

Projects & Procurement - Austria

Partial preclusion of participation documents in award procedures

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October 16 2012

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Introduction

During the course of an award procedure, it is not unlikely that the contracting authority will be requested to amend the tender documents during the participation or tender period. This can happen for various reasons, but in a large number of cases bidders request amendments because they feel discriminated against by strict requirements set out in the tender documents, which - if they remain unchanged - would make it impossible for certain bidders to succeed or even participate in the award procedure. If the tender document was amended, the new tender document and a notice setting out the changes of the tender document would need to be published and, if necessary, the period for the submission of tenders would have to be extended.

Review of tender documents

According to the Federal Public Procurement Act, applications for review of participation documents and tender documents can - in most cases - be filed with the competent procurement review body up to seven days before the expiry of the time limit for tender submissions. After the time limits for initiating review proceedings have expired, the right to apply for a review is precluded. Therefore, even if the tender document contains discriminating provisions, and hence is unlawful, bidders can no longer combat these provisions.

Partial change of tender documents in review proceedings

If the contracting authority only partly changes the tender documents and extends the tender period, the question arises as to which time limits for initiating review proceedings for the changed tender documents apply. For open procedures, the Viennese procurement review body (VKS) has decided that the amendment of tender documents itself must be qualified as a "separately contestable decision" and therefore the remaining part of the tender document is precluded and cannot be the subject of such review proceedings. In its reasoning, VKS pointed out that this decision was made mainly because the prolonged tender period should not enable bidders that had failed to file a respective application to review the tender document in time to make up for past omissions.

Partial change of participation documents in review proceedings

VKS was recently confronted with a case of potential partial preclusion of tender documents. The contracting authority initiated a negotiated procedure and the participation documents contained discriminating requirements that excluded certain bidders from the tender competition. Even after several changes, the discriminating character of the participation document remained. With each modification the contracting authority prolonged the participation period. Eventually, the bidder which had requested the amendments to the participation documents initiated review proceedings. Bearing in mind VKS case law in this matter, the application would have been too late and the participation document precluded in its main parts. However, despite the above-mentioned VKS case law, the review body did not issue a formal decision (eg, reject the application), but rather decided on the merits.

As the parties to the proceedings reached an agreement during the review proceedings, VKS provided no reasoning for its decision. On the one hand, the reasons for the different procedural treatment of participation documents and tender documents in review proceedings could be that, in contrast to the statutory rule for open

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procedures, the amendment to a participation document in a negotiated procedure is not a 'separately combatable decision', and hence the case law of VKS does not apply. Alternatively, in the case at hand, the partial annulment of 'non-precluded' provisions would have led to a 'participation document-torso' and a change in the circle of bidders. In such a case, the review body is obliged to declare the whole document null and void.

Finally, with regard to this decision on the merits, the conclusion must be that the case law of VKS on the partial preclusion of tender documents in open procedures is not (in any case) valid for participation documents in negotiated procedures.

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