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# The Legal 500 Country Comparative Guides

## Austria

# PUBLIC PROCUREMENT

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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Austria.

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# AUSTRIA

## PUBLIC PROCUREMENT



### 1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)

As Member of the European Union Austria has implemented the Procurement Directives into national law. The Directives 2014/24/EU and 2014/25/EU of the European Parliament and the Council were implemented in the Austrian Federal Procurement Act (*Bundesvergabegesetz 2018*, Federal Law Gazette I 65/2018; "FPA 2018"), the Directive 2014/23/EU into the the Federal Procurement Act for Concessions of 2018 (*Bundesvergabegesetz Konzessionen*, Federal Law Gazette I 65/2018).

Through its membership to the European Union Austria is contracting party to the Agreement on Public Procurement between the European Community and the Swiss Confederation (*Beschaffungsabkommen Schweiz*). The Treaty is directly applicable and, therefore, enforceable.

Also due to its membership to the European Union Austria is subject to the World Trade Organisation's Agreement on Government Procurement ("GPA"). Yet, the GPA's (direct) applicability is rather restricted, as the ECJ's jurisdiction lacks of rulings regarding the direct applicability of WTO provisions, as the ECJ ties the enforcement of the GPA to the European Procurement Directives.

### 2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?

The award of government contracts (this includes procurement by all public institutions on federal, local

and municipal level as well as bodies governed by public law of supply, service, construction and specific service contracts) is regulated under the Austrian Federal Procurement Act of 2018 (*Bundesvergabegesetz 2018*, Federal Law Gazette I 65/2018, last amended through Federal Law Gazette II 91/2019).

Procurement through utilities suppliers (*Sektorenauftraggeber*) is also subject to the FPA 2018, although with some simplifications and modifications compared to general public / governmental procurement. For Specific Service Contracts (*i.e.* medical, social, educational or cultural service contracts) as stated in Annex XVI to the FPA 2018, a somewhat lighter and more flexible procurement regime applies.

The award of concession contracts is regulated in a separate law, the Federal Procurement Act for Concessions of 2018 (*Bundesvergabegesetz Konzessionen*, Federal Law Gazette I 65/2018, last amended through Federal Law Gazette I 100/2018).

Procurement in the fields of defence and security are subject to the Federal Procurement Act for Defence and Security of 2012 (*Bundesvergabegesetz Verteidigung und Sicherheit 2012*, Federal Law Gazette I 10/2012, last amended through Federal Law Gazette II 436/2019).

### 3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?

The thresholds as set forth in the Procurement Directive of the European Union directly apply. However, the Austrian legislator issued its own threshold directive, the Threshold Ordinance (*Schwellenwertverordnung 2018*, Federal Law Gazette II 211/2018, last amended through Federal Law Gazette II 605/2020) specifying on sub-thresholds regulated in the Procurement Directive of the European Union.

In Austria, the following thresholds therefore apply, differing depending on the nature of procurement as well as the type of sector (*cf* Sec 12 FPA 2018):

a) Supply and service contracts:

- Contracting authorities: EUR 214,000
- Central government authorities (as listed in Annex II to the FPA 2018): EUR 139,000
- Sector contractors: EUR 428,000

b) Construction contracts and construction concession contracts: EUR 5,350,000

c) Specific service contracts (as listed in Annex XVI of to the FPA 2018):

- Contracting authorities: EUR 750,000
- Sector contractors: EUR 1,000,000

d) Sub-thresholds for direct awards, as amended by the Threshold Ordinance: Contracting authorities and sector contractors: EUR 100,000 (as opposed to EUR 50,000 pursuant to the FPA 2018 and the Procurement Directive).

Whether the respective public award falls above or below the above-stated thresholds is determined by the contracting authority prior to the commencement of the procurement procedure (estimated value of procurement; *geschätzter Auftragswert*). Once the procurement value is determined, the provisions applicable to the very case can be identified.

#### 4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

All public awards are subject to the FPA 2018, regardless of their value. However, different, mostly simplified and more flexible procedures may apply, and applicable provisions may differ depending on the value of the award. *E.g.* the range of available procedures is wider if the value of the award falls below the above-mentioned thresholds. Most notably, the FPA 2018 provides for direct awards (*i.e.* awards below EUR 100,000) to be procured rather unrestrictedly by the FPA 2018 (*formfreie Direktvergabe*).

#### 5. For the procurement of complex contracts\*, how are contracts publicised? What publication or journal is used for these purposes?

Depending on the procurement value the FPA 2018 provides for different publishing obligations that have to

be observed by contracting authorities (*cf* Sec 50 ff FPA 2018).

Assuming complex contracts usually being contracts above the FPA 2018 thresholds, the (planned) procurement of such contracts has to be published on a European level (*cf* Sec 56 FPA 2018, *Bekanntmachung auf Unionsebene*). For that purpose, the respective contracting authority has to submit the information as listed in Annex VI to the FPA 2018 by completing a standard form as stated in Annex VII via the electronic database of the European Union, Tenders Electronics Daily (TED). The information will then be published in Supplement S to the Official Journal of the European Union (OJEU; *Amtsblatt der Europäischen Union*). The publication of planned awards below the thresholds in TED is at the discretion of the contracting authority.

Following the publication via TED, planned procurements of complex contracts also have to be published on a national level (*cf* Sec 59 FPA 2018, *Bekanntmachung in Österreich*). There is a minimum of 48 hours between the publication via TED before the publication via [www.data.gv.at](http://www.data.gv.at) that has to be observed.

The relevant data as set forth in Annex VIII to the FPA 2018 has to be submitted to [www.data.gv.at](http://www.data.gv.at) either via the site itself (in this case an account is necessary) or via the Business Service Portal provided by the Federal Ministry for Digital and Economic Affairs (*Unternehmensserviceportal*; <https://www.usp.gv.at/en/index.html>). In case the procurement procedure is handled via an electronic procurement platform (such as “vemap” or “ANKÖ”) which is mandatory for the award of contracts above the thresholds, the relevant data can be submitted directly from the platform to [www.data.gv.at](http://www.data.gv.at).

Please note that the national publication is mandatory also for awards below the thresholds, excluding direct awards with a procurement value up to EUR 100.000,- .

The time period from the publication of the notice to a response from economic operators / bidders for a complex contract depends on the procurement procedure as well as the current stage of the proceedings (in case of a two-stage-procedure). For the most commonly used procedures for complex contracts these periods amount to a minimum of 30 days (*e.g.* for the initial stage of competitive procedures with negotiation, *cf* Sec 70 FPA 2018). However, with regard to complex contracts, it may be required to extend these periods due to the complexity of the contract as well as the time required for drawing up tenders (*cf* Sec 68 FPA 2018).

Nevertheless, particularly in light of the COVID-19-

pandemic, the FPA 2018 provides for reduced deadlines for application of 10 to 15 days and, therefore, fast-track procedures in case of a state of urgency (*cf* Sec 74 FPA 2018; *beschleunigtes Verfahren bei Dringlichkeit*).

The complexity of a contract as such does not have any consequences on the above mentioned publishing obligations.

## 6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?

Complex contracts generally have to be awarded through a competitive procedure with negotiation, an innovative partnership or a competitive dialogue (*cf* Sec 34 and Sec 41 FPA 2018).

In procurement procedures with an initial selection stage, qualification and selection criteria (*Eignungs- und Auswahlkriterien*) have to be determined in the tender documents by the contracting authority alongside any minimum requirements that have to be met by the candidates / bidders. These criteria have to be objective, non-discriminatory and proportionate to ensure a fair competition and equal treatment of the candidates, and enable them to identify the nature and scope of the award.

The methodology regarding the conduction of procedures with an initial selection phase does not differ for contracting authorities and utilities suppliers apart from marginal deviations only relevant in the negotiation phase (*cf* Sec 291 para 6 and 9 FPA 2018, as opposed to Sec 114 FPA 2018).

## 7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?

Yes, the FPA 2018 provides for mandatory exclusion of bidders from procurement procedures. These grounds are specified in Sec 78 FPA 2018 (for contracting authorities) and are as follows:

1. A conviction of the economic operator for criminal offenses listed in Sec 78 para 1, such as bribery, embezzlement, membership to a criminal or terrorist organisation, money laundering, illicit allocation of benefits or illicit

- intervention,
2. Opened or pending insolvency proceedings against the assets of the economic operator;
3. The economic operator's business operations are in liquidation or ceased commercial activity;
4. There are plausible indications that the economic operator has entered into agreements with others that distort fair competition or violate public morals;
5. Grave professional misconduct of the economic operator, violating employment, social or environmental laws;
6. Failure to payment of social security contributions or taxes the economic operator is obliged to in Austria or in its country of domicile, unless the outstanding payments are negligible or were paid in the meantime;
7. A conflict of interest that cannot be settled under the provisions of Sec 26 FPA 2018 or through other arrangements;
8. (Imminent) distortion of fair and equitable competition of the procurement procedure due to the economic operator's participation in the preparation of the tendering procedure pursuant to Sec 25 FPA 2018;
9. Significant or persistent deficiencies in the fulfilment of substantial requirements in the course of the fulfilment of a prior public contract or concession agreement that resulted in early termination of this contract, indemnities or other penalties;
10. Deception in the provision of information, failure of providing, explaining or completing fragmentary information regarding the qualification of the economic operator;
11. The economic operator attempted to unduly influence the contracting authority's decision-making or has attempted to illicitly obtain confidential information that be unduly advantageous to the economic operator in the following procurement procedure, or (attemptedly) communicated misleading information to the contracting authority that would significantly influence the contracting authority's decision on the outcome of the award procedure.

In exceptional and duly justified cases the contracting authority may refrain from the exclusion of economic operators if their participation cannot be dispensed for overriding reasons of public interest.

The exclusion of an economic operator on the grounds of points b) and c) stated above may be waived by the contracting authority, if the economic operator's

financial capacity suffices for the execution of the contract. This provision may prove useful in light of the current COVID-19 pandemic and the economic situation coming with it.

Other than that economic operators can undergo a so-called “self-cleaning”-process (*Selbstreinigung*) as set out in Sec 83 para 2 FPA 2018 in case certain exclusion grounds apply to them, and nonetheless participate in a procurement procedure. For that purpose, the economic operator may demonstrate their reliability to the contracting authority through evidence proving that it has either (i) paid compensations in respect of any damages caused, (ii) clarified the facts by actively collaborating with investigating authorities or (iii) that they have taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. If the measures are considered sufficient by the contracting authority, the economic operator shall take part in the procurement procedure in question.

The exclusion of economic operators in procurement procedures conducted by utilities suppliers that are not public utilities suppliers lies in the discretion of the supplier (*cf* Sec 249 FPA 2018), except the exclusion on the grounds of convictions for criminal offenses, which is also mandatory for non-public utilities suppliers subject to the FPA 2018. For public utilities suppliers, all of the above listed reasons for exclusion mandatorily apply.

### **8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.**

Complex contracts are typically procured through a competitive procedure with negotiation (*cf* Sec 34 fig 3 and Sec 114 FPA 2018; *Verhandlungsverfahren*), enabling the contracting authority to tailor the proceedings and its outcome according to the demands of the matter to be procured.

Competitive procedures with negotiation consist of two (main) stages, whereby in the first – initial – stage an unrestricted number of economic operators can submit a request for participation (*Teilnahmeantrag*) on the basis of which the contracting authority determines a limited number of candidates (minimum of three) who are invited to submit an initial tender (*Erstangebot*). The selection of candidates invited to the second stage is made on the basis of the selection criteria determined in the procurement documents made available to the economic operators in the initial stage of the procedure.

The selected candidates that have submitted an initial tender are then invited to negotiations with the contracting authority. The FPA 2018 does not determine a fixed structure of the second stage, contracting authorities can thus “customise” the specific process of each procedure. Therefore, depending on the complexity of the issue at hand, contracting authorities can schedule either one or successive negotiation rounds, ending with either an invitation to submit a revised or a final tender, whereas the final tender is not subject to any further negotiations.

After the submission of the final tender the contracting authority will assess them on the basis of the award criteria and awards the contract to the successful bidder.

The minimum time limit for the receipt of requests to participate is at 30 days, the timeframe for the submission of the initial tender is at least 10 days (for central contracting authorities: 25 days). If there is only one negotiation round, the procedures can be concluded within three months. Depending on the complexity of the issue as well as of the procedure, the duration of proceedings can extend over a much longer period of time.

### **9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?**

As the FPA 2018 applies for all procurements regardless their value its rules apply for both contracts below and above the thresholds. However, sub-threshold-procurements can be subject to simpler and more flexible procedures, e.g. without being subject to prior publication.

Contracts with a procurement value below EUR 100,000 can be awarded directly without any further proceedings. Direct awards therefore offer a fast-track, low cost and formless procedure, enabling contracting authorities to procure low-scale services with relatively low to no legal requirements when it comes to procurement law. However, basic provisions, such as the general procurement principles as set forth in the FPA 2018 and the procurement Directives, still apply, as do, though limited, reasons for challenging the direct award.

### **10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the**

### **nature of the procurement concerned?**

Procurement procedures shall always be carried out in compliance with the FPA 2018, with special regard to the underlying procurement principles, as well as to the rules determined in the tender documents. Therefore, both contracting authorities and economic operators should prepare tendering procedures and, respectively, their participation in such thoroughly and carefully.

Contracting authorities should pay particular attention to documentation, transparency and equal treatment of candidates and bidders throughout procurement procedures. The documentation of relevant events and decision processes including underlying reasons in standardised forms proved worthwhile to ensure maximum transparency. Further, measures to ensure the anonymity of bidders should be taken.

With regards to economic operators wanting to take part in an award procedure, a thoroughly and exhaustive preparation of tenders is a key-element for success. Economic operators shall always take into account the relatively short deadlines for seeking remedies or for challenging tender documents.

The FPA 2018 provides for a set of rules with regard to conflicts of interests or the (restricted) participation of economic operators that have participated in the preparation of the tendering procedure (*cf* Sec 25 FPA 2018) as well as certain transparency mechanisms and documentation requirements.

### **11. Please explain any rules which are specifically applicable to the evaluation of bids.**

Tenders are evaluated strictly on the basis of the award criteria determined in the tender documents. As mentioned above, the award criteria as well as any minimum requirements the bidders have to meet have to be outlined in the tender documents to enable economic operators to identify nature and scope of the procurement and to weigh whether to participate or not.

In a first step, tenders are scrutinised for any formal deficiencies as well as exclusion grounds and compliance with qualification and – if any – selection criteria.

Secondly, if the above mentioned criteria are met, the tender will be examined regarding the completion of the award criteria (*Zuschlagskriterien*). Contracts can be awarded either to the most economically advantageous tender or on the basis of the lowest price only. In the

former case the tender documents also have to include quality related criteria, and stating the weighing of the criteria. The tenders then have to be evaluated by means of this criteria and be weighed against each other. The bidder reaching the highest score or the lowest price will be awarded the contract (*cf* Sec 142 FPA 2018). The evaluation has to be documented in a comprehensible way (*cf* Sec 140 FPA 2018). Duly note that the award criteria, once legally valid, cannot be amended at a later point in the procedure.

### **12. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.**

In accordance with Sec 143 FPA 2018 the best bidder as well as all unsuccessful bidders who participated in the tender must be notified of the award decision. In this notification, the remaining bidders have to be informed of the respective end of the standstill period (at least 10 days), the reasons for the rejection of their offer, the award amount as well as the characteristics and advantages of the successful offer, as compared to their offer.

The content of the award decision may vary insofar as the disclosure of information would be contrary to public interests, the legitimate business interests of an entrepreneur or would damage free and fair competition. In practice, free and fair competition can particularly be impaired in the event of a reopening of competition, when a framework agreement is concluded with several economic operators.

### **13. What remedies are available to unsuccessful bidders in your jurisdiction?**

At the beginning, it should be noted that the regulations of the FPA 2018 regarding legal protection only apply to procurement procedures in the enforcement area of the federal government (state level). For contracting authorities in the enforcement area of the federal states, nine federal state procurement control laws apply regarding legal protection. The provisions regarding remedies implements the review procedures directive 89/665/EEC.

As the state procurement control laws have adopted the legal protection provisions of the FPA 2018 or are at least based on them, the same decisions as from federal contracting authorities can be reviewed or challenged

before the respective procurement control authority of the federal states. Only the procurement control authorities are different, namely

- the Federal Administrative Court (*Bundesverwaltungsgericht* or *BVwG*) for contracting authorities who allocated to the federal government;
- the respective administrative court (*Landesverwaltungsgericht* or *LVwG*) for contracting authorities who are allocated to the nine federal states. In some federal states, arbitration boards, which can be called before a request for review upon the administrative court is submitted, have been established.

Two types of legal remedies are available under the FPA 2018, which can be used to contest decisions made by contracting authorities in tendering procedures:

A review procedure can be initiated before the contract is awarded. With the review procedure, only the decisions attributed as separately contestable in Sec 2 fig 15 lit a FPA 2018 can be challenged (in particular the elimination of bidders, the award decision and the revocation decision). Decisions that cannot be separately challenged can only be reviewed together with a separately challengeable decision. Short deadlines of 10 days for tenders above the thresholds and seven days in the sub-threshold area must be observed for submitting the request for review. An application for a review has no suspensive effect on the award procedure. It is, therefore, recommended to combine a review application with a corresponding application for the issuance of an injunction.

After completion of the award procedure an unsuccessful economic operator who had an interest in concluding a contract that is subjected to the FPA 2018 can apply for a determination procedure, providing that damage has been caused by the claimed illegality. A determination procedure is the assumption for claiming damages for a bypassed bidder if the unlawful decision of the client can no longer be separately challenged before the procurement control authority. In addition, the procurement control authority can, under certain circumstances, declare an illicitly placed contract null and void, which means that the award must be reversed. Finally, the procurement control authority can also impose fines of up to 20% of the contract value on the contracting authority.

#### 14. Are public procurement law challenges

#### common in your jurisdiction?

The risk of contesting public procurements depends to a large extent on the value and prestige of the contract. Damage to the reputation of the bidder submitting an application for review is generally not to be feared. Nevertheless, the bidder is advised to carefully weigh the chances of success before submitting the review request. In general, it can be noted that the unsubstantiated submission of a review request for the sole purpose of delaying the award of the contract can cast a bad light on the bidder.

For applications which initiate proceedings before the procurement control authorities a flat fee has to be paid. Depending on the order to be awarded the fee amounts between EUR 324 and EUR 6,482. According to the estimated order value it can be many times higher.

#### 15. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case).

The administrative court must decide on requests for review immediately, but within six weeks after the receipt of the request at the latest. However, experience has shown that proceedings usually take much longer due to the fact that the courts are overwhelmed with work.

It should be noted that an application for review as such has no suspensive effect. The award procedure can only be interrupted if an injunction is granted by the court.

#### 16. What rights/remedies are given to bidders that are based outside your jurisdiction?

In principle, the scope of the Federal Procurement Act includes the award of contracts to companies from third countries. All companies, regardless of their country of domicile, have the right to participate in public tenders of Austrian contracting authorities.

With regard to a possible restriction of this basic rule, Sec 20 para 2 FPA 2018 shall be taken into account. Thereafter, bidders may be treated differently for reasons of their nationality or the origin of their goods, if this is permissible under international law. Guaranteed access for third countries only exists within the

framework of mandatory international obligations. This covers third countries that are on the one hand contracting parties to the EEA and on the other hand are subject to an agreement with the European Union, such as the GPA.

In principle, every procurement process has to be assessed separately whether it falls under the GPA or not, since an exclusion of GPA contracting states from procurement projects is not permitted. If the procurement does not fall within the scope of the GPA, a restriction clause for non-EU and non-EEA countries can be included in the tender documents. However, if the procurement falls within the scope of the GPA, only non-GPA countries may be excluded.

Regardless of the scope of the GPA there are options under public procurement law to promote regional procurement. High demands on the quality of the offer and the provision of services, such as response times, requirements for on-site availability, regulations on added value, compliance with certain social standards, etc can be included in the tender conditions. A higher weighting of qualitative award criteria at the expense of the price criterion can also prevent dumping prices from bidders from third countries.

If an economic operator from a third country applies or submits an offer, it is also advisable to strictly check its authorization to operate in Austria as part of the evaluation of its qualification. Due to commercial law provisions, the cross-border provision of services by companies based in third countries, independent from public procurement, is very limited.

### **17. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?**

If a subsidiary of a third country company located within the EU or the EEA participates as a bidder in a tender, discrimination is not permitted. They are on an equal footing with national bidders with regard to rights and legal remedies and, therefore, can take part in procurement procedures without any further limitations.

### **18. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?**

As stated above, depending on which enforcement area the contracting authority is subject to, the Federal

Administrative Court or the respective regional administrative court is the competent court for review proceedings. Furthermore, two federal states have established arbitration boards where invocation is optional.

### **19. Are post-award contract amendments/variatioins to publically procured, regulation contracts subject to regulation in your jurisdiction?**

With the total revision of the Federal Procurement Act 2018, Sec 365 FPA 2018 for the first time codified the principles already developed by the ECJ under what circumstances a subsequent amendment to the contract is permissible without carrying out a new award procedure.

Sec 365 FPA 2018 differentiates between substantial and non-substantial amendments of the contract. Only non-substantial amendments of the contract are permitted without an invitation to tender. The basic rule is that an amendment of a contract is substantial if it could have influenced the result of the previous award procedure.

The cases of non-substantial amendments of the contract that are permissible without carrying out a new award procedure are listed in Sec 365 (3) FPA 2018. Apart from amendments that are covered by a clearly, precisely and unambiguously formulated contract amendment clause, amendments to the contract that amount to a maximum of 10% of the contract value for delivery and service contracts and 15% for construction contracts, are permitted, provided the threshold values are not exceeded and the overall character of the contract is not changed.

A change of contractor is permitted if another economic operator takes the place of the original contractor as a whole or in part in the course of a company restructuring (takeover, merger, acquisition or bankruptcy) and the new contractor meets the qualification criteria originally specified in the procurement documents. A change of contractor must not necessarily lead to a substantial amendment of the contract and, therefore, must not result in any circumvention of the procurement regulations.

### **20. How common are direct awards for complex contracts (contract awards without any prior publication or competition)?**

Due to the Threshold Ordinance, which was currently

extended until the end of 2022, direct awards are permitted up to an estimated procurement value of less than EUR 100,000. To determine the respective procurement value, the contracting authority has to get an overview of the market. The estimated value can also be based on comparable awards in the past, whereby price developments must be taken into account.

When determining the procurement value, the “splitting ban” (*Splittingverbot*) must be observed. This is to prevent the splitting of (planned) procurements in order to fall below the threshold values for direct awards. Such circumvention of public procurement law is inadmissible and can lead to the cancellation of the respective contract and the imposition of a fine.

In case of lot-wise allocations, individual lots can be allocated directly under the small lot regulation (*Kleinlosvergabe*).

Direct awards can only be contested to a very limited extent. Only the choice of procedure can be challenged by means of a determination procedure. An application for a declaration must be submitted within six months of the date on which the applicant became aware of the decision. In order to achieve legal certainty, in some cases it is advisable to carry out an *ex-ante* transparency publication. This is a voluntary announcement with which the contracting authority informs about the planned procurement.

## **21. Have your public procurement rules been sufficiently flexible to allow contracting authorities to respond to the COVID-19 pandemic? What measures have been most used and in what areas have any difficulties arisen? Is it likely that lessons learned from procurement during this period will give rise to longer term changes?**

Particularly in times of a pandemic, it is important to convey security and stability – the FPA 2018 offers sufficient options for this. Reactions such as contract terminations or the implementation of accelerated procurement processes should thus be the last resort.

Considering that the public sector is one of the largest drivers of the economy its primary goal should be to reduce fear and lack of perspective and, thus, give hope for the future. This can only be successful if procurement projects that have already started are continued, so that, on the one hand, the public sector remains capable of acting, and on the other hand the economy is given the

certainty that it will continue to receive support.

In a first step, it should therefore be evaluated whether the performance periods once agreed upon are still applicable for the current situation. On the one hand, services that are not necessarily required immediately can be postponed; on the other hand, it is conceivable that the new situation requires that the goods or services are needed at an earlier point and can be procured before the originally agreed upon schedule.

It should also be taken into account that some companies are particularly hard hit by the crisis and could run into liquidity bottlenecks. This can be met by the public sector with advance payment plans. It is also possible that, due to the exceptional situation caused by the crisis, key personnel named in the procedure may not be available anymore – think of home office, short-time work or even quarantine. For this reason, it should be considered to adapt the key personnel requirements elastically to the situation or to suspend them at all.

All of these measures can help to ensure security and stability in this situation. If appropriately designed, these measures can be carried out in an uncomplicated manner and in full accordance with public procurement law by means of a non-substantial amendment of a contract in accordance with Sec 365 FPA 2018.

Also, tenders that have already commenced should be continued. A neglect or even the revocation of procurement projects that have already been announced would signal to the economy that the public sector is assuming that social and economic life will be restricted for even longer periods of time and thereby causing further uncertainty. Changes in circumstances compared to the time the award procedure was initiated can be responded to flexibly by extending deadlines and adapting the tender documents.

In order to prevent lasting damage to the economy, a corresponding workload of companies must be guaranteed. The announcement of new projects in times of crisis shows that the contracting authorities are fully capable of acting. In order to be able to react flexibly to fluctuating demand, the increased use of framework agreements and dynamic purchasing systems is proving useful.

In order to reduce the burden for both contracting authorities and bidders, the use of self-declarations can be increased and the obligation to provide evidence can be restricted. More compact procedures with short deadlines and few elaborations are to be provided. Hearings and negotiation rounds should also be carried out via video conference systems. Flexible qualification-, selection- and evaluation-systems are in demand right

now.

In particular, criteria for economic and financial performance should be fundamentally reconsidered. With regard to the company's actual performance, sales figures from previous years or ratings are currently not very conclusive. Criteria aimed at the company's actual liquidity, taking into account the application for or

support payments by federal funds, are conceivable here.

Adaptations are also necessary with regard to technical performance. The often used criterion of staffing based on values from the past is also no longer meaningful. In contrast, it would be much more appropriate to request measures that the bidder has taken for the retention of employees.

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