

Insolvency & Restructuring - Austria

Tenderer's insolvency in public procurement

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Suitability of tenderer
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Comment

The 2010 insolvency law reform in Austria aimed to make the law more suitable for financial restructuring. In particular, the revised law introduced tools for facilitating the continuation of companies, such as the sales ban laid down in Section 114b of the Insolvency Code. However, the Federal Procurement Act 2006 does not reflect that intention.

Suitability of tenderer

The bids submitted in a tender procedure are not only reviewed in terms of price; the participating bidder must also prove that its business has the ability to provide the offered services. In this context, the bidder must prove:

- its authority to pursue such professional activity;
- its technical, economic and financial ability to do so; and
- its reliability.

It must also prove that no grounds for disqualification exist (Sections 68 to 77 of the act).⁽¹⁾

If insolvency proceedings have been commenced in respect of an economic operator, or if such proceedings were rejected on the grounds that there were insufficient assets to cover costs, that operator must be disqualified from the tender procedure under Section 68(1)(2) of the act. However, this does not affect insolvency proceedings that have already been completed and have led to a reduction in the firm's debt burden.⁽²⁾

Grounds for disqualification

A tenderer must possess the necessary suitability, at least at the point in time set out by Section 69 of the act for the respective type of procedure. However, any deterioration after that point in time should also be taken into account.⁽³⁾ As a result, where insolvency proceedings are commenced during the tender procedure, this should lead to the respective tenderer's disqualification. The tenderer must also be considered suitable under Sections 129(1)(1) and (2) of the act when the contract is awarded.

As a matter of principle, the courts⁽⁴⁾ and legal scholars⁽⁵⁾ have generally agreed that a bid will still be qualified if a ground for qualification concerns only one member of a consortium or working group. Therefore, where a suitable economic operator commissions a subcontractor that is the subject of insolvency proceedings, there is no ground for disqualification, because the subcontractor is not deemed to be a "participant in the tender procedure".⁽⁶⁾

These exemptions from mandatory disqualification in case of insolvency are arguably unhelpful in practice and should apply only if the public sector has a vital interest in such supplies (eg, provision of important vaccines in short supply) and for smaller contracts of up to €100,000. In the latter case, the company must prove sufficient capability, such that the public contracting authority can ensure that the awarded contract will in fact be executed.

An economic operator's chances of executing a contract improve only after completion of the award procedure. If insolvency proceedings are commenced in respect of the contractor's assets only after completion of the contract award procedure, the administrator may either withdraw from the contract or choose to perform the contract in lieu of the debtor (Section 21 of the code). On the other hand, if cancellation of the

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contract could jeopardise continuation of the business, the contracting authority may cancel the contract pursuant to Section 25a of the code within the first six months of the commencement of insolvency proceedings only for good cause. If the business is closed or sold to a third party in connection with the contractor's insolvency proceedings, the award procedure must be repeated, as this constitutes a material change of contract.⁽⁷⁾

Comment

By disqualifying insolvent economic operators on a mandatory basis, the Austrian legislature may have exceeded its powers, since that qualification is only a 'possibility' under Section 45(2) of EU Directive 2004/18/EC.⁽⁸⁾ Furthermore, the European Commission's proposal for reform of the directive does not provide for the mandatory exclusion of an economic operator where it is the subject of insolvency proceedings.⁽⁹⁾

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Endnotes

- (1) See also Articles 45 and following of EU Directive 2004/18/EC.
- (2) Supreme Administrative Court, May 22 2012, 2009/04/0187.
- (3) UVS Steiermark, May 4 2007, 44.15-2/2007.
- (4) Supreme Administrative Court, March 18 2009, 2007/04/0234; VKS Salzburg June 25 2013, 20001-SVKS/133/26-2013.
- (5) Heid/Preslmayr, *Vergaberecht*⁹ (2010) Rz 1222; dissenting Harrer/Steiner, "Die Insolvenz aus Sicht des Vergaberechts" in Heck/Mauerhofer, *7 Grazer Baubetriebs- & Baurechtssseminar*, at 35 and following.
- (6) VKS Wien, December 1 2011, VKS-10427/11; dissenting Harrer/Steiner, *ibid*, at 37 and following.
- (7) More detailed commentaries can be found in Harrer/Steiner, *ibid*, at 43 and following.
- (8) See EU case C-465/11 of December 13 2012, which concerns the ground for exclusion for serious misconduct in Section 45(2)(d) of EU Directive 2004/18/EC.
- (9) Proposal for an EU Directive on Public Procurement, COM (2011) 896/2, Article 55(3) (b).

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