

Public procurement law and “Corona” – compatible?

The coronavirus poses enormous challenges to our health, economic and social systems. In order to be able to cope with these challenges, the public authorities are providing resources and funding on a scale never seen before. There is an enormous demand for protective equipment, such as respiratory masks, overalls and respirators. Quick and unbureaucratic actions, in order to protect doctors, nursing staff, patients and all of us in the best way, are necessary. Nobody thinks about public procurement law, at least not at first. But the question of public procurement law will arise at the latest, when obtaining tenders to carry out the procurement.

The public authorities have to use the regime of public procurement law to their procurements on construction, which is based on the Austrian–Federal–Public–Procurement Act 2018 (“Bundesvergabegesetz 2018” – “BVerG 2018”). This law has to be used, for example, for the public procurement of works, supplies or services. The BVerG 2018 provides various regulations in terms of contract value and procedure. The aim of BVerG 2018 is to ensure the principles of transparency, price adequacy and equal treatment of bidders in a competitive procedure. This is naturally linked to special formalities, starting with the announcement of the invitation to tender, fixed procedural rules and fixed (minimum) deadlines, and extending to a standstill period before the contract is awarded, including the possibility of appeal the invitation to tender.

The question is whether public procurement law, in its formalistic configuration, is created for times of calm and normality only, or whether it does provide instruments by which even times of crisis can be done.

What opportunities does the BVerG 2018 offer in the crisis?

It would be premature to conclude that in an exceptional situation such as the present one, the application of public procurement law would automatically be de facto excluded. The BVerG 2018 includes various instruments that are designed to make things easier and to enable an acting in accordance with public procurement law even in times like these:

- Services, such as deliveries, may be awarded by negotiated procedure without prior publication of a contract notice. This is only permitted, if there are extremely urgent overriding reasons beyond the control of the contracting authority which could not have been foreseen by it and which make it impossible to comply with the time limits laid down in traditional procedures. This will often be the case in connection with the COVID–19 pandemic.
- The negotiated procedure without prior publication is connected to the principle that the contracting authority must invite at least three contractors to submit a tender. Differing from this principle, the procedure can be done with only one contractor alone, if certain reasons exist, which include extreme urgency. This means maximum flexibility in the procurement process.
- If, in a particular case, the reasons do not justify the use of the negotiated procedure without prior publication (possibly with only one contractor), a reduction of time limits, such as the time limit for submission of tenders in open procedures to 15 days, or even shorter in the sub–threshold area, may be considered as a simplification.
- Certain service contracts in the field of catastrophe and civil protection and hazard prevention, such as rescue services or civil defence, are completely excluded from public procurement law. The same applies to non–economic services of general interest.
- Existing contracts may be extended in the event of the occurrence of circumstances that could not have been foreseen. The limit of amendment is determined by following the overall nature of the contract and a 50% threshold of the original contract value.
- In the event of a petition for review is granted, the balance of interests to assess the interim injunctions will often speak in favour of immediate implementation of the contract without any delay, especially in times like these.
- Overall, the public procurement law is prepared for the procurements necessary to pass the crisis. Especially in view of the remarkable procurement values, this cannot be done without any transparency and comprehensibility, even if this is reduced to a minimum of bureaucracy.

Caution is advised against overly hasty “alternative” procurement models. According to the case law of the European Court of Justice and the Austrian Administrative Court, the person of the contracting authority is judged by a functional and economic point of view. The obvious advance of a private third party, who carries out the procurement for the contracting authority, does not eliminate the validity of the awarding regime for the procurement process.

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We point out that the legal situation can change constantly, but we are on effort to keep the contents up to date.



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