BEITEN BURKHARDT

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The ten most important Questions and Answers regarding the Operation and Arrangement of Contract Award/Procurement Procedures in the Corona Crisis

This article provides you with answers to the ten most important procurement right questions arising at present in current and planned contract award and procurement procedures due to the Corona crisis. The selection is based on numerous questions submitted to us recently by awarding offices, bidder representatives or specialist advisers.

1. Which possibilities of accelerated procurement and provision of protective clothing, medical devices, external laboratory services or other supply performance and services for the treatment and the protection against the Corona virus are given for public-sector clients?

Procurement law provides for simplified procedures in case of extraordinarily urgent procurements and purchases. In case of purchases in connection with the COVID-19-pandemic it may be admissible, under certain conditions, to instruct directly one or more companies without formal procedure. This applies both to the above-threshold sector under GWB-procurement law as well as to the sub-threshold sector under the budgetary law of the federal government and the Länder.

Regarding the possibilities of accelerated purchases in the above-threshold sector please see in detail our article in the BEITEN BURKHARDT Corona Information Center of 23 March 2020: Link.

An overview of the meanwhile published decrees, circular letters and instructions at EU-, federal and Land level is included in our article in the BEITEN BURKHARDT Corona Information Center of 23March 2020: Link.

2. Which possibilities exist to deviate from statutory minimum deadlines in case of planned "regular" procurement procedures?

In case of the EU-wide awarding of supplies and services it is possible to shorten the regular deadlines for the respective type of procedure if there is "duly substantiated urgency".

See in this respect our article in the BEITEN BURKHARDT Corona Information Center of 23March 2020: Link.

In the sub-threshold sector the client is obliged pursuant to Section 13 UVgO (Section 10 (1) VOL/A) to determine reasonable deadlines and time-limits for the individual case (i.e. also short deadlines, if required).

3. What must / should be observed upon determination of the participation and tendering periods in view of foreseeable delays arising in the handling on the part of the bidder (telework, etc.)?

The tender/submission and participation periods pursuant to procurement law must always be reasonable. To the extent that on the part of the bidder - due to the Corona crisis - foreseeable delays are arising in the handling it may be necessary or advisable in the individual case to determine periods and deadlines exceeding the statutory minimum periods.

EU-procurement law stipulates statutory minimum periods for certain procedure types and phases. In the supplies and services sector the tender/submission period in the open procedure amounts, for example, to 30 days (case of electronic procurement) pursuant to Section 15 (2) VgV (Regulation on the Award of Public Contracts). The tender/submission and participation periods, however, must always be reasonable (Section 20 (1) VgV). Upon determination of the periods for the receipt of the tenders and participation applications the complexity of the service and - not least - the time for the preparation of the tenders have to be taken into account.

Upon determination of periods the public client must, therefore, take the current circumstances caused by the Corona crisis into account and review the reasonableness in the individual case. Depending on the market situation and the bidder structure it may, therefore, be required to extend the minimum periods in favour of the bidders. This applies, in particular, if concrete delays in the operational procedure of the bidders are foreseeable which might have an effect on the proper preparation of the participation applications or tenders. In such cases the delays in operational and communcation procedures upon determination of periods and time-limits have to be taken into account sufficiently. An example is that the bidders use or have to use increasingly teleworking / home office possibilities and, in so doing, communication and particularly also co-signing channels are becoming more difficult

and last longer. This applies all the more in cases of temporary shortage of personnel due to health reasons or due to quarantine ordered.

Frequently, it is also in the vested interest of the clients to provide for longer periods in the current crisis than required by law. Since the time-wise concession could substantially increase the number of bids and their quality as to content. Thus, the principle of efficiency and economy could be achieved also in times of crisis.

For national procedures the same applies. Also here reasonable participation and tender/submission periods must be fixed for the procurement of supplies and services pursuant to Section 13 Section 10 VOL/A.

4. What must clients and bidders observe in already ongoing procurement procedures? Can a cancellation be taken into account in case of changes in the object of service/performance or contract conditions resulting from the crisis?

In already ongoing procurement procedures the clients must check whether the determined tender/submission and participation periods and the further time schedule of the procedure are still reasonable and appropriate. In so doing, they should also review the contractual execution periods and deadlines as to their realisability. Any simplifications of the course of procedure should be considered. In certain individual cases also a cancellation and a new start of the procurement procedure could be taken into account.

Also in ongoing procedures, which have no direct "Corona connection", many clients are confronted with questions concerning the extension of deadlines or the prolongation / adjustment of procedure phases (e.g. of bidding negotiations).

In already ongoing procurement procedures clients must review whether due to the particular circumstances of the Corona crisis adjustments of the planned course of procedure are required or advisable in the individual case. It could be possible to reasonably extend the tender/submission or participation periods (see Question 3). It is also recommendable, if required, to simplify and facilitate process techniques (e.g. replacing third party declarations by own declarations). If the course or arrangement of the procedure is adjusted, then the bidders have to be informed accordingly in a transparent manner and - if required - the contract notice has to be adjusted.

Furthermore, clients should review - when appropriate - whether the existing IT-infrastructure (in the home office) guarantees a reliable and legally watertight handling of the procurement and awarding procedure. Due to modified maintenance and support routines also this could result in procedural impediments. If technical problems arise in its sphere of responsibility the

client may be liable for organisational faults (cf. VK Westfalen, Decision of 20 February 2019 - VK 1 - 40/18).

Insofar as an extension of periods or other measures concerning the arrangement of the procedure are out of the question, then in certain cases a cancellation and a new start of the procurement and awarding procedure is possible. Above all, this can be the case if - due to the Corona crisis - changes occur with regard to the object of the service/performance, the time-limits and deadlines or also with regard to the other contractual conditions. In so doing, the cancellation reasons pursuant to Section 63 (1) VgV / Section 48 (1) UVgO have to be reviewed and any risks attached to possible damage claims have to be taken into account. Cancellations as a result of the crisis may be justified, in particular, by essential changes of the fundamentals and the principles of the procurement procedure or other serious reasons (Section 63 (1) No. 2 and 4 VgV / Section 48 (1) No. 2 and 4 UVgO).

On the part of the bidders the Corona crisis could ensue that bidders are no longer willing to adhere to bids/tenders or applications made. Insofar as bids can no longer be revoked after expiration of the tender/submission period, the bidders are bound by their declaration of intent under civil law until expiration of the given period of validity (Section 145 German Civil Code). In this case bidders should be advised to very carefully review the possibilities and requirements in order to avoid any liability for damages.

However, clients should consider these circumstances and the calculation difficulties, which are connected with this on the part of the bidders, when determining the periods of validity and when they are asked to grant an extension of periods of validity frequently made only in standard form.

5. Can bidding negotiations, presentations or clarifying meetings also take place by telephone or web-conferences? What has to be observed in case of such forms of communication?

Yes. *Also the bidding negotiations usually carried out while all parties concerned are present or presentation and clarification dates can be handled, principally, also by electronic means. However, the IT used must guarantee the integrity, confidentiality and authenticity of the transferred data.*

In Sections 9 to 11 VgV the law, however, stipulates certain requirements regarding the use of electronic communication means in procurement and awarding procedures. Inter alia, an authentification process as well as an encryption is required. The electronic means must be available for all bidders equally and must be compatible with generally available devices and

programs. Only those technical means of communication may be used which guarantee the integrity, confidentiality and authenticity of the data.

Prior to the use of video conference devices or the like available to the client, the latter has to check in the individual case whether this technology complies with the statutory requirements.

Also the sufficient and adequate documentation of the negotiations and conversation meetings are of particular importance in this connection (inter alia, by time stamping). With regard to recordings the data protection requirements have to be complied with as well.

With regard to the question of admissibility of presentation valuations in general which is disputed in case at present, reference is made to our Newsletter of February 2020: Link.

6. Is it admissible to exclude bidders of COVID-19 risk regions from a procurement and awarding procedure?

No. *Also in times of the Corona crisis the principle of non-discrimination of all candidates and bidders applies in procurement and awarding procedures. A prior and general exclusion of bidders of COVID-19 risk regions is, therefore, inadmissible.*

However, there might be cases in which the performance of the bidders in case of existing prohibitions on leaving or entering the territory and curfews could appear to be doubtful with regard to the execution of contracts. In situations of such kind it must be reviewed always in the individual case whether and to what extent the qualification of the bidder for the concrete contract is concerned. Insofar we advise to directly communicate and clarify the situation with the bidder concerned to discuss existing doubts and any measures of the bidder concerning the maintenance and preservation of his performance and efficiency. Exclusion is only a measure of last resort.

Of further consideration should be the possibility of the bidder to refer to the capacities of other companies regarding the necessary economic and financial as well as technical and professional efficiency for the contract. This is the bidder's option if he proves that he actually has the means required for the contract. Such proof can be given, for example, by submission of a relevant declaration of commitment of these other companies (as a rule, subcontractors or affiliated companies).

7. Must a bidder fear the exclusion from future awardings pursuant to Section 124 (1) No. 7 GWB (Act against Restraints of Competition) in case of delays in performance caused by a crisis (e.g. as a result of plant closures)?

No. *The reason for exclusion of Section 124 (1) No. 7 GWB only applies in case of improper performance of a former contract. Performance delays due to the COVID-19 pandemic are covered, as a rule, by the term and principle of force majeure so that there exists no fault on the part of the contractor and, therefore, no improper performance is given from the beginning.*

The optional reason for exclusion of Section 124 (1) No. 7 GWB applies if the company has fulfilled an essential requirement in the performance of a former public contract or concession agreement in a significantly or permanently improper manner and if this resulted in a premature termination, damages or lead to a comparable legal consequence. An improper performance is given if there is a case of non- or malperformance. Relevant defects are insofar also the supply and performance failure.

The improper fulfilment of a contractual obligation, however, always requires liability on the part of the contractor (intentional or negligent fault). The existence of force majeure, however, excluded any fault, in principle, if there is no contributory negligence on the part of the contractor regarding the situation, for example, since the contractor does not give leave to recognised sick employees or does not provide for sufficient hygiene at the workplace. As a rule, the concluded contracts contain provisions for the case of force majeure, sometimes by inclusion of Section 5 No. 2 (1) VOL/B or Section 6 (2) No. 1 lit. c VOB/B.

The COVID-19 pandemic is, in principle, qualified to trigger the elements of force majeure. Force majeure means an unforeseeable, external event that cannot be prevented in an economically reasonable manner by utmost diligence to be expected according to the situation and must not be accepted because of its frequency. The existence of these requirements has to be reviewed in the individual case. If, however, a major part of the employees of the contractor are subject to quarantine by the relevant authorities and if the contractor cannot find replacement on the labourmarket or by sub-contractors, if the employees cannot reach the place of performance due to travel bans and if no replacement is possible or if the contractor cannot provide (building) materials, then, as a rule, a case of force majeure should be given and should also be provable. See in this respect also the decree BW I 7 - 70406/21#1 of the Federal Ministry of the Interior, for Construction and Homeland (BMI) of 23 March 2020 concerning building contract questions of the Corona pandemic: Link.

8. How will the envisaged crisis support regulations concerning the suspension of the duty to report insolvency proceedings affect the reason for exclusion of Section 124 (1) No. 2 GWB? Must an insolvent company nevertheless fear to be excluded from public awardings?

No. *Within the scope of discretion concerning the optional reason for exclusion of Section 123 (1) No. 2 GWB clients, as a rule, would not have any reason to exclude companies which are suffering from and are affected by the Corona crisis.*

A company can be excluded from the awarding procedure pursuant to Section 124 (1) No. 2 GWB if the company is insolvent, if insolvency proceedings have been instituted over the assets of the company or if similar proceedings have been applied for or instituted, if such proceedings are dismissed for lack of assets, if the company is in the process of liquidation or has suspended its activities. This is an optional reason for exclusion with regard to which the client has a margin of discretion (reviewable by court only to a limited extent).

On 27 March 2020 the COVID-19 Insolvency Supense Act (COVInsAG) was published in the Federal Law Gazette. The rule applies retroactively as of 1 March 2020 and provides for a suspension of the duty to report insolvency proceedings until 30 September 2020. In doing so, the companies should be given time necessary to apply for governmental assistance and to push restructuring efforts. For organisational and administrative reasons it cannot always be ensured that liquidity supports are received by the companies within the three-weeks' period to report insolvency proceedings stipulated by law (cf. Section 15a Insolvency Ordinance - InsO). Pre-requisite for the suspension of the period to report insolvency proceedings is that the insolvency reason is based on the impacts of the COVID-19 pandemic and that due to the application for public support or financing or restructuring negotiations there are good prospects for recovery. If the debtor has not been insolvent already on 31 December 2019, a statutory assumption applies in the latter's favour that these requirements are met.

In view of the objective it appears only logical not to sanction affected companies also within the scope of an awarding procedure. Insofar as companies are able to credibly show the institution of such restructuring measures, as a rule, there should be no reason for clients within the scope of their discretion to excluded companies suffering from the Corona crisis from the awarding procedure.

9. Should public contracts be offered for bidding at a later date due to the pandemic, since it has to be feared that fewer tenders will be submitted due to the current situation?

No. *Projects ready to go out to tender should be principally awarded and the respective planning should be continued.*

The Federal Government and several governments of the Länder (federal states) clearly communicated that projects ready to go out to tender should be awarded and that relevant plannings should be continued if possible (see Decree BW I 7 - 7046/21#1 of the Federal Ministry of the Interior, for Construction and Homeland (BMI) of 27 March 2020 concerning procurement right questions pertaining to the Corona pandemic Link. The key aim of the different measures concerning facilitated awarding procedures in times of crisis is to maintain the procurement and provision of supplies and services by public clients and, in so doing, to secure coverage of existing needs. Missing orders and contracts should cause considerable problems both for public clients as well as for the economy.

Any fears could and should be mitigated by the client by arranging the procedure and contract in a manner taking the interests of the bidders comprehensively into account, for example, by extending participation and submission periods (see Question 3, by using possibilities of e-communication increasingly and by communicating with the bidders always in a transparent manner (see Question 4) but also by considering and, if possible, realistically adjusting contractual execution periods and dates.

10. Which are the impacts of the Corona crisis on review proceedings under procurement law?

The compliance with short time-limits for decisions and for lodging an appeal based on the need for speed could be difficult in the present situation. Presently, it should be noted that the procurement chambers will make use of the extension and prolongation possibility pursuant to Section 167 (1) s. 2 GWB. In view of the longer duration of the procedures resulting therefrom it has to be expected that - increasingly - interim awards are required as interim solutions and in individual cases - for example, in the utility sector - also the awarding of contracts pursuant to Section 169 (2) GWB may be taken into account.

If you have any questions, please contact Lars.Hettich@bblaw.com, Sascha.Ophyes@bblaw.com or Christopher.Theis@bblaw.com.

For further information concerning legal consequences of the Corona crisis reference is made to the Corona Information Center on the BEITEN BURKHARDT website: Link.

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