

Environmental aspects in Public Procurement under Austrian Law

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Speakers were asked to present the legal status in their countries on how one can challenge the unjust award of the contract to another company in a procurement procedure. To present comparable answers they were given a questionnaire with several questions regarding 4 prepared cases: You can find the cases described in detail in the conference papers.

Questionnaire

For the Austrian situation given questions must be altered as follows:

- a. Did the Contracting Authority act in accordance with Austrian Public Procurement Law?
- b. If not, which violation was constituted?
- c. Which measures would be appropriate?
- d. Would the (prospective) contractor be awarded compensation?

Legal protection

In search for an answer we need to present a short overview on the system of legal protection in Austrian Public Procurement Law first. Sorting out the contracts provided by regional authorities we find Bundesvergabeamt (BVA) – the federal public procurement office – in charge of granting legal protection to claimants.

The federal public procurement office is a court meeting the requirements of article 234 of the EC-treaty. The decision is taken in senates. Each senate consists of three persons: The senate chairman, one member of the contracting authority side and another member of the economic operator side. Parties can appeal against Administrative Court and/or Constitutional Court.

So far we are talking about procurement procedures and decisions. As soon as it comes to the question of compensation, it's a civil court's task to come to a decision.

Procedures

We have to distinguish between "Nachprüfungsverfahren" and „Feststellungsverfahren“. Both are decisions taken by the federal public procurement office. Nachprüfungsverfahren is the procedure chosen until a tender is accepted (or the procurement procedure is cancelled).

Feststellungsverfahren is the legal protection procedure after cancellation of the procurement procedure or acceptance of the tender (only possible if a Nachprüfungsverfahren was impossible). It is usually answering on of the following questions:

- a. Was the procurement procedure incorrect? Did the contracting authority commit a failure?
- b. Was the contract not awarded to the cheapest or the economically most advantageous tender?
- c. Did the contracting authority cancel the procurement procedure not in accordance with procurement law?

Requirements for a successful Feststellungsverfahren are:

- a. Real chance of getting the tender
- b. Not if a Nachprüfungsverfahren is possible.

A Feststellungsverfahren can also be filed, if

- a. The procurement procedure is delayed by the contracting authority.
- b. The contract is unlawfully directly awarded.

The procedure for compensation is only possible after execution of a Feststellungsverfahren (a decision of the federal public procurement office is needed).

Compensation

Coming to the kind (amount) of compensation, following aspects must be considered:

- a. Costs of elaborating the offer.
- b. Costs of participating in the tender procedure.
- c. All other claims (based on other regulations) are not affected.

- d. Vertrauensschaden (breaches of faith) is part of the compensation, even if the frustrated costs are not caused by the contracting authority, because the contracting authority is obliged to treat the bidders fair and equal.
- e. Erfüllungsinteresse (positive interest) for the ignored tenderer with the best offer is in discussion in Austria. Basis for the promoters of this idea is the following argument: A failure in executing due diligence would have resulted in a contract between contracting authority and tenderer („culpa in contrahendo“). But the claimant must prove, that he would have been the tenderer with the best offer and would have been awarded the contract („probatio diabolica“).
- f. The public authority will in almost every case raise the topic of the not fulfilled loss-reduction commitment of the tenderer.

Answers to the questionnaire

What would be the outcome of a decision likely in the cases given?

- a. Did the Contracting Authority act in accordance with Austrian Public Procurement Law?
- b. If not, which violation was constituted?
- c. Which measures would be appropriate?
- d. Would the (prospective) contractor be awarded compensation?

The answer to question a) is NO in all of the four given cases.

The answer to questions b) to d) is obsolete. Compensation for the unjust award of a contract is in Austrian law (at the moment) more something like a concept than a real existing fact.

Compensation can only be claimed after the decision of a Feststellungsverfahren. The compensation will in most cases not include positive interest.