

# NEWS

## REVISION OF THE SWISS PUBLIC PROCUREMENT LAW

In Switzerland, the revised public procurement law will enter into force on 1 January 2021. It essentially implements the revised WTO Agreement on Government Procurement (GPA 2012) and leads to the standardization of the procurement regulations on the federal as well as the cantonal level. The revision is intended to ensure that sustainability and anti-corruption criteria are included in public tenders.

### INTRODUCTION

The public sector in the role of a customer is of great importance in today's economic environment. Against this background, regulations on how public supply, service and works contracts are to be awarded have existed for years. The currently applicable provisions in connection with the award of such contracts can be found, for procurements at federal level, in the Federal Act on Public Procurement ("PPA") and, at cantonal level, in the Intercantonal Convention on Public Procurement ("ICPP") respectively the associated cantonal and communal decrees. These provisions are overlaid by framework regulations, in particular the WTO Agreement of 1994 and the Federal Act on the Internal Market ("IMA"), which are mainly aimed at the non-discrimination of foreign suppliers.

On 21 June 2019, the parliament adopted the total revision of the PPA ("rev-PPA"), which will enter into force on 1 January 2021. The revised ICPP ("rev-ICPP"), which is widely congruent with the provisions of the rev-PPA<sup>1</sup>, was adopted by the cantons at the special plenary session of 15 November 2019 and is also expected to enter into force at the beginning of 2021.

The aim of the revision of the public procurement law was, on the one hand, to implement the revised WTO Agreement on Government Procurement (GPA 2012) and, on the other hand, to reasonably harmonise the procurement regulations on the federal as well as the cantonal level.

In the present article the authors present the most significant changes of the revised procurement law.

### QUALITY COMPETITION INSTEAD OF PRICE COMPETITION

The GPA 2012 established a key principle of awarding the contract to the most advantageous tender (*vorteilhaftestes Angebot*). The legislator followed this wording in art. 41 rev-PPA. Whether this revision will actually lead to a paradigm shift towards more quality and sustainability in public procurement is subject to many discussions. In the view of the Federal Council, the most economical offer according to the currently valid version of the PPA already corresponds to the terminology of the GPA 2012. In another view, the revision represents a change of mind away from price and towards quality competition. In any case, the introduction of new award criteria should reflect the increased weighting of qualitative factors.

### NEW AWARD CRITERIA

As it is already the case under current law, the new art. 29 rev-PPA lists a non-exhaustive number of different award criteria. The award criteria explicitly mentioned in the law are now supplemented in particular by the criteria of sustainability, life-cycle costs, delivery conditions, creativity and innovation.

### Sustainability

The award criterion of sustainability contains three dimensions. First, it is understood to be economic, according to which innovative and resource-saving technologies are more economical in the long term than outdated and resource-intensive procurement goods. Second, the ecological dimension includes aspects of environmental compatibility, resource conservation and resource efficiency, which are each considered over the entire life cycle. In particular, aspects such as pollutant levels, water, soil and air

<sup>1</sup> If the article numbers and contents of the regulations of rev-PPA and rev-ICPP are identical in the following, the rev-ICPP is not cited..

pollution or energy and water consumption can be taken into account in this regard. Third, the social aspect of sustainability enables, for example, to purchase fair trade products or take into account the employment of persons with health restrictions. In connection with the assessment of environmental and social aspects, the respective public customer can rely on internationally recognized certifications.

#### **Life cycle costs**

Within the framework of the new criterion of life-cycle costs pursuant to art. 29 rev-PPA, a global cost consideration with regard to the entire life cycle of the procurement object, including all costs in connection with procurement, operation, dismantling and disposal, can be taken into account when awarding the contract. In the context of the resulting more holistic approach to procurement costs, more expensive but easier to maintain or more durable products may, for example, appear more advantageous in an overall assessment than procurement alternatives with only a low purchase price.

#### **Different price levels**

With the award criterion of the different price levels of the countries in which the economic performance is rendered, the legislator creates a basis for taking into account the generally lower wage and price levels abroad in public procurement. Thus, foreign suppliers participating in public procurement procedures in Switzerland should not benefit from the differences in price and wage levels. Whether this award criterion will actually be included in future procurements is controversial from the perspective of international treaties and has also been criticized on various occasions during parliamentary discussions.

### **MEASURES AGAINST CORRUPTION AND COMPETITION AGREEMENTS**

The prevention of corruption and conflicts of interest was one of the key concerns in the implementation of the GPA 2012. As a consequence, the legislator has now implemented in both the purpose article (art. 2 lit. d rev-PPA) and the procedural principles for the award of public contracts (art. 11 rev-PPA) the fight against inadmissible competition agreements and corruption by means of measures and sanctions, which are regulated in art. 44 and 45 rev-PPA.

#### **Exclusion from the procedure and withdrawal of the award**

According to art. 44 rev-PPA, bidders can be excluded from an award procedure, removed from a list of suitable bidders, or a contract already awarded to them can be revoked if the bidder violates provisions on anti-corruption (art. 44 para. 1

letter e rev-PPA) or if there are sufficient indications that inadmissible agreements on competition have been made (art. 44 para. 2 letter c). In Switzerland, the provisions on anti-corruption can be found in the Swiss Criminal Code (“**CC**”) and the Federal Act against Unfair Competition (“**UCA**”).

With regard to sanctions for a violation of the provisions on anti-corruption, the law requires positive knowledge; a final conviction of the provider is not required. As regards illegal competition agreements, reasonable evidence is sufficient for sanctions to be imposed. Consequently, the contracting authority does not have to wait for the completion of proceedings by the competition commission before taking action.

The measures of art. 44 rev-PPA are at the discretion of the awarding authority, which means that not every misconduct of a bidder has to be sanctioned. For example, an exclusion from the award procedure would hardly be justified in the case of minor infringements which can be corrected immediately. However, if a final judgement has been issued for serious offences, exclusion from the procedure is likely to be unavoidable as a rule.

#### **Exclusion from future public contracts**

On the basis of art. 45 rev-PPA, a contracting authority may exclude a provider from the award of public contracts for up to five years if (i) a final judgement on a misdemeanor to the detriment of the respective contracting authority or on a felony has been issued, (ii) the provisions on anti-corruption have been violated, (iii) inadmissible competition agreements have been made, (iv) occupational health and safety provisions (in particular on equal payment of men and women) have been violated, or (v) reporting obligations under the Federal act on measures to combat illegal employment have been violated. In the event of minor violations, the public customer may issue a warning.

The exclusion from the award of public contracts means that the bidder is in principle only excluded for future invitations to tender by the contracting authority concerned. However, if the sanction is imposed due to a violation of the provisions on anti-corruption by a contracting federal authority, the exclusion shall have effect with regard to all contracting federal authorities. At the cantonal level, a fine of up to 10% of the adjusted bid amount may be imposed as an alternative to exclusion from the contract award procedure in accordance with art. 45 rev-ICPP.

The exclusion from future public contracts presupposes the existence of serious infringements,

but does not require a prior warning. Likewise, on the basis of the legal text, a final judgment is only necessary in relation to offences to the detriment of the contracting authority. However, the official explanations on the rev-PPA suggest that a corresponding exclusion is only pronounced in serious and repeated cases.

### PRICE NEGOTIATIONS AND TENDER ADJUSTMENT

Under current public procurement law, federal public procurement agencies are permitted to conduct negotiations, in particular price negotiations (so-called tender rounds). Under intercantonal law, bidding rounds are prohibited. The intercantonal prohibition is based, among other things, on the fear that bidders will build additional margins into their bids with a view to price negotiations in order to subsequently (partially) abandon them. For this reason, and in order to standardize the federal and cantonal regulations, art. 11 lit. d rev-PPA now excludes the organization of bidding rounds.

However, this innovation does not mean that price adjustments after submission of the offer are per se excluded. Especially in the context of the so-called adjustment of the offer (*Angebotsbereinigung* according to art. 39 rev-PPA), price adjustments may still occur under the revised law.

The aim of the tender adjustment is to ensure the comparability of tenders, clarify misunderstandings and fill gaps in the tender documents. Discussions

will be held between the awarding authority and the bidders in order to clarify and specify the contract and make the bids comparable. A corresponding adjustment or concretization of the object of performance justifies price adjustments on the part of the bidders (art. 39 para. 3 rev-PPA).

### LEGAL PROTECTION

According to the law currently in force, no appeal may be made against any dispositions outside the scope of the international treaties. With the revision of the procurement law, the legislator is introducing the so-called protection of secondary law (art. 52 para. 2 rev-PPA). This gives the supplier the possibility, provided the necessary thresholds (for supplies and services: CHF 150,000, for construction services: CHF 2,000,000) are exceeded, to have the illegality of a ruling asserted by the competent court and claim damages. Claims for damages are limited to the expenses incurred in connection with the tender.

Consequently, even under the new legislation, it is still not possible, outside the scope of the international treaties, to annul an award or to claim damages in the amount of the positive interest (in the sense of a hypothetical award in favor of the appellant).

**If you have any questions or need further assistance, please do not hesitate to get in touch with your contact person at BianchiSchwald.**



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