quantity production to establish commercial viability or to recover research and development costs.

where, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract must be awarded only to a particular economic operator.

insofar as it is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of the supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years.

for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure. As soon as the first project is put up for bid, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7 of the Directive 2014/24/EU. This procedure may be used only during the three years following the conclusion of the original contract.

for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotiations.

for supplies quoted and purchased on a commodity market.

for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations.

Besides these listed exemptions for a permissible negotiated procedure without a prior call for competition, Austrian Procurement Law also allows for direct awards procedures for contracts with an estimated value not reaching (currently) 100.000 euros. Direct award procedures differ from all other procedures as they generally do not provide for any competition and tend to be not transparent. Therefore, the use of this procedure is limited minor awards within the sub-threshold area because of its limited transparency and documentation requirements and its vulnerability to other than competitive influences.

## b. What are the consequences for violation of the competitive bidding requirement?

Public contracts which are awarded without any kind of bid procedure in breach of the BVergG, i.e. directly awarded to one contractor without meeting the conditions for such a direct award set forth, could be deemed void in a tender review procedure. A frustrated bidder or a company interested in the contract has to initiate such a review procedure within tight time limits (see 8 d below). If those time limits expire and no review procedure has been initiated, the directly awarded contract cannot be challenged to be void anymore.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

In Austria, tender review competencies (procurement-specific legal protection) are split up between the Federal Government (*Bund*) and the nine Provinces (*Länder*). If contracting authorities are mainly controlled or financed by the Federal Government, the legislation and the enforcement of tender review law is up to the Federal Government. If contracting authorities are mainly controlled or financed by one of the nine Provinces, the respective Province is competent for the legislation and the enforcement of the tender review law. Thus, depending on the individual contracting authority awarding a contract either the Federal Administrative Court (*Bundesverwaltungsgericht, BVwG)* or one of the nine Administrative Courts on Province level (*Landesverwaltungsgericht, LVwG*) are responsible for the respective tender review procedure.

In transposition or the Remedy-Directive 2007/66/EC, Austrian procurement law sets out three main types of legal review proceedings: the review procedure (*Nachprüfungsverfahren*), the interlocutory procedure (*Verfahren über einstweilige Verfügungen*) and the declaratory procedure (*Feststellungsverfahren*) as a prerequisite for damages procedures at civil courts.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

In the case of breaches of public procurement law, an applicant or bidder might be entitled to compensation for the cost of the bid and the cost of participating in the procurement procedure or its interest in the contract (lost profit). In order to successfully claim damages the breach of procurement law has to be verified in a declaratory procedure at the Administrative Court upfront. The civil courts are then competent to decide damage claims.

However, it has to be noted that there are many formal conditions for damage claims and that they are very rare because unsuccessful bidders mostly do not want to initiate a risky proceedings against a contracting authority.

As a basic rule Austrian procurement law states that in all other respects, i.e. in particular compensation claims, injunctions, solidarity claims, rights of rescission and design rights existing under other legal provisions shall remain unaffected by the specific procurement legislation and specific tender review competencies.

## c. Is there a specific forum before which procurement disputes are heard?

Procurement disputes are generally heard in front of either the Federal Administrative Court or one of the 9 Administrative Courts on Province level (see above point 8.a.).

On Province-level the legal protection procedures correspond largely to those on Federal-Government-level. There are, however, certain non-compulsory forums for out-of-court dispute resolution on Province-level. As an example in Lower Austria, a voluntary conciliation procedure prior to a review procedure exists; also in Vienna a conciliatory body may be called upon voluntarily in case a person wants to challenge provisions of tender documents; In Carinthia, an Ombudsman for Public Procurement is established also for mediation activities, which is optional as well.

## d. Are there any timing requirements for the review?

There are different (tight) time requirements for different procedures.

Time limits for tender review procedures (and interlocutory procedures):

Requests for revision must be submitted within 10 days (also in the sub-threshold-area). The period begins with the transmission or provision of the (separately contestable) decision or the initial availability of the notice.

In the case of the execution of a direct award, the time limit shall be 10 days from the date on which the applicant has been aware of or had obtained knowledge of the separately contestable decision.

Requests for review of the invitation to bid or the tender documents, in principle, may be submitted no later than 7 days prior to the end of the period for the submission of bids, the time limit for submission of the competition or the period for the submission of applications, provided that this period is more than 17 days.

Time limits for declaratory procedures at the Administrative Court:

Applications must be submitted within six months from the date on which the applicant became aware of the award or could have obtained knowledge at the latest.

In case the applicant did not participate in the tender procedure and the contracting authority has published a contract award notice applications must regularly be submitted within 30 days, in case of a ex-ante-transparency notice even within 10 days.

## e. What are the main preconditions for review?

A tender review procedure requires an "interested person" to apply for the review of a "separately contestable decision" of the contracting authority on the grounds of "specified alleged breaches of procurement law" until the award of the contract or until the revocation of the tender procedure. A bidder can therefore only successfully file such a application for review if he can (i) prove interest to (still) be awarded, (ii) specifies an alleged violation of his individual rights resulting from public procurement law provisions and (iii) demonstrate that as a consequence of such violation he might suffer damages (iv) applies for review of a "separately contestable decision" in time and (v) files its application with the competent Administrative Court.

These pre-conditions apply in principle to all three types of legal proceedings (see above point 8.a.).

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

A review proceeding itself does not affect an on-going procurement procedure. Nevertheless, an interlocutory procedure and the individual interim measures imposed on the contracting authority (e.g. prohibition to award the contract during the tender review procedure) does interrupt the procurement procedure.

If the contract has already been awarded, only a declaratory procedure (*Feststellungsverfahren*) might be initiated. This procedure can end with the annulment of the contract.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

If the review proceeding is successful, the separately contestable decision challenged shall be annulled. The contracting authority is bound to the decision of the Administrative Court when it continues the tender procedure.

If the declaratory procedure is successful, the court shall verify a breach of public procurement laws and might also decide the annulment of the contract or impose a fine on the contracting authority.

## i. How long does a judicial proceeding for review take?

At the Federal Administrative Court a decision in a tender review procedure must be made within six weeks from the date of receipt of the application at the latest. On Province-level a tender review procedure shall not take longer than 8 weeks. Please note in this context that there are no effective sanctions in case the Court exceeds these deadlines.

These tight timelines are not applicable to declaratory procedure because they are initiated after the contract is already awarded.

A decision in a interlocutory procedure must be taken without delay, but within a maximum period of 10 days after receipt of the application.

## j. Must unsuccessful bidders be notified before the award? If so, when?

Yes, for transparency reasons and in order to enable not successful bidders to seek legal protection within the applicable tight time limits during a tender procedure, bidders must be notified prior to the award (*Zuschlagsentscheidung*) “without undue delay”. The procurement contract can only be concluded 10 days after the notification has been issued (after this "standstill period").

## k. Are review proceedings common?

Yes, review proceedings are very common in Austria.

## l. Are damage claims in relation with procurement procedures common?

No, damage claims are rather rare because unsuccessful bidders mostly do not want to initiate a risky proceedings against a contracting authority.

## m. What are the leading court decisions involving procurement disputes?

In Austria there are already thousands of court decisions for tender review procedures dealing with very different questions. Leading decisions are those of the ECJ and a decision of the Constitutional Court resulting in the applicability of Austrian Public Procurement law (in a light version) also for tender procedures below the thresholds of the EU-Directives.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Other relevant rules of law are for example the:

Unfair Commercial Practices Law (*Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG*);

Federal law for the prevention of cartels and other barriers to competition *(Kartellgesetz 2005 - KartG 2005*);

Austrian Penal Code (*Strafgesetzbuch - StGB*)

## b. Does a specific contract law apply for public contracts?

No.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

No.

## b. Are there any specific laws or practices that apply in the defense sector?

In the defence sector, the Federal Procurement Act Defence and Security (*Bundesvergabegesetz Verteidigung und Sicherheit – "BVergGVS"*), which transposes the European Directive 2009/81/EC, applies. Public contracts in the defence sector may only be awarded on the basis of a competitive award procedures, which must be transparent and non-discriminatory. The BVergGVS also takes into account special requirements of the defence and security sector, such as the confidentiality of sensitive information and the security of supply.

## c. Are there any specific laws or practices that apply in the health care sector?

No.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

As set out by the EU-Directives, specific laws apply to the Utility sectors. These specific procurement laws are embodied in the BVergG.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

In Austria, the Public Procurement Directives 2014/23/EU, 2014/24/EU and 2014/25/EU are currently (as of May 2017) transposed into national law. Please note that this short overview of the Austrian Public Procurement framework already referred to the already existing draft of BVergG 2017. However, it cannot be excluded that further amendments not covered by this overview by now will be reflected in the BVergG 2017 which is expected to come into force in the next months.

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