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The International Comparative Legal Guide to: Public Procurement 2012

A practical cross-border insight into
public procurement

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Austria

Christian Schmelz



Philipp J. Marboe



Schoenherr

1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The relevant legislation is the Federal Procurement Act 2006 as amended (“BVerG”). The BVerG implements Directives 2004/17/EC and 2004/18/EC and therefore covers the legal framework for the award of both public contracts of public entities and entities operating in the water, energy, transport and postal sectors (“sectoral entities”).

In June 2011, a draft on a new Federal law on the award on contracts in the fields of defence and security (“BVerGVS”) was proposed, aimed at implementing Directive 2009/81/EC. In July 2011, a draft amendment to the BVerG was presented, aimed, above all, at simplifying sub-threshold public procurement procedures. For both draft laws the entry into force was last expected for early 2012 (for details on the two draft laws, please see question 8.1).

The BVerG covers the main principles and rules on public procurement procedures, including the different types of award proceedings and competences on appeal procedures for the Federal State, the provinces and the municipalities, not only for purchases above certain thresholds but also for those below such thresholds. In addition, there are several State Acts regulating the competent jurisdiction of the provincial authorities (“*Unabhängige Verwaltungssenate – UVS*” or “*Verwaltungskontrollsenate – VKS*”).

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

There are no specific government transparency rules relevant to public procurement. However, there are other areas of national law relevant to public procurement, such as the Penal Code, the Industrial Code, the General Social Security Act, the Foreigners Employment Act, the Bankruptcy Act, the Composition Act, and the Antitrust Act.

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The BVerG implements EC Directives 2004/17/EC and 2004/18/EC. Furthermore, Austria implemented its obligations under the GPA. As a Member State of the EU, Austria is also a Contracting Party to the Agreement between the European

Community and the Swiss Confederation on Public Procurement (and another six sectors).

1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic (underlying) principles are: (i) the fundamental freedoms under Community Law; and (ii) the ban on discrimination on the basis of the principles of free and fair competition and equal treatment of all applicants and tenderers. Public procurement contracts shall be awarded to qualified, capable and reliable entrepreneurs at reasonable prices. Any restrictions as to territory or certain professions, although other entrepreneurs are also qualified to supply the delivery or perform the work or service, are not permitted. These principles serve as the main principles for the interpretation of the BVerG.

1.5 Are there special rules in relation to defence procurement or any other area?

The BVerG shall not apply to public contracts when they are declared secret or their performance must be accompanied by special security measures or when the protection of essential interests of the security of the State so requires. The BVerG shall also not apply to supplies of goods and the performance of services and works within the scope of the Federal Ministry of Defence, subject to art. 346 para. 1 lit. b of the Treaty on the Functioning of the European Union (“TFEU”).

Moreover, a draft law in June 2011 proposed a new federal law on the award of contracts in the fields of defence and security (“BVerGVS”; for details, please see question 8.1).

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

The BVerG applies to public procurement procedures of public purchasers, such as the Federation, the States, the municipalities and municipality associations (territorial entities). Furthermore, the BVerG covers entities which are controlled, financed or supervised by territorial entities or other public entities which have been established for the specific purpose of meeting needs in the general

interest, not having industrial or commercial character, and having legal capacity at least in part (e.g. ASFINAG, OEBB, public hospitals, universities). Implementing Directive 2004/18/EC, the BVerG also applies to entities engaged in at least one of the sectoral activities.

2.2 Which private entities are covered by the law (as purchasers)?

The BVerG also applies to contracts awarded by purchasers other than public entities, engaged in one of the utilities activities pursuant to special or exclusive rights granted by an authority which has jurisdiction over them. Furthermore, contracting authorities are obliged to bind (private) contractors to apply the provisions of the BVerG when subcontracting contracts in certain cases (e.g. works concessionaires which intend to award works contracts to third parties).

2.3 Which types of contracts are covered?

The BVerG covers procedures for the procurement of:

1. supply contracts;
2. works contracts;
3. works concession contracts;
4. service contracts; and
5. service concession contracts.

2.4 Are there financial thresholds for determining individual contract coverage?

Yes, these financial thresholds are as follows:

- EUR 193,000 for supply and service contracts;
- EUR 125,000 for supply and service contracts awarded by central purchasing bodies listed in Annex 5 to the BVerG;
- EUR 387,000 for supply and service contracts awarded by sectoral entities; and
- EUR 4,845,000 for works contracts and works concessions.

Please note that BVerG also applies to contracts below the above-mentioned thresholds. However, the rules for contract awards below these thresholds are in part less strict.

Please also note that these thresholds are expected to be raised by 3 to 4% as of 1 January 2012.

2.5 Are there aggregation and/or anti-avoidance rules?

The BVerG provides detailed and specific rules regarding the calculation of the contract value (including aggregation and anti-avoidance rules) in order to determine the applicable thresholds and procedures, taking into account the different types of contracts to be awarded (service or supply works contracts). Generally, the estimated overall net value (without VAT) of the services or works to be awarded (including all options, lots and extensions of the contract) shall serve as a basis for the calculation. Breaking down a purchase order for a certain number of deliveries or choosing a particular method of calculation must not result in avoiding the application of the provisions of the BVerG, with regard to the order value range above the threshold.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

The BVerG sets forth specific rules and provisions applicable for

awarding public works and service concession contracts. Accordingly, works/service concession contracts are contracts of the same type as works/service contracts, except for the fact that the consideration for the works/services to be carried out consists either solely in the right to exploit the construction or in such right together with a specific amount of payment. Generally, the rules for awarding concession contracts are less strict. While the procedure for public works concessions basically follows the rules for public works contracts, public authorities only have to comply with the main principles when awarding a service concession contract. As to works concession contracts, the contracting authority has to follow the general rules and proceedings. Furthermore, there are specific provisions regarding the awarding of subcontracts. The contracting authority is, e.g. entitled to stipulate that the concessionaire shall subcontract a minimum of 30% of the total value of the works, as object of the works concession in a transparent and non-discriminatory procedure.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

Pursuant to the BVerG, the following award procedures are available: (i) open procedure; (ii) restricted procedure (with and without prior notice); (iii) negotiated procedure (with and without prior notice); (iv) direct award; (v) competitive dialogue; (vi) dynamic purchasing system; (vii) electronic auction; (viii) design and realisation contests; or a (ix) framework agreement. As of 2012, there shall be an additional new procedure, namely (x) direct award with a prior public market survey.

Contracting authorities are free to choose between the open procedure and the restricted procedure; all other procedures require certain conditions and circumstances to be satisfied:

- While in the open procedure an unlimited number of entrepreneurs is publicly invited to submit tenders, and in the case of restricted procedures (with prior notice), any economic operator may request to participate and only candidates invited to do so may submit a tender. In the restricted procedure, the contracting authority preselects a limited number of qualified entrepreneurs to be directly invited to submit tenders.
- In the negotiated procedure with prior notice, applicants selected from an unlimited number of entrepreneurs, publicly invited to submit applications to participate, are invited to submit tenders. Following that, the full scope of the order can be negotiated. The negotiated procedure generally may be applied only if an open or a restricted procedure with prior notice has not resulted in any tenders, or any tenders suitable for the purchaser. In the latter case, the original terms and conditions for the supply contract shall not be substantially altered. Additionally, contracts can be awarded in the negotiated procedure, e.g. if the particular characteristics do not permit an open or restricted procedure or the services to be performed prevent defining contractual specifications.
- In the negotiated procedure without prior notice, the contracting authority directly consults preselected candidates to submit an offer and subsequently negotiates the terms of the contract with them. This procedure may only be chosen under specific circumstances, e.g. if a contract can only be carried out by a particular contractor for certain reasons, extreme urgency or repetition of similar cases.
- Direct awards are only permitted if the contract value does not exceed EUR 100,000 (as of 2012: EUR 40,000 in the

classical sector and EUR 60,000 in the utilities sector) or if the projects is co-financed with Community funds.

- The competitive dialogue may be used for particularly complex contracts where the technical solutions or the legal or financial make-up of a project cannot be specified. Selected candidates are invited to define the best solution for the project in several dialogue phases.
- An electronic auction can be held merely subsequent to a procurement procedure and is not available for certain works and service contracts, such as the design of works which relate to intellectual performances.
- Framework agreements are merely available subsequent to an open, restricted or negotiated procedure. In principle, the term of a framework agreement must not exceed a four-year period.
- A dynamic purchasing system is an entirely electronic process, where entrepreneurs are invited to submit non-binding declarations for the provision of commercially available services. Subsequently, all economic operators satisfying the selection criteria are invited to submit a bid.
- Design contests are procedures, in particular in the fields of zoning, city planning, architecture, construction/civil engineering (design contests), promotion or data management, aimed at providing a plan or design to be selected by a jury on the basis of certain evaluation criteria with or without awarding prizes. Realisation contests lead to a negotiated procedure to award a public service contract after carrying out a design contest.
- Direct awards with prior market survey will be applicable (as of 2012) to all types of contracts with a contract value of EUR 100,000 in the classical sector and EUR 150,000 in the utilities sector, respectively. The contracting authority must publish a notice prior and subsequent to the awarding procedure. The course of the awarding procedure may be determined by the contracting authority, however, in compliance with the general principles of the Treaty establishing the European Community ("ECT").

3.2 What are the minimum timescales?

Minimum timescales vary due to the different award procedures and may be shortened under certain conditions. Accordingly, the minimum timescales are as follows:

- Open procedure:

For the receipt of tenders: 52 days from the date the contract notice was sent. A shortening of seven days is available if notices are drawn up and transmitted by electronic means, or of five days where direct access by electronic means to the contract documents is offered. When a prior information notice has been published, a shortening to 22 days is possible, and a further shortening of seven days if notices are drawn up and transmitted by electronic means.

- Restricted procedure (with prior notice):

For the receipt of requests to participate: 37 days. Shortenings of seven and five days as with the open procedure are available. In cases of urgency, a time limit of 15 days or 10 days if the notice was sent by electronic means may be fixed. In the utilities sector, for the receipt of requests to participate: shortening to no less than 15 days is available if the notice was transmitted by electronic means.

For the receipt of tenders: 40 days from the date on which the invitation to tender was sent. If a prior information notice was published, a shortening to 22 days is available. In cases of urgency, a time limit of 10 days may be fixed. In the utilities sector, the time limit may be set by agreement with the selected candidates. Unless such agreement is reached, a time limit of at least 10 days is admissible.

- Negotiated procedure (with prior notice):

For the receipt of requests to participate: 37 days. A shortening of seven days is possible if notices are drawn up and transmitted by electronic means. In cases of urgency, a time limit of 15 days or 10 days, if the notice was sent by electronic means, may be fixed. In the utilities sector, a shortening to no less than 15 days is available if the notice was transmitted by electronic means.

For the receipt of tenders: no minimum timescale in the classical sector. In the utilities sector, the time limit may be set by agreement with the selected candidates. Unless such agreement is reached, a time limit of at least 10 days is allowed.

- Competitive dialogue (merely in the classical sector):

For the receipt of requests to participate: 37 days from the date on which the contract notice was sent. A shortening of seven days is possible if notices are drawn up and transmitted by electronic means. The minimum timescale for the receipt of tenders is 52 days from the date on which the invitation was sent.

3.3 What are the rules on excluding/short-listing tenderers?

Tenderers shall be excluded from participating in award procedures if:

- a judgment which has entered into legal force has been rendered against them or against natural persons on their managerial body due to participation in a criminal organisation, corruption, fraud or money laundering;
- a bankruptcy or composition (reorganisation) proceeding by court order has been instituted against them or a bankruptcy proceeding has been rejected in the absence of sufficient assets;
- they are liquidating or winding up the business;
- they have been guilty of grave professional misconduct, in particular in violation of provisions of labour or social laws, according to evidence available to the purchaser or a judgment, which has entered into legal force, challenging their professional conduct that has been rendered against them or against natural persons on their managerial body;
- they have not complied with their obligations to pay social security contributions or taxes and levies; or
- they are guilty of serious misrepresentation in supplying information.

However, in certain cases tenderers may be permitted to participate in a procedure, even if an above-mentioned exclusion ground is fulfilled.

As there are no explicit rules on short-listing, the general principles and provisions of the BVerG apply. Therefore, e.g. negotiated procedures can take place in several stages and the bidders can be shortlisted by applying the contract award criteria. Due to the principle of equal treatment and transparency, the respective rules have to be published upfront.

3.4 What are the rules on evaluation of tenders?

For the evaluation of tenders, the contracting authority may either refer to the tender most economically advantageous or merely to the lowest price. If the tender most economically advantageous is selected, the entirety of the awarding criteria must be determined. Such criteria can be related to quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales services and technical assistance, delivery date and delivery period or period of completion. The contracting authority must also indicate the weighting attributed to each awarding criteria in order to guarantee the transparency of the evaluation.

3.5 What are the rules on awarding the contract?

Out of the tenderers left after the elimination procedure, the tenderer whose tender is either the technically and economically most advantageous tender or is the lowest price, shall be awarded the contract. The contracting authority has to notify the tenderers left in the procurement procedure simultaneously on the award.

However, there is no such obligation in cases where:

- a publication of a prior contract notice is not required and only one tenderer is involved; and
- procedures for which only one tenderer is concerned (contracts based on a framework agreement with one bidder, competitive dialogue where only one bidder was invited to bid, and procedures where only one bidder was left).

Any contract awarded in violation of the obligation to provide information on the award decision or during the standstill period is null and void.

3.6 What are the rules on debriefing unsuccessful bidders?

The contracting authority must inform unsuccessful bidders about the successful tenderer to which the award shall be attributed. Moreover, unsuccessful bidders must be notified of the reasons for the non-selection of their tenders, the award sum, and the characteristics and advantages of the winning tender, unless disclosure of such information would prejudice public interest, the legitimate commercial interests of any company, or free and fair competition. Unsuccessful bidders must also be informed about the end of the standstill period.

3.7 What methods are available for joint procurements?

The BVerG provides for the possibility to establish central purchasing bodies. As such, the central purchasing body, the Austrian Federal Purchasing Agency, has been established to purchase services and goods for the Federation, the States, the municipalities and the municipalities' associations. The BVerG does not apply to contracts awarded to such a central purchasing body in case the central purchasing body follows the rules of the BVerG when purchasing the requested services. Further, contracting entities are allowed to combine their procurement by establishing procurement cooperation, enabling them to jointly procure services, goods or works.

3.8 What are the rules on alternative bids?

Alternative bids are only acceptable for contracts to be awarded by the criteria of the technically and economically most advantageous tender. In case the tender documentation does not explicitly allow alternative bids, no such bids are admissible. Unless stated otherwise in the tender invitation, alternative tenders are, however, only acceptable if submitted in addition to a tender worked out in conformity with the tender invitation.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

The most relevant exclusions/exemptions refer to: contracts pursuant to a treaty entered into with a State not being party to the

EEA treaty; service contracts awarded by a contracting authority to another contracting authority on the basis of an exclusive right existing pursuant to a law; regulation or administrative provisions compatible with the ECT; contracts for the acquisition or lease of rights to real estate or buildings or other immovable property; employment contracts; certain broadcasting contracts; or in-house arrangements.

The application of exemptions has to be determined by the contracting authorities and is subject to examination by the review authorities.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The "in-house" provisions of the BVerG comply with the jurisdiction of the ECJ (e.g. "Teckal" and "Stadt Halle"). Thus, the in-house exemption applies only if the contracting authority or authorities exercise control over the contracting entity which is similar to that which it exercises over its own departments; and the contracting entity carries out the essential part of its activities with the contracting authority/authorities that control(s) it.

Furthermore, the BVerG does not apply to sectoral entities awarding contracts to an affiliated company or if a joint venture (formed by several sectoral entities for the purpose of performing sectoral activities) awards the contract to one of those sectoral entities or to an affiliated company, provided that at least 80% of the average annual turnover of the seller has been gained by performing such services to the joint venture.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement measures and if so what is the general outline of this?

■ Types of review procedures

There are two different types of proceedings, depending on whether the contract has been awarded or not, namely: (i) the review procedure, admissible unless the contract is awarded, which aims to declare decisions by the contracting authority null and void; and (ii) the review procedure, admissible after the contract was awarded, which aims at stating defaults within the award procedure challenged. Once a contract has been concluded it generally cannot be cancelled anymore but aggrieved bidders may demand compensation under certain circumstances. However, in certain cases of serious infringements of the BVerG, a contract can be declared null and void by the review authorities.

■ Decisions subject to review

The BVerG contains a catalogue of decisions of the contracting authority, which may be subject of a contestation. Those decisions are, among others, the tender invitation, the selection of the tenderers and the award decisions.

■ Power to file a complaint

Only persons who are having or having had an interest in obtaining the respective contract and who have been or risk being harmed by the alleged infringement, are entitled to file a complaint. Therefore, the power to file a complaint is denied if a request for participation or a bid is out of the question being selected.

■ Interim relief measures

Since an application for review does not suspend the respective award procedure automatically, the aggrieved bidders have to file a respective application. The BVA or UVS/VKS shall grant interim

measures if the applicant is at least in jeopardy of incurring loss, the interim measure is deemed necessary and suitable in order to prevent or eliminate any damage arising or directly imminent to the applicant by the alleged violation of the law and the possible special public interest in continuing the award procedure does not prevail the interest of the bidder.

■ Review of decisions

Since the BVA or UVS/VKS decide in the first and last instance, the decisions of these bodies may only be challenged before the Supreme Constitutional Court (“VfGH”) or the Supreme Administrative Court (“VwGH”).

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

Outside the BVerG, aggrieved bidders or applicants can claim for damages and demand compensation in the case the BVerG was infringed due to the fault of the contracting authority (as of 2012: due to “sufficiently qualified infringement”). Aggrieved companies may demand compensation for the costs of preparing the application/bid and of participating in the award procedure and demand compensation for lost profits, provided the bidder would have been awarded the contract if the infringement had not occurred. However, please note that such a claim is conditional upon the stating of the infringement by the review authority. Furthermore, disregarded applicants and bidders are entitled to claim forbearance, abatement and damages under the Unfair Competition Act.

5.3 Before which body or bodies can remedies/enforcement be sought?

At the national level, the BVA is the responsible body for reviewing award procedures attributable to national organs or contracting authorities. For reviewing public award procedures attributable to a State, in each State the respective UVS/VKS is responsible.

5.4 What are the limitation periods for applying for remedies/enforcement?

Subject to the type of procedure and claim, there are different time limits. Applications for review must be filed within 10 days if the decision was transmitted by electronic means or fax; in case of transmission by mail or for sub-threshold procurements, within 7 days. Tender documents have to be challenged at the latest 7 days prior to the deadline for submitting applications to participate or bid.

5.5 What remedies are available after contract signature?

After contract signature bidders can apply for a declaratory judgment, ruling that the procurement procedure infringed the BVerG and/or EU law. Such judgment is a precondition to claim damages against the contracting authority before the civil courts. Moreover, the review authorities must consider a contract ineffective if the contracting authority has awarded a contract without prior publication of a contract notice or if the contract has been awarded without notification of the award decision. The review authorities have the discretion not to make a declaration of ineffectiveness on the basis of general interest. However, if the review authorities refrain from making a declaration of ineffectiveness, they have to impose financial penalties upon the contracting authority.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

Applications to declare decisions of a contracting authority null and void and to state defaults within the award procedure shall be made at the latest within 6 weeks. Decisions on temporary injunctions shall be taken without delay, at the latest within 7 days after filing of the request.

5.7 Is there a culture of enforcement either by public or private bodies?

Generally, there is a strong culture of enforcement by public and private bodies in Austria. In the years 2003 to 2008, the number of review procedures (applications for review) per year amounted to a range between 106 (2006) and 161 (2008) and of applications for preliminary injunctions between 92 (2006) and 136 (2008), respectively. However, in 2009 and 2010 the number of procedures decreased. In fact, in 2009, 132 review procedures and 114 applications for preliminary injunctions before the BVA were counted, in 2010, 106 and 90, respectively.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

Since the introduction of judicial remedies under public procurement law, plenty of decisions have been rendered by the BVA, UVS/VKS, as well as the VwGH and the VfGH. Moreover, Austria plays a significant role in the EC public procurement law since there is a disproportionately large number of ECJ cases involving Austrian parties (e.g. ECJ, 28 October 1999, C-81/98 *Alcatel*; ECJ, 12 February 2004, C-230/02, *Grossmann Air Service*; ECJ, 19 June 2008, C-454/06, *Pressetext*; ECJ, 30 September 2010, C-314/09, *Stadt Graz/Strabag AG et al.*). The following recent cases are of particular interest:

In a decision dated 21 April 2011, the BVA held that the indication of requested costs with EUR 0 procures an inadmissible competitive advantage to the respective bidder and constitutes speculative price calculation (N/0099-BVA/11/2010-18). On 21 March 2011, the VwGH adjudged that belated clarification may not result in compulsory elimination of a tender (2008/04/0083). On 12 May 2011, the VwGH ruled that the contracting authority may hand reasons for the elimination of tenders in later (as late as during the review procedure), provided that the bidder is granted the opportunity to make a statement (2007/04/012). In this respect, the constant legal practice of the VwGH should be mentioned, stating that “*a bidder not being able to submit a bid which comes into consideration for contract awards as regards duly accomplished tender dossier, is not meriting protection and therefore may not claim that other or all bidders had to be excluded*” (30 April 2008, 2007/04/0060).

5.9 What mitigation measures, if any, are available to contracting authorities?

When contracting authorities consider they are entitled to rely on one of the exemptions from prior publication of a contract notice – e.g. for technical or artistic reasons, or in the case of extreme urgency – they can protect themselves from potential ineffectiveness if they can establish in a potential review procedure that this is permitted by the BVerG. As a respective mitigation measure, contracting authorities would be advised to have a formal internal procurement manual setting out defined procedures for

determining whether a contract falls within national and EU procurement rules and therefore needs to be tendered accordingly. Another opportunity for contracting authorities for managing the risk of challenge is to either publish a contract award notice (if the applicant for review is not a bidder) or to voluntarily inform all tenderers of the contract award. By doing so, the time limit for bringing proceedings for a declaration of ineffectiveness is reduced from six months to 30 days.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) pre-contract signature? If not, what are the underlying principles governing these issues?

The BVergG does not provide a regime for changes to contracts post-signature. However, certain changes can be achieved through adjustments clauses or options stipulated in the original tender. Moreover, additional or similar contracts or services are permissible in the negotiated procedure without prior notice under stringent conditions. Pursuant to the jurisdiction of the ECJ and the review authorities, “material changes” of the contract require a new procurement procedure unless the contract contains an option for such an extension.

6.2 To what extent are changes permitted post-contract signature?

As the respective provisions of the BVergG are limited to options and certain changes concerning the negotiated procedure without prior notice, the admissibility of any other changes are governed by the jurisdiction of the ECJ and the review authorities. Pursuant thereto, post-contract signature changes which do not result in “material changes” of the contract are permitted. It must be examined on a case-by-case basis whether such changes are relevant to competition or not. Accordingly, an amendment to a contract may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the admission of tenderers other than the one initially accepted. Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The BVergG does not provide for specific provisions on privatisation. However, according to the legal practice, privatisations are likely to be subject to the BVergG in case there is a close connection between the privatisation and the award of a contract.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The BVergG does not contain special provisions on PPPs and there is no special legislation with regard to PPPs.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

In June 2011, a draft on a new Federal law on the award of contracts in the fields of defence and security (“BVergGVS”) was proposed. In July 2011, a draft amendment to the BVergG was presented, aimed, above all, at simplifying sub-threshold public procurement procedures.

Key points of the BVergGVS:

- Scope: supply of military or sensitive equipment, including any parts, components and/or subassemblies thereof; works, supplies and services directly related; and works and services for specifically military purposes or sensitive works and sensitive services.
- Mixed contracts: Contracts within the scope of the BVergGVS and the BVergG shall be awarded pursuant to the BVergGVS, provided that the award of a single contract is justified for objective reasons.
- Exemptions: E.g. contracts excluded pursuant to art. 36, 51, 52, 62 or 346 TFEU; contracts that would supply information contrary to the essential interests of the security of a Member State; contracts on intelligence activities; certain contracts awarded on the basis of a cooperative research and development programme between at least two Member States; the acquisition or rental of land, buildings or other immovable property; certain contracts awarded by a government to another; arbitration and conciliation services; financial services; or employment contracts.
- Thresholds: The estimated value excluding VAT must amount to EUR 412,000 for supply and service contracts and to EUR 5,150,000 for works contracts.
- Special provisions: E.g. on confidentiality obligations of the contracting authorities, the protection of classified information, the security of information and supply; as well as special proceedings provisions e.g. enabling to exclude the public or parties. The possibility to oblige successful tenderers to tender subcontracts.
- The BVergGVS follows the same structure as the BVergG; it is *lex specialis* to the BVergG. The BVA is proposed as review authority.

Key points of draft amendment 2011 to BVergG:

- Direct awards with prior market survey as new awarding procedure: aimed at compensating for the expiring of the “increased” financial threshold for direct awards of EUR 100,000 by the end of 2011, which will decrease to the EUR 40,000 in the classical sector and EUR 60,000 in the utilities sector, respectively. Direct awards with prior market survey will be applicable to all types of contracts with a contract value of EUR 100,000 in the classical sector and EUR 150,000 in the utilities sector, respectively. The contracting authority must publish a notice prior and subsequent to the awarding procedure. The first notice must provide for all the necessary information on the procurement, the second one contains the information on the given award. The course of the awarding procedure may be determined by the contracting authority, however, in compliance with the general ECT principles.
- For all types of sub-threshold contracts, the negotiated procedure with prior notice shall be eligible.

- In justified cases, and in particular with regard to standard services, the minimum timescales for the receipt of requests to participate and the receipt of sub-threshold tenders may be shortened but must remain appropriate.
- In certain sub-threshold procedures without prior notice, with an estimated value not exceeding EUR 60,000, the contracting authority is no longer obliged to communicate its award decision.
- The verification of the suitability in sub-threshold procedures is facilitated as the presentation of evidence is no longer required for works contracts reaching an estimated value of EUR 120,000 and supply and service contracts of at least EUR 80,000.
- Introduction of strict liability of the contracting authority for procurement infringements, taking into account the respective ECJ jurisdiction (ECJ 30/09/2010, C-341/09). Instead of culpable infringement, merely a “sufficiently qualified infringement” is required.

Both for the BVergGVS and the draft amendment to the BVergG, no date was fixed for their entry into force. Originally, planned for 1 January 2012, the probable entry into force is expected in early 2012, lately.



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