Bundesverwaltungsgericht
Tribunal administratif fédéral
Tribunale amministrativo federale
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Media relations
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regarding judgment B-948/2025 of 10 November 2026

Right to be heard in the exclusion of a tenderer from public procurement

In a landmark judgment, the Federal Administrative Court clarifies the conditions under which a contracting authority must grant the right to be heard even though the specific wording of the relevant provision of procurement law does not require it. In the case at hand, the Court orders the SBB to continue the award procedure relating to track tamping works and to include the tender of an excluded company in its evaluation.

The Swiss Federal Railways (SBB) divided certain maintenance works to be carried out on their railway network into five lots. Following a public tender, the SBB awarded the contract for track tamping works in two lots covering the years 2016 to 2025 to a company based in Italy. In 2019, for the first time various reports about the selected tenderer appeared in the media. These reports raised the SBB's suspicions that the company was systematically failing to comply with workplace health and safety regulations and terms and conditions of employment, and was involved in organised crime. In 2024, the SBB re-tendered the same maintenance works for the period from 2026 until no later than 2035. After receiving the tenders, the SBB decided to exclude the company in question on the grounds that it was unreliable and untrustworthy, was involved in unlawful agreements affecting competition, compromised its professional honour or integrity through its acts, and disregarded workplace health and safety regulations as well as the terms and conditions of employment. The tenderer filed an appeal with the Federal Administrative Court (FAC) against the exclusion.

Wording of the law partially unconstitutional

In a landmark judgment, the FAC first considers the issue of the right to be heard in the context of an exclusion from an award procedure. The Court notes that, in its Message on the comprehensive revision of the Federal Act on Public Procurement (PPA), the Federal Council points out that granting the right to be heard may be appropriate where a company is to be excluded from such a procedure on the basis of Article 44 PPA. The Court therefore concludes that the wording of Article 51 para. 1 PPA, under which tenderers have no right to be heard before the decision is notified, is partially unconstitutional and that, in the light of legislative history, it must be interpreted in a manner consistent with the Constitution. In the case at hand, the SBB as the contracting authority breached the tenderer's right to be heard, in particular by basing its decision of exclusion from the award procedure on documents that were not part of the tender

documentation. The FAC found, however, that this breach of the right to be heard could be remedied in the appeal proceedings. Therefore, it did not settle the appeal by remitting the matter to the contracting authority and instead considered the merits of the case, taking into account the newly submitted documents in particular.

Insufficient indications for exclusion
The Court subsequently examined the reasons which had led the SBB to exclude the company from the award procedure. It found that the initial suspicion, which certainly existed, could not generally be corroborated to the extent required to qualify as ‘sufficient indications'. This applies especially to the tenderer’s suspected involvement in organised crime. It is true that the tenderer is facing criminal proceedings in Italy. However, during those proceedings, the serious original allegations of the public prosecution were subsequently refuted. Where sufficient indications for exclusion were found to exist, the FAC concludes that too much time had elapsed between the events in question and the contested decision of January 2025, and that an exclusion would consequently be disproportionate. The FAC therefore sets aside the contested exclusion decision and instructs SBB to continue the award procedure and include the appellants’ tender in its evaluation.

This judgment may be appealed to the Federal Supreme Court.

Media contact
Rocco R. Maglio
Spokesperson
+41 58 465 29 86
medien@bvger.admin.ch

About the Federal Administrative Court
Located in St. Gallen, the Federal Administrative Court (FAC) was established in 2007. With its staff of 395 employees (334 FTE) and its 79 judges (70 FTE) it is the largest federal court in Switzerland. The Federal Administrative Court has jurisdiction to hear appeals against decisions rendered by Swiss federal administrative authorities. In specific matters, the FAC may grant review on decisions rendered by cantonal authorities. Recourse actions are also reviewed by the Court. The FAC is composed of six divisions. It renders an average of 7,000 judgments every year.