

CERHA HEMPEL CEE NEWSLETTER *Austria*

E-Procurement in Austria

The latest major amendment of the Austrian Federal Public Procurement Act (BVerG) dates from 2018.

In implementation of the European Public Procurement Directives, one focus of this amendment is the so-called e-procurement (e-tendering).

The idea behind is simple: The entire award process is fully electronic in order to ensure that it is conducted in a standardized, transparent and as efficient manner as possible. Long gone, then, are the days when tenderers tied up large boxes of paper bids and sent them to the contracting authority by post or messenger service with the obligatory sticker "do not open before deadline!".

With certain exceptions, e-procurement is mandatory now for all contracting authorities in Austria in award procedures above the European thresholds.¹ Some large contracting authorities have been running their own digital award platforms for years. Contracting authorities that do not conduct tender procedures on a regular basis may still find e-procurement challenging, as it entails new technical requirements and additional costs. However, contracting authorities can make use of the services offered by a variety of award platform operators, who also provide guides and technical support for both tenderers and contracting authorities.

For the contracting authority, e-tendering starts with the contract notice, which must be published, as in the past, on www.ted.europa.eu (TED – tenders electronic daily), the online edition of the

Supplement to the Official Journal of the EU, if the estimated net contract value reaches the European threshold.

In addition, the contract notice must also be published ex ante in Austria:² For this purpose, the contracting authorities have to provide "key data", as specified by the BVerG, in the form of metadata (machine-readable, in a standardized format and under a free license) on www.data.gv.at (so-called "open government data" model). Like the contract notice on the European level, such tendering data are to be submitted by using standard forms that can be filled out and sent via the platform directly.

Subsequently, the aforementioned key data are published at www.ausschreibungen.usp.gv.at, a service provided on the „Business Service Portal“ („Unternehmensserviceportal“) of the Austrian Federal Ministry of Finance. Free access to tender data is also granted at www.offenevergaben.at. In addition, there are a couple of providers who offer tender databases on a subscription basis with various tools for research.

The tender documents are sent electronically to the interested parties by the contracting authority or - as a rule - made available free of charge as a download via the award platform. The participant is requested to register on the platform in order to be kept up to date on new developments, such as the contracting authority's answers to requests, amendments of the tender documentation or extensions of the submission deadline. This is essential for the preparation of the bid, but also for legal remedy in case of amendments that are contrary to procurement law: Depending on the

¹ For details see §§ 48 and 217 BVerG.

² For publication requirements see §§ 50 ff, 219 ff BVerG.

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type of award procedure, such amendments must be challenged before the competent administrative court within ten days of transmission in order to avoid preclusion.

It goes without saying that also the ongoing communication process between the contracting authority and tenderers must take place electronically. The registered participants are automatically notified "by the system" of new information, which is deemed to have been transmitted as soon as it is electronically available. Communication via the platform must be in compliance with fundamental procurement principles, in particular transparency and equal treatment of tenderers, in particular by providing information simultaneously to all participants. Also, the electronic processing ensures that the participants are kept anonymous among each other and also vis-à-vis the contracting authority until the end of the submission deadline.

According to the BVergG, "*communications of minor importance*" could also be made orally. Still, it is not always clear exactly what communication is covered. Any piece of information that potentially affects competition among tenderers, such as information regarding the conduct of the award procedure and requirements to be met by the bids, is certainly not "*of minor importance*" and must therefore be made available to all participants via the platform.

Occasionally, tenderers may wish to request details "bypassing the platform", for example by phone call or individual e-mail addressed to the contracting authority. Usually, contracting authorities will prevent such requests in the interest of equal treatment. Moreover, tenderers may not always be aware that the BVergG holds its own exclusion criteria for tenderers who attempt to influence the decision-making process of the

contracting authority or to obtain confidential information in order to gain a competitive advantage. It is therefore advisable for all parties involved to take the correct way and avoid direct communication.

Tenders and requests to participate must be submitted via the platform with a "qualified electronic signature", a requirement that quite often involves pitfalls. Although the BVergG seems to allow for an alternative mode of transmission provided it guarantees a comparable quality in terms of "*completeness, authenticity and integrity of the data records*", it is difficult to say when these requirements are met.

Any other form of signature, such as a scanned signature, is just as inadmissible as postal submission of a hand signed tender in an e-tendering process. As a rule, the platforms block the submission of tenders without the required electronic signature automatically. In any case, it would be a "no-go" under procurement law if the contracting authority were to allow an individual tenderer to submit the tender by other means, e.g. by post, rather than with electronic signature.

The tender documents usually contain a "standard" warning by the contracting authority to take care of the technical requirements for electronic signature as quickly as possible. In practice, tenderers face problems with the electronic signature relatively time and again, for example when the signature of a foreign service provider is used that is not recognized in Austria or the EU. The award platforms offer tools for checking the validity of the signature used. It must also be taken into account that the contracting authority can stipulate formal requirements for the signing of the tender that go beyond the requirements of the

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BVergG. Such requirements must be strictly adhered to in order to avoid the exclusion of the tender.

Another issue - not only in e-tendering - is whether the natural person signing is sufficiently authorized to do so on behalf of the tenderer. If the power of representation is not evident from the company register, it is recommended to attach a sufficient power of attorney to the tender or the request to participate. Even if this is not requested in the tender documentation, such approach helps to avoid subsequent discussions on the legal validity of the tender. When submitting a tender as a bidding consortium, it also makes sense for all members to grant the same natural person power of attorney to sign the tender.

As banal as it sounds, the identity of the tenderer must be evident from the electronic bid clearly and free from contradictions. In one case, for example, an employee who worked for several companies within a group that frequently participated in award procedures, was to upload a tender in the name of company A. However, some time ago he had created his account on the award platform in the name of company B. When uploading the tender, that was duly filled out and electronically signed in the name of company A, the employee used the access of company B, so unnoticedly, the tender was generated under the name of company B during the upload procedure. In the case in question, this contradiction could be clarified, but such cases involve quite a risk of exclusion.

Particular attention should be paid to the documents that must be uploaded along with the tender. Depending on the type of the documents and the specifications of the contracting authority, a subsequent submission of missing parts may

be permitted or excluded. In the worst case, forgetting an attachment can lead to the tender being rejected.

In any case, the current award platforms offer intelligent digital forms that make it easier for the tenderer to correctly provide the data as requested by the contracting authority. As in other cases, it is always advisable to make use of the opportunity to ask questions if there is any uncertainty about how to fill in forms or which documents are requested to be attached. It is certainly helpful to familiarize oneself with the special features of the award platform at an early stage. Some platforms also allow the uploading of "trial offers".

Like a bid in paper form, the electronic tender "travels" at the tenderer's risk. Late submission will thus result in the rejection of the tender, if not demonstrably due to server problems at the contracting authority. Just as it was not necessarily advisable in earlier times to send the paper tender "last minute", tenderers in the electronic award process are also advised not to start the upload process too late. In particular, it is crucial that the tender is not only uploaded on the platform before the end of the deadline, but that the transmission process is actually completed (which will be confirmed by the platform by sending an e-mail).

By means of encrypted storage of the incoming tenders the platform ensures that the contracting authority - as required by the BVergG - only becomes aware of the identity of the tenderers and the bids after the expiration of the submission deadline. Usually, the bid opening after expiration of the deadline takes place without the participation of the bidders. However, depending on the type of award procedure, they are entitled to receive the electronically generated opening protocol subsequently.



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Like the notification of the award decision, also the award of the contract itself can be executed electronically: Under Austrian procurement law, the contract is required to be concluded „*in writing*“, which, according to the definition given in the BVerG, also includes the conclusion by electronic means. Nevertheless, at the end of the electronic award process, some contracting authorities are finally "old school" and prefer to have the contract signed in hard copy.

For more information

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