

# Austrian Review System

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IPA 2008 TWL project “Strengthening capacities to remedy irregularities in public procurement procedures”

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## ■ 1. Organisation



# Public Procurement Act

- entered into force **1<sup>st</sup> of February 2006**
- last **amendment** came into force **5<sup>th</sup> of March 2010**
- **6 chapters**
  1. General Provisions
  2. Tendering Procedures for Contracting Authorities
  3. Tendering Procedures for Contracting Entities
  4. Reviews
  5. Monitoring (European Commission)
  6. Final provisions
- **9 Federal State laws** on review procedures



# Review Authorities

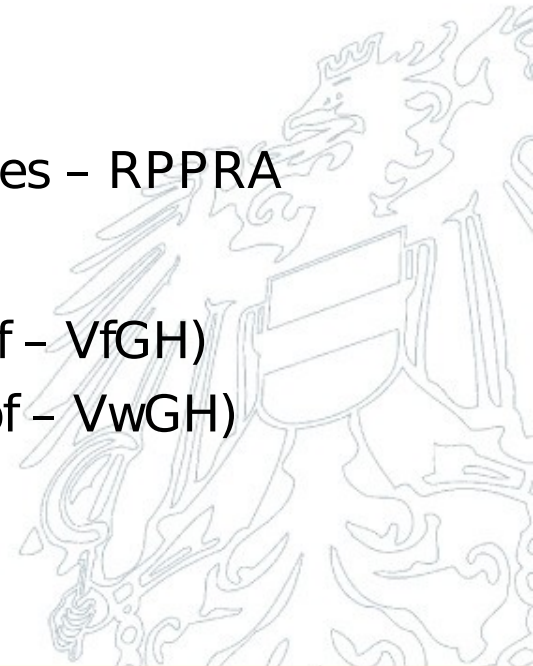
## ■ specialized authorities

### - **first instance**

- **Federal** Public Procurement Office – FPPO
- **9 regional** public procurement review authorities – RPPRA

### - **appeals**

- **Constitutional Court** (Verfassungsgerichtshof – VfGH)
- **Administrative Court** (Verwaltungsgerichtshof – VwGH)



# Organisation FPPO

- new **organisation** since **September 2002**, amended in 2006
- currently **14 senates**
- each **senate** consists of
  - one **chairman**
    - **independent** like judges
    - appointed for a period of five years or lifetime
  - **two associated judges**
    - independent like judges
    - appointed for five years
    - reappointment possible
- **plenary meeting**
  - **allocation of duties**
  - rules of **internal procedure**



# Powers FPPO

- interim measures
- annulment of decisions of the contracting authority
- ascertainment
  - **damages**
  - **nullification** of **contract** already concluded
  - **nullification** of **withdrawals** of procurement procedure
  - **withdrawal** of procurement procedures in cases contracting authority does not continue the procedure properly

## ■ 2. Interim Measures





## **Interim Measures - Aim**

- **prevent damages** until decision of review
- **prevent** contracting authorities from **creating unchangeable facts**
- **ensure effectiveness** of review procedure



## **Interim Measures - Requirements**

- **application** for interim measure
- already possible **before review proceedings** initiated
- possible **damages**
- **interests** of applicant prevailing over interests of contracting authority
- proposed **measure**



## Interim Measures - Procedure

- **parties:** applicant and contracting authority
  - **notification** of contracting authority
  - **effect** of notification in case of application to forbid contracting authority to
    - open the tenders,
    - withdraw the procurement procedure,
    - award the contract or
    - conclude the framework agreement
- the contracting authority must not do so until FPPO rules on the application
- **opinions** of both parties
  - comprehensive **duty to provide information**
  - usually **no oral hearing**



## **Interim Measures - Decision**

- **chairman** of a senate
- **within 7 working days**
- **consideration of interests**
- **interim measures**
  - adequate
  - least possible means
- **time**
  - fixed time or
  - until end of review procedure



## ■ 3. Review Procedures



## Separately Voidable Decisions

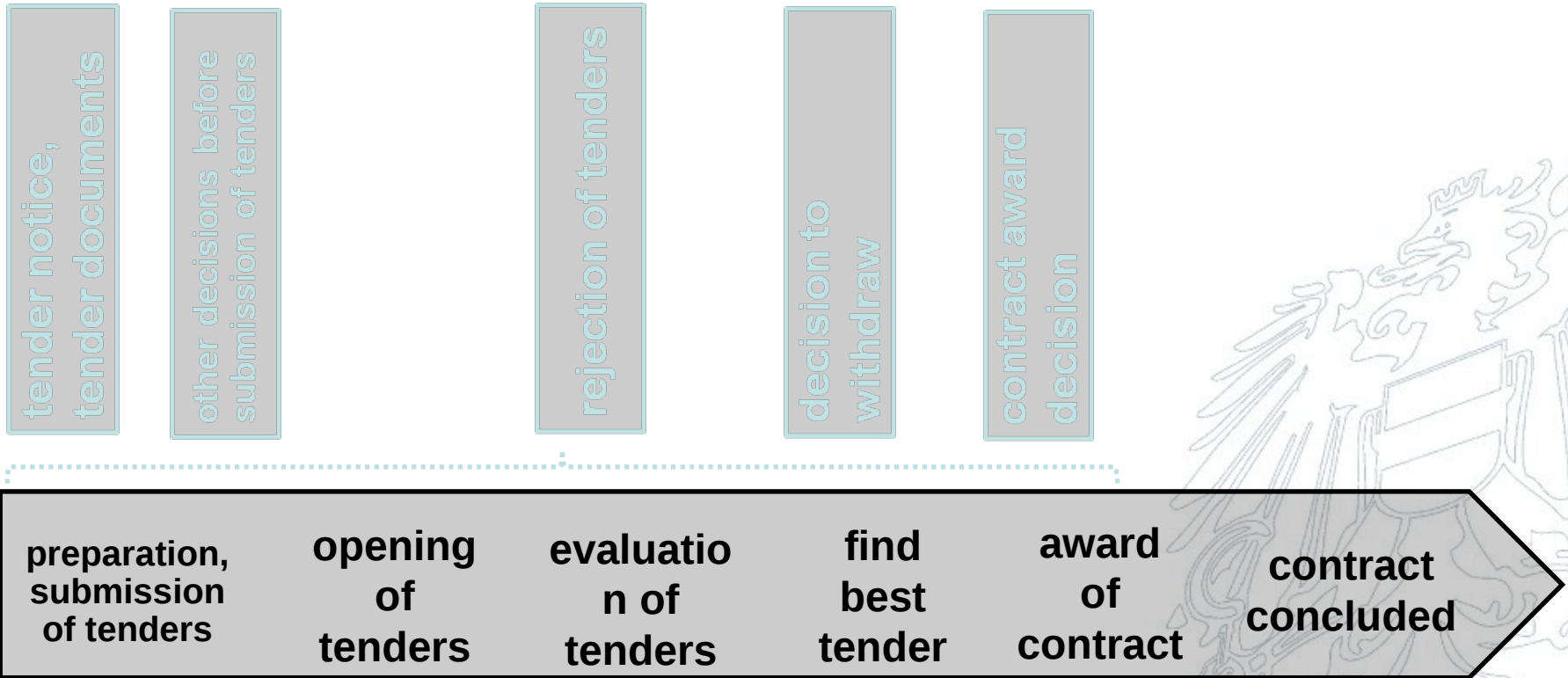
- **separately voidable decisions** defined by law
- **purpose**: dividing **procurement procedures** into **sections** containing all other decisions since the last separately voidable decision
- **reviews** only within defined **short time limits**
- if time limit passes without a review, **decisions cannot be voided anymore**



# Separately Voidable Decisions - Open

## Procedure

separately voidable decisions



# Application for Nullification - Requirements

- **interest** in entering into a contract
- **petition for nullification** of a separately voidable decision
- **illegality** of decision
- **damage**





# Application for Nullification - Necessary

## Content

- exact designation of
  - **procurement procedure** and
  - separately voidable **decision**
- exact designation of **contracting authority** including electronic address or fax
- facts including **interest** in entering into the **contract**; in case of contesting the award decision **nomination** of **economic operator** proposed for the award of the contract

# Application for Nullification - Necessary

## Content

- damage
- offended right
- reasons for infringement
- application for nullification
- information about **timeliness**



# Application for Nullification - Inadmissibility

- not against a **separately voidable decision**
- not within the given **time limits**
- **fees** not paid



# Fees

- fees **depend** on
  - **type** of procedure
  - **object** of procurement
  - **estimated value** of the contract
- fees **range** from EUR 208 to EUR 5.188
- **adapted** every year depending on index



## Rates of Fees

- **100 %** for **first application** for nullification or ascertainment
- **50 %** of the fee for application for **interim measures**
- **25 %** for **nullification of tender documents, application to participate or design contest document**
- **80 %** for each application for nullification or ascertainment if there has been a **review procedure** concerning the same contract award procedure **before**
- if contract **lot** and below thresholds fee for that lot only
- **return of**
  - **50 %** if application withdrawn before appointment of oral hearing
  - **20 %** if application withdrawn after appointment of oral hearing

# Ruling

- **dismiss** because application is incomplete or inadmissible
- **reject** because application is unfounded
- **nullify** decision if
  - **violation** of the **right** claimed as being **offended** by a decision of the contracting authority, **and**
  - **essential importance** for the outcome of the award procedure
- **decision** within **6 weeks**



## Refund of Costs by Contracting Authority

- refund of **fees** if applicant wins at least partly
  - fees for application for interim measures
  - fees for application for nullification
- costs eg **external expert**
- **no other costs** refunded eg attorneys



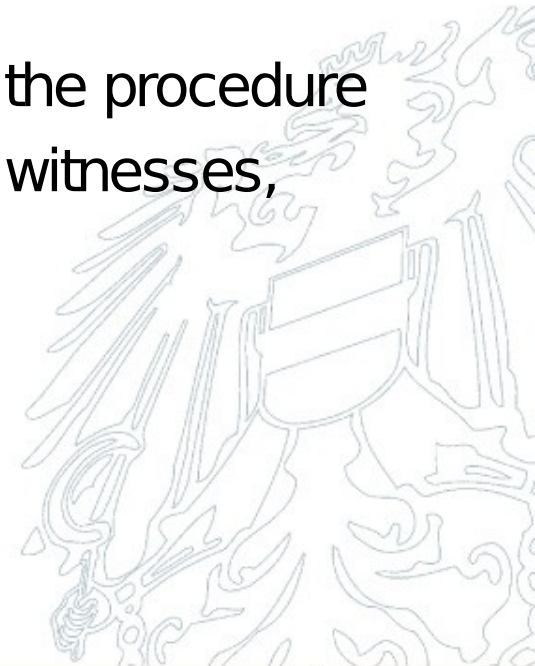
## Procedure - I

- proceedings following **General Administrative Procedural Act** (Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG), additional provisions
- **parties**
  - applicant
  - contracting authority
  - in cases of decision of award of contract - the tenderer to be awarded
  - other tenderers who are against the nullification of application
- **deciding body**: senate consisting of 3 members



## Procedure - II

- **publication** of review procedure in the [internet](#)
- **collecting facts**
  - prepared by chairman of senate
  - duty to give all information for all parties of the procedure
  - all kinds of proves admissible: documents, witnesses, experts, ...
  - hearing of evidence in front of senate



## Procedure - III

- **oral hearing**
  - in general
  - on application of parties or by decision of FPPO
  - withdrawal only with consent of all other parties
  - publication in the [internet](#)
- **no oral hearing** in accordance with Article 6 of the European Convention of Human Rights
  - reject the petition for nullification
  - procedural decision
  - decision without further procedure on the ground of the documents possible

## ■ 4. Ascertainment Procedures



# Damages

## ■ cases

- after end of procurement procedure by award of contract or withdrawal
- contracting authority does not continue procurement procedure

## ■ **illegality** determined by FPPO in **ascertaining ruling**

## ■ **ascertainment** of FPPO

- **necessary** for **claim** before **civil court**

## ■ award of **damages** by **civil court**



## **Ascertained - After the Award of the Contract**

- procurement procedure without prior publication or call for competition
- award of contract without contract award notice
- award of contract on the basis of a framework agreement or a dynamic purchasing system unlawful
- ⇒ FPPO has to
  - declare **contract ineffective** or
  - **cancel contract**
  - order **alternate penalties**



## **Ascertained - After the Withdrawal of the Contract**

- **withdrawal unlawful**
  
- **withdrawal without withdrawal notice**
- ⇒ **declare withdrawal ineffective**



## **Ascertained - Contracting Authority**

### **Inactive**

- time limit for award passed
- tenderer asks for continuation of procedure
- contracting authority does **not continue procurement procedure**
- **ascertainment**
- ⇒ **effect: withdrawal of procurement procedure**



# Petition for Ascertainment - Necessary

## Content

- exact designation of **procurement procedure** and of **decision**
- exact designation of **contracting authority** including electronic address or fax
- if possible nomination of **economic operator awarded** with the contract
- **facts** including **interest** in entering into the contract



# Petition for Ascertaining Damages - Necessary

## Content ■ damages

- offended **right**
- **reasons** for infringement
- certain **demand**
- information about **timeliness**



# Petition for Ascertainment - Inadmissibility

## ■ timeliness

- not within **6 weeks** from date of knowing of award or withdrawal
- not within **6 months** from date of award or withdrawal
- all other cases
  - **6 months**
  - **30 days** if
    - contracting authority informed tenderers and candidates concerned of the conclusion of the contract

## ■ infringement **could have been claimed in nullification proceeding**

## ■ **fees** not paid

## **As certainment - Procedure**

- **procedure** same as nullification
- **members** of deciding senate same as nullification
- ruling **binding civil courts**



## **As certainment - Decision**

- **dismiss** because petition is incomplete or inadmissible
- **reject** because application is unfounded
- **ascertainment**
- **costs**



## **As certainment - Effects of Decision**

- necessary for **claim for damages**
- **withdrawal** of procurement procedure
- **cancellation** of contract or withdrawal



## Ineffectiveness of Contract - Intention

- bring procurement procedure back **on the market**
  - **no advantages** of illegal behaviour for contracting authority and tenderer
  - **but**
    - still **need** of contracting authority?
    - still **plans** of contracting authority?
    - still **budget** of contracting authority?
- ⇒ **no guarantee** for a new procurement procedure



## Cancellation - Performance

- **cancel performance** for part of the contract
- **no application** necessary
- goods, services, works **cannot be returned** or can only be **returned** with a **loss of value**
- **extent of cancellation**
  - obligations **still to be performed**
  - goods, services, works can be **returned without loss of value**

# Alternative Penalties

## ■ penalty

- “effective, proportionate and dissuasive”
- **up to**
  - above thresholds 20 % of value of contract
  - below thresholds 10 % of value of contract
- **taking into account**
  - **severity** of infringement
  - **extent** of keeping contract





## ■ 5. Appeals



# Constitutional Court

- infringement of **rights granted by Constitution**
- application of **unconstitutional provision**
- application of **unlawful regulation**
- **facts of procedure: contested decision** ⇒ **no inquiry**
- usually **no oral hearing**



# Administrative Court

- **wrong application of law**
- **facts of procedure: contested decision ⇒ no inquiry**
- **usually no oral hearing**



# Supreme Court

- responsible for **civil law** and **criminal law**
- in the field of **public procurement**
  - **damages**
  - reviews of **service concessions**
  - reviews of **utilities works concessions**



Thank you  
for your attention

