THE GOVERNMENT PROCUREMENT REVIEW

Eighth Edition

Editors
Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

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EIGHTH EDITION

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PREFACE

It is our pleasure to introduce the eighth edition of *The Government Procurement Review*.

Our geographical coverage this year remains impressive, covering 15 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

When we started to produce this edition, we imagined that we would be focusing in detail once again in this preface principally on the trials and tribulations of Brexit: how quickly the landscape has changed! Suddenly all talk in procurement circles in the EU and beyond centres on the exigencies of the covid-19 crisis, whether that be modifications to existing contracts to reflect the 'new normal' (for instance in the recasting of rail franchise agreements in the UK) or the tension between procurement procedures and the need for urgent procurement of PPE and other medical needs. Many national chapters also consider the changes to procurement practice and rules centring around the imperative to kick-start economies as soon as the worst of the pandemic is behind us.

All of this has resulted in specific guidance at EU level and in the US, Germany, the UK (with the publication of three Procurement Policy Notes in short order) and elsewhere. So far, the European Commission has limited its communications to clarifying the current law. In due course, however, it is possible that there will be a relaxation of procurement law to enable authorities to respond more flexibly to the unprecedented challenges they are facing, and may face in the future. By way of example of changes already effected: (1) financial thresholds were raised in parts of Germany; and (2) new legislative provisions, adopted in February and March 2020 in Greece, allow use of the negotiated procedure for the supply not just of medical equipment but also other items necessary for contracting authorities and entities to adapt to the new situation. More generally, the proposed new legislation in Italy, with a strong focus on the treatment of subcontracting, is particularly noteworthy. There are also significant procurement law developments in Russia, including an extension of circumstances in which single sourcing is permitted.

Brexit is still out there! It remains the case that the United Kingdom continues to recognise the importance of procurement law both during and beyond the transitional period. Her Majesty's Government has pronounced itself committed to the need for continued regulation of procurement and, having secured approval from the World Trade Organization, the United Kingdom will become party to the Agreement on Government Procurement (GPA) in its own right, rather than through the European Union, at the end of the Brexit transition period.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this eighth edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion, particularly given the effects of the pandemic and consequent lockdowns in most countries covered in this work. We trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2020

Chapter 2

AUSTRIA

Philipp J Marboe[1]

I INTRODUCTION

The main sources of law for public procurement in Austria are the Federal Public Procurement Act 2018 (BVergG), the Federal Act on the Award of Concession Contracts 2018 (BVergGKonz) and the Federal Act on the Award of Contracts in the Fields of Defence and Security 2012 (BVergGVS) as amended. Owing to the country's federal structure (federal state, provinces and municipalities), there are a further nine separate public procurement acts at the regional level.

The BVergG applies for the entirety of public tenders awarded by the nine Austrian provinces and the communities and public bodies governed by them. In contrast, the review proceedings at the regional level are exempted from the BVergG; these are regulated by the nine distinct regional laws. However, these regional laws do not deviate significantly from the review proceedings stipulated in the BVergG.

The BVergG transposes the 2014 Public Contracts Directive, the 2014 Utilities Contracts Directive and the Remedies Directive. The BVergGKonz implements the 2014 Concession Contracts Directive, whereas the BVergGVS transcribes the Defence and Procurement Directive. In addition, the case law of the Federal Administrative Court (BVwG), the nine administrative courts, the Supreme Administrative Court (VwGH), the Supreme Constitutional Court (VfGH) and the Court of Justice of the European Union (CJEU) applies.

Austria has implemented its obligations under the World Trade Organization's Agreement on Government Procurement (GPA). As an EU Member State, Austria is at the same time a contracting party to the Agreement between the European Community and the Swiss Confederation on Public Procurement (and another six sectors).

The general principles of public procurement were formulated in compliance with the EU directives, the EC Treaty and the Federal Constitution. Accordingly, the basic principles for public procurement are free and fair competition, equal treatment of all candidates and tenderers in due consideration of the Community rules on fundamental freedoms, and non-discrimination. Pursuant to Section 20, Paragraph 1 of the BVergG, contracts shall be awarded to authorised, capable and reliable entrepreneurs at reasonable prices.

1 Philipp J Marboe is an attorney-at-law and counsel at Wolf Theiss.

II YEAR IN REVIEW

The past year was marked by the first experiences in practice with the application of the totally new BVergG, which entered into force in August 2018. As the BVergG tackled the entirety of the issues provided for in the 2014 Procurement Directives it introduced a multitude of changes and novelties to the current law. Accordingly, the past year brought uncertainty and discussion as to the exact meaning of certain provisions about the requirement to offer unrestricted and full direct access to the procurement documents from the date of publication of a notice. Another area of uncertainty was the new exclusion ground, where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract with a contracting authority, which led to early termination, damages or other comparable sanctions.

Concerning recent jurisprudence, one ruling stood out as to its relevance to economic operators and their responsibility to thoroughly prepare review proceedings. The VwGH[2] held that an application for review proceedings must compulsorily contain a determined claim. The latter has to include the application for the annulment of a separately challengeable decision. If the economic operator fails to formulate his or her claim correctly, this fault is, pursuant to the VwGH, not mendable. Therefore, the court concerned may not grant room for improvement or give the claim a new explanation. It is rather obliged to reject the application outright.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The 'classic' contracting authorities covered by the BVergG are the federal state, the provinces (regional states) and municipalities, associations formed by the previously mentioned bodies, and 'bodies governed by public law'.

A body governed by public law is an entity that is controlled, financed or supervised by contracting authorities and established for the specific purpose of serving needs in the general interest, and not having an industrial or commercial character.

In the utilities sector, three groups of contracting authorities may be differentiated: the classic contracting authorities; public undertakings engaging in a utility activity; and (private) entities carrying out utility activities based on special or exclusive rights. Thus, in practice, the utility regime also applies to a variety of private sector utilities including, for example, water companies.

ii Regulated contracts

In general, supply contracts, service contracts and works contracts awarded by the aforementioned contracting authorities are subject to the procurement regulations. In the utilities sector, a less strict regime applies. The contracting authority benefits from more freedom in the execution of the procurement procedure (e.g., a wider choice of eligible tender procedures).

In addition, the BVergGKonz sets forth specific rules and provisions applicable for awarding service and works concession contracts. Pursuant to Section 5, Paragraph 1 and Section 6, Paragraph 1 of the BVergGKonz, service and works concession contracts

2 Ra 2020/04/0005, 27 January 2020.

are contracts of the same type as service and works contracts, except for the fact that the consideration for the services or works to be carried out consists either solely of the right to exploit the services or construction, or of such a right together with a specific amount of payment. According to Section 7 of the BVergGKonz, on concessions comprising both services and works, the provisions of the contract type that constitutes the main subject matter of the concession contract shall apply. The term of concession contracts must be determined. If the term exceeds five years, it must not pass the period in which the concessionaire is able to generate the capital expenditures plus a return. Generally, the BVergGKonz leans on the structure of the BVergG, but imposes a less strict regime. For instance, the contracting authority is generally free to shape the award procedure of the concessionaire as long as the provisions of the BVergGKonz are observed. Likewise, the remedy regime is similar to that of the BVergG, assigning the competence to the BVwG.

The BVergG does not apply when the special provisions of the BVergGVS prevail. The latter provides special rules for defence and security procurement. It covers the supply of military or sensitive equipment, including any parts, components or subassemblies thereof. Moreover, the BVergGVS regulates works, supplies and services directly related to the aforementioned equipment, and works and services for special military purposes, or sensitive works and sensitive services. However, neither the BVergG nor the BVergGVS are applicable to public contracts when they come under the exemption pursuant to Article 346(1)(a) of the TFEU. Pursuant thereto, EU countries may not be obliged to provide information whose disclosure is, in their opinion, contrary to its vital security interests. Austria has exercised this exemption right in Section 9, Subparagraph 4 of the BVergG and Section 9, Paragraph 1, Subparagraph 1 of the BVergGVS.

Pursuant to the respective Commission Delegated Regulations (EU) on the application thresholds for the procedures for the award of contracts,[3] new application thresholds for the procedures for the awards of contracts do apply as of 1 January 2020. The thresholds have been lowered insignificantly as follows:

Public service and public supply contracts	Public Sector Directive	From €139,000 (specified contracting authorities, e.g., ministries) to €214,000 (€144,000 to €221,000, previously)
Public service and public supply contracts	Utilities Directive Defence Directive	€428,000 (€443,000, previously)
Public works contracts	Public Sector Directive Utilities Directive Defence Directive	€5.350 million (€5.548 million, previously)
Concession contracts	Concession Contracts Directive	€5.350 million (€5.548 million, previously)

Note that the BVergG, BVergGKonz and BVergGVS also apply below these thresholds. Whether the contract exceeds the thresholds is relevant for the scope of the applicable regulations (e.g., with regard to the number and conditions of the eligible tender procedures). The rules for contracts below the thresholds are, in general, less stringent (e.g., providing for simplified rules on publication obligations). In contrast, more formalised and transparent procedures apply above the thresholds.

Moreover, within the scope of the BVergG, contracts that do not exceed a value of €100,000 may be awarded directly. Direct awards with a prior market survey are applicable to

3 Commission Delegated Regulations (EU) 2019/1827, 1828 and 1829 of 30 October 2019.

supply and service contracts with a contract value less than €130,000 in the classic sector and €200,000 in the utilities sector, respectively; the contract value of works contracts must not exceed €500,000. When resorting to direct awards with a prior market survey, the contracting authority is obliged to publish a notice prior and subsequent to the awarding procedure. The course of the awarding procedure may be determined by the contracting authority, but in due consideration of the general principles of the TFEU.

The BVergG allows various exemptions for contracts. The procurement regulations shall not apply, for instance, to:

a contracts concerning the acquisition or lease of rights to real estate, buildings or other immovable property;
b employment contracts;
c arbitration and conciliation services;
d certain international contracts;
e central bank services and certain financial services;
f in-house procurement and public–public cooperation;
g certain research and development services;
h certain broadcasting services; and
i shall apply in part to service contracts on public passenger transport services by rail or underground.

The applicability of these exemptions must be demonstrated and documented by the contracting authority and is subject to review proceedings before the administrative courts. The majority of the above-mentioned exceptions correspond to the exceptions provided for the utilities sector, irrespective of minor differences (e.g., in relation to contracts on financial services). However, certain exemptions are reserved to the utilities sector exclusively, such as specific contracts awarded for purposes of resale or lease to third parties.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements are widely used, in particular in market sectors characterised by significant price dynamics (e.g., information technology or the power and gas markets). However, framework agreements are merely available in open, restricted or negotiated procedures. In principle, the term of a framework agreement must not exceed a four-year period. Framework agreements can be concluded between one or several contracting authorities on the one side and one or several entities on the other. This results in enhanced competition and flexibility – both advantages widely appreciated by contracting authorities.

Contracting authorities are entitled to conduct tender procedures jointly. Moreover, the BVergG allows the establishment of central purchasing entities. One such entity is the Austrian Federal Purchasing Agency (BBG). Its main task is to provide procurement services to the federal state, the provinces and municipalities, as well as to associations formed by the previously mentioned bodies. The BVergG introduced new provisions in order to foster joint cross-border tender procedures, including through central purchasing.

ii Joint ventures

Public-public joint ventures are common in Austria. In practice, one the most relevant forms thereof is the 'intercommunal cooperation'. Already, in the groundbreaking *Stadtreinigung Hamburg*[4] decision, the CJEU pointed out that a public authority is entitled to perform the public interest tasks conferred on it by using its own resources without being obliged to conduct a procurement procedure. Moreover, the public authority may do so in cooperation with other public authorities and this cooperation is not subject to a control criterion.

Section 10, Paragraph 3 of the BVergG codified the aforementioned exemption under the designation of 'public-public cooperation'. In order to rely on the exemption, the involved contracting authorities must aim at the fulfilment of common goals, pursue exclusively public interest and perform by their cooperation less than 20 per cent of the respective activities on the open market.

Another important exemption is the 'in-house' exemption, which corresponds to the jurisdiction of the CJEU (e.g., *Teckal*[5] and *Stadt Halle*[6]). However, the BVergG extended and differentiated its scope. Pursuant to Section 10, Paragraph 1, contracts that a contracting authority award to a legally distinct entity do not come under the BVergG if the contracting authority exercises over the distinct entity in question a control that is similar to that over its own departments, if the entity carries out more than 80 per cent of its activities with the contracting authority or authorities that control it, and if there is no private ownership or participation in the entity. However, the BVergG introduces a narrow exemption from the interdiction of private participation. According to Section 10, Paragraph 1, Subparagraph 1 c, non-controlling and non-blocking forms of private capital participation required by national legislative provisions that do not exert a decisive influence are admissible. Further, the BVergG widens the scope of the 'in-house' exemption to the 'bottom-up' and 'affiliate' in-house awards.

Moreover, the BVergG does not apply if sectoral entities award contracts to an affiliated company, or if a joint venture (formed by several sectoral entities for the purpose of performing sectoral activities) awards the contract to one of those sectoral entities or to an affiliated company, provided that at least 80 per cent of the average annual turnover of the seller has been realised by performing such services to the joint venture.

There is no specific legislation applicable to the awarding of public-private partnership (PPP) projects, but rather they are regulated by general public procurement rules (i.e., the BVergGKonz). The notion of PPP is not recognised by Austrian public procurement law, and PPPs are typically classified as service or works concessions.

V THE BIDDING PROCESS

i Notice

Contracts that come under the procurement regulations must be advertised in the OJEU. In addition, they have to be published at a nationwide level. As of 1 March 2019, all domestic advertisements must be executed within the scope of the Open Government Data system.

4 C-480/06, *Commission v. Germany*.

5 C-107/98, *Teckal Srl v. Comune di Viano*.

6 C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*.

The contract authorities are obliged to communicate the metadata of their procurement procedures accordingly. This should ensure better accessibility of information on tenders. Contracts not exceeding the thresholds may but do not need to be advertised at the EU level.

ii Procedures

Contracting authorities must use one of the tender procedures provided for in the BVergG: open, restricted or negotiated procedures; direct award (with or without prior public market survey); competitive dialogue; framework agreements; a dynamic purchasing system; design and realisation contests; or innovation partnership procedures.

Whereas the open procedure and the restricted procedure can be chosen regularly, other procedures are subject to certain conditions. In the open procedure, an unrestricted number of economic operators are publicly invited to submit tenders. In restricted procedures (with prior notice), any undertaking may submit an application for participation, whereupon the contracting authority merely invites a restricted number of qualified undertakings among the applicants to submit tenders. Subsequently, the full scope of the contract is negotiable.

In principle, the negotiated procedure (with prior notice) may be chosen unless an open or restricted procedure with prior notice has resulted in any tenders, or in any tenders appropriate for the purchase. However, the original terms and conditions for the contract must not be modified and amended materially. Moreover, the negotiated procedure may be selected if the special characteristics of the contract do not allow an open or a restricted procedure, or the services of the contract cannot be stipulated in contractual specifications. The BVergG has widened the possibilities to choose the negotiated procedure with prior notice.

In the negotiated procedure without prior notice, the contracting authority calls upon economic operators designated preliminarily to submit an offer. Subsequently, the terms and conditions of the contract are negotiated. The admissibility of this procedure is subject to particular conditions, such as, for instance, extreme urgency, recurrence of similar circumstances or if only one specific economic operator is able to execute the contract.

The competitive dialogue is most appropriate if solutions to particularly complex projects are sought. This is the case when the contracting authority is not capable of determining the technical specifications or legal or financial conditions of the project.

Framework agreements do not entail a purchase obligation but a non-binding basis for future purchases. A dynamic purchasing system is an entirely electronic process that is restricted to certain services in line with standard market conditions ('off-the-shelf' products or services).

Design contests are procedures in which plans or designs are selected by a jury; they can be conducted with or without prizes or payments to participants.

Under an innovation partnership procedure, introduced by the BVergG, the contracting authority uses a negotiation procedure to invite suppliers to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing 'product' on the market.

iii Amending bids

Whether amendments to bids are admissible, and the scope thereof, depends on the tender procedure chosen. In open or restricted procedures, bidders are not allowed to amend their bids when the time limit for receipt of tenders has expired. However, queries to the contracting authority for clarification are admissible provided that all bidders are treated

equally. In contrast, in negotiated procedures, generally, the entire content of the contract is negotiable. However, these negotiations must not modify the essential characteristics of the contract.

VI ELIGIBILITY

i Qualification to bid

To be qualified to bid, the bidders must prove their suitability, their technical and professional ability, and their economic and financial standing.

In this respect, the bidder is entitled to submit the European single procurement document pursuant to Section 80, Paragraph 2 of the BVergG. This declaration serves as preliminary evidence of the qualification requirements. If proof of suitability is not provided, the bidder can hand them in later within an appropriate time limit. The evidence of the required ability or suitability can be substituted by a third party (Section 86 of the BVergG).

Tenderers shall be excluded from participating in award procedures, particularly in cases of:

a a final judgment against them or natural persons on their managerial body because of participation in a criminal organisation, corruption, fraud or money laundering;
b bankruptcy or composition (reorganisation) proceedings against them, or bankruptcy proceedings rejected in the absence of sufficient assets;
c liquidating or winding up the business;
d guilt of grave professional misconduct, in particular violation of provisions of labour or social laws, according to evidence available to the purchaser or a final judgment against the tenderers or natural persons on their managerial body challenging their professional conduct;
e violation of their obligations to pay social security contributions or taxes and levies;
f a conflict of interest cannot be eliminated through less drastic measures (newly introduced by the BVergG);
g performance in earlier public contracts showing major or permanent deficiencies (newly introduced by the BVergG); or
h guilt of serious misrepresentation in providing information.

However, in certain cases, a tenderer may be permitted to participate in a procedure despite the application of an exclusion ground if they provide evidence of 'self-cleansing'. To do so, the tenderer is – in accordance with the respective tightened provisions pursuant to Section 83, Paragraph 2 of the BVergG – obliged to prove that he or she has (1) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct; (2) clarified the facts and circumstances in a wide-ranging manner by actively collaborating with the investigating authorities; and (3) taken effective technical, organisational, personal and other measures that are suitable to prevent further criminal offences or misconduct.

ii Conflicts of interest

Pursuant to Section 26, Paragraph 1 of the BVergG, the contracting authority must take appropriate measures in order to prevent conflicts of interest. Such a conflict of interest is established if personnel of the contracting authority involved in the tender procedure might have, directly or indirectly, a financial, economic or other personal interest that may impair

their impartiality and independence. In addition, according to Section 25, Paragraph 2 of the BVergG, economic operators or bidders that have advised the contracting authority or have participated by other means in the preparation of the tender procedure must be excluded if their participation would distort equal and fair competition in consideration of the principle of equal treatment. However, prior to any exclusion, the contracting authority is obliged to afford the economic operator the possibility to prove that his or her participation could not distort equal and fair competition.

iii Foreign suppliers

In principle, foreign (non-EU or EEA) suppliers may also participate in public tender procedures. However, they are obliged to comply fully with the conditions and requirements of the tender documents including, inter alia, the minimum eligibility and qualification criteria. The establishment of a local branch or subsidiary is generally not a precondition to participate.

In the utilities sector, a contracting authority can exclude a foreign candidate or bidder from an award procedure above the thresholds with regard to products originating from countries that are not EEA signatories or have no agreement with the EU according to which actual access to their national markets is guaranteed in favour of EU-based entities, and that have a legal situation comparable to the one provided by the BVergG. Moreover, the bidder can be excluded if 50 per cent of the required products stem from a country that is not an EA signatory or has not concluded an agreement with the EU on the aforementioned terms.

The GPA establishes the principles of equal treatment and non-discrimination in favour of candidates and bidders originating from the signatory states and parties to the GPA.

VII AWARD

i Evaluating tenders

Tenders may be evaluated either on the basis of the most economically advantageous tender or merely on the lowest price. If the most economically advantageous tender is chosen, all awarding criteria must be specified and notified. These may refer to quality, price, running costs, aesthetic and functional characteristics, environmental characteristics, technical merit, cost-effectiveness, after-sales services and technical assistance, delivery date and delivery period, or period of completion. Awarding criteria may also refer to the whole life cycle of the subject matter of the contract. In addition, for the sake of transparency, the contracting authority is compelled to notify the weighting that is linked to each awarding criteria. Ultimately, the award should be made in accordance with what the individual contracting authority considers the most economically advantageous solution among those offered. The BVergG strengthened the preference of the 'most economically advantageous principle'. The latter may be based on the lowest cost or best price–quality ratio.

Alternative bids are exclusively admissible if explicitly mentioned in the tender documents. Unless stated otherwise in the tender documents, they have to be submitted in addition to a 'main' offer in conformity with the tender conditions.

In contrast, bids marginally amending the tender are permitted unless explicitly stated otherwise in the tender documents. However, they may merely entail minor technical modifications of the contract.

ii National interest and public policy considerations

National interest and, in particular, public policy considerations, can be taken into account exclusively to the (limited) extent conceded by the legislator and, in particular, in due consideration of the procurement principles.

VIII INFORMATION FLOW

Contracting authorities are obliged by law to assure fair and transparent award procedures in accordance with the procurement principles, above all the principle of equal treatment and non-discrimination. On the one hand, this means, essentially, that candidates and bidders must be notified with the same information to guarantee a level playing field. On the other hand, contracting authorities are compelled by law to protect the confidential character of all information provided to them, especially trade and business secrets.

Tenderers are entitled to request clarification about the tender or pre-qualification documents. The contracting authority must respond to such requests. It must summarise the anonymised questions and the answers and communicate them to all participating candidates or bidders.

The contracting authority is obliged to notify the bidders other than the successful tenderer to which the award shall be made. Moreover, it must indicate the award sum, the characteristics and advantages of the winning tender, the reasons for the bidder's non-selection and the end of the standstill period.

IX CHALLENGING AWARDS

i Procedures

There are two distinct main types of proceedings before the administrative courts: review proceedings that can be brought in prior to the award of the contract, and proceedings for declaratory decisions subsequent thereto. Applications for review proceedings seek to have decisions by the contracting authority declared null and void. Applications for declaratory decisions tend to seek to have award procedure faults declared unlawful.

Subject to the type of proceedings and the means of communication of the decision concerned, there are distinct time limits. Applications for review proceedings must be filed within 10 days if the decision was transmitted by electronic means. Applications for declaratory decisions have to be submitted within six months of the moment in which the applicant had or should have had knowledge of the challenged decision (e.g., award). However, the sanction to cancel the contract or to declare the contract null and void is subject to an (absolute) application term of six months subsequent to the challenged award.

ii Grounds for challenge

According to the BVergG, only certain explicitly enumerated decisions by the contracting authority may be challenged by economic operators and bidders. These decisions refer, inter alia, to the selected award procedure, the tender documents, the invitation to tender, the selection (or exclusion) of the bids, and the award decision.

The legitimacy to file a complaint is subject to an interest in obtaining the relevant contract. In addition, the plaintiff must be harmed by the alleged infringement or at least face the risk of being harmed.

Challenges are quite frequent in Austria. As to the chances of success, in the reporting period from 1 February 2018 to 31 January 2019, almost 34 per cent of appeals filed with the BVwG were granted.

For each application, a fixed basic fee has to be paid. The amount depends on the contract and the type of proceeding and varies from €324 to €6,482. The basic fee may be further increased (e.g., trebled when the estimated contract value is more than 10 times higher than the relevant thresholds) or reduced (e.g., quartered in the case of applications for review of tender documents).

The decision deadline for the courts is six weeks.

iii Remedies

The main remedies, which correspond to the two main types of proceedings, are applications for review proceedings and for proceedings for a declaratory judgment. The administrative courts have the power to annul decisions taken by the contracting authority (e.g., the award decision). The contracting authority is obliged to adhere to the court's ruling and release a corresponding decision, anew. To safeguard the effectiveness of the review proceedings, the authority is entitled to grant interim relief (upon a respective application) and suspend the tender procedure or certain decisions.

The courts may declare contracts null and void. If they refrain from doing so, they generally must impose fines instead. The highest fine imposed (on BBG) to date amounted to €367,000.[7] In this respect, the VwGH[8] held that an imposed fine still has to be paid even if the incriminated contract has been terminated.

Judgments in procurement cases are rendered in both the first and last instance. They can be further challenged exclusively through complaints before the VwGH or VfGH.

Infringements of the procurement law entitle disregarded economic operators to claim forbearance, abatement and damages under the Unfair Competition Act. In addition, they may claim damages under civil law. However, entitlement to bring a claim before the civil courts is conditional upon a declaratory judgment of violation of the procurement law.

X OUTLOOK

At the beginning of 2020, a new government was sworn in. In its government programme 2020–2024, it promulgated its plans in the area of public procurement. The key projects revealing the government's respective conduct for the five years concerned are as follows:

a the introduction of binding eco-social award criteria for nationwide procurement;
b strengthening of the regionalism within the scope of the 2014 Procurement Directives;
c utilisation of the public procurement law as a consequential instrument in the fight against climate change;
d a paradigm shift from the lowest price principle to the most economically advantageous principle as well as total cost of ownership;
e a new obligation of active disclosure of information, including public contracts from a certain threshold;

7 BVwG, W187 2014517-1, 22 December 2014.
8 Ra 2017/04/0005, 23 October 2017.

f strengthening of public-public cooperation (e.g., in the IT sector and facility management), especially at the municipal level;

g increased consideration of building information modelling in public procurement; and

h less red tape in public procurement.

Appendix 1

ABOUT THE AUTHORS

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Philipp J Marboe is an attorney-at-law and counsel at Wolf Theiss. He is a member of the regulatory and procurement practice group. Prior to joining Wolf Theiss he was junior partner in a leading Vienna-based Austrian and central European practice. Mr Marboe is recognised as one of Austria's leading procurement lawyers.

He has extensive professional experience in tender procedures, ranging from railways and public passenger transport services, project development and construction projects, including building information modelling, to the security and defence sector. Mr Marboe also specialises in public commercial law and contract law. He regularly represents contracting authorities and bidders in review proceedings. He gained international experience in working at the Vienna office of a British multinational law firm and for a law firm in Paris.

Mr Marboe has authored numerous publications on regulatory and procurement-related topics. He studied law at the University of Vienna and the Autonomous University of Madrid. Mr Marboe wrote his doctoral thesis in international law at the French Institute of International Relations in Paris. He is fluent in German, English, French and Spanish.

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