

Austria

Fiebinger, Polak, Leon & Partner

Am Getreidemarkt 1
A-1060 Vienna
Austria

Tel: (43) 1 582 580
Fax: (43) 1 582 582
E-mail: p.polak@fplp.at
Website: www.fplp.at

1.Does your legal system provide specific procedures for the award of contracts by contracting authorities?

Yes, in the Federal Act on the Award of Contracts 2006 (Purchase Contract Awards Act, or BVergG) there are several provisions concerning the different procurement procedures - corresponding to the European rules. Which procurement procedure shall be applied, depends on the requested services of the contracting authority.

2.Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be produced?

The BVergG 2006 distinguishes between procurement procedures for contracting authorities and procurement procedures for sectoral principals. In the award procedures for contracting authorities the following types of contracts must be distinguished: works contracts, supply contracts, service contracts, works concession contracts and classification of service contracts.

The sectoral purchases area are gas, heat and electricity; water; traffic; post; seeking and finding of kerosene, gas, carbon and other solid combustibles; and finally harbours and airports.

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be produced (thresholds) and if so, what are the thresholds?

The Austrian legislator does not distinguish with respect to the procedure for awarding of contracts being at the lower part of the threshold or being at the upper part of the threshold. There are some differences especially with respect to the publication requirement of public contracts, the procedures which are available for the authorities, in the time limits, as well as at the awarding control procedure itself.

The thresholds themselves are to be distinguished between the individual order types (works, supply and service contracts, works concession contracts, competitions), whereas the thresholds for awarding services in the sectoral field (water, energy and transport supply, as well as telecommunication services) are partly higher as for the classical awarding procedure. Currently, there are following thresholds applicable broken down by the contract type.

a) supply contracts:

1. central procurement bodies: EUR 125.000,--
2. contracting authority: EUR 193.000,--
3. sectoral principals: EUR 387.000,--

b) works contracts and works concession contracts: EUR 4.845.000,--

c) service contracts and competitions:

1. central procurement bodies: EUR 125.000,--
2. contracting authority: EUR 193.000,--
3. sectoral principals: EUR

4. In what way does the contracting authority have to inform the market about the intended procurement?

Procurements relating to the upper threshold part must be published in the supplement to the official register of the European Community. Furthermore, there are publications in the Austrian publication media. Concerning the lower threshold part there is no need for a European wide publication. A national publication is sufficient.

5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

No, according to the Austrian law, a specific legal form is not required. However, the contract shall be awarded only to an authorized, efficient and reliable company. If there is a bidding consortium, every member of this consortium must comply with these criteria.

6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

Yes; both are possible.

7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

According to the Austrian law, a potential bidder must not have a registered office or branch office in Austria.

8.If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

According to the Austrian legal system, foreign bidders must be treated in the same way as Austrian bidders. The principal is allowed to request proof that the bidder has the necessary qualifications (*e.g.* certificate concerning the registration with the competent trade register of the country of origin), professional reliability (*e.g.* criminal records excerpts of the country of origin), financial and economical capability (*e.g.* information about the creditworthiness, confirmation of a professional indemnity insurance), technical capability (*e.g.* evidence about work performed, references).

9.Is a multinational bidding consortium allowed to submit a bid?

Yes, multinational bidder consortia are also allowed to take part in a tender procedure.

10.In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?

When preparing their offers, bidders must comply with the contract documents; if not indicated otherwise in the contract documents, the offer and all enclosed documents (*e.g.* certificates) must be in German and amounts denominated in Euro. Tenders must be in paper form (in a closed envelope), if not mentioned otherwise in the contract documents.

11.Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

In the upper threshold part in the “classical” area, as in the sectoral field, there is for the receipt of tenders a minimum time limit of 52 days from the date on which the contract notice was sent. In the so-called accelerated procedure the minimum time limit must be 22 days for the classical procurement area as well as for the sectoral; also this time limit may be shortened by seven days if electronic medias are used. But these shortened time limits require a prior information notice released to the public by the commission.

12.Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of reimbursement?

As a general rule, bidders cannot ask for reimbursement of the cost of submitting a tender. However, if the award procedure is cancelled due to reasons for which the principal can request to be reimbursed. If for the preparing of the tender special work must be performed, it is possible to provide for an appropriate reimbursement; however, such reimbursement is only due if the tender complies with the tender procedure.

13.Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

It is required by law that the contracting authority mentions in the public contract notice or in the publication precisely whether the award is to be given to the tender with the lowest price or to the

most economically and technically advantageous tender. If the contract should be given to the tender being the most economically and technically advantageous, the contracting authority must state in the notice or in the contract document all the criteria on which he will rely and their weighting must be mentioned. If in the notice or in the documents no mentioning of the criteria for awarding the contract are stated, the tender with the lowest price will be granted the contract.

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

Yes, in Austria law provides for protection prior to the award of the contract. Until the contract is awarded, every bidder is allowed to request a review of the decision if the decision is separately appealable and if the bidder considers that the decision was unlawfully rendered with the Federal Awarding Department (BVA) and the bidder can also request that the decision of the authorities shall be declared void, so as to prevent other bidders from obtaining the contract. In general, the time limit for appeal is 14 days; in exceptional case, *e.g.* for the accelerated procedure due to the urgency or in the case of direct awarding, the time limit is seven days. The investigation department must reach a decision within six weeks.

Because such an appeal does not have any suspensive or blocking effects, in most of the cases it is necessary when an interim measure is applied for to take up the relief thought in the main proceedings, by asking that the public authority is not entitled to grant the contract during the time period of the review. In general, the main application is combined with the request of issuing an interim measure. The authority is prohibited in such cases from granting the contract, otherwise the contract would be void. Respectively, the authority is not entitled to open the tenders. The regulation, which authority is competent for the review is complicated and regulated due to the division of power between the federal government and the regional governments. The facts mentioned above are valid for all the (regional and federal) authorities.

The decision of the review authority can be appealed before the Constitutional Court or before the highest administrative court.

The aforesaid revealed legal protection system also applies to foreign bidders.

15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?

The system described under point 14 applies to all tender procedures in the same way. Only in the lower threshold part, the time limit for an appeal is 7 days instead of 14 days.

16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?

In Austria there is – as said above – regular primary legal protection available. Furthermore, legal protection is available also for the period after the contract was awarded. This legal protection is granted in terms of declaratory claims; such declaratory claim serves to initiate damage claims before the civil courts. A claim for damages before the civil courts is only permissible, if a positive conclusion notice by the BVA has been issued. The claimant can request to be reimbursed for the costs occurred for preparing the tender, for participating in the tender procedure from the granting authority. In addition, the claimant can also ask for specific damages, and ask to be put in

much the same situation he would have been in, had he won the award (includes lost profits on contract).

17. Can your office

–give legal advice to foreign clients concern in the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

–represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?

–Please name a contact person within your office for questions of public procurement law!

Yes, our office has the competence to

–advise clients on bid preparation in Austria;

–represent foreign clients in procedures for the award of contracts before all public offices/courts in Austria; and

– contact persons within our office for questions of public procurement law are Peter Polak (p.polak@fplp.at) and Gerhard Kienast (g.kienast@fplp.at)