



Exclusion of a tenderer due to serious mistakes in Austria

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Judge

Administrative Court of Styria



Overview

I. Review system in Austria

II. Exclusion grounds



I. Review system in Austria

Constitutional framework

- Art 14b B-VG (Austrian Constitution): The rules concerning the procedure to award public works, supply and service contracts for all public tenders are federal legislation.
- Public procurement review system: Federal competence concerning the tenders and contracts at province level
- 10 Administrative Courts



Public Procurement Law



- **Federal Public Procurement Act 2018**
- **9 Legal Protection Acts** at the level of the federal provinces: regulate the review of tenders and contracts at the state level
- Law of Styria on legal protection against decisions in connection with the award of public contracts

Public procurement review system



- Fair trial within appropriate time (max. duration 6 weeks/2 months)
- Independent in exercising the judicial office
 - only bound by law
 - not subject to any instructions
 - not subject to dismissal or transfer

Public procurement review system

- Ex-ufficio principle
- Oral hearings
- Court acts only on appeal

- **Decisions:**
 - Interim measures – suspend procedure
 - Withdraw unlawful decisions
 - Declaratory decisions
 - Declare contracts null and void
 - Impose fines





II. Exclusion grounds

Exclusion grounds

- § 78 BVerG 2018: different to Directive 2014/24/EU
- Contracting authority has to examine tenders before awarding the contract
- Certain **reasons** such as:
 - participation in a criminal organisation
 - corruption
 - terrorist offences
 - money laundering

Authority has to exclude when it is aware that the economic operator has been subject of a conviction by final judgement.





Exclusion grounds

- where the contracting authority can demonstrate that the economic operator is **guilty of grave professional misconduct**, which renders its integrity questionable,
- sufficiently plausible indications that the operator has entered into **agreements with other operators aimed** to distort the competition,
- **conflict of interests** which cannot be remedied by other less intrusive measures,
- in a prior contract **significant or persistent defects** which led to an early termination, damages or comparable sanctions,

Exclusion grounds - exception

§ 78 Abs 5 BVergG 2018:

If the contracting authority cannot fulfill the purpose without the tenderer for reasons of general interest, the economic operator could remain in the procedure.

Interpreted strictly!





Exclusion grounds

§ 83 BVergG 2018: Right to self cleaning for the economic operator.

- In certain cases the economic operator may provide evidence that measures taken are sufficient to demonstrate its reliability.
- Shall prove that it
 - paid compensation,
 - clarified the facts and circumstances in comprehensive manner by actively collaborating,
 - taken concrete technical, organisational and personnel measures that are appropriate to prevent further offences or misconduct.



Exclusion grounds

- Contracting authority has to **evaluate the measures** and take into account the **gravity and particular circumstances** of the criminal offence or misconduct.
- **Maximum period of exclusion** if the no measures are taken or they are regarded as insufficient:
 - 5 years from the date of the conviction by final judgement,
 - 3 years from the date of the relevant event.



Exclusion grounds

- Art 57 Abs 4 Directive: Member states shall specify the implementing conditions
- Art 83 Abs 2 and 3 BVergG 2018:
 - Adversarial procedure;
 - Authority has to give operator the **chance to explain** the measures etc;
 - **Examination** of the measures through the authority;
 - **If regarded as insufficient**, the economic operator shall receive a statement of the reasons for that decision and is in consequence excluded;
 - **If regarded as sufficient**, the economic operator remains in the procedure.



Thank you for your attention!

Mag. Karin Schnabl