



**COUNTRY  
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# **The Legal 500 Country Comparative Guides**

## **Austria**

### **PUBLIC PROCUREMENT**

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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Austria.

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# AUSTRIA

## PUBLIC PROCUREMENT



\*"Complex contracts" refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.

### 1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL).

As Member of the European Union Austria has implemented the Procurement Directives into national law. The Directives 2014/24/EU and 2014/25/EU of the European Parliament and the Council were implemented into the Austrian Federal Procurement Act (*Bundesvergabegesetz 2018*, Federal Law Gazette I 65/2018, last amended through Federal Law Gazette II 91/2019; "**FPA 2018**") and the Directive 2014/23/EU into the Federal Procurement Act for Concessions of 2018 (*Bundesvergabegesetz Konzessionen*, Federal Law Gazette I 65/2018, last amended through Federal Law Gazette I 100/2018).

Through its membership to the European Union, Austria is contracting party to the Agreement on Public Procurement between the European Community and the Swiss Confederation (*Beschaffungsabkommen Schweiz*). The Agreement is directly applicable and, therefore, enforceable.

Also due to its membership to the European Union, Austria is subject to the World Trade Organisation's Agreement on Government Procurement ("**GPA**"). However, the GPA's (direct) applicability is rather restricted, due to the lack of rulings of the European Court of Justice (ECJ) regarding the direct applicability of WTO provisions, as the ECJ ties the enforcement of the GPA to the European Procurement Directives.

### 2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

The award of government contracts regarding supply, services, construction and specific services is regulated under the FPA 2018. This includes procurement by central government institutions (e.g. ministries) and other public institutions on federal, local and municipal level as well as bodies governed by public law.

Procurement by utilities suppliers (*Sektorenauftraggeber*) is also subject to the FPA 2018, although with some simplifications and modifications compared to general public / governmental procurement.

For Specific Service Contracts (e.g. medical, social, educational or cultural service contracts) as stated in Annex XVI to the FPA 2018, a less strict and more flexible procurement regime applies.

The award of concession contracts is regulated

separately in the Federal Procurement Act for Concessions of 2018).

Procurement in the field of defence and security are subject to the Federal Procurement Act for Defence and Security of 2012 (*Bundesvergabegesetz Verteidigung und Sicherheit 2012*, Federal Law Gazette I 10/2012, last amended through Federal Law Gazette II 346/2021).

**3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction? Does the financial threshold differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules on the valuation of a contract opportunity.**

The thresholds as set forth in the Procurement Directive of the European Union directly apply. However, under Austrian law, also the Threshold Regulation (*Schwellenwerteverordnung 2023*, Federal Law Gazette II 148/2023, last amended through Federal Law Gazette II 202/2023) applies, specifying sub-thresholds regulated in the Procurement Directive of the European Union.

In Austria, the following thresholds therefore currently (as of Jan. 1 2024) apply, differing depending on the nature of procurement as well as the type of sector (cf Art 12 FPA 2018):

a) Supply and service contracts:

- Contracting authorities: EUR 221,000
- Central government authorities (as listed in Annex II to the FPA 2018): EUR 143,000
- Sector contractors: EUR 443,000

b) Construction contracts and concession contracts: EUR 5,538,000

c) Specific service contracts (as listed in Annex XVI to the FPA 2018):

- Contracting authorities: EUR 750,000
- Sector contractors: EUR 1,000,000

d) Sub-thresholds for direct awards, as amended by the Threshold Regulation:

Contracting authorities and sector contractors: EUR 100,000 (as opposed to EUR 50,000 pursuant to the FPA

2018 and the Procurement Directive).

Whether the respective public award falls above or below the above-stated thresholds is determined based on the estimated value of the procurement (*geschätzter Auftragswert*) by the contracting authority prior to initiating of the procurement procedure. Based on this determination, the respective procurement rules apply. For procurements with an estimated value above the aforementioned thresholds for the respective contract, the relevant procurement rules apply without limitations. Procurement procedures based on an estimated value below the relevant thresholds are subject to a less strict procurement regime (see below). The basis for calculating the estimated contract value of a contract is the total value, excluding value added tax, expected to be paid by the contracting authority. This calculation shall take into account the estimated total value of all the services forming part of the project, including all options and any contract extensions to be expressly provided for in the invitation to tender. The FPA 2018 provides for different rules for calculating the estimated contract value depending on the specific type of contract (works, supplies or services, cf Art 12 ff FPA 2018).

**4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.**

All public awards are subject to the FPA 2018, regardless of their value. In general, procurements above the aforementioned thresholds must adhere to the procurement procedures set out in the respective statutory procurement regulations. However, more simplified and flexible procedures may apply if the estimated value of the award falls below the relevant financial thresholds. Most notably, the FPA 2018 provides for direct awards (i.e. awards below EUR 100,000) to be procured rather unrestrictedly by the FPA 2018 (*Direktvergabe*).

**5. For the procurement of complex contracts\*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes? What is the typical period from the publication of the advert that bidders have to respond to the advert for a complex contract?**

Depending on the procurement value, the FPA 2018

provides for different publication obligations that have to be observed by contracting authorities (cf Art 50 ff FPA 2018).

Assuming complex contracts usually being contracts above the FPA 2018 thresholds, the (planned) procurement of such contracts has to be published at an European level (cf Art 56 FPA 2018, *Bekanntmachung auf Unionsebene*). For that purpose, the respective contracting authority has to submit the information as listed in Annex VI to the FPA 2018 by completing a standard form as stated in Annex VII via the electronic database of the European Union, Tenders Electronics Daily (“TED”). The information will then be published in Supplement S to the Official Journal of the European Union (OJEU). The publication of planned awards below the thresholds in TED is at the discretion of the contracting authority.

Following the publication via TED, planned procurements of complex contracts also have to be published on a national level (cf Art 59 FPA 2018, *Bekanntmachung in Österreich*). There is a minimum gap of 48 hours between the publication via TED before the publication via <http://www.data.gv.at> that has to be observed.

The relevant data as set forth in Annex VIII to the FPA 2018 have to be submitted to [www.data.gv.at](http://www.data.gv.at) either via the website itself (in this case an account is necessary) or via the Business Service Portal provided by the Federal Ministry for Digital and Economic Affairs (*Unternehmensserviceportal*; <https://www.usp.gv.at/en/index.html>). In case the procurement procedure is conducted via an electronic procurement platform (such as “vemap”) which is mandatory for the award of contracts above the thresholds, the relevant data can be submitted directly from the platform to [www.data.gv.at](http://www.data.gv.at).

Please note that the national publication is, in general, also mandatory for awards below the thresholds, excluding direct awards with an estimated value of the procurement of up to EUR 100,000.

The period from the publication of the notice to a response from companies / bidders for a complex contract depends on the procurement procedure as well as the current stage of the proceedings (in case of a two-stage-procedure). For the most commonly used procedures for complex contracts, these periods amount to a minimum of 30 days (e.g. for the initial stage of competitive procedures with negotiation, cf Art 70 FPA 2018). However, with regard to complex contracts, it may be required to extend these periods due to the complexity of the contract as well as the time required for the preparation of tenders (cf Art 68 FPA 2018).

Nevertheless, particularly in light of the COVID-19-pandemic, the FPA 2018 provides for reduced deadlines for application of 10 to 15 days and, therefore, fast-track procedures in case of a state of urgency (cf Art 74 FPA 2018; *beschleunigtes Verfahren bei Dringlichkeit*).

However, the complexity of a contract as such does not have any consequences on the above mentioned publishing obligations.

**6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.**

Complex contracts generally have to be awarded through a competitive procedure with negotiation, an innovative partnership or a competitive dialogue (cf Art 34 and Art 41 FPA 2018).

In procurement procedures with an initial selection stage, qualification and selection criteria (*Eignungs- und Auswahlkriterien*) have to be determined in the tender documents by the contracting authority alongside any minimum requirements that have to be met by the bidders. These criteria have to be objective, non-discriminatory and proportionate to ensure a fair competition and equal treatment of the bidders, and enable them to identify the nature and scope of the award. Such criteria usually include references on previous comparable contracts, staffing and financial stability (e.g. minimum annual revenue, minimum equity ratio, liability insurance, credit reports).

The methodology regarding the conduction of procedures with an initial selection phase does not differ for contracting authorities and sector contractors apart from marginal deviations only relevant in the negotiation phase (cf Art 291 para 6 and 9 FPA 2018, as opposed to Art 114 FPA 2018 applicable to contracting authorities).

**7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with**

**convictions for bribery)? If so, what are those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers of excluded suppliers? Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?**

The FPA 2018 provides for mandatory exclusion of bidders from procurement procedures. These grounds are specified in Art 78 FPA 2018 (for contracting authorities; *Ausschlussgründe*) and are as follows:

- a. A conviction of the contractor for criminal offenses listed in Art 78 para 1, such as bribery, embezzlement, membership to a criminal or terrorist organisation, money laundering, illicit allocation of benefits or illicit intervention, etc;
- b. Opened or pending insolvency proceedings against the assets of the contractor;
- c. The contractor's business operations are in liquidation or ceased commercial activity;
- d. There are plausible indications that the contractor has entered into agreements with others that distort fair competition or violate public morals;
- e. Grave professional misconduct of the contractor, violating employment, social or environmental laws;
- f. Failure to payment of social security contributions or taxes the contractor is obliged to in Austria or in its country of domicile, unless the outstanding payments are negligible or were paid in the meantime;
- g. A conflict of interest that cannot be settled under the provisions of Art 26 FPA 2018 or through other arrangements;
- h. (Imminent) distortion of fair and equitable competition of the procurement procedure due to the contractor's participation in the preparation of the tendering procedure pursuant to Art 25 FPA 2018;
- i. Significant or persistent deficiencies in the fulfilment of substantial requirements in the course of the fulfilment of a prior public contract or concession agreement that resulted in early termination of this contract, indemnities or other penalties;
- j. Deception in the provision of information, failure of providing, explaining or completing fragmentary information regarding the qualification of the contractor;
- k. The contractor attempted to unduly influence

the contracting authority's decision-making or has attempted to illicitly obtain confidential information that be unduly advantageous to the contractor in the following procurement procedure, or (attemptedly) communicated misleading information to the contracting authority that would significantly influence the contracting authority's decision on the outcome of the award procedure.

In exceptional and duly justified cases the contracting authority may refrain from the exclusion of contractors if their participation cannot be dispensed for reasons of public interest.

The exclusion of a contractor on the grounds of Sec b) and c) stated above may be waived by the contracting authority, if the contractor's financial capacity suffices for the execution of the respective contract. This provision may prove useful in light of the aftermath of the COVID-19 pandemic and the economic situation coming with it.

Other than that, contractors can undergo a so-called "self-cleaning"-process (*Selbstreinigung*) as set out in Art 83 para 2 FPA 2018 in case certain exclusion grounds apply to them and nonetheless participate in a procurement procedure. For that purpose, the contractor may demonstrate its reliability to the contracting authority through evidence proving that it has either (i) paid compensations in respect of any damages caused, (ii) clarified the facts by actively collaborating with investigating authorities or (iii) that they have taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. If the measures are considered sufficient by the contracting authority, the contractor shall take part in the procurement procedure in question.

The exclusion of contractors in procurement procedures conducted by contracting bodies in the utilities sector lies in the discretion of the contracting body (cf Art 249 FPA 2018), except the exclusion on the grounds of convictions for criminal offenses, which also has to be observed mandatorily by non-public contracting bodies. For public contracting authorities in the utilities sector, however, all of the above listed reasons for exclusion apply mandatorily.

There is no central register of excluded suppliers. Every contracting authority is obliged to check all bidders for possible mandatory exclusion reasons at each procurement procedure.



**8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.**

Complex contracts are often procured through a competitive procedure with negotiation (cf Art 34 fig 3 and Art 114 FPA 2018; *Verhandlungsverfahren*), enabling the contracting authority to tailor the proceedings according to the demands of the contract to be procured.

Competitive procedures with negotiation consist of two (main) stages, whereby in the first – initial – stage an unrestricted number of applicants can submit a request for participation (*Teilnahmeantrag*) on the basis of which the contracting authority determines a limited number of bidders (minimum of three) who are invited to submit an initial tender (*Erstangebot*). The selection of bidders invited to the second stage is made on the basis of selection criteria (*Auswahlkriterien*) determined in the procurement documents made available to the bidders in the initial stage of the procedure.

The selected candidates that have submitted an initial tender are then invited to negotiations with the contracting authority. The FPA 2018 does not determine a fixed structure of the second stage, contracting authorities can thus “customise” the specific process of each procedure. Therefore, depending on the complexity of the issue at hand, contracting authorities can schedule either one or successive negotiation rounds, ending with either an invitation to submit a revised or a final tender, whereas the final tender is not subject to any further negotiations.

After the submission of the final tender the contracting authority will assess them on the basis of the award criteria (*Zuschlagskriterien*) and award the contract to the successful bidder.

The minimum time limit for the receipt of requests to participate is 30 days, the timeframe for the submission of the initial tender is at least 10 days (for central contracting authorities: 25 days). Subject to the duration of the negotiation phase of the procurement, the procedures can usually be concluded within three to four months. However, depending on the complexity of the issue as well as of the procedure and number of bidders, the duration of proceedings can extend over a much longer period of time.

**9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)**

As the FPA 2018 applies for all procurements regardless of their value, its rules apply for both contracts below and above the thresholds. However, sub-threshold-procurements can be conducted via simpler and more flexible procedures, e.g. without being subject to prior publication.

Contracts with an estimated procurement value below EUR 100,000 can be awarded directly without any further proceedings. Direct awards, therefore, offer a fast-track, low cost and informal / simple procedure, enabling contracting authorities to procure low-scale services with relatively low to no legal requirements when it comes to procurement law. However, basic provisions, such as the general procurement principles as set forth in the FPA 2018 and the procurement Directives, still apply, as do, though limited, grounds for challenging the direct award.

For contracts with an estimated procurement value of at least EUR 100,000 but below the sub-thresholds, a wider range and (partially) more flexible procedures – compared to contracts with an estimated procurement value above the thresholds – are applicable (see also Question 4 above).

**10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?**

Procurement procedures shall always be carried out in compliance with the FPA 2018, with special regard to the underlying procurement principles as well as to the rules determined in the tender documents. Therefore, both contracting authorities and bidders should prepare tendering procedures and, respectively, their participation / bids in such procedures thoroughly and carefully.

Contracting authorities should pay particular attention to a comprehensive evaluation of the contract to be procured prior to the commencement of a procurement procedure as well as to documentation, transparency and equal treatment of candidates and bidders

throughout the procedure. Usually, a thorough documentation of the contracting authority's decision making processes in the preparation of the procurement including e.g. parameters for the calculation of the estimated contract value, evaluation of the needs of the contracting authority and reasons for selecting the respective procedure, is advisable to ensure maximum transparency. Further, strict measures to ensure the anonymity of bidders – where applicable – should be taken.

With regard to contractors a thoroughly and exhaustive preparation of tenders is a key-element for a compliant bid. Contractors shall always take into account the relatively short deadlines for seeking remedies or for challenging tender documents. An often undervalued tool for bidders is to timely submit questions to the contracting authority to obtain necessary clarifications for a successful bid.

The FPA 2018 provides for a set of rules with regard to conflicts of interests or the (restricted) participation of contractors that have been involved in the preparation of the tender procedure (cf Art 25 FPA 2018) as well as certain transparency mechanisms and documentation requirements.

#### **11. Please explain any rules which are specifically applicable to the evaluation of bids.**

Tenders are evaluated strictly on the basis of the award criteria determined in the tender documents. As mentioned above, the award criteria as well as any minimum requirements the bidders have to meet have to be outlined in the tender documents to enable bidders to identify the nature and scope of the award and, ultimately, to consider whether to participate or not.

In a first step, tenders are assessed with regard to formal deficiencies as well as grounds for exclusion and compliance with qualification and – if any – selection criteria. Secondly, if the above mentioned criteria are met, the bid will be examined regarding the completion of the award criteria. Contracts can be awarded either to the most economically advantageous tender or on the basis of the lowest price only. In the first case the tender documents also have to include quality related criteria and stating the weighting of the criteria. The tenders then have to be evaluated by means of the criteria and be weighted against each other. The bidder reaching the highest score or the lowest price will be awarded the contract (cf Art 142 FPA 2018). The evaluation has to be documented in a comprehensible way (cf Art 140 FPA 2018). The award criteria, after certain stages in the

procedure have been reached (e.g. after expiry of the time limit for the submission of bids) may not be amended at a later point during the procedure.

#### **12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?**

Contracting authorities are obliged to evaluate if the prices of the tenders are adequate and plausible (cf Art 137 FPA 2018). In case this evaluation raises questions, the contracting authority is obliged to perform an "in-depth-evaluation" of the relevant tenders. One of the reasons for such an "in-depth-evaluation" stated by Art 137 FPA 2018 are "abnormally low" prices (either of the total price of the tender, but also of single prices in relevant positions). During an "in-depth-evaluation" contracting authorities are *inter alia* obliged to seek further information/clarification from the affected bidder. In case that the bidder cannot provide a reasonable explanation for the low prices and the contracting authority must have reason to believe that the price of a tender has been calculated in a speculative way, the respective bid must be excluded from the tender proceeding (cf Art 141 para 1 no 3 FPA 2018).

There is no general rule on how to determine "abnormally low" prices. A comparison with the initially estimated value of the procurement (based on the valuation by the contracting authority at the beginning of the tender) or with standard market prices in the relevant field are eligible ways to determine an abnormally low price.

#### **13. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the**

### contract in question?

Pursuant to Art 143 FPA 2018 the best bidder as well as all unsuccessful bidders who participated in the tender must be notified of the award decision (*Zuschlagsentscheidung*). In this notification, the remaining bidders have to be informed of the respective end of the standstill period (at least 10 days; *Stillhaltefrist*), the reasons for the rejection of their offer, the award amount as well as the characteristics and advantages of the successful tender in comparison to their offers.

The content of the award decision may vary insofar as the disclosure of information would be contrary to public interests, the legitimate business interests of a contractor or would impair free and fair competition.

### 14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has occurred?

The regulations of the FPA 2018 regarding legal remedies only apply to procurement procedures in the enforcement area of the federal government (state level). For contracting authorities in the enforcement area of the federal states, nine federal state procurement control laws apply. The provisions regarding remedies implement the Review Procedures Directive (**Council Directive** 89/665/EEC).

Legal remedies with regard to the challenge of a decision by a contracting authority may be brought before

- the Federal Administrative Court (*Bundesverwaltungsgericht*) for contracting authorities who are allocated to the federal government;
- the respective administrative court (*Landesverwaltungsgericht*) for contracting authorities who are allocated to the nine federal states. In some federal states, arbitration boards, which may settle a dispute prior to initiating a review procedure before the administrative courts, have been established.

Two types of legal remedies are available under the FPA 2018 or the respective laws in the federal states to contest decisions issued by contracting authorities in tender procedures:

a) A review procedure can be initiated **before** the contract is awarded. With the review procedure, only the decisions attributed as separately challengeable in Art 2 sec 15 lit a FPA 2018 can be challenged (in particular the elimination of bidders, the award decision and the revocation decision). Decisions that cannot be separately challenged can only be reviewed together with a separately challengeable decision. Short deadlines of 10 days for tenders above the thresholds and seven days in the sub-threshold area must be observed for submitting the request for review. An application for a review has no suspensive effect on the award procedure. It is, therefore, recommended to combine a review application with a corresponding application for an injunction.

b) **After** the completion of an award procedure, an unsuccessful bidder who had an interest in concluding a contract that is subjected to the FPA 2018 can bring a remedy in a declaratory procedure. Such procedure is intended to determine whether the award procedure was unlawful.

The administrative court's decision rendering the procurement unlawful, is the basis for claiming damages for a bypassed bidder. In addition, the administrative court can, under certain circumstances, declare a contract null and void, which means that the award must be reversed. Finally, the administrative court can impose fines of up to 20% of the contract value on the contracting authority.

### 15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?

The risk of contesting public procurements depends largely on the value and significance of the contract. Reputational damage of the bidder submitting an application for review is generally not to be feared. Nevertheless, the bidder is advised to carefully assess the chances of success before submitting the review request. In general, unsubstantiated submissions of a review request for the sole purpose of delaying the award of the contract can cast a bad light on the bidder.



For applications initiating proceedings before the administrative courts, a flat fee has to be paid. Depending on the award value, the fee amounts between EUR 324 and EUR 6,482. According to the specific value it can be many times higher. However, the current system of the flat fees (especially the fact that it may have to be multiplied, leading to very high fees, which are sometimes hard to be determined by the bidder at the initiation of the proceedings) might be profoundly revised following the judgement of the European Court of Justice in the cases C-274/21 and C-275/21 (*EPIC Financial Consulting Ges.m.b.H.*).

Usually, both parties in such proceedings are represented by attorneys. If the remedy is successful, the refund of the flat fee is ordered by the courts, however, other costs would need to be claimed as damages before civil courts.

**16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.**

The administrative court must decide on requests for review immediately, but not longer than six weeks after the receipt of the request. However, experience has shown that proceedings often take much longer.

An application for review as such has no suspensive effect. The award procedure can only be suspended if an injunction is granted by the court, which is usually sought by applicants in review procedures. In most cases in the proceedings before the administrative courts there will be oral hearings with pleadings of the parties, questioning of witnesses etc, as a key element in the review procedure.

**17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your jurisdiction? To what extent are those rights dependent on whether the host state of the bidder is a member of a particular international organisation (i.e. GPA or EU)?**

In principle, the scope of the FPA 2018 includes the award of contracts to companies from third countries. All companies, regardless of their country of domicile, have the right to participate in public tenders of Austrian contracting authorities.

With regard to a possible restriction of this basic rule, Art 20 para 2 FPA 2018 allows for contracting authorities to prevent non-EU bidders from participating in the tender procedure or from performing public contracts, provided this is permissible under international law. Guaranteed access for bidders from non-EU countries only exists within the framework of mandatory international obligations. This covers third countries that are on the one hand contracting parties to the EEA and on the other hand are subject to an agreement with the European Union, such as the GPA.

Every procurement process has to be assessed separately whether it falls under the scope of the GPA, as the exclusion of GPA contracting states from procurement projects is not permitted. If the procurement does not fall within the scope of the GPA, a restriction clause for bidders from non-EU and non-EEA countries can be included in the tender documents. However, if the procurement falls within the scope of the GPA, only bidders from non-GPA countries may be excluded.

Regardless of the scope of the GPA there are options under public procurement law to promote regional procurement. High demands on the quality of the offer and the provision of services, such as response times, requirements for on-site availability, regulations on added value, compliance with certain social standards, etc, can be included in the tender conditions. A higher weighting of qualitative award criteria at the expense of the price criterion can also prevent price dumping from bidders from third countries.

If a bidder from a third country applies or submits an offer, it is also advisable to strictly check its authorization to operate within Austria as part of the evaluation of the qualification criteria. Due to commercial law provisions the cross-border provision of services by companies based in third countries, independent from public procurement, is very limited.

**18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the**

### **same rights and remedies as a nationally owned company bidding in your jurisdiction?**

If a subsidiary of a third country company located within the EU or the EEA participates as a bidder in a tender, discrimination is not permitted. They are on equal footing with national bidders with regard to rights and legal remedies and, therefore, can take part in procurement procedures without any further limitations. However, public authorities may prevent non-EU bidders from participating in the tender procedure or from performing public contracts, provided this is permissible under international law (see also answer to question no 16).

### **19. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?**

As stated in Question 14, depending on the enforcement area the contracting authority is subject to, the Federal Administrative Court or the respective regional Administrative Court is the competent court for review proceedings. Furthermore, two federal states have established arbitration boards where the case can be brought prior to initiating formal review proceedings before the administrative courts.

### **20. Are post-award contract amendments/variations to publicly procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?**

Art 365 FPA 2018 codifies the principles already developed by the ECJ setting out when a subsequent amendment of a contract is permissible without carrying out a new award procedure.

Art 365 FPA 2018 differentiates between substantial and non-substantial amendments of the contract. Only non-substantial amendments are permitted without a renewed invitation to tender. The basic rule is that the amendment of a contract is substantial if it could have influenced the result of the previous award procedure.

The cases of non-substantial amendments of the contract that are permissible without carrying out a renewed award procedure are listed in Art 365 Para 3 FPA 2018. Apart from amendments that fall within a clear, precise and unambiguous contract amendment clause, amendments to the contract that amount to a maximum of 10% of the contract value for delivery and service contracts and 15% for construction contracts are permitted, provided the threshold values are not exceeded and the overall character of the contract is not changed.

A change of contractor is permitted if another contractor takes the place of the original contractor as a whole or in part in the course of a company restructuring (takeover, merger, acquisition or bankruptcy) and the new contractor meets the qualification criteria originally specified in the procurement documents. A change of contractor must not necessarily lead to a substantial amendment of the contract and, therefore, must not result in any circumvention of the procurement regulations.

### **21. How common are direct awards for complex contracts (contract awards without any prior publication or competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?**

Due to the Threshold Regulation direct awards are permitted up to an estimated procurement value of less than EUR 100,000.

To determine the respective procurement value, the contracting authority has to gain an overview of the market. The estimated value can also be based on comparable awards in the past, whereby price developments must be taken into account.

When determining the estimated procurement value, the contracting authority must observe the principle of not splitting the value of the contract (*Splittingverbot*). This is to prevent the splitting of (planned) procurements in order to fall below the threshold values for direct awards and thus circumvent otherwise relevant provisions. Such circumvention of public procurement law is inadmissible and can lead to the termination of the respective contract and the imposition of a fine.

Direct awards can only be contested to a very limited extent. Only the choice of procedure can be challenged by means of a declaratory procedure. An application for a declaration must in general be submitted within six

months of the date on which the applicant became aware of the decision. In order to achieve legal certainty, in some cases it will be advisable to carry out an *ex-ante* transparency publication. This is a voluntary announcement through which the contracting authority informs about the planned procurement, thus preventing possible challenges of the award.

In case of lot-wise allocations, individual lots of above-threshold awards can – under certain conditions – be allocated directly under the small lot regulation (*Kleinlosvergabe*).

## **22. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?**

In the wake of the war in the Ukraine, the European Union has reacted by imposing sanctions against the Russian Federation. In addition to restrictions on financial markets, goods and persons, sanctions were also imposed for the first time on persons, organizations and institutions from the Russian Federation, including public procurement matters. These exclude certain natural persons and legal entities from participating in public procurement procedures in the EU. The so-called “Sanctions Regulation” (EU 2022/576) has been in force since April 2022 and is addressed to all public contracting authorities.

On the one hand, the Sanctions Regulation results in a prohibition of awarding contracts. This prohibits the awarding of public contracts or concessions to persons, organizations or institutions from Russia. On the other hand, a contract performance ban also applies: The performance of contracts concluded after April 9th 2022 has to cease immediately.

Contracting authority are therefore now obliged to comply with the requirements of the Sanctions-Regulation when conducting award procedures. This means that as part of the suitability test, contracting authorities must exclude the participation of companies from Russia in procurement proceedings.

This is just one immediate consequence that the war in the Ukraine has had on public procurement procedures in Austria. Other (indirect) consequences are severe impacts on global supply chains and the increase in prices.

Beside from this aspect, the FPA 2018 offers numerous options for flexibility that can be taken advantage of also

in the current situation resulting from the war in the Ukraine:

The prolongation or amendment of pre-existing contracts by means of non-substantial amendments pursuant to Art 365 FPA 2018 is an important practical tool in order to deal with requests for price adaption following the current inflation. However, such amendments must not exceed 10 % of the procurement value for supply and service contracts and 15 % for construction contracts. This can give contracting authorities the opportunity to properly evaluate and prepare longer-term procurement solutions while maintaining the supply for the time being.

Further, the use of negotiated procedures without publication (*Verhandlungsverfahren ohne vorherige Bekanntmachung*; cf Art 35 para 1 fig 4, Art 36 para 1 fig 4, Art 37 para 1 fig 4 FPA 2018 for contracting authorities and Art 206 para 1 fig 5 FPA 2018 for sector contractors) proved to be another helpful tool in cases of extreme urgency and events unforeseeable by the respective contracting authority. The procedure allows for contracting authorities to acquire supplies and services within a very short timeframe and with a minimum of procedural provisions to observe. However, the European Commission in its Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/0) stressed that this procedure should only be used in order to cover the gap until more stable solutions can be found.

Strategic planning, assessment and structure of procurement proceedings are becoming even more essential for public buyers facing an economic downturn, energy crisis and disruption of supply chains etc. Therefore, flexible procedures that reduce formal obstacles and include reasonable qualification, selection and award criteria must be implemented to enable public authorities to respond to these challenges in the best possible way. This includes *inter alia* dynamic purchasing systems, open-house procedures and cross-border procurements that have proven to be a valuable addition for public buyers facing challenges with regard to delivery and supply chain issues.

The public sector is a driving force in the race to achieving sustainability goals and is, therefore, also tasked with creating sustainable solutions, e.g. with regard to producing green energy. Cooperations and joint ventures between are another way for public buyers to develop expertise and strategically develop skills to reach such goals more quickly. Such partnerships do not always require the execution of a formal procurement procedure, for example when

structuring a public-public cooperation.

To summarise, the FPA 2018 already provides the public sector with many options for responding to current

problems in the best possible way. However, it requires a strategic approach and a long-term vision in order to utilise the available tools in a goal-oriented way.

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