



FEDERAL PROCUREMENT ACT OF 2006: ANOTHER ATTEMPT AT CODIFICATION

The enactment of the Federal Procurement Act of 2006 (BVerG 2006) on 1 February 2006 is yet the fourth attempt since 1993 to codify the public procurement provisions. The new Act aims to implement the new EU procurement directives. Since case law of the European Court of Justice made numerous changes necessary, legislators once again decided on a course of total revision. The comments below provide a short overview of some interesting alterations.

As the past procedure was found to be rather clumsy in some procurement situations, legislators have created new **types of procurement procedures**, in order to better comply with the different requirements governing the state purchasing system: the “dynamic purchasing system” is a fully electronic procedure for the online procurement of marketable services. The “competitive dialogue” is a flexible procedure that does away with most of the formalities and is designed for highly complex projects where bidders may be included already when defining and specifying the object of the procurement. The “framework agreement” has now been extended to tender procedures above the defined thresholds, in order to facilitate participation for small and medium-sized enterprises (SMEs) in procurement procedures.

So far, contracting authorities, in designing the tender documents, had to limit their own input to the specification and contract “to a minimum” when suitable guidelines, such as the Austrian **ÖNORM** standards, were available. As of now, deviations may be specified “in individual items” (i.e. not on an overall scope), but the entity must inform potential bidders upon their request of its reasons for doing so. While,

according to the explanatory notes of the Act, it is not necessary to furnish any justification on objectivity grounds for a deviation, a limit is drawn when it comes to abuse and violation of bonos mores. Considering, however, that objectivity is mandatory in general, the question is how to reason any deviation if not on objectivity grounds. In our opinion, contracting authorities will be allowed to deviate from established ÖNORM standards in their tender documents only when there is an objective reason for it.

Considering that it is now possible (since 1 January 2006) to convict legal entities and partnerships on criminal offences (Verbandverantwortlichkeitsgesetz, Act Governing the Liability of Enterprises for Activities Punishable By Court), it is conceivable that any conviction of an “enterprise” may cause it to be **excluded from procurement procedures** on the grounds of lacking professional conduct, even when the acting managers themselves have no criminal record whatsoever. On the other hand, minor arrears in social insurance contributions, taxes or other duties no longer automatically exclude them from the tendering procedure.



Where the past regime was considered to be “amenable to alternative bids”, a future bid for an alternative performance (**alternative bid**) is to be acceptable only when such was expressly permitted by the contracting authority. A newly introduced option is the **change bid**, where the change concerns a minor technical change of equivalent value but must not deviate from the tendered performance to the same extent as is possible in an alternative bid. A (technical) change bid is permissible in conjunction with a main bid in line with the invitation provided that the tender documents do not stipulate anything different. With this, disputes are bound to occur whenever such a bid is selected to get the award or is eliminated, because distinguishing it from an alternative bid is difficult and can be done only on a case-to-case basis.

The **stand-still period** within which no award must be made because it would be null and void now generally extends to two weeks upon announcement of the award decision. In special cases, e.g. for tender procedures below the threshold and in accelerated procedures, that period is shortened to seven days. Same as the award decision, the cancellation decision and the elimination decision must now be announced to the bidders, and they are now open to a review as decisions against which a separate appeal can be lodged. A cancellation of the tendering procedure is now permissible when there are objective reasons.

Several other changes regarding legal protection should be noted as well: The Bundes-Vergabekontrollkommission (Federal Procurement Supervision Commission) has been abolished. The **appeal periods** were simplified and partly shortened. As a rule, applications for a review of a decision against which a separate appeal can be lodged must be filed within two weeks of obtaining knowledge of it. In special

cases, such as tender procedures below the threshold or for accelerated procedures, the period is shortened to seven days. As has been the case before, speed thus is of the essence because an unlawfulness will be “cured” unless it is asserted in good time.

To strike an odd note in conclusion: the **thresholds** given in the BVerG 2006 are invalid. Legislators used the amounts from the last threshold regulation, but the European Commission has since then identified new thresholds in a regulation that has applied directly in Austria since 1 January 2006. In this respect, the BVerG 2006 therefore must not be taken literally and the thresholds should (or rather must) be adjusted by an ordinance to be issued by the federal government.

It remains to be seen whether legislators have finally “scored” with the BVerG 2006. In view of the considerable economic importance of public procurement and the ongoing evolution of this relatively young field we can be pretty sure of only one thing: there is an odds-on chance of further amendments.



For more information on this subject please contact:

Dr. Raimund Madl
Attorney-at-Law and Partner

madl@preslmayr.at



For more information on this subject please contact:

Mag. Oliver Walther
Associate

walther@preslmayr.at

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PETER RESCH
accepted as a new partner



Our law firm continues on its growth path:

In late November 2005, Mag. Peter Resch was made a new partner. We know him well: he already worked for us for two years as associate. He concentrates on company law, competition and cartel law. We celebrated his entry by throwing a party in December together with his friends and our staff members.