

## Projects & Procurement - Austria

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### New public procurement regime introduced

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#### Introduction

#### Defence Procurement Act

#### Amendment to Federal Public Procurement Act

#### Introduction

On February 16 2012 a new law was published in the *Federal Law Gazette* (2012/10 I). The law comprises:

- the Federal Act on the Coordination of Procedures for the Award of Contracts in the Fields of Defence and Security (also known as the Defence Procurement Act) (Article 1 of the law); and
- the 2012 Amendment to the Federal Public Procurement Act (Article 2 of the law).

The Defence Procurement Act, as well as major parts of the Amendment to the Federal Public Procurement Act, will enter into force on April 1 2012.

#### Defence Procurement Act

#### ***Implementation of EU Defence and Security Directive***

The Defence Procurement Act implements the EU Defence and Security Directive (2009/81/EC). This implementation follows some delay, since the directive was expected to have been transposed into national law by August 21 2011.

#### **Scope**

The act follows the model of the Procurement Act, but is a separate law that

is *lex specialis* (ie, special law) to the general rules of the Procurement Act. Subject to Articles 30, 45, 46, 55 and 296 of the Treaty on the Functioning of the European Union (awards under these articles do not fall within the scope of the Defence Procurement Act or the Procurement Act, but are subject only to the fundamental freedoms of the treaty), the Defence Procurement Act applies to contracts awarded in the field of defence and security for:

- the supply of military equipment, including any parts, components and/or subassemblies thereof;
- the supply of sensitive equipment, including any parts, components and/or subassemblies thereof;
- works, supplies and services that are directly related to military or sensitive equipment;
- works and services for specifically military purposes; and
- sensitive works and sensitive services.

The Defence Procurement Act covers the above contracts regardless of the amount of the award. The contracting authority can freely choose between:

- the restricted procedure with prior publication of a contract notice; and
- the negotiated procedure with prior publication of a contract notice.

### ***Relaxed regime below certain thresholds***

Below the threshold of €75,000, contracts can be directly awarded with publication of a contract notice and without tender proceedings involving more than one tenderer. Furthermore, below the threshold of €500,000 for works contracts and €200,000 for supply and service contracts, a direct award with prior publication of a contract notice is admissible. With respect to awards below the thresholds of €387,000 for supply and service contracts and €4.845 million for works contracts, a public procurement regime-'lite' applies, which gives the contracting authority greater discretion in line with the regime of non-priority services under the Procurement Act (and EU Directives 2004/17/EC and 2004/18/EC), provided that the tender procedures follow the principles of equal treatment and non-discrimination and grant sufficient transparency.

### ***Specific rules for security of information and security of supply***

Since the Defence Procurement Act relates to the award of contracts in the field of defence and security, the law contains specific rules for measures and requirements necessary to ensure the security of such information at the requisite level. To this end, the contracting authority may, among other things, require that the tender comprise a commitment of the tenderer and

the subcontractors to safeguard appropriately the confidentiality of all classified information. With regard to the security of supply, the contracting authority may in particular require that any tenderer provide certification and documentation demonstrating, to the satisfaction of the contracting authority, that the tenderer will be able to honour its obligations regarding the export and transfer of goods associated with the contract.

### ***Rules to be applied to review proceedings***

In respect of remedies, the act declares that the regulations regarding review proceedings of the Procurement Act are also applicable for the review of awards of contracts in the field of defence and security. The same applies to confirmation proceedings after the award. In addition, the Defence Procurement Act provides for certain organisational rules with respect to classified information.

## **Amendment to Federal Public Procurement Act**

### ***New direct award procedure***

The amendment introduces the new award procedure of "direct award with prior publication of a contract notice" below the thresholds of €500,000 for works contracts and €130,000 for supply and service contracts. Below these two new thresholds, public contracts can be directly awarded with prior publication of a contract notice. This means that the respective contracting authority must publish a contract notice (at least on a national level), pursuant to which interested economic operators can submit an application to participate in the direct award. Such companies must be selected pursuant to objective, non-discriminatory selection criteria that relate to the planned award.

Furthermore, the amendment reduces the current threshold for direct awards from €100,000 to €50,000. Consequently, award procedures that are initiated before April 1 2012 can still benefit from the higher direct award threshold of €100,000.

The Procurement Act applies not only to awards above the thresholds of EU Directives 2004/17/EC and 2004/18/EC, but in principle to all types of awards of public supply, service and works contracts.

### ***Greater transparency for award decisions***

Similar to other types of contract, such as works, delivery and priority services contract, the amendment introduces a requirement for non-priority services that the communication of the award decision contain a summary of the characteristics and relative advantages of the tender selected, the name of the successful tenderer and the award sum.

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