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The Revised Public Procurement Law in Switzerland

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Key Take-aways

- 1.** The purpose of the revision is to harmonise the partly heterogeneous federal and cantonal public procurement regulations as far as possible.
- 2.** With new sanction instruments, the procuring entities can issue warnings, procurement bans and, at the cantonal level, fines against non-compliant suppliers.
- 3.** The revision leads to a stronger focus on quality competition. Now it is no longer the "most economically favourable" tender that wins the contract, but the "most advantageous" tender.

1 Introduction

The **revised public procurement regulations** came into force in Switzerland on 1 January 2021. At the federal level, the Public Procurement Act and the Public Procurement Ordinance (**PPA** and **PPO**) were revised. At the cantonal level, the revised Intercantonal Agreement on Public Procurement (**IAPP**) was adopted on 15 November 2019; it enters into force when two cantons have joined it.

2 Background and expected benefits

The decisive factor for the changes was the **revision of the WTO Agreement on Government Procurement (GPA 2012)**, which was completed in 2012. The implementation of the GPA 2012 provides the Swiss economy access to an expanded procurement market. The new GPA 2012 rules are also expected to lead to cost reductions as competition among suppliers is strengthened, leading to a wider choice of tenders. The improved user-friendliness, clarity and legal certainty also promise potential savings for suppliers.

One of the main objectives of the total revision of the PPA was also to harmonise the partly **heterogeneous procurement regulations** of the federal government and the cantons as far as possible – while maintaining the federal division of competences. Other objectives of the revision were the systematic regulation of the exclusion and sanction provisions, the inclusion of the award of certain concessions and the transfer of certain public tasks, the prohibition of bidding rounds, the prevention of corruption, the flexibilisation of the procurement process and a (moderate) expansion of legal protection.

Stronger focus on quality competition.

3 Amendments of Practical Importance

The new public procurement regulations entail some **far-reaching changes**. Some of the changes that are of practical importance concern the following topics.

3.1 New focus on quality competition

The revised public procurement regulations place a **stronger focus on quality competition**. The "most advantageous tender" and no longer the "most economically favourable tender" will be awarded the contract. This expression is based on the requirements of the GPA 2012 ("*more advantageous*") and expresses that a comprehensive evaluation of the tender, i.e. including qualitative aspects, should take place. The focus on

stronger quality-oriented competition is reflected in other new provisions, such as the new award criteria of sustainability, level of innovation, plausibility of the tender or reliability of the price as well as the obligation to examine unusually low tenders.

3.2 Sanction instruments

As part of the revision, additional sanction instruments were introduced. According to the hitherto existing and still valid regulations, a procuring entity may (i) **exclude suppliers from the procedure** (e.g. in case of non-compliance with the selection criteria, false declarations or agreements that eliminate effective competition), (ii) **revoke the award** (e.g. in case of a subsequently discovered reason for exclusion) and (iii) **remove the suppliers from tender lists**.

It is **now** uniformly regulated that the procuring entities can issue a **warning**, a **procurement ban** or, at the cantonal level, also fines against non-compliant suppliers. With the procurement ban, suppliers can be excluded from future public procurement tenders for a period of up to five years. While the procurement ban applies in principle only in relation to the procuring entity ordering the ban, at the federal level a procurement ban can also be imposed in relation to all federal procuring entities in the case of violations of the anti-corruption provisions.

The **warning** is the mildest form of sanction and consists of a formal warning to the supplier to comply with the legal provisions in the future. However, it must be noted that in the event of a repeated violation, a previous warning is taken into account and can lead to a more severe sanction.

The newly introduced **fines** (only at cantonal level) can amount to up to ten percent of the adjusted tender amount. They pursue special and general preventive goals, which are intended to encourage the obedience to the law of all suppliers and to deter suppliers who have been fined from further violations of the rules. The condition for the imposition of a fine is (i) a binding conviction for a misdemeanour to the detriment of the respective procuring entity or for a felony, (ii) the violation of anti-corruption provisions, (iii) the disregard of labour regulations or (iv) the existence of an inadmissible competition agreement.

3.3 Novelties in legal protection

Significant changes of practical importance were also made in the area of legal protection, in particular, a **harmonisation of the appeal period**, which is now 20 days at both federal and cantonal level.

Furthermore, the possible **object of appeal has been expanded**. According to the revised federal legal protection provisions, orders for contracts below the scope of international treaties can now also be reviewed by the courts. Previously, this only applied to contracts within the scope of international treaties. However, in the case of procurements below the scope of international treaties, it is not possible to request the annulment of the affected order by means of an appeal, but – depending on the type of procurement determined by the threshold value for the invitation procedure or the open procedure – only the declaration of its unlawfulness. The request for a declaration of the unlawfulness of an order outside the scope of international treaties may be combined with a request for an award of damages. Such claim for damages

is limited to the necessary expenses incurred by the supplier in connection with the preparation and submission of its tender. Consequently, the contested award decision cannot be annulled by the court decision, which leads to a limited scope of application and thus insufficient legal protection. At the cantonal level, comprehensive legal protection applies above the threshold for the invitation procedure. However, foreign suppliers are only admitted to appeal in the case of procurements outside the scope of international treaties, insofar as the state in which they are domiciled grants reciprocal rights.

Another **novelty concerns the suspensive effect of the appeal**. The previous rule, according to which a procurement appeal generally has no suspensive effect, is not going to change for contracts within the scope of the international treaties, both at the federal and cantonal level. Outside the scope of the international treaties, the question of suspensive effect does not arise, since in this area the contested order cannot be annulled. Therefore, if the suspensive effect is not ordered by the court upon special request, the procuring entity can still conclude the contract with the award recipient even before the conclusion of any appeal proceedings. In this case, if the appeal is successful, only the unlawfulness of the award can be declared and claims for damages can be awarded.

However, the new regulation concerning the exchange of submissions on the suspensive effect appears to be problematic. The law now stipulates that only one exchange of submissions will take place on the question of the suspensive effect. As a result, an unsuccessful supplier will have to explain conclusively in its (first) statement of appeal why its appeal is sufficiently motivated and not hopeless – which is very difficult at this point (usually without having the complete procedural files) and rather leads to a reduction in legal protection.

The newly introduced fines can amount to up to ten percent of the adjusted tender amount.

3.4 Harmonisation of thresholds

With the revision, the **threshold amounts are harmonised** at the cantonal and federal levels. The threshold amounts are decisive for the choice of the procurement procedure, since public contracts that reach a certain threshold amount must generally be awarded in a public tender. The open procurement procedure is now mandatory for supplies and services at the federal level above CHF 230'000 and at the cantonal level above CHF 250'000. For construction services, public procurement is required at the federal level above CHF 2 million and at the cantonal level above CHF 500'000 (main building industry). Within the scope of the international treaties, an anal-

ogous adjustment is not possible, as the threshold values are determined at the international level (GPA 2012).

3.5 Introduction of electronic auctions

Another novelty is **the introduction of electronic auctions**, according to which procuring entities can conduct auctions for the procurement of standardised services by means of an iterative, automated and electronic procedure. The electronic auction is not an independent procurement procedure, but an instrument with which suppliers can outbid or underbid each other.

The actual auction is preceded by a prequalification: In a first phase, the procuring entity examines the suitability criteria and the technical specifications and carries out an initial evaluation. The electronic auction only takes place in a second phase. In this context, the suppliers must be informed beforehand of the result of the initial evaluation of the tender, the automatic evaluation method, including the mathematical formula based on the aforementioned award criteria, as well as all other relevant information for the handling of the auction. The auction procedure covers prices, if the award is made to the bid offering the lowest price, or prices and figures for quantifiable components such as weight, purity or quality, if the award is made to the most economically advantageous bid.

Before the auction is held, all admitted suppliers are invited simultaneously and electronically to submit new or adjusted bids. In this process, it must be ensured that the participants' submissions are pseudonymised in order to protect business secrets and to prevent price exchanges, so that the participants cannot identify which competitors submit which bids.

3.6 Prohibition of bidding rounds

Bidding rounds are negotiations with the aim of lowering the price. In the new PPA, the possibility of price negotiation has generally been abandoned. What remains possible, however, is the adjustment of tenders. Therefore, the procuring entity may still conduct technical negotiations with the aim of clarifying the order or the tenders and to make the tenders objectively comparable with each other, respectively. In doing so, the services may also be amended within certain limits, as long as the service is not re-characterised or the group of potential suppliers is not changed. As a result of such changes, the tender price may also be adjusted. The same provision now also applies at the cantonal level, which leads to a liberalisation in certain cantons.

4 Outlook

The new public procurement regulations introduce some far-reaching changes and aims at harmonising the procurement culture and making it more transparent. Both suppliers and procuring entities have to deal with the new legislation and revise or adapt their processes (procurement manuals, guidelines) and bidding tactics.



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