



The Legal 500 Country Comparative Guides

Austria: Public Procurement

This country-specific Q&A provides an overview to public procurement laws and regulations that may occur in Austria.

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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)

The Austrian public procurement laws have transposed the 2014 Procurement Directives by the European Parliament and the Council (i.e. the Classic Procurement Directive, the Utilities (Sector) Directive and the Directive on the Procurement of Concessions).

The World Trade Organisation's Agreement on Government Procurement (GPA) also has been implemented in Austria. Further, as an EU Member State, Austria is a contracting Party to the Agreement between the European Community and the Swiss Confederation on Public Procurement. However, due to the restrictive jurisdiction of the ECJ on the (lack of) direct applicability of WTO law, the effectiveness of the GPA within the European Union is limited and its enforceability in the European Union is only possible in accordance with the public 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 supply contracts, service contracts, special service contracts and construction contracts are subject to the procurement regulations under the Austrian Federal Procurement Act 2018 (Bundesvergabegesetz 2018 - FPA 2018). Special service contracts pertain to services regulated in Annex XVI of the FPA 2018 (e.g. medical, social, cultural, legal services).

Furthermore, in the second main part of the FPA 2018 the procurement of the utilities sector (including water, gas, oil, electricity, telecommunication, transport etc) ("Sector") is regulated. The procurement regime for companies and contracting authorities in those sectors is less strict compared to procurements by "classic" awarding authorities (e.g. wider choice of available tender procedures and grounds to cancel a procurement procedure).

Furthermore, concession contracts are regulated under the Federal Procurement Act Concessions 2018 (Bundesvergabegesetz Konzessionen 2018).

The Federal Procurement Act Defence and Security 2012 (Bundesvergabegesetz Verteidigung und Sicherheit 2012) sets forth specific rules for procurement procedures with regard to defence and security related procurements (i.e. military purposes and sensitive equipment, works or services).

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

EU Regulations with regard to financial thresholds for the application of procedures for the

award of contracts are directly applicable in all EU member states, such as Austria. As of 1 January 2020 the following financial thresholds apply:

1. EUR 5,350,000 for construction contracts and construction concessions;
2. EUR 214,000 for service and supply contracts (EUR 428,000 in sector procurements);
3. EUR 139,000 for service and supply contracts by specified contracting authorities pursuant to Annex V of the FPA 2018 (e.g. ministries);
4. EUR 750,000 for special service contracts (EUR 1 Million in sector procurements);
5. EUR 214,000 for architectural competitions (EUR 139,000 for specified contracting authorities).

The financial thresholds are relevant for the scope of application of the FPA 2018 (e.g. regarding eligible tender procedures). Whether a contract falls above or below the financial thresholds is determined by the contracting authority prior to a tender based on the estimated contract value.

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.

The FPA 2018 applies even below the aforementioned financial thresholds. Whether or not the contracts' value exceeds the financial threshold is relevant for the scope of the applicable regulations. The rules for the procurement of contracts below the financial thresholds are less stringent and, in general, provide for a less formalised procurement procedure (e.g. tender procedures, simplified publication).

Furthermore, below the financial thresholds certain sub-thresholds may apply. In case the estimated contract value falls even below such sub-thresholds further tender procedures and simplifications in the tender procedures may become applicable (e.g. direct award with a financial threshold of below EUR 100,000).

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

Contracts that fall under the application of the procurement regulations must be advertised in the Official Journal of the European Union (OJEU), Supplement S, via EU standard forms, which can be found via the Tenders Electronic Daily (TED), which is the online version of the Supplement to the OJEU (<https://ted.europa.eu/>).

Furthermore, a nationwide notice must be published. Since 1 March 2019, contracting authorities must for the nationwide publication make available the metadata of the core data of tender procedures at www.data.gv.at, in which they have to refer to the information pursuant to Annex VIII of the FPA 2018. National contract publications can be searched on the Austrian Company Service Portal (Unternehmensserviceportal) under

<https://ausschreibungen.usp.gv.at/>.

The time limits for participation or submission of bids in procurement procedures vary according to the type of procurement procedure (e.g. 30 days for participation in a negotiated procedure).

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?

In procurement procedures with an initial selection stage, contracting authorities must determine qualification criteria (Eignungskriterien) and selection criteria (Auswahlkriterien), which must be disclosed to tenderers in the procurement documents. The selection criteria represent the minimum requirements for tenderers to participate in the procurement procedure.

In any procurement procedure under the FPA 2018, however, with only limited application for direct awards, bidders must prove their ability to fulfill the contract to be eligible to participate (i.e. professional reliability, professional and technical ability, economic and financial standing and professional competence) based on the qualification criteria set out by the contracting authority. Evidence of technical ability and economic and financial standing may be substituted by third parties. However, with regard to professional reliability a substitution by third parties is prohibited; each bidder must give evidence that no grounds for exclusion are fulfilled or the bidder has taken sufficient "self-cleaning" measures in order to further participate in the tender proceedings, even though grounds for exclusion may have been realized (see below).

In general, contracting authorities are free to determine the qualification criteria and selection criteria for the selection stage of a procurement, provided, however, that such criteria are non-discriminatory, relate to the subject of the contract and are proportionate thereto. There are no differences in methodology for sector procurements under the FPA 2018 with regard to the selection phase; however certain simplifications may apply (e.g. the contracting authority may refrain from excluding a bidder even if the bidder has fulfilled a ground for exclusion, except in case of certain criminal convictions).

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?

The FPA 2018 defines specific grounds for mandatory exclusion of bidders by the classic contracting authorities, such as the federal state, the provinces and municipalities, associations of such bodies and bodies governed by public law (i.e. entities controlled, financed or supervised by contracting authorities that are established for a special purpose to serve needs in the general interest, which do not have a commercial character). Pursuant to

Section 78 of the FPA 2018 such grounds are the following:

1. In case the bidder is convicted of certain criminal convictions (e.g. bribery, embezzlement);
2. in case of insolvency proceedings, if the bidder is in liquidation or ceases or has ceased his commercial activity;
3. in case of agreements which aim to impair fair competition between bidders. Plausible grounds for the contracting authority are sufficient for the realisation of such grounds for exclusion;
4. in case of grave professional misconduct by the bidder, in particular with regard to employment, social or environmental law;
5. in case of violation of obligations relating to payments of social security duties or taxes in Austria or in accordance with the provisions of the country in which the bidder's company is established;
6. in case a conflict of interest pursuant to section 26 of the FPA 2018 cannot be avoided by other, less drastic measures by the contracting authority;
7. if the fair competition in a tender proceeding would be distorted due to the involvement of a bidder in the preparation of the tender proceeding;
8. in case the bidder has shown, in the fulfilment of a substantial requirement under a previous contract or concession agreement, substantial or permanent defects which have led to the premature termination of that previous contract or concession agreement, damages or other similar penalties;
9. in case the bidder is responsible for a serious misrepresentation in supplying information concerning the suitability of the service, has not supplied such information or has not produced, completed or explained the supporting documents or certificates required by the contracting authority as proof of suitability; or
10. in case the bidder has sought to unduly influence the decision-making process of the contracting authority or has tried to obtain confidential information which might have given him undue advantage in the award procedure.

The contracting authority may waive exclusion where, in exceptional and duly justified cases, the exclusion of the bidder cannot be rendered for imperative reasons of public interest.

The aforementioned grounds for exclusion are discretionary for contracting authorities procuring in sectors, except, however, the grounds for exclusion with regard to criminal convictions of a bidder.

In certain cases, bidders may be permitted to participate in a tender procedure despite having fulfilled grounds for exclusion if they meet the requirements under the FPA 2018 for "self-cleaning" of the bidder (e.g. cooperating with investigating authorities, taking technical, organisational and personnel measures that may prevent further misconduct).

8. Please described a typical procurement procedure for a complex contract. Please

summarise the rules that are applicable in such procedures.

The FPA 2018 defines various types of procurement procedures (e.g. open procedure, restricted procedure, competitive dialogue, direct awards etc). For each type of award procedure specific statutory requirements must be observed when conducting the award procedure or participating in the award procedure.

The procurement of a complex contract usually requires a two stage procurement procedure to be conducted (e.g. negotiated or restricted procedures). In the first stage of the procurement (qualification stage) bidders apply for participation in the procurement. In this stage bidders must prove their suitability to fulfill the contract by providing evidence on certain qualification criteria as set out in the tender documents.

To avoid a potential exclusion from further participation in the tender procedure, it is imperative that a bidder complies with the requirements regarding the qualification in the tender documents and timely provides the contracting authority with the relevant evidence and documents (e.g. permits, professional certifications, criminal record certificate etc). Alternatively, a bidder may provide a European Single Procurement Document (ESPD) form to evidence eligibility for the tender. However, bidders will be asked to provide proof of eligibility for the tender at a later stage.

This qualification process usually lasts several weeks, including the statutory minimum time limit for participation in the tender and the assessment by the contracting authority.

In the second stage, qualified bidders prepare a bid on the basis of the contract to be awarded and the tender documents. The requirements of the tender documents must also be strictly adhered to. The bid is evaluated by the contracting authority on the basis of the award criteria in the tender documents. In a negotiated procedure, the contracting authority must negotiate the contract to be procured with all bidders, unless otherwise specified in the tender documents (e.g. a contracting authority may under the FPA 2018 reserve the right to refrain from negotiations and award the contract based on the initial offer).

Subject to the determination by the contracting authority in the tender documents, a second (or third) offer based on amended tender documents has to be filed. The last and final offer forms the basis for the determination of the best bidder and the scoring for the ranking of the bids by the contracting authority.

The second stage of the procurement (tender stage) usually lasts several months, including the time limit to prepare and file a bid, negotiations with the contracting authority (if permitted in the procurement procedure), the evaluation of the bid and the conducting of the award procedure by the contracting authority.

Such two-stage procurement procedures for the award of complex contracts usually last

between 4-7 months.

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

For low value contracts generally the same regulations apply as for the procurement of high value contracts. Nevertheless, depending on the estimated contract value, which has to be determined prior to initiation of the tender proceeding, simplifications may apply (e.g. no publication notice or procedures with only one tenderer invited by the contracting authority). The key stages of a procurement procedure, however, stay the same.

Contracts with a value of less than EUR 100,000 may also be awarded directly to a company by the contracting authority. For such direct awards contracting authorities are free to determine the course of the tender awarding, provided, however, the general principles of the FPA 2018 and the Treaty on the Functioning of the European Union (TFEU) are adhered to.

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?

With regard to the participation in procurement proceedings, strict compliance with the requirements in the tender documents is necessary. Documents evidencing the suitability for the performance of the contract must be timely submitted to the contracting authority (i.e. depending on the type of procurement proceeding, with the application for the qualification to participate in the tender or together with the offer). Although a bidder may provide a ESPD form to evidence eligibility for the tender, it is strongly advised to submit the relevant documents instead, in order to avoid potential problems with the evidencing of suitability with the contracting authority (e.g. documents issued after the relevant time limit may lead to exclusion from the award procedure).

The FPA 2018 also introduced rules to prevent conflicts of interest between employees of the contracting authority and a bidder. Both the contracting authority and the bidder are obliged to take appropriate organisational or personnel compliance measures. Ultimately, if a conflict of interest arises that cannot be resolved by mitigating measures, the respective bidder must be excluded from the procurement procedure. Prior to participating in a procurement procedure, bidders should therefore take steps necessary to ensure that no such conflict of interest exists.

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

Bids are evaluated by the contracting authority on the basis of the award criteria set forth in the tender documents, which also should include a weighing of the award criteria. Award criteria may be based on the principles of the most economically advantageous tender or the

lowest price. Award criteria pertaining to the most economically advantageous tender must include quality related criteria (e.g. technical merit, cost-effectiveness, functional characteristics etc). In certain cases, the contracting authority is obliged to apply the most economically advantageous tender principle for the award of a contract (e.g. in case of the awarding of contracts with regard to intellectual services, in case of construction contracts with an estimated value of at least EUR 1 million, in case the description of the procured services is essentially functional).

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.

Pursuant to Section 143 of the FPA 2018 a contracting authority must in general notify unsuccessful bidders of the award decision at least ten days prior to awarding the contract. In the award decision the contracting authority must inform the unsuccessful remaining bidders of the end of the standstill period (i.e. the period in which the contract must not be awarded), the reasons for the evaluation of their bid, the total price as well as the characteristics and advantages of the successful tender, unless the disclosure of such information would be contrary to the public interest or the legitimate business interests of a bidder or would impair free and fair competition.

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

Under the FPA 2018 two main types of remedies to challenge decisions by contracting authorities in tender procedures before the administrative courts are available. Review proceedings may be brought prior to the award of the contract. Subsequent thereto, a declaratory decision may be sought by the (former) bidder or a competitor. The administrative courts can annul decisions by the contracting authority in review proceedings and declare contracts null and void if in a declaratory proceeding after the award of a contract certain violations of the FPA 2018 have been determined (e.g. if a contract has been unlawfully awarded without (i) prior publication of a procurement notice or (ii) issuing an award notice to the other bidders prior to the award of the contract). For reasons of public interest, the contract may not be declared null and void at the request of the contracting authority. In this case, however, fines must be imposed on the contracting authority.

Usually, applications for the review of a decision by the contracting authority (prior to the award of the contract) are combined with an application to grant interim relief to suspend the tender procedure or certain decisions by the contracting authority. The contracting authority must adhere to the court's ruling and release a corresponding new decision.

Applications for such remedies must be filed within short time limits (e.g. ten days for applications for review proceedings).

14. Are public procurement law challenges common in your jurisdiction?

Challenges of decisions by contracting authorities in public procurement procedures are fairly common, in particular in large scale tender proceedings, which usually do not result in reputational harm or harm for future prospects of the claimant. However, bidders are advised to thoroughly assess whether to challenge decisions or not in order to avoid time consuming but unnecessary and/or a priori unsuccessful claims.

To bring a challenge before Austrian administrative courts the claimant has to initially pay a fixed basic court fee. The amount of the court fee varies from EUR 324 to EUR 6,482. Depending on the estimated value of the contract, the fee is increased. The fee is reduced in certain cases (e.g. the tender documents are challenged or if an application for review is withdrawn before the oral hearing is held). If the claimant is at least partially successful, the court fees are to be refunded by the contracting authority.

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 decision deadline for the administrative courts in review proceedings is six weeks.

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

Bidders from EU member states are regarded as equal to Austrian nationals, and therefore are granted the same rights and remedies as Austrian nationals.

Pursuant to the Public Procurement Directives and the FPA 2018, foreign tenderers (non-EU, EEA member states) generally have no guaranteed access to procurement procedures in the EU, unless a (partial) opening of the EU procurement market has been agreed with the respective country (e.g. the GPA being the most important treaty), which opens the EU market for public procurement to the other contracting parties. There are no equality agreements with many other countries, including inter alia China. Bidders from these countries may be excluded from procurement procedures.

If foreign bidders are eligible to participate in tender procedures, they must fully comply with the minimum qualification requirements set out in the tender documents. Therefore, eligible foreign bidders are in general afforded the same rights and remedies in tender procedures. However, the requirements of the contracting authority in the tender documents or for the performance of the contract may result in de facto restrictions on the participation of foreign bidders in procurement procedures (e.g. permits to be obtained for the performance of the contract or proof of suitability provided by the bidder from its country cannot be verified by the contracting authority etc).

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?

In principle, the establishment of a local branch or subsidiary is not a precondition to participate in tender procedures under the FPA 2018. If a foreign bidder therefore has a subsidiary within the EU or EEA and this subsidiary participates in an award procedure, discrimination is not permitted. Therefore, a national subsidiary would be granted the same rights and remedies as nationally owned companies. In any case, a (national, EU or an eligible non-EU) bidder will have to prove full compliance with the conditions and requirements set out in the tender documents to be able to participate.

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

In case of applicability of the FPA 2018, Austrian administrative courts are responsible for deciding on applications regarding (i) the review of decisions by contracting authorities prior to the award of the contract and (ii) the court's declaration of a violation of procurement laws once the contract has been awarded. Such a declaration of the violation of procurement laws is required if a bidder seeks civil law damages before a civil court.

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

Pursuant to Section 365 of the FPA 2018 post-award contract amendments are only permissible if the amendments are not material. Material amendments of procured contracts would require the repetition of a tender procedure.

In general, if one of the requirements set out under Section 365 Paragraph 3 of the FPA 2018 is fulfilled, an amendment is to be considered a non-material amendment. These requirements include certain amendments to the contract value (e.g. 10% of the initial value of the contract in the case of supply and service contracts and 15% of the initial amount in the case of works contracts, if the amendment does not exceed the financial thresholds), amendments based on precise and explicit contractual amendment clauses and certain cases in which a new party replaces the contractor to whom the contracting authority had originally awarded the contract.

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

The FPA 2018 is applicable to every procurement with a contract value even below the financial thresholds by public authorities and other entities governed by the FPA 2018.

Therefore, direct awards are the most common procurement procedures conducted by public authorities.

Direct awards are permissible under the FPA 2018 if the contract to be procured has a value of under EUR 100,000. Provided that the estimated contract value has been determined in accordance with the FPA 2018, no special justification is required to directly award a contract if the value of the contract falls below the aforementioned threshold.

Where there is a potential cross-border interest in the contract to be awarded, the award of the contract must be made transparent and public. However, the contracting authority is in principle free to structure and determine the procedure for the direct award of contracts. Certain documentation obligations must be observed (e.g. any offers obtained, the object and value of the contract, the contractor and any examination of price appropriateness must be documented).

The possible remedies for challenging the direct award are very limited. Prior to awarding the contract, only the choice of the direct award procedure itself can be challenged. If the contract has already been awarded, an application to declare that the award procedure was unlawfully conducted without prior publication of a notice can be filed.