

Practitioner Note: the use of electronic signatures in procurement between jurisdictions

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The Austrian Federal Railways (Österreichische Bundesbahnen) (ÖBB) conducted a two-stage procurement procedure to order new double-decker trains. In the tender documents, ÖBB stipulated, among other things, that final bids could only be submitted electronically using a qualified electronic signature, as defined in Regulation (EU) No 910/2014 (eIDAS regulation¹).

In June 2021, ÖBB made the selection decision and accepted the electronically submitted offer of Swiss company Stadler Rail AG. Another bidder in this procurement procedure, who had been excluded from the tender in autumn 2020, challenged the selection decision before the Austrian Federal Administrative Court (Bundesverwaltungsgericht) (BVwG), arguing that Stadler Rail AG did not comply with the requirement of using a qualified electronic signature.

In its decision of 10 September 2021,² the BVwG essentially ruled in favour of the other bidder, because Stadler Rail AG had apparently used a Swiss signature service provider to sign its final bid. There (undisputedly) was and still is no agreement between the EU and Switzerland within the meaning of article 218 of the Consolidated version of the Treaty on the Functioning of the European Union³ (TFEU) pursuant to the eIDAS regulation by which Swiss electronic signatures could be recognized as equivalent to the requirements of the eIDAS regulation. Therefore, an electronic signature created in Switzerland does not qualify as a signature pursuant to the eIDAS in the EU (and thus neither in Austria).

Factual and legal situation

Within the eIDAS regulation framework, a distinction is made between three types of electronic signatures: simple electronic signatures (article 3(10)), advanced electronic signatures (article 3(11)) and qualified electronic signatures (article 3(12)). Only the latter are relevant for the present case.

From the Austrian perspective, the Austrian Federal Public Procurement Act 2018 (BVerG 2018⁴) stipulates, in articles 48 and 217, that communication with the contractors (bidders) in the upper threshold (i.e. if the contract value is above a certain threshold, the amount depending on the subject of the tender) must in principle be carried out electronically. This applies to public contracting authorities as well as sector contracting entities (Sektorenauftraggeber). Thus, in procurement procedures with an estimated net contract value equal to or

¹ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC OJ L 257, 28.8.2014, p. 73–114.

² BVwG W131 2243410-2 ECLI:AT:BVWG:2021:W131.2243410.2.00

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bvwg&Entscheidungsart=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=W131+2243410-2&VonDatum=01.01.2014&BisDatum=09.05.2022&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Position=1&SkipToDocumentPage=true&ResultFunctionToken=93992a77-7fa2-43c7-b31c-e0001a5b6eec&Dokumentnummer=BVWGT_20210910_W131_2243410_2_00

³ OJ C 326, 26.10.2012, p. 47–390.

⁴ <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010295> .

exceeding the amounts set forth in article 12 BVergG 2018, electronic communication is required, unless there is an exception as set out in article 48, para 6 or article 217, para 6 (e.g. if the use of electronic means of communication required specific instruments, devices or file formats that are not generally available due to the special nature of the contract, etc.).

Article 48, para 12 and article 217, para 12 BVergG 2018 further provide in this context that, especially (but not only) bids must in principle be submitted with a qualified electronic signature. Paragraph 12 is identical in both articles, as follows:

Bei Übermittlung von Ausschreibungs- und Wettbewerbsunterlagen, Teilnahmeanträgen, Angeboten, Wettbewerbsarbeiten sowie Auftragsbestätigungen sind diese mit einer qualifizierten elektronischen Signatur, einem qualifizierten elektronischen Siegel oder einer Amtssignatur gemäß § 19 Abs. 1 des E-Government-Gesetzes – E-GovG, zu versehen bzw. hat die Übermittlung so zu erfolgen, dass die Vollständigkeit, Echtheit und Unverfälschtheit der Datensätze mit einer Qualität gewährleistet ist, die mit der Qualität einer qualifizierten elektronischen Signatur bzw. eines qualifizierten elektronischen Siegels vergleichbar ist.

When tender and competition documents, applications for participation, bids/offers, competition works and order confirmations are transmitted, they must be provided with a qualified electronic signature, a qualified electronic seal or an official signature pursuant to article 19, para 1 of the Austrian E-Government Act (E-GovG), or the transmission must be carried out in such a way that the completeness, authenticity and integrity of the data records is guaranteed with a quality comparable to that of a qualified electronic signature or a qualified electronic seal.

Thus, when not using a qualified electronic signature, the submission may also be made ‘in such a way [...] that the completeness, authenticity and integrity of the data records is guaranteed with a quality that is comparable to the quality of a qualified electronic signature [...]’. This alternative may be conceivable for bidders, who do not have a qualified electronic signature within the meaning of the eIDAS regulation, but have instead a comparable qualified electronic signature.⁵ However, there is no provision in law to determine when this requirement is met. Therefore, the ‘comparability’ must always be examined in each individual case. Additionally, the examination and its result ought to be, ideally, documented by the contracting authority.

Furthermore, the contracting authority can also set stricter requirements for the electronic signature in its procurement documents, which are then binding for all (potential) bidders.⁶ This can pose challenges or even problems for (potential) bidders – especially for those from non-EU countries. In this context, faults can, in particular, result from the fact that an electronic signature of a provider from a third country is used, which is not recognised as legally equivalent in the EU (or Austria).⁷

This happened in the present case, since ÖBB stipulated that ‘a qualified electronic signature [is] required for the electronic submission’ and bidders should ‘[...] therefore ensure that they have a qualified electronic signature within the meaning of Regulation (EU) No 910/2014 at the latest by this time [...]’ in its invitation to submit a final offer. However, Stadler Rail AG, as a Swiss company (thus, a company from a third country), apparently used a qualified electronic signature issued by a Swiss trust service provider for its final offer. The BVwG therefore ruled that the bid by Stadler Rail AG – as a bid signed with a non-qualified electronic signature pursuant to the eIDAS regulation – was not compliant with the rules of the procurement procedure and therefore null and void. In this context, it also found that ÖBB had not documented that Stadler Rail AG had the required qualified electronic signature at the time of the final bid or that it used this signature when submitting the bid.⁸

⁵ Florian Kromer, Die eSignatur im Vergabeverfahren, ZVB 2020/14.

⁶ Michael Weiner, Einige praktische Herausforderungen der eVergabe, ZVB 2022/11.

⁷ Michael Weiner, Einige praktische Herausforderungen der eVergabe, ZVB 2022/11; for additional difficulties, see Stephen Mason, ‘The practical issues in using electronic signatures in different jurisdictions’, *Computer and Telecommunications Law Review*, 2021, Volume 27, Issue 6, 165 – 179.

⁸ BVwG W131 2243410-2 ECLI:AT:BVWG:2021:W131.2243410.2.00.

The decision of the BVwG was unsuccessfully challenged before the Supreme Administrative Court (Österreichischer Verwaltungsgerichtshof) (VwGH), thus the award remains void.

Despite this, according to media reports, the assignment was successfully awarded to Stadler Rail AG, and they apparently are now able to deliver the double-decker trains to ÖBB. While the media reports mention a decision by the VwGH as the reason for the award, no such decision exists. Thus, it appears that the matter has apparently been resolved out of court, with the details a closely guarded secret.

To avoid such signature problems in the future, (potential) bidders can refer to the suggestions made below, among others.

Practical advice for foreign bidders in Austrian procurement procedures

If communication in a specific procurement procedure takes place electronically, it is primarily recommended to sign all documents – in particular requests for participation and bids – with a qualified electronic signature within the meaning of the eIDAS regulation.⁹ Alternatively, the potential bidder can check whether there is an agreement within the meaning of article 218 TFEU in conjunction with the eIDAS regulation between the country of residence of the trust service provider used for the tender. If the answer is yes, the qualified electronic signature of such a signature service provider can also be used.

Should the (potential) bidder not have a (recognised) signature within the meaning of the eIDAS regulation, it should first familiarise itself with the current legal requirements, in particular with the specific requirements set out in the procurement documents and take the appropriate further steps. If, for example – as in the case at hand – a qualified electronic signature as defined in the eIDAS regulation is required, the (potential) bidder could use a trust service provider from the EU or another recognised country. A corresponding list of recognised providers within the EU can be found under the link in the footnote.¹⁰

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⁹ Michael Weiner, Einige praktische Herausforderungen der eVergabe, ZVB 2022/11.

¹⁰ <https://esignature.ec.europa.eu/efda/tl-browser/#/screen/home> .