

PROTECTION OF BUSINESS SECRETS VS. TRANSPARENCY IN PUBLIC TENDERS

Spanish Business Briefing
April 26, 2022

Question 1:

- We are participating in a public tender.
- We are confident that we will win it because we have a much better solution than our competitors.
- ? However, could our competitors receive information about our solution in the tender proceedings?

➤ **Need: Protection of Business Secrets**



Question 2:

- We have participated in a public tender.
- Although we offered the lowest price and our product is the best, unfortunately our competitors got far more points for their technical solution and therefore, we missed the award.
- We have no idea what this alleged technical solution of the competitor is supposed to be. What can we do?

➤ **Need: Transparency in Public Procurement**



What are business secrets?

- Protection of technical drawings, drafts, models, specimens, calculations... (outside “classic” IP rights)
- Art. 2 (1) EU Directive 2016/943; Art. 26b (1) Austrian Federal Act against Unfair Competition



‘trade secret’ means information which meets all of the following requirements:

- it is **secret** in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- it has **commercial value** because it is secret;
- it has been **subject to reasonable steps** under the circumstances, by the person lawfully in control of the information, to keep it secret.

The protection of business secrets is shielded by fundamental rights.

- Protection of Property (Art. 5 Austrian Fundamental State Act of 1867, Art. 17 EU CFR)
- Freedom of Employment (Art. 6 Austrian Fundamental State Act of 1867, Art 15-16 EU CFR)
- Respect for Private and Family Life (Art. 8 ECHR, Art. 7 EU CFR)



Is transparency a right?

Right to a Fair Trial (Art. 6 ECHR)

- Adversarial principle implies right to access relevant information.
- Not unlimited if other protected interests are at stake: balancing of interests.



Is transparency a right?

Art. 20 (3) Federal Constitutional Act “**Official Secrecy**”

- In principle public authorities must keep secrecy about facts they have learned when exercising their duties.

Bill by Ministry of Justice on Act on Freedom of Information:

- Art. 20 (3) shall be abolished
- New Art. 22 a: Public Authorities must provide information of general interest to everyone, as long they are not to be kept secret.

Transparency is a fundamental principle.

Art. 20 (1) Austrian Public Procurement Act

- *“Award procedures shall be carriedin compliance with the principles of European Union law such as, in particular, equal treatment of all candidates and tenderers, non-discrimination, proportionality, **transparency** as well as free and fair competition and in compliance with the principle of economic efficiency.”*

....but what is “transparency”?

ECJ Judgement C-368/10 of 5 April 2007, Commission vs. Netherlands

"The principle of transparency means that all terms and conditions of the procurement procedure shall be formulated in a clear, precise and unambiguous manner.....so that, on the one hand, all duly informed tenderers acting with ordinary diligence understand the precise meaning of the terms and conditions and can interpret them in the same way...."

- Award criteria must be clear, precise and unambiguous.
- All tenderers must receive the same information from the contracting authority.

Art. 27 Austrian Federal Public Procurement Act

- The contracting authority and the participants in a procurement procedure shall maintain the confidential nature of all information exchanged in the conduct of a procurement procedure.
- The contracting authority may not disclose any information provided to it by a contractor and **designated as confidential** by the latter. This applies, in particular, to technical secrets, trade secrets and confidential aspects of offers.
- The contracting authority may prescribe requirements for the participants in a procurement procedure to protect the confidentiality of information provided, transmitted or made available to them in the context of a procurement procedure.

- Advise: ALWAYS designate business secrets as such (cf. definition of business secrets under the EU Directive!)
- NO access by competitors to business secrets in tender proceedings
- Access to certain information to be disclosed in award protocol and by asking questions and review question of other tenderers



But what about tender review proceedings?

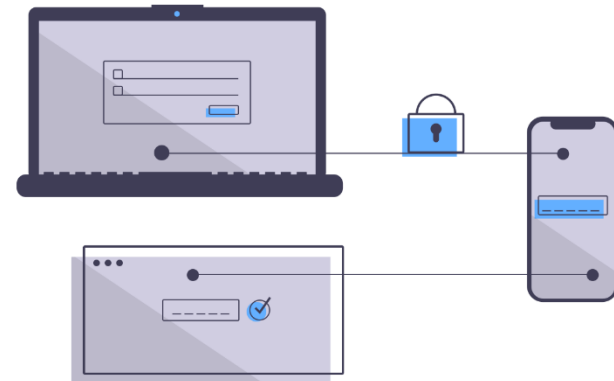
- “Our competitors won because they got the best score for their technical solution...what can we do?”
- “We won because we have got the best technical solution. Our competitors have challenged the award decision. How can we avoid that they receive information about our solution?”



- Business secrets are confidential in procurement procedures, including review procedures.
- The review body must have access to all information concerning business secrets and is itself bound to confidentiality.
- It is up to the review body – and not the contracting authority and the companies involved in procurement procedures – to decide which information is to be considered confidential.



- Result: review bodies (in Austria: Federal and Regional Administrative Courts) must always be granted access to business secrets and it is up to them to decide which information is protected and which information may be disclosed to other parties.



Right to inspection of files

Art. 17 General Administration Proceedings Act

- Parts of the file shall be excluded from inspection insofar as their inspection would cause damage to the legitimate interests of a party or third persons or jeopardize the tasks of the authority or impair the purpose of the proceedings.



Cooperation duties in Tender Review Proceedings

Art. 336 (1) Austrian Federal Public Procurement Act:

- *“...the contracting authorities or... shall provide the Federal Administrative Court with all information necessary for the performance of its duties and shall submit all documents required for this purpose in an orderly manner. The same applies to the contractors involved in an award procedure.”*

-> contracting authorities and presumptive “winners” of tender proceedings must deliver all their documents to the Federal Administrative Court.

-> if they do not deliver the required information/documents, the administrative court may only rely on the arguments of the applicant.

Art. 337 Austrian Federal Public Procurement Act

- “When submitting documents to the Federal Administrative Court, parties and involved persons may request that certain documents or parts of documents be excluded from the inspection of files in order to protect technical or trade secrets.”*

From OI 08

For some time we have been concerned by the recurring [REDACTED]. They periodically continue to pop up; during the last week, one was observed hovering over [REDACTED] for about thirty minutes. They have been reported by so many sources and from such a variety of places that we are convinced that they cannot be disregarded and must be explained on some basis which is perhaps slightly beyond the scope of our present intelligence thinking.

When officers of this Directorate recently visited the Swedish Air Intelligence Service. This question was put to the Swedes. Their answer was that some reliable and fully technically qualified people have reached the conclusion that "these phenomena are obviously the result of [REDACTED] which cannot be credited to any presently known [REDACTED]. They are therefore assuming that these objects originate from some [REDACTED]."

One of these objects was observed by a [REDACTED] technical expert near his home on the edge of a lake. The object crashed or landed in the lake and he carefully noted its azimuth from his point of observation. [REDACTED] Intelligence was sufficiently confident in his observation that a naval salvage team was sent to the lake. Operations were underway during the visit of [REDACTED]. Divers had discovered a previously uncharted crater on the floor of the lake. As further information is available, but we have been promised knowledge of the results. In their opinion, the observation was reliable, and they believe that the depression on the floor of the lake, which did not appear on current hydrographic charts, was in fact caused by a [REDACTED].

Although accepting this theory of the origin of these objects poses a whole new group of questions and puts much of our thinking in a changed light, we are inclined not to discredit entirely this somewhat spectacular theory, meantime keeping an open mind on the subject. What are your reactions?

TOP SECRET

What to do for the protection of business secrets?

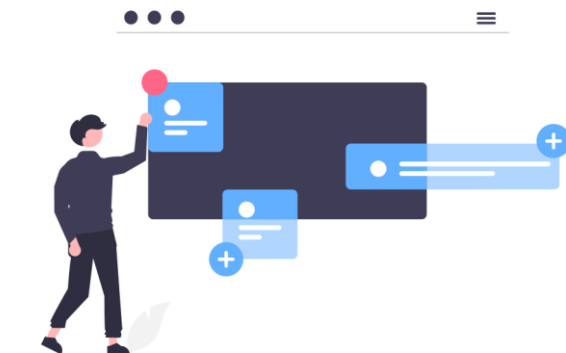
- Designate all business secrets disclosed to the contracting authority from the beginning.
- In tender review proceedings be cooperative: Provide all information and documents, including business secrets, but only together with a specified, detailed and well-founded request for the exclusion of sensible information from inspections by the applicant.
- Proactive communication with the contracting authority



What in do for getting access to information?

- Ask questions in tender proceedings
- Review award protocol
- **Challenge the award decision based on assumptions and without evidence**
- Carefully inspect file and information provided by contracting authority and presumptive “winner”
- If too much content is “blackened”, complain in tender proceedings and request disclosure of this information

- Public bodies must proactively provide information of general interest in an electronic information register (Art. 4), public-owned companies by request of any person.
- Information of general interest = which is relevant to the public, in particular studies, expert opinions, statements and **contracts with an object value of at least 100,000 euros** (Art. 2).



- Information shall not be published if there is a prevailing particular interest, in particular
 - to safeguard the right to protection of personal data,
 - to protect professional, business or trade secrets; or
 - to protect the intellectual property rights of data subjectsafter balancing them with other interests.

Art. 6 (1)(7)

- Possibility of complaint before administrative courts if information is not provided.

Possible effect on public tenders

More transparency?

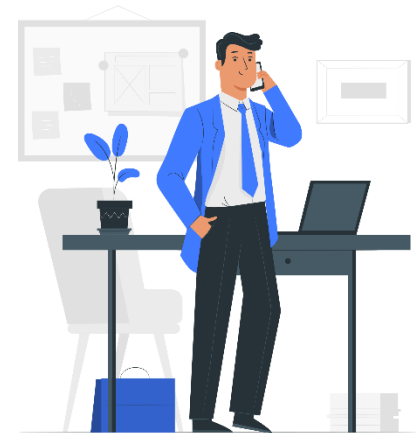
- Easier to get information before challenging the tender?
- Information will be published before tight deadlines for review applications?
- **Contracts must be published**

Risks for protection of business secrets?

- Risks for disclosure of business secrets also without review proceedings
- Necessity for tenderer of proactively designating business secrets
- Important to review existing contracts with contracting authorities

- Attention: Extremely short deadlines... may legal traps!
- Contracting entities know the game! Do you?
- Therefore... trust is good but legal advice is better

➤ **WORK WITH A LAWYER FROM THE BEGINNING!**



Thank you for your attention!

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