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What needs to be considered when reorganizing a company during (and after) the tender procedure?

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In the course of ongoing procurement procedures and after a contract has been awarded, business practice often leads to company reorganizations[1] on the part of the bidder, for example when one or more bidders or contractors merge or split off. Such processes can have disadvantageous procedural and contractual consequences, such as the elimination of bids. This article examines the legal effects of reorganizations in the various phases of the procurement procedure and during the term of the contract, as well as the underlying legal principles that must be observed.

1. Effects of reorganizations during the first phase of the tender procedure

The following section deals primarily with issues relating to the two-staged tender procedure, namely negotiation procedures and restricted procedures with prior publication.

In the first phase of the tender procedure, reorganization processes on the part of an applicant (future bidder) generally will not raise major issues under public procurement laws. This is because the applicant still has the opportunity to amend or withdraw its request to participate until the deadline for submitting a request to participate has expired. Pursuant to Section 79 (2) and (4) of the Austrian Federal Procurement Act (BVergG 2018[2]), the suitability of the applicants must be available at the latest by the time the deadline expires; a change to the identity of the applicant remains possible until then. In addition, any applicant can submit a request to participate up to this point in time; from a competition or equality perspective, there are therefore no concerns if a applicants changes its identity.

2. Effects of reorganizations during the offer period and after submission of the offer

2.1 Guiding legal principles

Reorganizations can conflict with the principles of public procurement law.[3] The relevant principles include the principle of equal treatment, the principle of binding bids, the principle of

1 In simplified terms, these are changes in legal form in which assets (parts of a business) are transferred to a new legal entity by way of universal or singular succession; for the scope of the term "reorganization", see only Section 11 (4) Austrian Trade Act - GewO 1994 and Article I et seq. of the Austrian Reorganization Tax Act - Umgründungssteuergesetz.

2 Federal Act on the Award of Contracts (Federal Procurement Act 2018 - BVergG 2018) Federal Law Gazette I 2018/65 as amended by Federal Law Gazette II 2019/91.

3 See § 20 para. 1 BVergG 2018.

free and fair competition and the award of contracts to suitable contractors.[4]

The principle of equal treatment under public procurement law states that all bidders must have the same chances (without preferential treatment) of being awarded a contract when submitting their bids.[5] Reorganizations on the part of the bidders could compromise this principle insofar as the reorganization could give an individual bidder the opportunity to improve its bid. For example, a merger in the second phase of the award procedure could lead to a subsequent improvement of the performance of the absorbing bidder and thus create unequal treatment. The change of identity of a bidder can also potentially contradict the principle of equal treatment;[6] the ECJ has repeatedly stated that an overly strict application of the equal treatment requirements would mean that the identity of the bidders in the first and second phase of the procedure must remain the same without exception. However, such an interpretation is not necessary if, despite a change in identity, the original requirements of the contracting authority continue to be met and there is no impairment of the competitive situation of the other bidders.[7]

The principle of free and fair competition also applies to reorganizations. The bidders concerned could gain advantages over the other bidders as a result of the reorganization: For example, a merger could lead to a subsequent increase in the performance of a bidder. Conversely, the continued consideration of a bidder following a reduction in its performance capability and the associated loss of suitability may also violate the principle of competition.[8] This is because, in this case, the contracting authority would have to deviate from the original tender conditions or documents to the unfair advantage of the merged bidder.

Bidder eligibility aspects pursuant to Section 20 (1) BVergG 2018 also play an important role: These are the award to suitable bidders and the time at which this eligibility must be given. In two-stage procedures, this is the time at which the deadline for submitting a request to participate expires,[9] whereby eligibility must not be lost after this time.[10] This is particularly relevant in the case of reorganizations, as there can typically be a change in suitability and, in particular, in performance.

The principle of binding bids and the principle of the obligation to submit a bid in the form in which the bidder was invited to submit a bid are also essential. The fact that the bidder is bound by its bid is derived from the limited subsequent possibility of remedying defects in a bid in accordance with Section 138 BVergG 2018. Even the mere change of the bidder identity after

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4 See also ECJ 26. 9. 2019, C-63/18, Vitali SpA; 27. 11. 2019, C-402/18, Tedeschi Srl; 30. 1. 2020, C-395/18, Tim SpA.

5 ECJ 2. 5. 2019, C-309/18, Lavorgna; 11. 7. 2019, C-697/17, Telecom Italia SpA; 12. 11. 2009, C-199/07, Commission v Greece.

6 ECJ 11. 7. 2019, C-697/17, Telecom Italia SpA.

7 ECJ 11. 7. 2019, C-697/17, Telecom Italia SpA; 24.5.2012, C-396/14, MT Højgaard and Züblin.

8 VwGH January 27, 2010, 2006/04/0163-6.

9 Section 79 (1) Z 2, 4 BVergG 2018.

10 VwGH 25. 1. 2011, 2006/04/0200; 17. 6. 2014, 2013/04/0033; 30. 4. 2019, Ra 2018/04/0196.

submission of the tender is only possible to a limited extent, as this forms part of the content of the tender.

Furthermore, reorganization processes are also relevant under public procurement law during the ongoing bidding period: The contracting authority has usually made a certain pre-selection of bidders for the second phase of the procedure and thus already restricted the group of bidders. According to Art 28 (2) sentence 1 of the Public Procurement Directive[11] , only those contractors who have been invited by the contracting authority may submit a tender.[12] The legal and factual identity of these selected contractors must be preserved in the award procedure;[13] otherwise, contractors who have not been invited to submit a tender could also, by bypassing the first phase, continue to participate in the ongoing procurement procedure. However, participation in the procedure remains permissible despite a change in the identity of the bidder, provided that the principle of equal treatment under public procurement law is not violated, the bidder's performance is exclusively increased and the competitive situation of the other bidders is not impaired.[14]

2.2 Legal effects of a reorganization

Bidder reorganizations during the award procedure could have negative consequences under public procurement law: The exclusion of the bidder,[15] the elimination of its bid or,[16] if it is awarded the contract, other bidders could challenge the contracting authority's decision.[17]

As per Section 78(1)(4) BVergG 2018, the contracting authority may exclude a bidder if it has entered into agreements with other bidders that are detrimental to the contracting authority, offend common decency (contra bonos mores), or has entered into agreements with other contractors that are aimed at distorting competition. This risk exists in particular in the case of restructuring processes that take place between several bidders during the procedure. For example, a bidder may refrain from submitting a bid due to a planned, but not yet completed, merger with another bidder in order to increase the probability of the other bidder being awarded the contract.

In the case of the elimination of bids in reorganization cases, the following circumstances in particular come into consideration:[18] Elimination of bids due to lack of suitability as well as lack of solicitation can occur if the reorganization process has a negative impact on the economic and financial performance or technical capability of the bidder. In addition, inadmissible agreements between bidders in the course of the reorganization process can also lead to a bid being eliminated. This is particularly

11 Directive 2014/24/EU of the European Parliament and of the Council of February 26, 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94/65.
12 This is also evident from the legislative materials and case law; ErlRV 89 BlgNR XXVI. GP, 139, 148; VwGH 27. 2. 2019, Ra 2016/04/0131.
13 ECJ 24.5.2012, C-396/14, MT Højgaard and Züblin.
14 ECJ 11. 7. 2019, C-697/17, Telecom Italia SpA.
15 Section 78 (1) no. 4 BVergG 2018.
16 Section 141 para. 1 no. 2, 9 BVergG 2018.
17 Section Section 342 (1) BVergG 2018; Section 353 (1) BVergG 2018.
18 Section 141 para. 1 no. 2, 9 BVergG 2018.

relevant in the case of reorganizations involving several bidders: If a bidder refrains from submitting a bid in view of an agreed merger with a co-bidder, or if the bidders divide the relevant lots among themselves, or if they coordinate their bids with each other, this may constitute an unlawful agreement in the award procedure. Such agreements affect the professional reliability and therefore also the suitability of the bidders,[19] and can lead to the exclusion of the bidders concerned.[20]

In addition, bids can be rejected due to a lack of invitation by the bidder if the bidder does not submit its bid in the form (in terms of bidder identity) in which it was invited to do so. The identity of the bidder must therefore be maintained at least during the current bidding period[21] , at least if the principles of equal treatment of bidders and fair competition are violated.

In addition to bid rejections by the contracting authority, participating co-bidders can also challenge decisions made by the contracting authority in the context of review proceedings or declaratory proceedings due to alleged infringements in connection with the reorganization of another bidder.[22]

The impact of reorganizations on the award procedure will in the following be examined as per the type of reorganization:

2. Merger

Mergers are transfers of assets to existing or newly established companies by way of universal succession.[23] Both the merger by absorption[24] and the merger by new formation[25] can have consequences under public procurement law, in particular if the legal and actual identity ceases to exist.

Mergers on the part of a bidder can, among other things, lead to the exclusion of the bidder or the withdrawal of its bid.[26] For example, the ECJ had to decide whether a member of a bidding consortium can continue to participate in the procedure as an individual bidder after the dissolution of the bidding consortium. The court ruled that, despite the loss of legal and factual identity, there is no breach of the principle of equality if the original requirements of the contracting authority can still be met by the remaining bidder. Furthermore, there must be no impairment of the competitive situation of the remaining bidders. Under these conditions, the change of identity caused by the dissolution of the bidding consortium does not automatically lead to exclusion from the procedure.[27]

These principles were further expanded in subsequent case law:[28] In the course of a merger, the legal identity of the absorbing

19 ECJ 15.9.2022, C-416/21, J. Sch. Omnibusunternehmen and K. Reisen.
20 Section 78 (1) no. 4 BVergG 2018.
21 This is at least 25 or 10 days, depending on whether it is a tender in the upper or lower threshold range (see Section 71 (2) BVergG 2018 or Section 76 (2) BVergG 2018).
22 Section 342 (1) BVergG 2018; Section 353 (1) BVergG 2018.
23 See § 219 AktG; regulated in §§ 219-234b AktG and §§ 96-101 GmbHG .
24 Section 219 no. 1 AktG.
25 Section 219 no. 2 AktG.
26 ECJ 11. 7. 2019, C-697/17, Telecom Italia SpA; 24.5.2016, C-396/14, MT Højgaard and Züblin.
27 ECJ 24.5.2012, C-396/14, MT Højgaard and Züblin.
28 ECJ 11. 7. 2019, C-697/17, Telecom Italia SpA.

company is retained in the course of the universal succession, but the "actual identity" no longer exists. However, the latter does not automatically mean that further participation in the proceedings would be forbidden. This is determined on the basis of the principle of equality: From a procurement law perspective, it would be problematic if there was a significant deterioration in financial, economic or technical performance after the pre-selection of bidders. Further participation of the bidder concerned could constitute an inadmissible circumvention of the pre-selection procedure under public procurement law. However, since mergers (unlike demergers, for example) typically lead to a de facto increase in the performance capacity of the absorbing company, this reorganization is usually not disadvantageous from the contracting authority's point of view. If the original requirements of the contracting authority continue to be met despite the merger, equal treatment considerations do not preclude further participation in the procedure, despite the loss of the legal or actual bidder identity, .

It must also be examined whether the reorganization process has an impact on the competitive situation of the other bidders. The increase in efficiency does not in itself constitute an impairment. However, when two bidders merge, care must be taken to ensure that there is no exchange of sensitive information relating to the award procedure . In particular, there is no impairment of the competitive situation if no objections to the merger process have been raised by the EU Commission in accordance with the relevant competition law merger control regulations .[29][30]

In this context, a special legal issue to be addressed is whether the bids of all (merged) bidders remain valid after the submission of bids in the case of a merger of several bidders; i.e. whether all bids now continue to bind the absorbing company vis-à-vis the contracting authority or whether they are lost in the course of the merger (like the transferring companies). The binding effect should be affirmed in our opinion. This is because the tender is transferred by way of universal succession and neither principles of public procurement law, civil law nor reorganization law speak in favor of the relevant tenders of the transferring companies lapsing. This is particularly advantageous for the contracting authority because the merger process does not result in a de facto reduction of the tenders. However, it should be noted that this is only possible if the contracting authority has not excluded the submission of multiple bids in the tender documents, the best bidder principle applies and there are differences between the bids that are relevant to the evaluation.[31]

2. Conversions

The term "conversion" includes transformations in the narrower sense according to the Austrian Act on Conversions (UmwG[32]) and

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29 Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings ("EC Merger Regulation"), OJ L 24/1.

30 ECJ 11. 7. 2019, C-697/17, Telecom Italia SpA.

31 VwGH 27.2.2019, Ra 2016/04/0103.

32 Federal Act on the Conversion of Commercial Companies (UmwG) BGBl 1996/304 as amended by BGBl I 2023/78.

merely form-changing conversion according to the Austrian Stock Company Act (AktG[33]). Conversions in the narrower sense include the merging conversion and the establishing conversion. In the case of a merging conversion, the assets of the transferring company are transferred to its main shareholder. The transferring company ceases to exist.[34] In the case of an establishing conversion, the transferring company transfers its assets by way of universal succession to a partnership to be established. Here too, the transferring company ceases to exist.[35]

In the case of a change of legal form, there is no transfer of assets; only the legal form of the company is changed.[36] As a rule, this form of conversion has no effect on the award procedure or the converted bidder itself, even if the conversion takes place after the invitation to submit a bid or only after the bid has been submitted. The bidder can therefore also submit a bid in the changed legal form or the submitted bid remains valid without giving a reason for rejection. There is no risk to the bidder's ability to perform because there is no transfer of assets. In addition, none of the relevant principles of public procurement law are violated because the bidder neither gains a competitive advantage nor is there a violation of the principle of equal treatment.

The situation is different however for conversions within the meaning of the UmwG. In contrast to form-changing transformations, these also involve asset transfers. In contrast, the Public Procurement Control Panel of Vienna has determined that the conversion of the member of a bidding consortium from a GmbH & Co KG into a GmbH does not lead to the elimination of the bidding consortium's bid.[37] This can be justified by the fact that the technical capability, and thus the eligibility to bid, is maintained in the case of such reorganizations due to universal succession. With regard to the other effects under public procurement law, the above comments on mergers apply.

2. Demergers and spin-offs

The definition of a demerger under the Austrian Demerger Act (SpaltG)[38] includes the transfer of assets of a company by way of universal succession to existing companies or new companies formed as a result.[39] A distinction is made between demergers for absorption, demergers for new formation and spin-offs for absorption and spin-offs for new formation.[40] Due to their practical relevance, spin-offs are dealt with below.

The principles set out for mergers in the award procedure also apply to spin-offs. Special features may arise in the course of a spin-off with regard to the requirements of the contracting au-

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33 Federal Act on Stock Corporations (Stock Corporation Act - AktG) BGBl 1965/98 as amended by BGBl I 2023/178.
34 Section 2 UmwG.
35 Section 5 UmwG.
36 Sections 239 et seqq AktG; Sections 245 et seqq AktG.
37 VKS Vienna 26.6.2006, VKS-1672/06.
38 Federal Act on the Demerger of Corporations (SpaltG) BGBl 1996/304 as amended by BGBl I 2022/186.
39 Section 1 (2), (3) SpaltG.
40 Section 1 (2) SpaltG.

thority; in particular, the suitability and performance of the bidder may not be changed contrary to the original requirements. In individual cases, it will depend on which parts of the company are spun off and whether these were essential for the pre-selection of the bidder; for example, if the spun-off parts of the company contain key personnel or these are important for the technical capability of the bidder.

In addition, it must be examined on a case-by-case basis whether the authority to make the offer or the offer itself is transferred. This depends on which part of the company is transferred. According to the case law of the Austrian Federal Administrative Court (BVwG), when a member of a bidding consortium is spun off, the right to participate in the award procedure is transferred to the absorbing company in any case if the part of the company that is decisive for the relevant service is spun off. [41] The relevant part of the company is the part that has the majority of the technical and economic resources and know-how to fulfill the contract in accordance with the invitation to tender. Therefore, if the transferring company submits an offer despite the loss of the relevant part of the company, this must be eliminated in accordance with Section 141 (1) no. 2 BVergG 2018.

Furthermore, the bid of a bidding consortium must be eliminated if the bidding consortium has lost its capacity and suitability due to the demerger of one of its members.[42] This is because the requirements of the contracting authority can no longer be met and further participation in the procedure would therefore violate the principle of equal treatment.

3. Individual successions

Individual legal successions relevant to reorganizations are divisions and mergers of partnerships, as well as cases of business contributions to corporations as contributions in kind. In the case of such (partial) transfers of companies or assets, each right must be transferred separately; there is no uniform universal succession of all rights and obligations. Individual successions must also be assessed on a case-by-case basis under public procurement law, depending on which parts of a bidder's assets or business are transferred and whether these were essential for the pre-selection of the bidder. The principles of public procurement law described above must be observed; in particular, the suitability and performance of the bidder must not be changed contrary to the original requirements of the contracting authority.

The effects in the award procedure in the aforementioned contribution cases depend on which side of the transaction the bidder is on. If the absorbing corporation is a bidder in an ongoing procurement procedure, there should generally be no concerns under public procurement law if there is a corresponding increase in performance and the bidder identity continues to exist. If, on the other hand, the bidder is the transferring company,

41 In the specific case, the relevant part of the company was the "technical services" sub-operation; see BVwG 16.2.2019, W187 2237702-2/26E.

42 BVA 6.7.2011, N/0038-BVA/12/2011-42.

the transfer of assets can potentially lead to a reduction in performance and thus also to a loss of eligibility from the point of view of equal treatment and competition. In the absence of universal succession, the right to participate in the proceedings is also not transferred to the acquiring corporation. The effects of a merger (and division) are similar to those of a spin-off; here, too, it depends on which business or part of the business is exchanged for a share in the partnership. If this was decisive for the pre-selection of the bidder, further participation in the procedure will generally not be possible. However, a relevant difference to the spin-off is that the right to participate in the procedure cannot be transferred without universal succession.

4 Effects of reorganizations during the term of the awarded contract

Reorganizations can affect the validity of the concluded contract even after the contract has been awarded. In the event of changes to the current contractor (former bidder) during the term of the contract, the basic principles of public procurement law discussed above apply: In particular, competition law principles and the principle of equal treatment may also be violated in this phase if the contractor no longer meets the original requirements of the client.

A change of contractor due to a reorganization is a subsequent contract amendment within the meaning of Section 365 BVergG 2018. Whether the contract amendment is permissible in the sense of public procurement law depends on whether it is to be qualified as material or immaterial: Material contract amendments are only permissible after a new award procedure has been carried out.[43] According to the wording of the law, it must be determined whether the amended contract differs significantly from the original contract.

Section 365 (2) or (3) BVergG 2018 contains a demonstrative catalog of material or immaterial changes. The change of contractor constitutes a material change to the contract.[44] However, there are exceptions: For example, a change of contractor merely constitutes an immaterial amendment to the contract if it is brought about by a corporate restructuring, such as a takeover, merger, acquisition or insolvency. Nota bene: The contractor replacing the original contractor must in any case fulfill the suitability criteria set for the respective procurement procedure. In addition, the change must not lead to a significant change in the contract or circumvent the provisions of the BVergG 2018.[45] Special characteristics of the original contractor or its offer, which were decisive for the award of the contract, must be retained or an equivalent replacement must be offered.[46]

The wording of the law "including" and the explanations of the legislator are to be interpreted in such a way that all restructuring measures, i.e. both total and partial legal successions, can

43 Section 365 (1) BVergG 2018.
44 Section 365 (2) no. 4 BVergG 2018.
45 Section 365(3)(3)(b) BVergG 2018.
46 ErlRV 69 BlgNR XXVI. GP, 220 f; ECJ 13.4.2010, C-91/08, Wall AG.

be qualified as immaterial;[47] thus in particular the reorganization processes of mergers, transformations and spin-offs affecting the contractor. This in turn only applies if the special features that were essential for the award of the contract are retained or an equivalent replacement is offered.

As outlined above, spin-offs in particular can lead to significant changes in the suitability and performance of the new contractor, depending on which part of the company is spun off and whether the awarded contract remains with the transferring company or is transferred to the acquiring company. Those parts of the company that are relevant for the fulfillment of the contract must be retained in the course of the spin-off. If this is not the case or if the "new" contractor does not meet the suitability or performance requirements, the contract must be put out to tender again.[48]

The agreement of a specific contract amendment clause for contractor-side restructuring processes represents a practical option for standardizing the change of contractor as a merely insignificant contract amendment or defining the special features to be retained.[49]

5 Bidding consortiums

If it is foreseeable that there will be a reorganization process later in the award procedure, it makes sense to enter into a joint bidding consortium at an early stage, provided that there are no competition law concerns in this regard; the latter may arise, for example, if entrepreneurs with a strong market position form a bidding consortium , although they could submit independent competing bids.[50] Entering into a bidding consortium makes sense in particular if several candidates/bidders will be affected simultaneously by the planned reorganization process in the award procedure; for example, if two bidders merge. In any case, such a merger does not result in a change in the suitability or performance of the bidder. In this case, the transfer of assets takes place exclusively between the members of the bidding consortium. The same applies to spin-offs that affect only the members of a bidding consortium. Another option to mitigate the potential negative consequences of a future reorganization is the use of subcontractors. The same considerations apply here as for the concept of bidding consortiums.

6 Conclusion

Reorganization procedures will generally not rise legal issues in the first phase of the award procedure due to the possibility of amending the requests to participate and because suitability and pre-selection factors do not yet apply. In the second phase, the principles of public procurement law must be observed to a

47 Section 365 para. 3 no. 3 lit b BVergG 2018; ErlRV 69 BlgNR XXVI. GP, 220 f.
48 § Section 365 para. 3 no. 3 lit b BVergG 2018; ErlRV 69 BlgNR XXVI. GP, 220 f; ECJ 13.4.2010, C-91/08, Wall AG.
49 Section 365(3)(3)(a) BVergG 2018.
50 BVA 30. 11. 2010, N/0037-BVA/13/2010-108.

greater extent, in particular equal treatment of bidders, competition, binding bids and the awarding of contracts to suitable contractors. A distinction must be made according to the type of reorganization: In the case of bidder mergers, the contracting authority requirements must still be met; performance and competition must not be impaired. This also applies to conversions within the meaning of the UmwG; merely form-changing transformations are generally unobjectionable in the absence of a transfer of assets. In the case of spin-offs, the decisive factor from a competition and equal treatment perspective is, in particular, an imminent reduction in performance or a loss of suitability. In the case of individual legal successions such as mergers, divisions and some contribution cases, these rules are also relevant depending on the transaction structure. This applies even after the award of the contract; reorganization transactions constitute insignificant contractual changes, but the essential award features must be retained or an equivalent replacement must be offered. Procedural options such as the timely formation of a bidding consortium and the use of subcontractors can prevent negative effects on the bidder side in the event of reorganizations.

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