

Public Procurement and Cartel Law: Luther obtains landmark ruling before the Bavarian Supreme Court

Munich, 20.01.2023 – Affiliated companies that form an economic unit must also submit their bids independently in an award procedure of a public contracting authority in order not to be excluded for violating the principle of equal treatment. Luther Rechtsanwaltsgesellschaft advised the bus company Egenberger on this issue in terms of public procurement and antitrust law and was successful before the Bavarian Supreme State Court.

Egenberger GmbH & Co. KG had submitted a bid to the district of Aichach-Friedberg in an EU procurement procedure for public bus transport services. In its decision of 11 January 2023, the Bavarian Supreme Regional Court transposed the judgment of the European Court of Justice of 15 September 2022, which had been obtained in the context of a preliminary ruling procedure, into national procurement law: it confirmed the award decision made by the contracting authority, according to which the coordinated bids of the competing bidders of Egenberger, which were connected in an economic unit and interwoven in terms of personnel, were excluded. With this ruling, the principle of equal treatment under public procurement law gains an independent significance as a ground for exclusion in addition to the legally standardised grounds for excluding a bidder.

Following the rulings of the Bavarian Supreme Court and the European Court of Justice, the way is now clear for Egenberger to be awarded the contract. The questions answered by the highest European court in these proceedings and the decision of the Bavarian Supreme Court are likely to be groundbreaking for future decisions involving similar constellations of parallel participation of affiliated companies in public procurement procedures.

"We would like to thank Luther for the competent cooperation, which has always been based on partnership. Thanks to the experienced advisors at our side, we are now looking forward to a good outcome of the public procurement review proceedings that have been ongoing since 2020. The fact that legal history is being written with the court decisions naturally pleases us and demonstrates Luther's quality once again," Paul Kienberger, Managing Director of Egenberger GmbH & Co. KG, summarises.

About Egenberger GmbH & Co. KG:

Egenberger GmbH & Co. KG is a bus company based in Thierhaupten (Bavaria). It operates both touring and special transport services as well as regular services in the Augsburg Transport Association (AVV) and in the Donau-Ries Transport Community (VDR). The company was founded in 1938 by Anton Egenberger, is managed in the third generation by Paul Kienberger and has about 130 employees.

On behalf of Egenberger GmbH & Co. KG:

Luther, Competition Law: Dr Sebastian Felix Janka, LL.M. (Partner)

Luther, Public Procurement Law: Ulf-Dieter Pape (Partner), Tobias Osseforth (Partner), Dr Henning Holz, LL.M. (Counsel)

Luther Rechtsanwaltsgesellschaft mbH

Luther is a leading German commercial law firm that offers comprehensive legal and tax advice. The full-service law firm employs over 420 lawyers and tax advisors and is represented in ten German economic hubs as well as with 11 of its own international offices in key investment locations and financial centres in Europe and Asia. Its clients include medium-sized enterprises and large corporations, as well as the public sector.

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