

Procurement Guide of the Medical University of Vienna

Status as of 17.06.2021

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1 Introduction

The Medical University of Vienna ("MedUni Vienna") is a contracting authority pursuant to the Federal Act on the Award of Contracts (BVerG 2018). Every contract awarded by MedUni Vienna is subject to this law.

This document is a concise summary guide based on the main legal requirements for contract awards under the BVerG 2018.

If you have any questions, the Building, Security and Infrastructure Management ("GSI") Department and the Legal Department will be happy to assist you. To contact them, please send an e-mail to: beschaffung@meduniwien.ac.at

2 Award procedure

2.1 When is a procurement procedure to be carried out?

As a matter of principle, MedUni Vienna and its affiliated companies may only award any construction, supply or service contract (e.g. the purchase of consumables) after a procurement procedure has been carried out. This applies to financing from the global budget and from third-party funds in accordance with §§ 26-27 of the Universities Act 2002, as well as to procurements made from other budget funds (donations, inheritances, etc.).

2.2 When is no award procedure to be carried out?

In the cases listed below, no award procedure is to be carried out:

- When services are called from framework agreements of the BBG, and also
- When the procurement is carried out by AKH or BIG

2.3 Value limit

If the contract value is less than **EUR 100,000.00** (excluding VAT), the law allows the contract to be awarded to a company by way of a form-free direct award.¹ However, it is advisable to obtain several offers in this case as well. The signature regulations laid down in the respective organisational units must be complied with in any case when procuring services; this also applies if the procurement is handled by the GSI.

If the value of the contract reaches or exceeds EUR 100,000.00 (excluding VAT), direct award may not be chosen.

If this value limit is exceeded, please contact the GSI department via the e-mail address beschaffung@meduniwien.ac.at to agree on the further procedure.

If the service to be procured has so-called "unique selling propositions" and the service can therefore only be provided by a specific contractor and, in addition, there is no reasonable alternative or substitute solution, this contractor can - irrespective of the value - be commissioned within the framework of a negotiated procedure without prior announcement. In this case we request you to contact the GSI department in advance via the e-mail address: beschaffung@meduniwien.ac.at

How is the value limit calculated?

The contract value to be estimated prior to the initiation of an award procedure is the expertly estimated total value of all services belonging to the project. All ancillary services such as assembly, delivery, installation of media connections or creation of additional infrastructure are to be included, as well as optional performance parts.

Special calculation rules apply to certain orders:

Regularly recurring orders: If similar goods or services are procured on a regular basis (e.g. orders for consumables), it is not the value of the individual order,

but rather the total value of all anticipated orders in the consecutive 12 months.ⁱⁱ

(Un)fixed-term contracts: In the case of leasing, renting, hiring or hire purchase of goods or in the case of standing orders, the total estimated value for the duration of the contract shall be used. However, if the contract is concluded for an indefinite period or if its duration is more than 48 months, 48 times the monthly salary is to be used.ⁱⁱⁱ

Splitting orders and choosing the valuation method, with the intention to circumvent the law, is not permitted.

The determination of the contract value and the justification of the admissibility of the direct award must be documented (see Annex ./A); when drawing up the file note, it must be taken into account that this is part of the procedural documentation and must therefore be clearly assignable (use of the same project number or file number). This file note must be prepared prior to the execution of the service procurement and sent to the e-mail address: beschaffung@meduniwien.ac.at

Note: Special provisions apply to framework agreements. Framework agreements are contracts from which services can be called off, but for which there is no obligation on the part of the client. If you require a framework agreement, please contact the GSI department at the following e-mail address: beschaffung@meduniwien.ac.at.

3 Implementation of the procurement procedure

3.1 Main principles of direct award

The principles of public procurement law must also be observed in the case of a direct award. The most important points are:

Compliance ^{iv}

Equal treatment of companies and free and fair competition between companies must be ensured. Companies are therefore not allowed to participate in the preparation of the procedure (e.g. drawing up the technical requirements).

If companies are contacted by MedUni Vienna before the direct award is initiated (e.g. to obtain non-binding price information), this must be done in a transparent manner and be adequately documented. These companies must not gain any inadmissible advantages from this (such as special knowledge compared to other companies from which offers are obtained).

It must also be ensured that no persons on the MedUni Vienna side are involved in the awarding of contracts, or have any influence on the outcome of these awards, if there could be a conflict of interest on the part of these persons that could cast doubt on their impartiality and independence. (e.g. due to a close economic or other relationship with the company).^v

The information submitted by the undertakings must be treated as confidential and must not be (e.g. technical secrets, price information).

Award only to suitable companies

Even in the case of a direct award, the contract may only be awarded to a company that is suitable at the time of the award (conclusion of the contract).^{vi} Suitability is generally lacking

- in the event of insolvency or liquidation of the
- as a result of the conviction of the entrepreneur or leading persons for certain criminal offences
- in the event of violations of labour, social and
- in the event of arrears in the payment of social security contributions or taxes;
- if the performance of this company in a previous order of MedUni Vienna had significant or permanent defects;
- In the case of collusion by the contractor which distorts competition.^{vii}

If there is an outward appearance of an authorised trade, the suitability of a company can be presumed.^{viii} However, if doubts arise, the suitability must be examined and, additionally Obtain evidence.

Written surcharge

The contract shall be concluded in writing with the contract contents specified in item 3.2.

Documentation

Every award of contract must be documented in an appropriate manner. The documentation must contain all decisions essential to the award of the contract, such as in particular the subject matter and value of the contract, the offers or non-binding price information obtained, the name of the contractor and - unless the effort would be uneconomical - the assessment of whether/that the price offered is reasonable.^{ix} Depending on the necessity, further content must be added, such as on the non-existence of a conflict of interest or on the examination of suitability.

In this context, it is pointed out that the procedural documentation must be kept for at least three (3) years from the awarding of the contract / commissioning; the performance contracts themselves must be kept for their entire term. For practical reasons (problems of proof, regulations on retention obligations in other laws, audit by the Court of Audit), it is recommended that the respective documentation be kept for the entire term of the contract, or in the case of shorter periods, for at least three years.

3.2 The most important contract contents

The following points represent the most important contract contents to which attention should be paid when awarding a contract. In general, it should be noted that caution in the conclusion and content of contracts can avoid disputes later on:

General Terms and Conditions (GTC)

GTC of the company should not apply unless MedUni Vienna expressly agrees to them. Under no circumstances should the validity of foreign law or a foreign place of jurisdiction be accepted. Furthermore, if suitable GTC of MedUni Vienna exist, these should be enclosed when soliciting offers and it should also be expressly pointed out that contracts are to be concluded exclusively on the basis of the GTC of MedUni Vienna.

Payment terms and deadlines ^x

The payment deadline for MedUni Vienna must be 30 days (in exceptional cases longer, but max. 60 days). The payment period starts from the date of receipt of the invoice at the agreed point of receipt at MedUni Vienna. This can be done electronically or by post, depending on availability. Care must be taken to ensure that no higher interest rate on arrears than that provided for by law is agreed. In addition, compensation for the contractor's operating costs may not be excluded entirely.

Risk bearing, warranty and liability

In the case of deliveries, it should be ensured that the risk (transfer of risk) is only transferred to MedUni Vienna upon delivery. This can be done by agreeing the Incoterms 2020: "*The delivery shall take place in accordance with Incoterms 2020 DDP plus unloading at the place of destination*".

In order to ensure the effectiveness of the above provision, the specific destination (address + component + room number) should therefore be specified and made part of the contract. At the same time - in order to prevent untimely deliveries - it should be ensured that the delivery date is agreed in good time before delivery with the contact person at the contracting authority must agree on the terms and conditions of the contract and, if necessary, approve them.

It is recommended that advance payments should only be agreed in exceptional cases; in the case of partial payments for partial services, a cover discount of approx. 5 % should be retained (primarily for construction services). In the case of larger procurements of equipment/goods, MedUni Vienna should retain part of the payment for the warranty period in the event of defects when paying the final invoice (liability discount - usually approx. 3 %); this liability discount can be paid out on presentation of a bank guarantee.

In addition, the obligation to give notice of defects should be avoided when purchasing goods. For this purpose, we recommend the following wording: *"The client is not obliged to inspect and give notice of defects within the meaning of Section § 377 f of the Austrian Commercial Code (UGB) in order to protect its warranty claims."*

In general, it is important to ensure that no conditions are agreed which are more disadvantageous than the statutory provisions (3-year warranty period for immovable objects and 2-year warranty period for movable objects); in particular, exclusions of liability or imitations of the contractor's liability for damages are to be rejected.

In this context, it should be pointed out that - irrespective of questions regarding the warranty period - it must be taken into account that six months after handover the buyer must prove that the defect was already present at the time of handover (so-called reversal of the burden of proof). This problem can be counteracted by the fact that a corresponding guarantee period is agreed.

Obligation / right of MedUni Vienna to terminate the contract

MedUni Vienna is obliged to terminate a contract if the Federal Administrative Court or the ECJ finds that there has been a serious breach of procurement law.^{xi} Furthermore, a contractual right of termination should also be reserved in the event of the contractor's lack of suitability or an inadmissible amendment to the contract. The following wording is recommended

"The contracting authority may terminate the contract without notice or time if the contractor was not suitable at the time the contract was awarded or if the existence of an unlawful change in the contract has been finally determined."

In addition, the client may terminate the contract without notice, or dates, even if the contract in question is declared null and void or annulled by the competent contract awarding authorities."

If you have any questions or require further information, please do not hesitate to contact the GSI department or the legal department at the following e-mail address: beschaffung@meduniwien.ac.at

Prior contract review by legal department / GSI

In this context, it is pointed out that all contracts which are concluded by the Medical University of Vienna or which may affect its interests must be submitted to the Legal Department for review prior to signing. Once a contract has been reviewed and finalised, it is released by the Legal Department. The signature (including the date of signature) by the person authorised to represent the University (in principle the head of the respective organisational unit according to § 27 UG) can only be made after the contract has been approved.

The preceding contract review is handled by the GSI and therefore draft contracts, which are to be used as a basis for procurements within the framework of a direct award, are to be sent to the GSI in advance. The GSI will carry out the further contract review with the legal department and return the approved draft contract to the user for further use.

If a procedure or contract document provided by the GSI is used, the coordination with the legal department is also carried out by the GSI.

4 After conclusion of the contract

4.1 Obligatory announcement of the conclusion of the contract

Each contract awarded with a value of EUR 50,000.00 or more (excluding VAT) and each call-off from a framework agreement above this value must be published on www.data.gv.at within 30 days of the conclusion of the contract.^{xii} However, call-offs from a framework agreement may be bundled per quarter.

The GSI department has experience with the specific modalities and handles this announcement for you. Therefore we request you to immediately contact us after the contract has been awarded or called-off from a framework Agreement, by way of the e-mail address: beschaffung@meduniwien.ac.at.

4.2 What changes may be made after conclusion of the contract?

After the contract has been awarded, only insignificant changes to the contract are permitted. These must be documented (note in file).

In particular, amendments to the contract that exceed the value limit for direct awards (e.g. through additional deliveries/services or price changes) or that substantially change the subject matter of the contract would be inadmissible. In any case, if changes to the contract sum exceed 10% of the original contract sum in the case of supply and service contracts or 15% of the contract sum in the case of construction contracts, an inadmissible change must generally be assumed.^{xiii} Such a change to the contract could lead to the contract being declared null and void or to a fine being imposed on MedUni Vienna.

In any such case, we request you to contact us at beschaffung@meduniwien.ac.at.

5 Legal consequences of non-compliance

An infringement of public procurement law can result in the annulment or cancellation of a concluded contract by the courts on the one hand, and on the other hand the contracting authority can also be imposed with considerable fines.

Violations of public procurement law can also have consequences under civil service law; civil liability (claims for damages) can also result from violations of public procurement law.

Nor is it entirely ruled out that a deliberate omission, contrary to procurement law, of a public invitation to tender that is actually to be carried out constitutes a punishable offence within the meaning of the

6 Overview document: Checklist for the award of contracts

1. Determination of the contract value	
<input type="checkbox"/>	Is the order value less than EUR 100,000.00 (excluding VAT)? If not, we request that you contact the GSI Department and the Legal Department at the following e-mail address: beschaffung@meduniwien.ac.at
2. Compliance	
<input type="checkbox"/>	Prior to the launch of the tendering procedure, no potential bidder was contacted? If so: The contact was transparent, was sufficiently documented and the company has no undue competitive advantage as a result?
<input type="checkbox"/>	Was a tenderer involved in the preparation of the tender documents (in particular the technical requirements)? If so, we request that you contact the GSI Department and the Legal Department at the following e-mail address: beschaffung@meduniwien.ac.at
<input type="checkbox"/>	Can conflicts of interest involving MedUni Vienna staff who are involved in the awarding of contracts or have an influence on their outcome be ruled out? If there are indications of a possible conflict of interest (appearance is sufficient!): Have the necessary measures been taken to prevent such a conflict and documented?
<input type="checkbox"/>	Is the confidentiality of the information provided by the companies ensured?
3. Suitability	
<input type="checkbox"/>	There are no indications that the future contractor is not suitable (e.g. insolvency, criminal convictions, significant deficiencies in previous contracts)? If there is evidence of this: has the suitability been checked and has this check been documented?
4. Contents of the contract	
<input type="checkbox"/>	Was attention paid to the important contents of the contract (e.g. general terms and conditions, warranty and liability, payment terms and deadlines, early termination of contract, etc.)?
5. Documentation	
<input type="checkbox"/>	Are all relevant points sufficiently documented (e.g. subject matter and contract value, offers, and if applicable, also points 2 and 3) and is the contract awarded in writing?
6. Announcement of contract conclusion and contract changes	
<input type="checkbox"/>	If the order value is at least EUR 50,000.00 (excluding VAT): Was the conclusion of the contract is announced?
<input type="checkbox"/>	If changes have been made to the contract: Are these changes insignificant (in particular, have they not exceeded the value limit of EUR 100,000.00 (excluding VAT)) and have they been sufficiently documented?

Table 1: Overview document: Procurement checklist

ⁱ § 46 BVergG 2018 in conjunction with the Threshold Value Ordinance (valid until 31.12.2022).

ⁱⁱ §§ 15(2), 16(3) BVergG 2018.

ⁱⁱⁱ §§ 15(1), 16(2) BVergG 2018.

^{iv} See, mutatis mutandis, §§ 25-27 BVergG 2018 (§ 46 in conjunction with § 20(1) BVergG 2018).

^v Cf. Art 24 Procurement Directive 2018/24/EU, which already assumes a conflict of interest if it can be assumed that impartiality and independence are impaired. In the sense of an interpretation in conformity with the Directive, the mere appearance of impairment of impartiality and independence will therefore already be detrimental.

^{vi} § 46(3) BVergG 2018.

^{vii} See, mutatis mutandis, § 78 BVergG 2018 (§ 46 in conjunction with § 20(1) BVergG 2018).

^{viii} EBRV 69, XXVI GP at § 46.

^{ix} § 46(4) BVergG 2018.

^x § 100 BVergG 2018.

^{xi} § 366 Z 2 BVergG 2018.

^{xii} § 66 BVergG 2018.

^{xiii} See, mutatis mutandis, § 365 BVergG 2018 (§ 46 in conjunction with § 20(1) BVergG 2018).

^{xiv} Cf. ruling of the Federal Court of Justice of 08.01.2020, 5 StR 366/19 on a comparable legal basis. For a punishable breach of trust according to the offence of breach of trust of the Austrian Criminal Code, in the case of facts relating to public procurement law, on the one hand a knowing misuse of an authority in decisions on the award of contracts on behalf of a public contracting authority is required. On the other hand, a financial loss must actually have occurred.

Annex ./A - Memorandum on the estimation of the contract value for preparation of a direct award

Project Name:	
Project number / File number:	
Estimated order value: (in EUR excl. VAT)	
Contractor:	
Date of order value estimate:	
Project Manager:	

The project must be briefly described below (max. 2,853 characters including blanks) and the contract value estimate must be explained and justified. Any supplementary documents must be enclosed.

With my signature below, I confirm that the contract value estimate has been carried out competently (if necessary, with the assistance of external experts) and in accordance with the specifications of the procurement guidelines of the Medical University of Vienna, and I confirm the correctness and completeness of the above information and the supplementary documents:

Date, Signature
Project Manager