

The Public Procurement Act of 2018

The Act of 2018 reforming public procurement (Bundesvergabegesetz 2018; BVergG 2018) which for the most parts has entered into force on 21 August 2018 has transformed the package of EU directives passed in 2014 into Austrian law. The new procurement regime has introduced some fundamental changes affecting contracting authorities as much as contractors.

Following the adaptation of some provisions of the BVergG 2006 to the new directives already back in 2016, the entire package of EU directives has now been fully transformed by way of a revision of the Public Procurement Act of 2006, resulting in the BVergG 2018. Even though the BVergG 2018 spans a large number of changes it still retains the previous structure of the law as well as the fundamental mechanisms of procurement.

Scope and procedures

Terminological changes apart, the personal scope of the BVergG 2018 remains unaffected. Same as the previous version, the Act applies not just to federal, state and local governments and other public authorities but also to procurement in certain sectors, such as water and energy utilities and parts of public transport.

Added to the catalogue of permitted procedures was the so-called **innovation partnership**, a two-stage procedure where suitable candidates are invited to submit bids for the development of an innovative product, service or works. The contract involves the development and subsequent acquisition of such product, service or works. Open and restricted procedures with prior notification will continue to be the

norm, but the **scope of the competitive procedure with negotiation has been substantially extended.**

Mandatory electronic award

A key novelty of the BVergG 2018 is the obligation to handle procurement procedures by electronic means ("electronic procurement") whenever they exceed thresholds, starting on 18 October 2018. Previously used methods to prepare and submit bids will then be permitted only for values below the applicable thresholds.

Potential bidders will then be able to submit bids for a tender above the threshold only if they have the technical means to participate in electronic bidding and their staff are suitably trained for this. Specifically, electronic bids will need to bear an electronic signature, which needs to be signed by persons authorised to sign for the bidder, since otherwise the bid will have to be rejected.

Considering that in recent years only a handful of contracting authorities have made provision for electronic tendering, this procedure will constitute a major challenge for many economic operators and smaller contracting authorities.

SPECIAL ISSUE 2018

Stricter grounds for exclusion

Another point of special relevance is the tightening of grounds for exclusion (Section 78 (1) BVergG 2018).

Of particular note is the new ground for exclusion in the form of "*significant or persistent deficiencies*" from a former contract which resulted in early termination, damages or comparable sanctions. Such an earlier contract may have been one awarded by another contracting authority; exclusion therefore does not necessarily require that the contracting authority itself has had a "bad experience" with the economic operator actually concerned.

Exclusion is also possible when there are "*sufficiently plausible indications*" for adverse agreements with other economic operators, especially agreements aimed at distorting competition. This ground for exclusion is particularly critical since the decision, whether there are "*sufficiently plausible indications*" is based solely on the contracting authority's assessment. It is expected that this ground will furnish plenty of fuel for judicial reviews.

Another new ground for exclusion is the attempt to unduly influence the decision-making process of the contracting authority or to obtain confidential information by which the economic operator might gain an undue advantage in the procedure. Contacts with contracting authorities during ongoing tenders should thus be governed by care and caution.

Since even the negligent providing of incorrect information, which is of relevance for the decision on suitability or for the awarding decision, to the contracting authority, or the mere attempt to provide such information constitute a ground for exclusion it will be necessary to exercise a greater degree of care when preparing bids and giving explanations during the tender evaluation.

The rule, that the contracting authority must exclude economic operators from participating in the tender procedure when a conflict of interests cannot be avoided by other, less drastic means, gives room for interpretation. Under Section 26 BVergG 2018 it is, however, primarily up to the contracting authority to take suitable measures to effectively prevent, to disclose, and to remedy conflicts of interests in order to avoid a distortion of competition and ensure equal treatment of all bidders.

This ground for exclusion can thus be only the "ultima ratio".

Under the new provisions, legal entities must be excluded when any of their members of the administrative, management or supervisory board or persons with powers of decision or control have been convicted with legally binding effect. With regard to board members, also other grounds for exclusion suffice for the exclusion of the legal entity.

Given these aggravations, it is positive from economic operators' point of view that non-payment of social insurance contributions, taxes and other dues constitutes grounds for exclusion only when such non-payment is determined by a legally binding court or administrative decision or otherwise suitably documented by the contracting authority. Under some circumstances (especially when a payment agreement has been reached or when the debt is minor only) exclusion on such grounds is not admissible at all. Exclusion on the grounds of insolvency or liquidation can be refrained from when the entrepreneur's capacity to perform suffices to carry out the specific contract.

Stricter requirements for self-cleaning

Requirements for self-cleaning were also massively increased. Under Section 83 (2) BVergG 2018, self-cleaning now requires the cumulation of several conditions. In addition to taking the already known effective measures, economic operators must have paid a compensation for any damage caused by the criminal offence or misconduct or at least undertaken an obligation to pay such compensation. Further, it is necessary to fully contribute to clarifying the criminal offence or misconduct by way of active cooperation with the investigating authorities.

If no or only inadequate measures are taken, the economic operator may be excluded from participating in tender procedures for three or five years, depending on the grounds for exclusion. In this connection also the new provision of Section 83 (4) BVergG 2018 is of relevance, according to which economic operators cannot carry out self-cleaning when they have been excluded from procurement procedures in another EEA member state due to a final decision by a court ("blacklisting"). In such a case, the economic operator must be excluded from procurement procedures in Austria for a period specified in the court decision.

Limitation of subcontractor referencing

Also of note is the limitation now contained in the BVergG 2018, according to which economic operators *"can only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required"*. Pleading references of a subcontractor is thus possible only when such subcontractor actually performs the relevant works or services. This is intended to prevent so-called reference shopping.

The contracting authority must be informed, not later than at the start of performance, of the contact data and authorised representatives of any subcontractor used.

Aggravations in providing means of proof for selection criteria

For tenders in excess of the defined threshold, "classical"

contracting authorities must request the so-called European Single Procurement Document. Individual self-declarations are now permissible only for contracts below the threshold and in the sectoral procedures.

The possibility for references to databases are limited insofar as such databases must be free to use by the contracting authority. The frequently used ANKÖ reference will now be possible only when the contracting authority is already an ANKÖ user.

Similarly limited is the possibility to provide equivalent alternative references: they are accepted only to prove the financial and economic standing. All other selection criteria must be proven by the references as specified by the contracting authority.

A welcome relief, however, is provided by the new rule that references for bids above the threshold need not to be submitted again in case the contracting authority already knows them from a previous procedure.

Changes in protection under procurement law

Given the competence-sharing between federal and state governments, the BVergG 2018 continues to be harmonised substantive law but the **legal protection** granted to bidders remains **splintered**, since there are still several procurement supervisory bodies at federal and state levels plus a total of **ten different legal protection acts**. Added to this are special regulations in the Public Procurement Act for Defence and Security (BVergGVS 2012) and in the new Public Procurement Act for Concession Contracts (BVergGKonz 2018).

Both federal and state levels provide protection in procurement procedures, consisting of review proceedings to nullify decisions that can be appealed against separately, provisional protection proceedings to grant temporary injunctions and declaratory proceedings for the period after conclusion of the procurement procedure.

The most important change in legal protection is the change in time limits. Thus, the **standstill period** after the revocation and award decision has been notified is now **generally ten days** when electronically

transmitted (standard case) for both contracts above and below the threshold. Analogously the period for appeals was harmonised at ten days (Section 343 BVergG 2018). This eliminates a potential source for errors, especially for procedures incorrectly carried out for contracts below the threshold. However, it needs to be noted that when it comes to legal protection at state level, at least as long as the states have not harmonised their procurement protection acts, the time period for applications to review contracts below the threshold could still be seven days, so that in such cases the standstill period may be longer than the appeal period under procurement law.

Legal protection may be adversely affected by the **reduced time limits to apply for participation and bidding**. The bidding period to be set by the contracting authority in the open procedure now must be at least 30 days (previously 52 days), and at least 25 days for two-step procedures. Accelerated procedures after prior information notice or in case of urgency allow the period to be shortened to 15 and 10 days respectively. For contracts below the threshold

the bidding period is at least 20 days; for two-step procedures it is down to ten days.

This is of relevance because applications for tender review procedures must be filed at the competent administrative court not later than seven days before the end of the bidding period provided that the bidding/participation period is more than 17 days; if this time limit is shorter, applications for a review of the tender must be filed within ten days of the notification. Accordingly, economic operators will have only a very **short time window to check tender documents for violations of law** and to appeal against them.

The time limit for an application for declaratory proceedings is six months after it was possible to become aware of the award or revocation.

As another novelty, central procurement agencies act as party instead of the actual contracting authority when they carry out the procurement procedure as awarding agent; in such case the contracting authority may join the legal protection proceedings as an intervener. Where a procurement procedure is carried out by several contracting authorities, they form a joinder of parties. The provisions of the Code of Civil Procedure apply correspondingly.

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Key amendments of the BVergG 2018 at a glance:

- Obligatory electronic procurement procedure for contracts above the threshold as of 18 October 2018
- Stricter rules governing grounds for exclusion and self-cleaning
- Limited option to refer to subcontractors
- Major changes in means of proof of selection criteria
- Tighter legal protection by reduction of time limits for applications to participate and bids
- Harmonised standstill periods for contracts above and below the threshold



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