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# Public Procurement & Government Contracts

**Austria**

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## Law and Practice

**Contributed by:**

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## 1. GENERAL

### 1.1 Legislation Regulating the Procurement of Government Contracts

In Austria, the procurement of government contracts is regulated by the Federal Public Procurement Act 2018 (BVerG 2018), the Federal Public Procurement Act for Concessions (*BVerG - Konzessionen*) and the Federal Defence and Security Procurement Act (BVerGVS). On the one hand, the BVerG 2018 implements the Directives 2014/24/EU, 2014/25/EU and 2007/66/EC and therefore covers the legal framework for the awarding of both public contracts from public entities and entities in the utilities sector and on the other hand, it implements the remedies Directives 89/665/EEC and 92/13/EEC to secure minimum review standards for the public and utilities sector. Furthermore, the *BVerG - Konzessionen* transposes the Directive 2014/23/EU thus setting out rules on the award of concessions and the BVerGVS transposes the Directive 2009/81/EC covering the procurement procedures in the defence and security sector.

In addition, there are nine Federal State Acts in Austria, that regulate these appeal proceedings and declare the State Administrative Courts (*Landesverwaltungsgerichte* or LVwG) competent for appeal proceedings for the review of decisions of contracting authorities that are attributable to the federal states or municipalities. For appeal proceedings that fall under the jurisdiction of the Federal Government, the BVerG 2018 regulates the procedure and provides for jurisdiction of the Federal Administrative Court in Vienna (*Bundesverwaltungsgericht* or BVwG).

### 1.2 Entities Subject to Procurement Regulation

The public procurement regulations generally apply to public procurement procedures of

public purchasers, such as the Federal Government, the Federal States, the municipalities and municipal associations (territorial entities). Furthermore, the public procurement regulations cover (all) 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, which do not have an industrial or commercial character, and which do have legal capacity at least in part (eg, ASFINAG, ÖBB, ORF, public hospitals, universities, etc). Moreover, associations consisting of one or more public entities are also covered by the BVerG 2018.

Furthermore, the public procurement regulations also apply to contracts awarded by purchasers other than public entities engaging in at least one of the utilities activities pursuant to special or exclusive rights granted by an authority having jurisdiction over them.

### 1.3 Types of Contracts Subject to Procurement Regulation

The procurement regulations (BVerG 2018, BVerGVS, *BVerG - Konzessionen*) cover award procedures for the procurement of public supply contracts, works contracts/works concessions and service contracts/service concessions. However, the (national) procurement rules only apply if certain thresholds are exceeded, that threshold currently being EUR100,000. Contracts below this threshold can be awarded directly without having to follow a specific procedure. In addition, the obligation to initiate an EU-wide tender procedure depends on the respective EU thresholds. These threshold values are:

- EUR5.35 million for works contracts and works concessions;
- EUR214,000 for supply contracts and service contracts;
- EUR139,000 for supply and service contracts awarded by centralised public authorities;

- EUR428,000 for service and supply contracts awarded by utilities; and
- EUR428,000 for service and supply contracts in the defence and security area.

### **1.4 Openness of Regulated Contract Award Procedure**

Generally, the BVerG 2018 also applies to the award of contracts to companies from third countries. Therefore, in principle, all companies, regardless of their nationality or country of origin, have the right to participate in public tenders issued by Austrian public entities and entities in the utilities sector. However, the public procurement regulation provides for the possibility to exclude bidders from participation in procurement procedures who are established in states that are neither party to the GPA nor a member of the EEA.

### **1.5 Key Obligations**

The key obligations under the applicable legislation follow the basic (underlying) principles of public procurement law, namely the fundamental freedoms under Community Law, and the ban on discrimination on the basis of the principles of free and fair competition and equal treatment of all applicants and tenderers. Hence, public procurement contracts shall be awarded in transparent proceedings to qualified, capable, and reliable contractors at reasonable prices.

Any territorial restriction of the group of participants or a restriction of participation to individual professions is inadmissible. These principles are applicable for all procurement procedures (above and below the thresholds mentioned in **1.3 Types of Contracts Subject to Procurement Regulation**) and serve as the main principles and guidelines for the interpretation of the BVerG 2018.

## **2. CONTRACT AWARD PROCESS**

### **2.1 Prior Advertisement of Regulated Contract Award Procedures**

Generally, ie, unless certain exemptions are provided for, any regulated contract award procedure shall be published in certain publication media.

Public procurement procedures above the relevant EU threshold must be published at Union level through the Publications Office of the European Union (“Publications Office”) by using the standard forms introduced by Regulation (EU) No 2015/1986 and that can be found online. The specific notice is advertised in the Official Journal of the European Union (OJEU). In addition to publicity at Union level, there is also an obligation to advertise public procurement procedures at the national level in Austria.

This obligation applies both to public procurement procedures above the EU threshold and below the EU threshold. Since 1 March 2019 contracting authorities are obliged to announce public procurement procedures via the Open Government Data-model (OGD-model).

However, contracting authorities are free to additionally publish invitations to tender on their homepage or in other media, such as regional newspapers.

#### **Notice Content**

Content wise, contract notices shall include the following minimum information:

- name, identification number (where provided for in national legislation), address including NUTS code, telephone, fax number, email and internet address of the contracting authority and, where different, of the service

- from which additional information may be obtained;
- information where and how the procurement documents are available, type of contracting authority and main activity exercised;
  - information whether the contracting authority is a central purchasing body or that any other form of joint procurement is involved, CPV codes;
  - information whether the contract is divided into lots, NUTS code for the main location of works, supply or services; and
  - a description of the procurement including the nature and extent of works, the nature and quantity or value of supplies and the nature and extent of services.

Where the contract is divided into lots, this information shall be provided for each lot:

- estimated total order of magnitude of contract(s);
- admission or prohibition of variants;
- time-frame for delivery or provision of supplies, works or services and, as far as possible, duration of the contract/framework agreement or dynamic purchasing system;
- conditions for participation, including a list and brief description of eligibility and selection criteria;
- information on the type of award procedure; and
- information regarding the contract award criteria, information regarding the bid/tender submission (deadlines, address, language, format, etc), name and address of the review body.

## 2.2 Preliminary Market Consultations by the Awarding Authority

Contracting authorities are entitled to carry out market surveys in the pre-procurement phase with a view to initiate an award procedure. In this context the contracting authority may, inter

alia, consult companies that are potential candidates or tenderers in order to gather ideas for this procedure.

Within the scope of this consultation (“market exploration”), information on the planned award procedure (eg, problem descriptions, schedules) can already be disclosed to the above-mentioned companies. This consultation can also be carried out with third parties (independent experts, authorities or other companies). The information obtained can be used to plan and implement the respective award procedure, provided that this does not distort competition or violate the principles of public procurement.

## 2.3 Tender Procedure for the Award of a Contract

The public procurement legislation generally provides for a closed catalogue of available procurement procedures. (Public) contracts may be awarded through the following options.

### Open Procedures

The open procedure is characterised by the fact that an unlimited number of entrepreneurs is publicly invited to submit tenders.

### Restricted Procedures

In the case of restricted procedures (with prior publication), any economic operator may request to participate but only candidates invited to do so may submit a tender. Hence, in this variant of the restricted procedure, the contracting authority pre-selects a limited number of qualified entrepreneurs (either directly or based on a request to participate) to be directly invited to submit tenders.

As a rule, the contracting authority must not conduct any negotiations in the open procedure and in the restricted procedure.

### **Negotiated Procedures**

In the negotiated procedure with prior publication, applicants selected from an unlimited number of entrepreneurs are publicly invited to submit applications to participate. Based on the evaluation of the applications to participate, a certain number of entrepreneurs is selected and invited to submit tenders. In contrast to the open procedure and the restricted procedure, the full scope of the procurement can be negotiated with the tenderers.

In the negotiated procedure without prior publication, the contracting authority directly invites pre-selected candidates of its choice to submit offers and subsequently negotiates with them on the full scope of the procurement.

### **Direct Awards**

The direct award procedure is characterised by the fact that services, works or products are procured directly from a freely selected entrepreneur. As the case may be, procurement units may request binding bids or price indications from one or more entrepreneurs prior to direct award.

By contrast, in the case of a direct award with prior publication, contracting authorities are required to publish the main characteristics of the intended procurement activity (eg, the subject of the procedure, selection criteria) at the beginning of the procedure. However, the subsequent procedure is not regulated and can be freely designed by the contracting authority.

### **Competitive Dialogues**

The competitive dialogue is designed for awarding complex contracts if the technical solutions or the legal and/or financial makeup of a project cannot be defined sufficiently. The competitive dialogue is conducted in several stages and comparable to the negotiated procedure. After the pre-selection of tenderers in a pre-qualifica-

tion phase, selected candidates are invited to define the best solution for the project in several dialogue phases. Candidates submit their final tenders based on the findings elaborated in the dialogue phase.

### **Electronic Auctions**

A contracting entity may also hold an electronic auction to award a contract. The electronic auction can only be applied after a procurement procedure (such as an open or restricted procedure) has taken place. Before proceeding with the electronic auction, the contracting authority shall make a full initial evaluation of the tenders in the course of a procurement procedure.

All tenderers who have submitted an admissible tender shall be invited to participate in the auction simultaneously by electronic means. Bidders can subsequently optimise their offers in several phases.

### **Framework Agreements and Dynamic Purchasing Systems**

Framework agreements are agreements between one or more economic operators and one or more contracting authorities which are characterised by the fact that the contracting authority can obtain services/supplies/works within the framework agreement by initiating one or several call-offs. However, there is no obligation on the part of the contracting authority to actually award any service, supply or works. Framework agreements shall only be concluded after an open, restricted, or negotiated procedure has been conducted and the respective bidders have been selected.

Since the dynamic purchasing system is a completely electronic process, an unlimited number of entrepreneurs are publicly 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 and Realisation Contests

Design contests are procedures that serve to provide the contracting authority with a plan or design, in particular in the fields of zoning, city planning, architecture and construction/civil engineering (“design contests”) the selection of which is made by a jury on the basis of certain evaluation criteria with or without awarding prizes (“comparative assessment”). Realisation contests lead to a negotiated procedure in which a public service contract is awarded after a design contest has been held.

## Innovative Partnerships

The innovation partnership aims at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works. Similar to the negotiated procedure, the innovation partnership is structured in successive phases that follow the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

## 2.4 Choice/Conditions of a Tender Procedure

As a rule, contracting authorities can, generally, freely choose between the open procedure and the restricted procedure (with prior publication). The use of all other procedures is subject to certain conditions.

The negotiated procedure with prior publication and the competitive dialogue may generally be applied, inter alia, if no tenders or no suitable tenders or no applications have been submitted in response to an open or restricted procedure with prior publication, if the services to be provided do not permit the establishment of contractual specifications as required for the award

of a contract by open or restricted procedure, if the subject of the award procedure is the procurement of innovative or conceptual solutions or if the complexity of the contract requires negotiations.

Procurement procedures without prior publication may only be applied in exceptional circumstances (such as extreme urgency or if the specific contract can only be carried out by a particular contractor for certain reasons, such as technical or artistic reasons) due to the associated lack of transparency.

The direct award of public contracts may only be conducted if the estimated contract value stays below certain thresholds (EUR100,000 or EUR130,000 for direct award with prior consultation of public supply and service contracts (in case of public works contracts, the threshold is generally EUR500,000).

## 2.5 Timing for Publication of Documents

As a rule, all tender documents (including the pre-selection questionnaire, the invitation to tender, the full list of services or the draft contract) shall be freely available, without restriction, after publication of the contract notice.

However, due to the current wording of the law, it is presently unclear whether contracting authorities are also obliged to grant access to the contract and certain other documents with the contract award notice in case of two-stage procedures (eg, negotiated procedure with prior publication or restricted procedure with prior publication).

## 2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

As a rule, contracting authorities shall take into account the complexity of the contract and

the time required for drawing up tenders when setting the procedural time limits. Additionally, the public procurement regulations provide for certain minimum time limits for the receipt of expressions of interest and of tenders. The specific minimum time limit depends on both the specific type of procurement procedure and whether the contract value exceeds or falls below the EU threshold.

Above the relevant EU threshold, the minimum time limit for submitting an expression of interest varies between 15 days (in case of extreme urgency) and 30 days. The minimum time limit for the tender submission varies between ten to 15 days (in cases of extreme urgency) and in regular proceedings between 25 days (restricted procedure and negotiated procedure with prior publication) and 30 days (open procedure).

For award procedures below the EU threshold, shorter minimum time limits apply (eg, 20 days for the submission of tenders in the open procedure).

### **2.7 Eligibility for Participation in a Procurement Process**

As a rule, public procurement contracts shall only be awarded to qualified, capable and reliable entrepreneurs at reasonable prices. Therefore, the regulations provide for a catalogue of eligibility criteria that have to be fulfilled by interested parties in order to participate in a procurement procedure, namely the suitability to pursue the professional activity, economic and financial standing, the technical and professional ability and the reliability/non-fulfilment of exclusion grounds.

The regulations further provide for a closed catalogue of means of proof for the fulfilment of the above-mentioned criteria. Only with regard to the financial and economic capability does the regulation leave the contracting authority some

discretion in determining the means of proof required.

### **2.8 Restriction of Participation in a Procurement Process**

Contracting authorities may limit, ie, reduce, the number of qualified bidders in two-stage procedures (namely restricted procedures with prior publication, negotiated procedures with prior publication, competitive dialogues and innovation partnerships) based on selection criteria.

Selection criteria must be disclosed in the tender documents and be objective, non-discriminatory, related to the subject of the contract and proportionate. Usually, certain eligibility criteria (such as the average turnover or previous projects) are applied. However, as a rule, the number of qualified suppliers should generally not fall below three.

### **2.9 Evaluation Criteria**

Once the bids have been submitted, contracting authorities enter the tender evaluation phase, which leads to the award of the contract. When evaluating the tenders, the contracting authority shall evaluate whether the tender complies with all formal requirements (such as compliance of time limits, signature requirements, etc) as well as with the qualification and selection criteria (as the case may be).

As a rule, tenders may not deviate from the requirements set forth in the tender documents and the contract award notice. The remaining bids will be evaluated in accordance with the contract award criteria specified in the tender documents and the contract notice.

### **MEAT**

Contracts may be generally awarded based either on the lowest price or on the most economically advantageous tender/lowest cost (MEAT). In the latter case, further criteria related



to the subject-matter of the contract shall be established, such as quality performance criteria, social criteria or environmental criteria.

However, the public procurement regulations generally favour the MEAT principle. A focus on the pure price competition (lowest cost principle) is generally only permissible if the quality standard of the service has been specified in the service description so clearly and unambiguously in technical, economic and legal terms that the submission of comparable tenders at a defined (quality) level is guaranteed.

Furthermore, the procurement legislation provides for a closed catalogue of situations/procedures where the application of the MEAT principle is mandatory. Pursuant to the public procurement legislation, the contract shall be awarded to the technically and economically most advantageous tender in the following situations:

- a contract shall be awarded for the provision of intellectual services which are to be awarded by negotiated procedure;
- a contract shall be awarded where the description of the performance is essentially functional;
- a public works contracts with an estimated value of at least EUR1 million shall be awarded; or
- the contract is awarded by means of a competitive dialogue, or an innovation partnership.

Finally, criteria used for the selection or qualification of tenderers may not be used as award criteria.

## 3. GENERAL TRANSPARENCY OBLIGATIONS

### 3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

Selection criteria, qualification criteria and contract award criteria shall be disclosed either in the contract notice or in the tender documents. Furthermore, the contract notice and/or the tender documents shall provide information on the relative weighting of the criteria (including potential sub-criteria).

While the procurement regulations do not explicitly provide for the obligation to disclose the evaluation methodology, both the common practice as well as the relevant case law confirm that the evaluation methodology must be disclosed in the tender documents for reasons of transparency.

### 3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Contracting authorities are obliged to notify interested parties who have not been selected for participation in the contract award procedure of the reasons for this decision. The statement of reasons must be sufficiently detailed to enable the unsuccessful bidder to evaluate whether it should initiate appeal/review proceedings. This notification should occur immediately or, at the latest, within one week after an award decision.

### 3.3 Obligation to Notify Bidders of a Contract Award Decision

Contracting authorities are obliged to inform unsuccessful bidders in writing (email, fax, letter, etc) of the award decision. This information has to provide substantial reasoning (characteristics and relative advantages of the selected tender, characteristics and reasoning why the unsuccessful bidder was not selected as well as the name of the successful tenderer or the parties

to the framework agreement, etc). Furthermore, the notification has to provide information about the end of the “standstill period”.

### **3.4 Requirement for a “Standstill Period”**

The public procurement regulations provide for a standstill period between the notification of the contract award decision and the conclusion of the contract of at least ten calendar days (in case of electronic availability of the contract award decision) or 15 days (in case of transmission via postal delivery), respectively. As a rule, any contract award during the standstill period shall be null and void.

## **4. REVIEW PROCEDURES**

### **4.1 Responsibility for Review of the Awarding Authority’s Decisions**

The Austrian public procurement review system is characterised by different authorities on the federal government level and the federal state level. With regard to procurement procedures attributed to the Federal Government, the competent review body is the Federal Administrative Court (BVwG). At the state level, the competent review bodies are the individual State Administrative Courts (LVwG). Both decisions of the LVwG as well as decisions of the BVwG can be appealed before the Constitutional Court (*Verfassungsgerichtshof* or VfGH) and the Supreme Administrative Court (*Verwaltungsgerichtshof* or VwGH) within six weeks after the respective decision has been rendered.

### **4.2 Remedies Available for Breach of Procurement Legislation**

Before the signing of a contract, aggrieved applicants or bidders may apply to challenge and declare specific decisions of the contracting authority null and void. The public procurement regulation provides for an exhaustive list of deci-

sions of the contracting authority against which an appeal may be lodged (such as the contract notice, the tender documentation, the decision to exclude a bidder, the invitation to bid or the contract award decision).

After the signing of the contract, a declaratory procedure (*Feststellungsverfahren*) may be initiated with the aim of establishing deficiencies in the contested award procedure (declaratory decision) and the annulment of an unlawful direct award, as the case may be. If the contract cannot be declared null and void (eg, due to an overriding public interest) the contracting authority can be fined with a penalty of up to 20% of the contract value.

Furthermore, aggrieved applicants or bidders may claim damages before the civil courts if the procurement regulations have been infringed and the contracting authority was to blame for the infringement in question. In principle, the aggrieved companies may claim compensation for the costs of preparing the tender, compensation for participation in a procurement procedure or (alternatively) compensation for lost profits, provided that the bidder would have been awarded the contract if the infringement had not occurred.

However, a declaratory decision by the competent review authority establishing the non-conformity of the procurement procedure/contract award is a mandatory prerequisite and therefore the basis for damage claims before the civil courts. Accordingly, a complainant seeking damages must first obtain a corresponding declaratory decision from the review authority.

### **4.3 Interim Measures**

Since the challenge of a specific decision of the contracting authority does not stop the specific award procedure, applicants must apply for an interim measure (eg to suspend the contract

award procedure, to suspend the standstill period or to suspend the opening of bids) jointly with the respective appeal.

#### 4.4 Challenging the Awarding Authority's Decisions

In order to bring a challenge, an applicant must substantiate its interest in concluding the respective contract and provide proof that they have suffered or are in danger of suffering a loss as a result of the alleged infringement of the award provisions. Therefore, standing must be denied if participation or the submission of a tender is not an option for the contestant.

Consequently, an enterprise that has not submitted a bid has no standing to challenge the award decision. Furthermore, bidders who have been excluded or who must necessarily be excluded have, generally, no standing. Finally, neither subcontractors nor single members of a bidding consortium have standing to file an appeal.

#### 4.5 Time Limits for Challenging Decisions

The time limits for filing a challenge depend on the subject of contestation (tender documentation or another contestable decision of the contracting authority). In general, any separately contestable decision must be contested within ten days after the bidder has become aware of the contested decision. Tender documents shall be challenged at the latest seven days prior to the deadline for submitting applications to participate or the bid submission deadline.

#### 4.6 Length of Proceedings

The (Federal/State) Administrative Courts generally have to rule on a review application within six weeks after the application has been filed. However, in practice, review proceedings take between six weeks and three months, depending on how heavy the workload is at the respective Courts. Procedures aimed at a declaratory

decision must be completed within six months of the submission of the respective application.

#### 4.7 Annual Number of Procurement Claims

The average number of procurement claims per year varies significantly depending on the review body.

While the number of review procedures before the Federal Administrative Court amounted to 190 in 2020, the number of public procurement claims filed before the nine State Administrative Courts (*Landesverwaltungsgerichte*) in 2020 amounted to 124 (approximately 14 files per State Administrative Court).

#### 4.8 Costs Involved in Challenging Decisions

The typical costs associated with challenging a decision of an awarding authority depend significantly on:

- the value of the respective contract being tendered;
- the type of award procedure chosen; and
- the competent review body.

Considering these factors, the cost (court fees) for filing an appeal with the court range from EUR324 to almost EUR40,000. Additionally – as the case may be – the cost of applying for interim measures (preliminary injunctions) are to be taken into account in the amount of half of the costs for the appeal, while the court fees are to be reimbursed by the unsuccessful party, with each party having to bear its own lawyers' fees.

## 5. MISCELLANEOUS

### 5.1 Modification of Contracts Post-award

Pursuant to the public procurement regulations, modifications to a public contract after it has been awarded generally require a new procurement procedure, unless a certain (exhaustively listed) exemption explicitly provides for the possibility to change or extend a contract.

The public procurement regulations provide for the following exemptions that make modifications permissible following the award of a contract:

- the subject and circumstances of the modification are provided in the original tender documents in clearly, precisely and unambiguously worded contract amendment clauses;
- the modification covers additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial tender documents provided that a change of the contractor cannot be made for technical or economic reasons;
- the modification has become necessary due to circumstances which a diligent contracting entity could not foresee, provided that the modification of the contract does not alter the overall nature of the contract;
- a new contract partner replaces the undertaking to whom the contracting authority had originally awarded the contract provided that such change of the contract partner is clearly formulated in the contract or the change of the contract partner is caused by legal succession (including takeover, merger, acquisition or insolvency) provided that the new contractor meets the initial eligibility criteria;
- the public contracting authority itself assumes the obligations of the main contractor from its subcontractors;

- the modifications are only minor and neither exceed the relevant threshold nor 10% (service and supply contracts) or 15% (works contracts) of the initial contract value; and
- the modification is not materially different to the originally awarded contract, demonstrating the parties' intention to renegotiate the essential terms of the contract.

### 5.2 Direct Contract Awards

The public procurement legislation provides for the possibility to directly award a contract if the estimated contract value is below EUR100,000. The legislation provides for the possibility to conduct exclusive negotiations with only one entrepreneur in extraordinary situations, such as extreme urgency, if only a specific entrepreneur can provide the required services due to technical reasons or exclusive rights or the new services consist in the repetition of similar services, and if the contract is awarded by the same contracting authority to the contractor who was awarded the original contract and such a subsequent award has been reserved in the initial tender documents.

### 5.3 Recent Important Court Decisions A 2020 Supreme Court Ruling on Incorrect CPV Codes

In its decision of 28 September 2020 (VwGH 28.09.2020, Ra 2020/04/0044), the Supreme Administrative Court deduced the illegality of the entire award procedure due to the indication of an incorrect CPV code in a contract notice. This decision was preceded by the applicant's request for a declaration that the award procedure had been carried out unlawfully. The applicant argued its claim on the basis that, due to the significant deviation of the actual subject matter of the contract from the chosen CPV code, there was no legally effective notice.

The Federal Administrative Court followed the applicant's view and, due to the choice of the

wrong CPV code, found that an award procedure had been carried out without prior publication. In doing so, the Federal Administrative Court referred to the case law on the interpretation of declarations of intent (eg, notices) and the relevant objective value of the declaration for an averagely competent and usually diligent bidder. The Supreme Administrative Court confirmed the legal opinion of the Federal Administrative Court.

It can therefore be concluded from this decision that the indication of an incorrect and misleading CPV materially equals a total absence of a contract notice and that consequently, contracting authorities should not misjudge the importance of a correct choice of CPV.

## A 2019 Supreme Court Ruling on Bidding Consortia

In its decision from 26 June 2019 (VwGH 26.06.2019, Ra 2018/04/0161), the Supreme Administrative Court ruled that the opening of insolvency proceedings against the assets of a member of a bidding consortium leads to the mandatory exclusion of the “remaining bidding consortium”. The subject matter of the proceedings was an open procedure for the award of a construction contract. The contract was awarded to a bidding consortium, whereby (after the award decision but before the contract was awarded) insolvency proceedings were opened against the assets of one member of the bidding consortium. By order of the *Tribunale di Roma*, the member of the bidding consortium in question was granted a period of time for the final submission of an application for compensation or an application for approval of the debt rescheduling agreement and three persons were appointed as court commissioners to supervise the contractor’s activities.

The Administrative Court assumed that the appointment of these court commissioners was indisputably to be regarded as the appointment

of an administrator within the meaning of Regulation 2015/848/EU and that this was therefore to be used for the interpretation of when insolvency proceedings were deemed to have been opened. Accordingly, the application of the bidding consortium member was already to be regarded as the opening of insolvency proceedings, since the power of disposal over their assets was at least partially withdrawn from them. The Administrative Court therefore held, in agreement with the Federal Administrative Court, that the opening of insolvency proceedings over the assets of the bidding consortium member had occurred and thus a ground for exclusion was fulfilled.

Even the ruling of the ECJ, according to which the requirements of a legal and factual identity of the economic operator can be “lowered” during the entire course of the procedure in order to ensure adequate competition in a negotiated procedure, as required by Article 54 (3) Directive 2004/17, does not change this according to the Court. Article 54(3) of the Directive would only apply to restricted and negotiated procedures and was therefore not applicable to the open procedure relevant in the present case. In particular, the prohibition of negotiations, which must be observed in the open procedure, speaks against a transfer of the principles established by the ECJ in this case.

Apart from that, the facts of the case were not comparable because the decision of the ECJ concerned the admissibility of the change in the composition of the bidding consortium. In the relevant case, however, the bidding consortium was awarded the contract in unchanged composition - and thus with the participation of an unreliable member.

## 5.4 Legislative Amendments under Consideration

Currently, no legislative amendments to the procurement legislation are expected.

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## AUTHORS



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the CEE, he has extensive expertise in advising both governmental bodies and private sector clients in all potential issues related to complex and cross-border procurement procedures. Johannes has long-standing experience in all procurement-related aspects, particularly in structuring complex infrastructure proceedings, and he provides a wide coverage of services to domestic and international clients across various industries. Johannes frequently publishes articles, is a lecturer on public procurement and speaks at various international public procurement conferences.



**Felix Schneider** has been an associate with Schoenherr since 2018. He is a member of the firm's regulatory practice group and his main areas of practice are public procurement law,

energy law and environmental law. Felix regularly advises both governmental bodies and private sector clients in all potential issues related to complex procurement structures (such as PPP) and cross-border procurement procedures. In this context, he monitors in particular the compliance of tenders with the procurement legislation and tender conditions and advises on the delicate process of remedying and clarifying deficiencies. Most recently, he advised a major Austrian museum on the procurement of permanent exhibitions.

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The logo for Schoenherr, featuring the name 'schoenherr' in a lowercase, bold, sans-serif font.