

Green Public Procurement for Buildings
WP 4.3 - Procedures and Guidelines

Guide on the Austrian Action Plan for Sustainable Public Procurement (naBe) in Building Construction

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Content of this document

This guide presents the most important information on green public procurement and the Austrian Action Plan for Sustainable Public Procurement (naBe Action Plan) and the related criteria, which are specifically related to building construction. In addition, the application of the Federal Procurement Act 2018 (Bundesvergabegesetz 2018 - BVerG 2018) in connection with ecological criteria is explained. The information is presented in such a way that it can be used by small and medium-sized enterprises (SMEs) on the one hand and by public procurers (municipalities, cities, Länder, etc.) on the other.

On the one hand, this document is intended to provide SMEs with information on the evidence they need to provide in order to fulfill the criteria of the naBe Action Plan. On the other hand, public procurers should receive an overview of the possibilities of integrating ecological criteria in public procurement contracts through this document.

List of abbreviations

ANAC	Anti-Corruption Agency
WP	Work Package
APE	Friuli Venezia Giulia Energy Agency
BVerG 2018	Federal Public Procurement Act 2018
CAM/MEC	Minimum environmental criteria (Criteri ambientali minimi)
CC	Competence Centre(s)
EPD	Environmental Product Declaration
ETS	Emissions Trading Sectors
FPA	Federal Procurement Agency, Italy
GPP	Green Public Procurement (GPP)
IPP	Integrated Product Policy
SME	Small and medium-sized enterprises
LCC	Life cycle costs
MoE	Ministry of the Environment, Italy
naBe	Green Public Procurement, Austria
OI3 Index	Eco Index 3
PoC	Competence Platform
PP	Public procurement
Dir. 2014/24/EU	Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC
TCO	Total Cost of Ownership
GHG	Greenhouse gas

1. Environmental policy framework

1.1. EU Climate and Energy Package 2020

Within the framework of the European Union's climate and energy package, Austria, together with the other 27 EU Member States, is contributing to the goal of reducing 20 percent of GHG emissions (greenhouse gas emissions) compared to 1990 levels in the period 2013 to 2020. This target was divided among the member states in the area of non-emissions trading sectors (agriculture, transport, buildings, trade, waste management, F-gases) by EU decisions in the so-called "effort sharing".

Accordingly, Austria is obliged to reduce the GHG emissions caused in these sectors by 16% by 2020 compared to 2005. This decision was taken at national level in Austria through the Climate Protection Act (KSG; BGBl. I No. 106/2011).

1.2. EU framework for climate and energy policy until 2030

The 2030 climate and energy policy framework continues the 2020 climate and energy pack-age and aims to be in line with the 2050 targets.

According to the EEA report "Trends and projections in Europe 2020" by the European Environment Agency, further reductions in GHG emissions from the effort sharing sectors are required in 15 Member States, including Austria, compared to the base year 2005 (EEA 2020). Between 2005 and 2014, a downward trend in GHG emissions was observed in Austria, but this trend reversed again in the following years (BMK 2020) (see Figure 1).

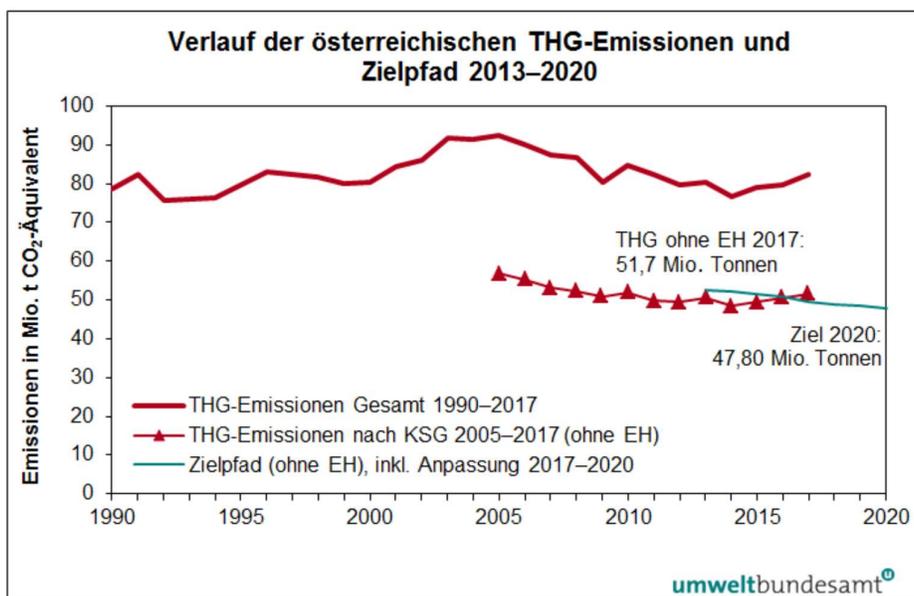


Figure 1: GHG emissions trajectory (total between 1990 and 2017 and target pad (without emission proximity) between 2013 and 2020 (BMK 2020)

Overall, the European Union is on track to meet the targets of the Climate and Energy Pact 2020 (EEA 2020). However, it should be noted that after 2020, a much steeper reduction path is required under the 2030 climate and energy policy to achieve the goal of climate neutrality by 2050. The 2030 climate and energy policy target is

to reduce GHG emissions by at least 40% by 2030 (compared to 1990). The target for the non-ETS (non-Emissions Trading) sectors is a 30% reduction in GHG emissions (for the EU as a whole). In terms of effort sharing, an individual GHG emission reduction of 36 % compared to 2005 was accordingly set for Austria in Regulation (EU) 2018/842. The Climate and Energy Policy 2030 is the basis for the long-term goal of the European Union to achieve climate neutrality by 2050. In this context, Austria has defined the long-term strategy 2050 - Austria in which fields of action are formulated for the individual sectors (BMNT 2019).

1.3. Fields of action of the Long-Term strategy 2050 - Austria for buildings

The following fields of action were defined in the Long-Term Strategy 2050 for the buildings sector and are intended to make an important contribution to achieving climate neutrality by 2050:

- Focus on the construction of low energy buildings
- Promotion of thermal-energy refurbishment of existing buildings and improvement of the efficiency of heating systems.
- Phasing out fossil liquid fuels
- Switch to renewable gas
- Optimisation of energy planning (climate-friendly energy supply and energy production)
- Increasing efficiency and supply through district heating/cooling and waste heat
- Use of the building as part of the energy supply

Public procurement also plays a central role in the context of the EU Action Plan for the Circular Economy, published in March 2020, in which requirements for the carbon footprint of products or recycling can be set and thus the market can be shaped in the respective supply chains.

2. Policy framework of the naBe Action Plan

The political background of the naBe Action Plan is an initiative of the European Commission from 2003, in which all European Member States were called upon to introduce national action plans for the greening of public procurement. This was communicated to the European Member States in COM(2003)302.

Following the demands of the European Commission, the Austrian government decided on 11 July 2007 in the course of a Council of Ministers resolution to draw up an Austrian action plan for sustainable public procurement.

Starting in 2007, environmental performance sheets with ecological requirements for the procurement groups ICT equipment, paper, cleaning agents, road vehicles and electricity were drawn up within the framework of a pilot phase for ecological public procurement by the federal government.

The development of a national action plan for sustainable public procurement was started in 2008, the final version of which was published in the course of the "Presentation to the Council of Ministers of 14 July 2010" (Aktualisierung des Aktionsplans 2018-2020).

After eight years of use by public procurers, a revision of the naBe Action Plan was decided in 2018. The objectives of the update concern the following points:

- Updating the criteria according to the state of the art and the legal framework or legal requirements,
- Strengthening the regional and local economy through a stronger focus on short procurement channels and quality labels,
- Optimisation and, if necessary, combination of the criteria according to the needs of the users,
- Expansion to include procurement groups of high relevance for public procurement and the achievement of goals in the areas of climate protection and sustainable development.

With the revision of the action plan, in addition to pushing for a climate-neutral administration, increased focus should also be placed on the implementation of the Sustainable Development Goals (SDGs) of the United Nations (UN). The goal was a final assessment in summer 2020 and a new publication in the same year. Due to the Corona pandemic, the publication was postponed to a later date - at the current time (April 2021), no revised core criteria have been published yet.

3. The naBe Action Plan

Due to the current revision of the action plan and the core criteria, the following information refers to an unpublished draft of the core criteria. This draft was made available to the project by the technical and scientific support of the naBe Action Plan. Thus, due to the current draft status, no exact conformity with the future published core criteria can be guaranteed.

In the following section, the most important contents of the naBe Action Plan are presented, followed by an overview of the core criteria according to overarching themes and according to classification in the planning process.

3.1. Objectives

The primary objective of the naBe Action Plan is to implement and promote a basic level of sustainability in products and services in public procurement. The criteria and their implementation should take into account the three-pillar model of sustainability, so that an improvement in one dimension does not lead to a deterioration in the other dimensions. Thus, the most favourable case is to achieve an improvement in all three dimensions through one measure - which is often very difficult to implement in practice. However, the focus in the development of the criteria for the individual procurement groups is on the dimension "ecology", as this is where the greatest need for action exists in relation to the achievement of the climate goals (BMLFUW 2010).

3.2. Structure

The naBe Action Plan is divided into two parts. The first part of the Action Plan can be understood as an information part, in which the political background, definitions and goals as well as measures for achieving the goals, implementation and the current status quo in public procurement are communicated.

The second part of the action plan consists of a guide to action for the implementation of sustainable procurement, which is aimed directly at procurement officers. This part also lists the core criteria (also called specifications) of the respective procurement groups. In the first full version of the action plan from 2010, core criteria were available for 16 procurement groups, whereas the updated catalogue of criteria for 2020 provides for 17 procurement groups in three categories.

The core criteria or specifications of the respective procurement groups are eligibility criteria, technical specifications and contract terms. A distinction is made between mandatory and optional core criteria.

3.3. Formal obligation

The criteria of the naBe Action Plan are binding for the federal departments and the Federal Procurement Agency (BBG), i.e. the federal ministries are obliged to order the application of the criteria for their respective departments and their subordinate departments. The criteria are thus binding for federal procurers, the federal states and subordinate public procurers such as cities and municipalities are not formally bound to the naBe criteria, but are required to apply them (MRV 67/32 2010).

3.4. Procurement groups

One innovation in Part 2 of the Action Plan is the restructuring of the procurement groups. Accordingly, the procurement groups are divided into three categories:

- A: Consumer products and events
- B: Long-life products or capital goods
- C: Construction works

The procurement groups by category are shown in Table 1.

Procurement groups according to categories			
A	Consumer products and events	B	Long-life products or capital goods
1	Office supplies	9	Electrical appliances
2	Events/Green Events	10	Vehicles, transport services, tyres etc.
3	Sanitary paper	11	Horticultural products and services
4	Toilet paper and graphic paper	12	IT equipment
5	Lamps	13	Rental textile services
6	Food and catering services	14	Furniture
7	Cleaning products and services	15	Textiles
8	Electricity	C	Construction works
		16	Building construction
		17	Civil engineering services

Table 1 Procurement groups of the naBe action plan (according to draft version 2020)

3.5. Core criteria in structural engineering

The core criteria for the procurement group can be categorised on the one hand according to superordinate subject areas and on the other hand according to allocation to individual construction process phases.

The following notes should be considered when applying the core criteria of the naBe Action Plan:

- The core criteria (referred to as specifications in the naBe action plan) contain all the basic criteria of the 2017 "klimaaktiv Bauen und Sanieren" standard for new construction and renovation.
- A building that meets the specifications of the Building Construction procurement group therefore meets the criteria of the klimaaktiv bronze rating
- Vice versa, this is not the case, as some of the naBe specifications go beyond the basic criteria of the klimaaktiv standard
- The following specifications, which concern energy efficiency, do not apply to listed buildings

- The specifications for low-emission building materials are harmonised with the requirements of ÖkoKauf Wien, the requirements of the service package Sustainable:Building in the Municipality and the requirements of the N:Check (Sustainable Procurement Service Lower Austria).
- The Eco-Edition of the ABK tendering software complies with the following specifications for low-pollutant building materials
- The recycling of construction waste must be provided for in every construction project in accordance with the Recycling Building Materials Ordinance and the Construction Products Ordinance.

The core criteria of the building construction procurement group can be classified according to the following major topics: economic efficiency, energy efficiency, resource efficiency, low-pollution and optional award criteria (Table 2):

Criteria category	Chapter	Explanations
Economic efficiency		
Economic efficiency calculation (new buildings)	3	The economic efficiency calculation ensures that costs arising over the life cycle of the building (energy, maintenance, servicing, etc.) are also considered in addition to the construction costs
Energy efficiency		
Energy efficiency of the building envelope and the ventilation system	5	Requirements for the specific heating demand, the externally induced cooling demand, the specific total primary energy demand and the specific carbon dioxide emissions for new buildings and refurbishments
Basics for energy-relevant building management	8	It must be ensured that a) the appropriate meters are installed as a prerequisite for energy consumption monitoring in operation and that b) the building is airtight
Operation of the building after completion of construction	12	If there is no building manager, the commissioning of the building must be put out to tender. Reference is made to the federal government's energy performance contracting scheme.
Resource efficiency		
Location of the building	2	The building should only be constructed or new buildings should only be used by the public sector where infrastructure facilities already exist. Building on greenfield sites should thus be avoided.
Concept for the deconstruction of the building	4	In the planning of the building, a concept for deconstruction is to be worked out. Here, the possible expansion and the possible reuse of building materials and components must be considered.
Environmentally friendly building materials	6	It must be ensured that environmentally friendly building materials are used (limit values for the OI3 index (eco-index 3)) that can be recycled (limit values for disposal indicator E110)
Heating system	10	No use of oil heating systems
Water saving devices	11	Limit values for maximum flow rates of cisterns and fittings
Low-pollution		
Product and chemical management	9	Ensure that low-pollution building materials are used for interior finishing work

Construction site management	7	During construction, ensure that construction waste is minimized and that construction equipment used complies with Stage III B emission limits.
Optional award criteria		
Environmental management system	12	Additional points for companies with a certified environmental management system
Recycled building materials	12	Additional points for the use of recycled aggregates
Mobile plant on the construction site	12	Additional points for the production of recycled aggregate from a mobile plant directly at the construction site on site
Tonne-kilometres	12	Additional points for short distances between construction site and production site of the building material

Table 2 Classification of the core criteria according to major topics (according to draft version 2020)

As an orientation for public procurers, a classification of the core criteria in the planning and construction process is presented below, as well as the respective persons responsible for the implementation of the respective criteria (Table 3).

Development	Preliminary draft	Draft	Tender	Construction phase	Commissioning/ operation
Location of the building (Building Client)	Economic efficiency calculation (Specialist planner)	Economic efficiency calculation (Specialist planner)	Construction site management (Planner)	Construction site control (especially product and chemical management) (a.o. Specialist planner)	
	Information on the required energy efficiency of the building envelope (Building Client)	Energy efficiency of the building envelope (Planner)	Basics for energy-relevant building management (Planner)		
	Information on environmentally friendly building materials (Building Client)	Concept for the deconstruction of the building (Planner)	Product and chemical management (Specialist planner)		
		Environmentally friendly building materials (Planner)	Water saving devices (Planner)		
			If applicable: Commissioning (Building Client)		
			Environmental management systems (Planner)		
			Recycled building materials (Planner)		
			Mobile plant on the construction site (Planner)		
			Tonne-kilometres (Planner)		

Table 3 Classification of the core criteria in the planning and construction process (according to draft version 2020)

3.6. Verification

This chapter is dedicated to the different types of documentation/verification that must be submitted in order to comply with the core criteria/specifications. For the specifications listed in Table 2, the respective verification is documented in the following table. The criteria categories can contain several specifications or requirements that must be fulfilled (Table 4).

Table 4 Core criteria with specifications according to overarching themes incl. verification (according to draft version 2020)

Criteria category	Specifications	Verification
Economy		
Economic efficiency calculation (new buildings)	Integration of life cycle costs (energy, maintenance, servicing) for the entire building or for individual energy-relevant building components or building services components	Calculation according to the net present value method, the annuity method or the payback period method. Basic principles and explanations of the calculation of economic efficiency can be found in ÖNORM M 7140, VDI 2067 or ISO 15686-5. Various tools are available free of charge (e.g. econ-calc) for the calculation.
Energy efficiency		
Energy efficiency of the building envelope and the ventilation system	Requirements for the reference heating demand of office buildings and non-office buildings for new construction and refurbishment	These specifications can be verified in the course of the mandatory energy certificate in Austria according to OIB guideline 6, OIB guideline "Energy performance of buildings" and applicable standards. In addition, equivalent verifications are also permitted.
	Requirements for the externally induced cooling demand for new buildings and refurbishments	
	Requirements for primary energy demand for new buildings and refurbishment, differentiated for different types of use	
	Requirements for specific carbon dioxide emissions for new construction and refurbishment	
	Educational facilities: At least 80 % of the floor space must be ventilated. Ventilation systems with heat recovery must be used for this purpose; the average heat supply efficiency of the ventilation system should be at least 70 %.	Test certificate or proof of calculation for the heat supply efficiency of the ventilation systems used, or equivalent proof.
Basics for energy-relevant building management	Implementation of user-specific energy consumption monitoring, for which measuring equipment must be installed to record (energy) consumption. Additional measuring equipment must be installed for buildings with a gross floor area of 1,000 m ² or more.	Verification in the form of an HVAC and electrical schematic with representation of the metering equipment or description of the building measurement technology. Equivalent evidence is permitted
	Air tightness requirements for new buildings and refurbishments	Verification by air tightness test according to ÖNORM EN ISO 9972 or equivalent verification.

Operation of the building after completion of construction	If there is no building manager, it is recommended that the building be put into operation for about 2 years.	Recommendation and not a mandatory requirement
	For federal offices, reference is made to the federal government's energy performance contracting (Bundescontracting). This involves contracts between federal offices and specialist companies with the aim of saving a guaranteed amount of energy per year over a period of 10 years.	
Resource efficiency		
Location of the building	The building should only be built or new buildings should only be used by the public sector where at least 2 infrastructure facilities from 11 categories are available within a distance of max. 1,000 m or are created during the construction phase.	Site map of the building with location and designation of the existing infrastructure facilities within 1,000 metres, including textual explanations.
Concept for the deconstruction of the building	In the planning of the building, a concept for deconstructability must be worked out. Here, the possible removal and the possible reuse and further use of building materials and components are to be considered.	Concept - otherwise no specific requirements for the conceptual design
Environmentally friendly building materials	It must be ensured that comparatively environmentally friendly building materials are used (limit values for the OI3 index (eco-index 3)) that can be recycled (limit values for disposal indicator EI10)	Calculation of eco-index 3 via building physics programmes OR equivalent proof.
	For the disposal indicator EI10, limit values for the balance limit BGI or BG3 must be complied with.	In the case of refurbishments, the criterion is considered fulfilled if the refurbished part of the building covers more than 50 percent of the conditioned gross floor area (GFA) and the existing building is older than 20 years.
Heating system	No oil heating systems may be planned and installed as heating systems.	Calculation of the disposal indicator EI10 via building physics programmes or equivalent proof
Water saving devices	All consumption points in sanitary rooms and kitchens must be equipped with water-saving technology.	Technical documentation for the planned heating system OR sanitary fittings certified with the Austrian Eco-label or equivalent evidence
Low pollutant content		
Product and chemical management	Product and chemical management includes as mandatory components: a) consideration of the criteria in the invitation to tender or in the awarding of the contract, b) testing and approval of the building	It must be ensured that low-pollutant building materials are used for interior construction; this must be verified by means of safety data sheets (SDS), manufacturer's sheets (MDS) or test reports (PG). Depending on the substance group, it is defined which type of verification (SDS, SDS or PG) is applicable. Important: Products

	materials intended for use before they are used on the construction site, and c) construction site control. Specifications are available for 19 groups of building materials and are listed in a table on "Requirements for low-polluting building materials in the naBe Action Plan.	with the Austrian Eco-label, the Blue Angel or the natureplus label fulfil these criteria in any case.
Construction site management	Contractors must ensure that construction site waste (plastic, wood, metal, cardboard, etc.) is minimized on the construction site and separated according to type and that hazardous waste is secured.	The bidder or contractor must describe these measures relating to construction site waste in the bid and submit a self-declaration.
	The contractor must ensure that the construction machinery used complies with the Stage III B emission limits of Directive 97/68/EC.	A self-declaration by the contractor or contractor shall be deemed to be proof.
Optional award criteria		
Environmental management system	Additional points can be awarded if contractors have implemented a certified environmental management system in accordance with ISO 14001:2015 or EMAS at the start of construction.	The bidder or contractor must submit a valid environmental statement in accordance with EMAS or a valid certificate in accordance with ISO 14001. Equivalent evidence is also permissible.
Recycled building materials	Additional points can be awarded for the use of suitable recycled building materials that meet the requirements of the Recycling Building Materials Decree, such as recycled stone aggregate in concrete production. Here, the naBe Action Plan lists possible point award proposals.	A self-declaration by the bidder or contractor shall be considered as proof.
Mobile plant on the construction site	Additional points for the production of recycled stone aggregate from a mobile plant directly on site at the construction site.	A self-declaration by the bidder or contractor shall be deemed to be proof.
Tonne-kilometres	Additional points can be awarded according to the principle of "tonne-kilometres" (= tonnage of mineral building material delivered multiplied by the distance in km from the production site of the building material to the construction site). A calculation procedure is presented in the naBe action plan.	Evidence shall be the designation of the production site of the building material with a presentation of the calculation and the bidder's self-declaration. Equivalent evidence is also permissible.

4. Basics of public procurement law for sustainable contract awarding

The legal framework for procurement in Austria is the Federal Procurement Act (Bun-desvergabegesetz). The currently valid versions are the Federal Procurement Act 2018 (BVerG 2018) and the Federal Procurement Act on Concessions (BVerG Konz 2018). The BVerG 2018 regulates the procedures for the procurement of services (award procedures) in the public sector and in the sectors sector, with the exception of concession awards - these are subject to the Bundesvergabegesetz Konzisionen 2018.

Accordingly, the BVerG 2018 also forms the foundation for sustainable procurement and, in implementation of the Public Procurement Directive 2014/24/EU, contains clear guidelines on how public procurement processes can be made more sustainable.

The integration of environmental aspects is specified in the Public Procurement Act in § 20 para. 5 BVerGG 2018, in which the obligatory consideration of ecological aspects ("environmental justice of the performance") is mentioned as an essential principle (BVerG 2018):

"In the award procedure, consideration must be given to the environmental compatibility of the service. This can be done in particular by taking into account ecological aspects (such as energy efficiency, material efficiency, waste and emission avoidance, soil protection) [...] in the description of the service, in the definition of the technical specifications, by defining concrete award criteria or by defining conditions in the service contract (BVerG 2018, S. 30)."

This principle allows the consideration of ecological aspects in the different phases of the procurement. For example, ecological aspects can be included in the tender specifications, by defining technical specifications, concrete award criteria or by specific conditions in the service contract.

In addition, specific requirements must be met for various types procurement (e.g. procurement of road vehicles or energy efficiency requirements for supply and service contracts in the upper threshold range). In the following, the most important information on public procurement law for the implementation of green public procurement is summarized and relevant terms are defined.

4.1. Principles of the award procedure

In the BVerG 2018, the principles of European Union law are established and apply to the upper and lower thresholds (for threshold information see 4.2):

- Compliance with the fundamental freedoms of the European Union
- Equal treatment and transparency of all candidates and bidders
- Prohibition of discrimination
- Proportionality (award of contracts at reasonable prices)
- Principle of free and fair competition
- Consideration of the environmental justice of the performance.

These principles must be considered in all contracts covered by the BVerG 2018.

4.2. Thresholds

Contracts under the Federal Procurement Act are classified as upper or lower thresholds (OSB or USB) depending on the contract value. Accordingly, the contracting authority must calculate the estimated value of the contract in net amounts (excluding value added tax) according to Section § 12 BVerG 2018 before starting to award the contract. Depending on the contract value, the respective contract is classified in the upper or lower threshold area, which in turn has certain consequences. For example, construction contracts and concession contracts above €5,350,000 must be announced at EU level. In the subthreshold area, for example, certain award procedures are permitted or required depending on the contracting authority, the type of contract and the contract value (Table 5).

The threshold values as well as the calculation of the estimated contract value are specified in § 12 BVerG 2018. Accordingly, the following values are differentiated in the classic area of the BVerG 2018:

Table 5 Thresholds according to § 12 BVerG 2018

Procedure in	Thresholds according §12 BVerG 2018
Upper threshold (OSB)	
Building contract	5.350.000 €
Supply/service contract	214.000 €
Lower threshold (USB)	
Direct awarding	100.000€

4.3. General awarding or lot awarding

Services within a contract or project may be awarded together or separately (general or lot allocation). Separate awarding in lots can be carried out in terms of location or time, according to the quantity and type of service or with regard to services of different trades or specialisations. Decisive for the general or lot allocation are economic or technical aspects, such as the necessity of a uniform execution and a clear warranty. It is important to note that it is not permissible to circumvent the BVerG 2018 by separating services or dividing up the total service put out to tender.

4.4. Types of procedures

The Public Procurement Act recognises several types of procedures. The standard procedures according to § 31 BVerG 2018 are:

- **Open procedure** in which an unlimited number of companies are publicly invited to submit tenders and
- **Restricted procedure with prior publication**, in which an unlimited number of enterprises are publicly invited to submit requests to participate and subsequently selected suitable candidates are invited to submit tenders.

The law differentiates further types of procedure, which may only be chosen under certain conditions and are listed under § 31 BVerG 2018. An important award procedure in the USB is the direct awarding. Here, after obtaining various offers or non-binding price information, a service is procured without formalities from a selected suitable contractor in return for payment.

4.5. Tender

According to the definition in § 2 BVerG 2018, the tender is "the declaration of the contracting authority addressed to a specific or unspecified number of contractors in which it specifies which service it wishes to receive and on what terms". The contracting authority must draw up the invitation to tender in such a way that the bidders can understand the service for which a contract will be concluded in the end. The BVerG specifies which contents must be communicated to the bidders in the tender documents. This includes information such as whether the award procedure will be conducted in the OSB or in the USB (§91 (1) BVerG 2018), whether the lowest offer principle (lowest price) or the best offer principle (technically and economically most favourable offer) will be applied (§91 (2) BVerG 2018). The best offer principle is mandatory under certain circumstances - this also classifies construction contracts with an estimated contract value of at least 1 million euros. Furthermore, in order to determine the best price-performance ratio, the applicable cost model or the selection criteria and award criteria and their weighting must be indicated (§91 (7) BVerG 2018). The service to be provided must be clearly and unambiguously described and include technical specifications and, if necessary, provisions regarding the transfer of rights (§91 (8) BVerG 2018).

However, the tender documents differ depending on the types of procedure and may also contain selection or evaluation criteria.

4.6. Service description: functional vs. constructional

According to § 102 BVerG 2018, the service description must be designed either functional or constructional. In general, the client is free to choose the type of service description, but this decision is not insignificant in terms of environmental protection issues.

4.6.1. Constructional service description

Nella descrizione funzionale del servizio, il servizio deve essere descritto come un'attività specificando i requisiti di servizio. Questo tipo di descrizione è utile se il cliente è a conoscenza del prodotto obiettivo o finale del contratto, ma non ha un'idea specifica su come realizzare il progetto nel miglior modo possibile. Tuttavia, nella descrizione funzionale del servizio, le specifiche tecniche devono essere descritte in modo sufficientemente preciso e neutrale, in modo che lo scopo e i requisiti per i servizi siano chiaramente riconoscibili dagli offerenti (§ 104 (2) BVerG 2018). Se necessario, devono essere aggiunti piani, disegni, modelli o campioni.

La descrizione funzionale del servizio è spesso il modo più efficace per raggiungere elevati standard ambientali. Specificando una norma minima in materia di protezione ambientale da parte dell'amministrazione aggiudicatrice, gli offerenti hanno la libertà di migliorare la norma minima richiesta (Stadlober 2017). Ciò rende possibili offerte innovative da parte dell'offerente e può, ad esempio, portare a una concorrenza entusiasmante, soprattutto nella procedura di aggiudicazione aperta (Stadlober 2017). Tuttavia, ciò richiede conoscenze specialistiche e personale specializzato adeguato da parte della giuria di valutazione al fine di classificare le offerte in termini di protezione ambientale.

4.6.2. Descrizione costruttiva del servizio

In the constructional service description, the services are listed in a specification of services (in short: LV) - it clearly describes the service and the individual service components are often divided into individual positions. The functional service description is useful if the client has a clear idea of the service objective, as well as the necessary materials, services, etc. to reach the objective. With regard to environmental protection, the contracting

authority can, for example, demand environmental criteria for building materials in the specifications which must be fulfilled by the bidders. However, the bidder is often very strongly restricted by the service positions.

4.7. Best offer vs. lowest offer principle and life cycle costing

Public procurement law distinguishes between two awarding models. On the one hand, the award can be made by pure price competition or the most economically favourable offer (lowest offer principle) or by the technically and economically most favourable offer (best offer principle). According to §91 BVerG 2018, the principle of the lowest offer is allowed if the quality standard of a service is defined in the service description in such a clear and unambiguous economic, technical and legal manner that the planned technical and qualitative level of the submitted offers is guaranteed. Otherwise, the best offer principle is to be applied in the form of the best technical and economic offer – either in the form of a cost model or on the basis of previously announced award criteria. For specific services, the contract must be awarded to the technically and economically most advantageous tender, including construction contracts with an estimated contract value of at least 1 million euros or service descriptions that are put out to tender on a functional basis (see Service description: functional vs. constructional).

4.7.1. Lowest offer principle

The basis for determining the economically lowest offer are the production and acquisition costs of the service, but operating costs and other cost categories can also be included in the evaluation. In general, the principle of the lowest offer is considered to be less effective from an ecological point of view, but there is at least the possibility of introducing a certain ecological standard by integrating ecological aspects into the service description (Stadlober 2017).

4.7.2. Best offer principle

The best offer principle on the other hand is used to award the contract on the technical and economical most favourable offer. Two models can be used to determine the technically and economically most favourable offer: the best price-performance ratio on the basis of a cost model or on the basis of announced award criteria.

Best price-performance ratio through life cycle costing

Regarding the cost model for determining the best price-performance ratio in the best offer principle the BVerG specifies in §92 BVerG 2018 the calculation on the basis of a Life-Cycle Costing. In summary, life cycle costing includes "the sum of all expenditures incurred for a contract item, from its production through its operation to the end of its useful life" (Stadlober 2017, S. 67).

According to the BVerG it is possible to calculate life cycle costs based on the costs only arising for the contracting authority or other users (e.g. acquisition costs, utilisation costs, maintenance costs or costs for recycling and disposal at the end of life). The second possibility is the additional integration of external effects into life cycle costing, i.e. costs that arise due to environmental pollution – provided that these costs arising due to external effects can be clearly represented in terms of a monetary value. These costs are therefore not paid directly by the contracting authority but rather by society. In addition to life-cycle costing, other cost-effectiveness approaches are also allowed, but these are not specified in more detail either in Directive 2014/24/EU or in the BVerG 2018.

Life cycle costing for the calculation of the best price can often be very time-consuming in practice, even though there is now a wide range of software available for the calculation. Especially when including external effects in the life cycle costing, expert knowledge is necessary in order not to cause negative rebound effects, which is often insufficiently available in smaller procurement units (e.g. municipalities).

Best price-performance ratio through awarding criteria

In this approach, the most economically and technically favourable offer is determined using award criteria which must be communicated clearly and comprehensibly to the group of bidders (§91 (7) BVerG 2018). However, the decision may not be made based on only non-cost criteria, but must include at least one cost criterion. A combination of a cost-effectiveness approach, i.e. the combination of award criteria and life cycle costing instead of pure manufacturing costs is possible.

4.8. Eligibility criteria, award criteria, selection criteria and evaluation criteria

Terms such as eligibility criteria, selection criteria or award criteria can easily be misleading and used in the wrong context. Accordingly, they will be briefly discussed below and their suitability for the implementation of ecological aspects will be explained.

Section 91 (6) of the BVerG 2018 allows, in addition to the award criteria, quality criteria and ecological criteria to be taken into account in other phases of the award procedure: Accordingly, these can also be included in the call for tenders, the definition of the technical specifications, the eligibility criteria and other terms and conditions of the contract.

Eligibility criteria

Suitability criteria are determined by the contracting authority and include criteria related to the contract which constitute a minimum requirement in terms of competence, reliability and capability of the bidders and are thus company-related. These must not be discriminatory and must be related to the subject of the contract. The bidder must therefore provide evidence regarding the minimum requirements. These are often referred to as "knock-out criteria", as these requirements must be met in full. Although these are not known for strongly pushing the ecological standard there is still the possibility of taking environmental protection into account.

For example in the case of construction contracts information on environmental management activities that the contractor will apply during the execution of the contract can be requested as proof of technical performance (Annex XI para. 2 line 5).

Award criteria

Award criteria are, according to § 2 line 22 lit d BVerG 2018) "*non-discriminatory criteria related to the subject of the contract, which are used to determine the most technically and economically favourable offer for the contracting authority*".

They are contract-related and not related to the company (as selection criteria).

When selecting the award criteria, it is important that the criteria do not grant unrestricted freedom of choice for the contracting authority and therefore guarantee effective competition. Furthermore, the verification and the type of weighting of award criteria is essential in order to be able to calculate a reproducible degree of fulfilment of the respective criterion. In the best offer procedure, the lowest price can be used as the award criterion. In general, the contracting authority can decide which criteria will be used in a contract and how they are weighted, as long as the following principles are met (Stadlober 2017):

- I. An award criterion must relate specifically to the contract, i.e. there must be a connection between the subject of the contract and the award criterion

- II. The award criterion must not give the contracting authority unlimited freedom to decide on the award of the contract
- III. The criterion must be explicitly mentioned in the invitation to tender and the weighting must be defined. (See Art 29 (1) of Directive 2014/24/EU, which states that all award criteria must be specified in the contract documents)
- IV. The award criteria must comply with the most fundamental principles of European law, in particular the prohibition of discrimination.

It is important to clearly separate suitability and award criteria. Accordingly, suitability criteria may not be used as award criteria. Only under special circumstances suitability criteria can also be used as award criteria, e.g. concerning special qualifications of employees (see ECJ 24.1.2008, C-532, Lianakis, para. 30f).

Selection criteria

Selection criteria are only permitted in the two-stage procedure (see 4.1 "restricted procedure with prior publication"), in the innovation partnership and in restricted competitions or in the competitive dialogue. Selection criteria are company-related, non-discriminatory and objective criteria associated with the contract, according to which the quality of the applicants is assessed (§ 2. Z 22 lit a BVerG 2018). They are not considered knock-out criteria, but can be fulfilled "better" or "worse". The aim is to reduce the number of bidders through selection criteria in the first step of the two-stage procedure (Stadlober 2017).

Evaluation criteria

Evaluation criteria can only be used in the procedure type "competition", which does not belong to the classic award procedures under § 31 of the BVerG 2018, but to the types of competition listed under § 32 of the BVerG 2018. They basically have the same purpose as award criteria, however, the competition does not necessarily result in the award of a contract, but are rather award procedures in idea competitions that *"serve to provide the contracting authority with a plan or planning, in particular in the fields of spatial planning, urban planning, architecture and construction, advertising or data processing"* (Section 32 (2) BVerG 2018).

Accordingly, the selection in a competition is not based on award criteria, but on evaluation criteria.

4.9. Use of quality labels in the award procedure

With the implementation of Directive 2014/24/EU, the use of quality labels in public procurement law has been redefined. Directive 2014/24/EU defines the use of quality labels as follows:

"Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they can request specific quality labels as proof that the construction works, services or supplies comply with the required characteristics. These can be used in the technical specifications, in the award criteria or in the conditions of performance [...]."

This regulation was implemented in § 108 BVerG 2018 in such a way that the contracting authority may require a specific label as proof in the technical specifications, the award criteria or the conditions for the performance of the contract. The use of quality labels is tied to five key requirements (§ 108 (1) 1-4 BVerG 2018):

- I. The requirements of the label relate exclusively to criteria that are linked to the subject of the contract and are suitable for describing the characteristics of the service,
- II. The requirements of the label are based on objectively reviewable and non-discriminatory criteria,

- III. The label has been established through an open and transparent procedure in which all relevant interested parties, such as public authorities, consumers, social partners, manufacturers, distributors and non-governmental organizations, have been able to participate,
- IV. The label is accessible to all interested parties; and
- V. The requirements of the label are defined by a third party on which the entrepreneur applying for the label cannot exert any decisive influence.

On the one hand, clients can only demand the fulfillment of individual requirements of a quality label. As a client, it must be ensured that it only requests requirements from quality labels that are related to the subject of the contract. I.e. if a quality label contains criteria that are not directly related to the subject of the contract and thus only fulfills conditions II-V, the client must not demand the quality label in general as a requirement, but only the individual technical/environmental/social specifications with reference to the respective quality label. Furthermore, if a specific quality label is requested, quality labels equivalent to the required quality label must also be accepted.

5. Bibliography

BMK (2020): Monitoringreport betreffend Klima- und Energieziele – Berichtsjahr 2019. Hg. v. Bundesministerium für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie. Wien. Online verfügbar unter https://www.parlament.gv.at/PAKT/VHG/XXVII/III/III_00153/index.shtml#tab-Uebersicht, zuletzt geprüft am 24.03.2021.

BMLFUW (2010): Österreichischer Aktionsplan zur nachhaltigen öffentlichen Beschaffung - Teil I. Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft. Wien. Online verfügbar unter <https://www.nabe.gv.at/nabe-aktionsplan/>, zuletzt geprüft am 30.03.2021.

BMNT (2019): Langfriststrategie 2050 - Österreich. Hg. v. Bundesministerium für Nachhaltigkeit und Tourismus. Wien. Online verfügbar unter https://www.bmk.gv.at/dam/jcr:37a641d0-6762-4c23-8e1b-e799e1557acd/Langfristige_Klimastrategie_2050.pdf.

BVerG 2018: Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabebezugsgesetz 2018 - BVerG 2018), BGBl. I Nr. 65/2018.

EEA (2020): Trends and projections in Europe. Tracking progress towards Europe's climate and energy targets. Hg. v. European Energy Agency. Luxemburg. Online verfügbar unter <https://www.eea.europa.eu/publications/trends-and-projections-in-europe-2020>, zuletzt aktualisiert am 2020, zuletzt geprüft am 24.03.2021.

MRV 67/32 (2010): Vortrag an den Ministerrat vom 14. Juli 2010 zum Gegenstand: Nationaler Aktionsplan zur nachhaltigen öffentlichen Beschaffung, MRV 67/32/2010.

Stadlober, P. (2017): Umweltschutz durch Vergaberecht. Karl-Franzens-Universität Graz, Graz. Institut für Öffentliches Recht und Politikwissenschaft.