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Absolution from unreliability is possible, but difficult

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Background

Authority's ruling

Comment

For the first time an Austrian public procurement authority has clarified what enterprises must do in order to be allowed to participate in tender proceedings despite previous misconduct. Comparable cases are pending. Short-term measures are insufficient.

Background

In the area of public procurement law, the employment of a person by a tenderer without having obtained all necessary permits is not a trivial offence. The same applies to other examples of grave professional misconduct or to criminal conviction of the tenderer or its managing director, which may call into question the tenderer's professional reliability (eg, corruption offences). Unreliable tenderers must be excluded from procurement procedures.

However, since 2007 the Federal Public Procurement Act 2006 has given unreliable tenderers a last chance to avoid such exclusion. They are allowed to "wash away their guilt", provided that several requirements are met. Against this backdrop, candidates and tenderers whose past is clouded with misconduct may regain their professional reliability (as required for participation in tender proceedings) by proving that all the technical, organisational or personal measures needed to prevent such criminal offences have been taken. The greater the number of offences, and the more serious they are, the more comprehensive self-cleansing measures must be taken and the stricter the judgement of whether professional reliability had been regained.

Authority's ruling

For the first time within a review procedure, a public procurement authority in Austria has, as far as can be seen, answered the question of whether a successful tenderer in prospect had taken sufficient measures. The presumptive best tenderer for security services had been convicted repeatedly for violations of the Aliens Employment Act. The regulatory authority gave the tenderer's plea a fair hearing and interrogated its employees. However, it finally denied reliability on the ground that the measures taken had been insufficient.

From the decree issued by the regulatory authority, against which a complaint was filed with the Administrative Court, the following conclusion can be drawn. First, absolution from unreliability requires sustainable personnel consequences. It is insufficient to remove the personnel officer from the company if the responsible members of the management emerge unscathed. It is also important to respond to misbehaviour by implementing in-house liabilities and penalties. In addition, major enterprises should appoint special responsible representatives for certain premises or departments of the company.

It is not enough simply to take any organisational or technical steps. Instead, the public procurement authority must closely examine whether the measures taken by the successful tenderer in prospect are appropriate and sufficient in order to prevent further similar offences. In the case at hand, the public procurement authority said no.

Although the company had created a new human resource programme, which should prevent further violations of the Aliens Employment Act, it did not contain a mechanism that made it impossible to register aliens without a work permit from the social security authorities. In particular, there was no daily review of necessary permits. Consequently, violations could remain undiscovered for up to a month. Furthermore,

the regulatory authority saw a problem in the decentralised recruitment of staff by regional directors, which was inappropriate for ongoing monitoring. In addition, the managing director who testified as a witness had no detailed knowledge of these reorganisation measures. Consequently, it appeared that the managing director did not examine the measures' implementation effectively. As a result, the tenderer threw away its last chance and did not succeed in proving its professional reliability.

Comment

The decree shows that in the area of public procurement law, absolution from unreliability is possible, but requires serious personnel and technical organisational measures. These measures must be implemented under the responsibility of the management and monitored constantly and effectively by the management or by appointed special responsible representatives. Gaining absolution from unreliability is not a short-term activity, but an ongoing process.

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