

Press information

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Public authorities must allow used software

Awarding chamber of Düsseldorf: used software must be considered when placing software orders

Public authorities are obligated to allow suppliers of used software to participate in tenders for standard software. In proceedings on review, the awarding chamber of Düsseldorf recently decided that the exclusion of used software suppliers would violate the Law against Restraints of Competition ("Gesetz gegen Wettbewerbsbeschränkungen" = "GWB") and the VOL/A. This court order has become final and absolute, and it has significant consequences for the purchase of software by authorities – last but not least in light of the fact that 70 percent of the German local authorities are actually broke.

These proceedings on review were prompted by a complaint lodged usedSoft, a leading European supplier of used software, which was directed against the Landesbetrieb für Datenverarbeitung und Statistik ("State Enterprise for Data Processing and Statistics") of the German land North-Rhine-Westphalia. Only authorized MS-Large-Account-Reseller (LAR-traders) had been allowed to participate in the tender for Microsoft standard software. This tender was challenged by usedSoft. The Awarding Chamber of Düsseldorf has now rescinded the awarding proceedings and requested that a non-discriminating tender shall take place.

In the decision of May 23, 2008 (VK-7/2008 L), the Awarding Chamber decided that it were inadmissible to exclusively restrict such tender to authorized Microsoft dealers. It should be possible to procure standard software in non-discriminating and open awarding proceedings. Suppliers of used software should also be given the opportunity to submit their offer. The only prerequisite for submitting a tender should be that they were definitely able to supply the corresponding product.

The Awarding Chamber decided that the procurement of software without public tender would be inadmissible under aspects of the Awarding Law; and that the same would apply to a restriction of such tender to Microsoft LAR-dealers. According to the Awarding Chamber this decision was based on the following argument: "The demanded products (standard software) can also be offered by other suppliers than LAR-dealers in a legally unobjected way."

The plea that a contract could not be concluded with dealers of used software for fear of legal uncertainty was resolutely rejected by the Awarding Chamber. According to the Awarding Chamber usedSoft "could refer to decisions in its favour which affected partial areas of its business based on which it could principally derive a further lawfulness under Copy Right aspects." Based on such background "there are no reasons to assume that it would not have good prospects (...) in any future competition proceedings." In this regard, it was for example only recently that the Regional Court of Munich I stated in a judgment which has become final and absolute (file number 30 O 8684/07) that "the sale respectively disposal of individual Microsoft software licences which had been sold within the scope of volume licence contracts before would be principally possible even without Microsoft's consent in an effective way."

Moreover, the Higher Regional Court of Düsseldorf had already decided three years ago that the mere doubts about the legal certainty without any corresponding legal review would not be sufficient to deny a supplier his service capability and to exclude his offer (Higher Regional Court of Düsseldorf, court order of February 21, 2005, VII Verg 91/04). The Awarding Chamber of Düsseldorf explicitly referred to such judgment: "Only after "it is established with the required certainty" that the applicant has violated any third-party copyrights due to the kind and nature of its offer and that therefore a

prohibitory action may be brought against the applicant with prospects of success, the applicant could be considered as being not capable to render services.” In the Awarding Chamber’s opinion, even any legal concerns, any legal uncertainty or unsolved legal issues would not entitle the awarding authority to leave the offers of used software unconsidered or to exclude them.

Next to the principle of competition, the regulations under awarding law aspects would safeguard the principle of cost-effectiveness above all: ”The contract will be awarded to the most cost-effective offer”, as it reads in section 97 of the GWB. Therefore, public authorities are obligated to exactly compare all offers with one another and to opt for the most favourable supplier. Any special conditions possibly provided by any exclusive Microsoft-select-contracts cannot annul such principles. “The sales strategies of a developer cannot shorten any competition proceedings”, emphasized the Awarding Chamber in its court order.

Information about usedSoft

usedSoft was set up in 2003, and it is a leading European supplier of used software originating from all application fields. Buyers of usedSoft licences are companies as well as software dealers. Customers of usedSoft are, among others, companies such as Edeka, KarstadtQuelle, Kaufland, Neckermann, Rewe, the Law Office Holme Roberts & Owen, as well as a leading soccer club belonging to the German Soccer League and a number of different Savings Banks. German authorities are more and more using used software as well: Next to the Bavarian State Capital of Munich, the German Federal Social Court in Kassel, the Municipal Administration of Bad Salzflun and the Data Central Office of Baden-Württemberg, there were more than 100 additional local authorities benefiting from usedSoft licences. The cost-saving benefit when buying used licenses ranges between 20 and 50 percent.

www.usedsoft.com

For further inquiry, please contact:

Christoph Möller

möller pr

Phone: +49 (0) 221 80 10 87-87

E-mail: cm@moeller-pr.de

www.moeller-pr.de