



BVwG

Bundesverwaltungsgericht
Republik Österreich

THE AUSTRIAN SYSTEM OF PUBLIC PROCUREMENT

Legal basics

- **WTO – World Trade Organisation**
 - GPA Government Procurement Agreement (international plurilateral agreement between the WTO-Parties concerning public procurement)
 - Principles
 - More Transparency
 - More Competition; open up government procurement markets
 - Good governance in the field of public procurement (legal guarantees of non-discrimination; use of electronic procurement tools; prevention of corrupt practices)
 - Procurement of goods, services and capital infrastructure

Legal basics: new EU Directives

- **New Directives of the European Union**
(implementation on national law until April 2016)

- Public procurement, Directive 2014/24/EU
- Procurement in the field of utilities; Directive 2014/25/EC
- Directive on concessions, Directive 2014/223/EU

No revision of the Directive on Procurement in the field of Defense and Security, Directive 2009/81/EC

New EU Directives: Simplifications

- **Simplification for tenderers; eg self-declaration**
- **Simplification for contracting authorities**
 - More options to choose different procurement procedures
 - More flexible and efficient proceedings
 - Additional flexibility for local and regional authorities
 - Also bundle purchases for authorities

New EU Directives – Electronic Procurement

- **Electronic procurement mandatory**
 - By March 2016: electronic notification
 - By March 2017: electronic submission of offers for central purchasing bodies
 - By March 2018: electronic submission of offers for all contracting authorities

Simplification of procurement procedures

Open up for economic operators

New EU Directives; Public Public Cooperations

- Contracts between public sector entities without applying procurement rules
- In-house relationships („vertical cooperation“)
- Cooperation between contracting authorities („horizontal cooperation“)

New EU Directives; additional aspects

- New regime for certain services
- ‚Green‘ (ecologically) public procurement
- Life cycle costs
- Social aspects (training of apprentices; equal treatment between men and women, e.g. wages)
- Innovation
- Transparency and anti-corruption

New EU Directives – Concessions

- **Concession**
 - Kind of partnership between the public sector and a (usually) private company
 - Remuneration: permission to run and exploit the work or service
 - Exposed to a potential loss on its investment (risk)

- **Provisions on**
 - Award criteria
 - duration
 - procedural guarantees

Austria

- **Federal state – 9 regional states**
- **1.1.2014: reform of administrative jurisdiction**
- **Introduction of**
 - 1 administrative court at federal level
 - 9 administrative courts at regional level

Replacement of numerous specialized ‚tribunals‘, e.g. Federal public procurement office

Public Procurement in Austria

- **Federal constitution act**
 - Transforming of EU-directives for all authorities (federal, regional, communities) by national law: public procurement act
 - Public procurement review authorities since 1.1.2014:
 - First instance
 - Federal Administrative Court
 - 9 regional administrative courts
 - Appeals
 - Constitutional Court
 - Administrative Court
- **Concessions and damages:** civil courts (3 Instances)

Federal administrative court

- **In general: responsible for appeals against administrative decisions of federal authorities, e.g. in the fields of**
 - Social affairs
 - Handicapped people
 - Unemployment allowance
 - Employment of foreigners
 - Social insurance

Federal administrative court

- **Human and personal rights**

- Education (e.g. school certificates; university degrees, study aid support)
- Civil servants' and army servants' right
- Disciplinary rights of officials, civil servants and of the army servants (but not criminal law)
- Protection of privacy; also religion matters and equal treatment
- Some decisions concerning elections of political parties and parliamentary investigation committees

Also: Asylum procedures

Federal administrative Court

- **Economic affairs and environmental protection, e.g.**
 - Financial market supervision
 - Review of decisions in the field of public procurement of federal authorities
 - Decisions of supervisory authorities and regulators, eg gas and power supply, telecommunication, media supervision, state broadcastings fees
 - Excess in court-ordered house searches in cartel proceedings
 - Environmental impact Assessment (infrastructure projects, like roads and railway projects, power plants and power lines, sports and leisure facilities, industrial factories and animal breeding factories)
 - Agricultural support by EU-law and market regulation
 - Decisions of the Federal Office of metrology and surveying
 - Decision of the Federal office for national monuments

Federal administrative Court: Organisation

- **Central in Vienna**
 - outposts in Linz, Innsbruck, Graz
- **220 judges**
- **600 staff overall**
- **2015: 23.000 cases;**
- **2016: approximately 28.000 cases**
 - Review of decisions of public procurement:
200 cases/year; 8 senats deal with review procedures (but not only in those cases)

Federal Administrative Court; powers

- **Interim measures**
- **Nullification of decisions of the contracting authority**
- **Ascertainment**
 - Damages
 - Ineffectiveness of contract already concluded
 - Ineffectiveness of withdrawals of procurement procedure
 - Withdrawals of procurement procedures in cases contracting authority does not continue the procedure properly

Interim Measures

- **Aim**
 - Prevent damages until decision of review
 - Prevent contracting authorities from creating unchangeable facts
 - Ensure effectiveness of review procedure
- **Application necessary**
- **Decision**
 - judge
 - within 7 working days
 - consideration of interests

Decisions subject to appeal

- Decisions subject to appeal defined by law
- Purpose: dividing procurement procedures into section containing all other decisions since the last decision subject to appeal
- Reviews only with defined short time limits (mostly two weeks)
- If time limit passes without a review, decisions cannot be appealed anymore

Review of Decisions of the Contracting Authority

- **Requirements**

- Interest into entering the contract
- Damage threatening or already occurred
- Petition for nullification of a decision subject to appeal
- Illegality of decision
- Fees

- **Procedure**

- parties: applicant, contracting authority, other tenderers whose rights may be harmed by nullification of decision reviewed
- Exchange of opinions
- Oral hearing (Civil right)

- **Decision**

- senate (judge and two expert lay judges)
- nullification or dismissal of application

Ascertainment

- **After end of procurement procedure by award of the contract or withdrawal**
- **Determine illegality of decision of contracting authority**
- **Aim**
 - Prepare claim for damages
 - Ineffectiveness of contract
 - Ineffectiveness of withdrawal
 - Alternate penalties

Appeals

- **Constitutional court**
 - Infringement of rights granted by Constitution
 - Application of unconstitutional provision
 - Application of unlawful regulation
- **Administrative Court**
 - wrong application of law
 - decision of important legal questions only
 - no individual legal protection any more
- **Supreme court**
 - damages, concessions, punishments

THANK YOU FOR YOUR ATTENTION.

Michael Sachs
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