THE GOVERNMENT PROCUREMENT REVIEW

Ninth Edition

Editors
Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

© 2021 Law Business Research Ltd

THE GOVERNMENT PROCUREMENT REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

© 2021 Law Business Research Ltd

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Jack Bagnall, Joel Woods

BUSINESS DEVELOPMENT MANAGERS
Katie Hodgetts, Rebecca Mogridge

BUSINESS DEVELOPMENT EXECUTIVE
Olivia Budd

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Georgia Goldberg

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Sarah Andreoli

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2021 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at May 2021, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-783-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2021 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADDLESHAW GODDARD LLP

ADVOKATFIRMAN FYLGIA

ARRUDA ALVIM, ARAGÃO, LINS & SATO ADVOGADOS

BAKER MCKENZIE

CROWELL & MORING LLP

HENGELER MUELLER PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

KPV LEGAL

THE LAW FIRM OF WAEL A ALISSA IN ASSOCIATION WITH DENTONS & CO

LENZ & STAEHELIN

MARTÍNEZ, PEÑA & FERNÁNDEZ

SOCIEDADE REBELO DE SOUSA & ADVOGADOS ASSOCIADOS, SP, RL

WOLF THEISS

© 2021 Law Business Research Ltd

CONTENTS

PREFACE v
Jonathan Davey and Amy Gatenby

Chapter 1 AUSTRALIA 1
Geoff Wood, Anne Petterd and Sally Pierce

Chapter 2 AUSTRIA 15
Philipp J Marboe

Chapter 3 BRAZIL 26
Teresa Arruda Alvim and David Pereira Cardoso

Chapter 4 CANADA 37
Theo Ling, Karina Kudinova and Nadia Rauf

Chapter 5 DOMINICAN REPUBLIC 53
Luis Ernesto Peña Jiménez

Chapter 6 EUROPEAN UNION 62
Jan-Oliver Schrotz, Michael Rainey, Bill Gilliam and Clare Dwyer

Chapter 7 GERMANY 78
Jan Bonhage and Simone Terbrack

Chapter 8 GREECE 92
Manolis J Velegrakis

Chapter 9 PORTUGAL 103
José Luís Moreira da Silva and João Filipe Graça

Chapter 10 SAUDI ARABIA 115
Nick Simpson, John Balouziyeh and Bshayer Binyamin

© 2021 Law Business Research Ltd

Chapter 11 SWEDEN....130
Fredrik Winroth and Markus Garfvé

Chapter 12 SWITZERLAND....139
Astrid Waser and Benoît Merkt

Chapter 13 UNITED KINGDOM....149
Louise Dobson, Ryan Geldart and Jack Doukov-Eustice

Chapter 14 UNITED STATES....168
Daniel Forman, Adelicia Cliffe, Craig Barrett and Christian Curran

Appendix 1 ABOUT THE AUTHORS....181
Appendix 2 CONTRIBUTORS' CONTACT DETAILS....193

© 2021 Law Business Research Ltd

PREFACE

It is our pleasure to introduce the ninth edition of *The Government Procurement Review*.

Our geographical coverage this year remains impressive, covering 14 jurisdictions, including the European Union (EU), and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

The past year has of course been dominated by the ongoing coronavirus crisis. In many cases, the tension between the need for urgent procurement of essential supplies clashes with the requirement to follow a structured procurement process. These issues are a subject of particular focus in the chapters for Brazil, Canada, the Dominican Republic, Germany, Greece and the United States. At EU level, the focus has been on identifying the ways in which such urgent procurement needs can be accommodated within the existing procurement rules. In the United Kingdom, the government has published several procurement policy notes during the pandemic, including advice on payments to struggling suppliers. In addition, the UK Green Paper on Transforming Public Procurement (referred to below) recognises the lessons of the covid-19 pandemic by proposing a new 'crisis' exemption to sit alongside the various urgency-related relaxations, with a proposal that a crisis could be declared by a minister, bringing with it the possibility of relaxations of the application of procurement law.

Another theme this year across a range of jurisdictions is legislative reform: for example, extensive reforms are proposed in Brazil, Greece, Saudi Arabia and Sweden. Portugal also had major reforms on track until shelved by the President. Switzerland is in the process of implementing recent legislative changes. Areas of focus for a number of these reforms include cybersecurity, prompt payment of suppliers, sustainability, the environment, whistle-blowing, modern slavery and supply chain management (see in particular the chapters for Austria, Australia, Canada, the United States and Germany).

As mentioned above, the UK government also published a Green Paper on reform of procurement law, taking advantage of the (limited) room for manoeuvre offered by the UK membership of the World Trade Organization's Agreement on Government Procurement and the boundaries set by the EU–UK Trade and Co-operation Agreement. While Brexit itself resulted in only minor changes to the UK procurement law regime, the Green Paper is very wide ranging: among its more notable proposals are a significant attempt at simplification and wider permitted use of negotiation; a move to provision of information to bidders throughout procurement processes; and a cap on damages for successful complainants, born

© 2021 Law Business Research Ltd

of recent significant damages payouts in high-profile cases. The latter proposal has been met with a largely negative response from practitioners. It will be interesting to see what the balance of responses to the Green Paper is, and how many of its radical proposals become law.

International trade agreements feature again: as well as the EU–UK TCA mentioned above, we now have the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (or CPTPP – superseding the Trans-Pacific Partnership) between Asia Pacific nations, and the Canada–United States–Mexico Agreement (or CUSMA – the replacement for NAFTA, applying, as regards procurement, only between the United States and Mexico). The United Kingdom and Canada have also signed a bilateral trade agreement, and various other free trade agreements are coming into force or are under negotiation.

There has also been some significant case law in the past year, most notably in the EU on public sector contracting and the issue of self-cleaning for contractors guilty of past failures.

The European Commission has been active on a number of fronts: the outcome of the process involving a White Paper looking at the potential distortive effects of foreign subsidies on the EU Internal Market, including a focus on these effects in the context of public procurement, is clearly one to watch.

When reading chapters regarding EU Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the EU chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this ninth edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion, particularly given the effects of the pandemic and consequent lockdowns in most countries covered in this work. We trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2021

© 2021 Law Business Research Ltd

Chapter 12

SWITZERLAND

Astrid Waser and Benoît Merkt[1]

I INTRODUCTION

Public procurement in Switzerland is regulated by international treaties, federal law, and cantonal and intercantonal law. The international treaties set out standard principles, constitute the basic legal framework of rights and obligations, and are binding on authorities. These include international framework agreements such as the Government Procurement Agreement of 15 April 1994 (GPA) (which was replaced in Switzerland by the GPA 2012 on 1 January 2021), the Bilateral Agreement between the European Community and Switzerland on certain aspects of public procurement of 21 June 1999 (EU-CH AAGP) and the Convention establishing the European Free Trade Association of 4 January 1960 as amended (the EFTA Agreement). As Switzerland is not a Member State of the EU, EU law on public procurement is not applicable.

At state level, public procurement is governed by federal law. The principal legislative acts regulating federal public procurements in Switzerland are the Federal Act of Public Procurement of 21 June 2019 (FAPP), and the corresponding Federal Ordinance of Public Procurement of 12 February 2020 (OPP) and the Ordinance on the Organisation of Public Procurement of the Federal Administration of 24 October 2012 (OOPP). The FAPP sets out general procurement principles and also contains more detailed provisions. Furthermore, the OPP makes specific provision for execution of the FAPP. Every canton in Switzerland has its own procurement law governing cantonal administration procurement. The main legislative act for regional and local authority procurements is the Intercantonal Agreement on Public Procurement of 25 November 1994/15 March 2001 (IAPP), harmonising the legal framework within the cantons and the cantonal public procurement regulations of each canton.

The purpose of the FAPP is to make efficient use of public funds by enabling competition between tenderers. The FAPP stipulates that the contract must be awarded to the tenderer with the most advantageous offer. Furthermore, transparency as an important tool to facilitate competition is a fundamental principle of the procurement procedure and stated as a purpose of the FAAP. The principle of equal treatment and non-discrimination is also a key principle of the FAAP. Additionally, the FAAP states that tenderers must guarantee compliance with health and safety regulations, employment regulations, including equal treatment of men and women, and environmental regulations.

In principle, exemptions from the general regime of applicable procurement laws derive directly from the relevant procurement acts. The FAPP, for example, contains a list of

1 Astrid Waser and Benoît Merkt are partners at Lenz & Staehelin.

© 2021 Law Business Research Ltd

procurements to which the FAPP does not apply. For instance, if a procurement is deemed necessary for the protection and maintenance of external or internal security or public order, the FAPP itself stipulates the non-applicability of the FAPP.

This chapter focuses primarily on federal law, as the considerable number of different cantonal, and even municipal, regulations in the Swiss Confederation still in force at this point in time are beyond the scope of this chapter.

II YEAR IN REVIEW

The entire legislative framework has undergone revision in the past to implement the revised World Trade Organization (WTO) Agreement on Government Procurement (GPA 2012). In addition to the implementation of the GPA 2012 in the FAPP, one of the main objectives of the revision was to harmonise the federal and cantonal procurement regulations. At federal level, the revised FAPP and OPP entered into force on 1 January 2021. At an extraordinary plenary meeting on 15 November 2019, the cantons also unanimously adopted the revised IAPP (the IAPP 2019), which largely contains the same rules as the revised FAPP and will leave the cantons little room for their own regulations. The IAPP 2019 will enter into force as soon as it has been ratified by two cantons, which has not yet been the case. Furthermore, the IAPP 2019 has to be enacted into cantonal law by cantonal governments. The new cantonal acts are expected to enter into force in the course of 2021 or 2022.

The key changes to the laws are as follows:

a Contracts are to be awarded to the 'most advantageous offer' and no longer to the 'most economically favourable' one. The numerous new awarding criteria contained in the new laws are to be given more weight in relation to the price. These criteria particularly include suitability, deadlines, technical value, cost-effectiveness, life cycle costs, aesthetics, sustainability, plausibility of the offer, the different price levels in the countries in which the service is provided, price reliability, creativity, customer service, delivery conditions, infrastructure, innovative content, functionality, service readiness, professional competence and efficiency of the methodology. The overall aim is to place greater emphasis on quality competition rather than price competition.

b Bidding rounds (i.e., negotiations with the sole purpose of reducing the price offer) are now prohibited by law at the federal level, as was already the case at cantonal level. However, price adjustments will remain possible in the context of a bid adjustment or special procedures such as the dialogue, where minor modifications may result in a corresponding adjustment of the price offer. In addition, price adjustments may be made within the framework of an electronic auction or during the negotiation of an offer in an invitation procedure.

c Flexible and modern procurement instruments were introduced in the revised federal law, such as the possibility of concluding framework agreements or study contracts, as well as competitions. With respect to modern technologies, the law provides for electronic auctions and the electronic processing of award procedures.

d Legal protection on procurement proceedings will be harmonised across the federal and cantonal levels (e.g., the appeal period for awards will be 20 days at both federal and cantonal level).

© 2021 Law Business Research Ltd

Since the current legislation will remain effective until entry into force of the revised decrees, the following remarks will focus primarily on the current legislative framework but also take into account the planned new legislation where fundamental changes are expected.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The FAPP provides a list of the public authorities, which are subject to the law. The list contains entities both with and without legal personality and also entities such as courts, federal prosecutors and parliamentary services. Appendix 1, Annex 1 of the GPA 2012 contains a list of awarding authorities; however, this list is not exhaustive and entities founded after the contract signing may also be subject to public procurement law. Contracting authorities in the water, energy, transport and telecommunications sectors are explicitly regulated. However, entities active in these sectors may be granted individual exemptions by the federal department.

Private entities are, under specific circumstances and for certain actions, especially when providing public services in the area of production, transport or distribution of electrical power, subject to public procurement law. They have to meet the same legal requirements, in particular, if they act in place of contracting authorities for procurements.

ii Regulated contracts

The FAPP provides an explicit definition of 'public contracts' as transactions by which a contracting authority subject to the law procures against payment the products or services for the fulfilment of its (public) tasks. Accordingly, the public contract is characterised by its remuneration and the exchange of goods or services in return. It is not necessary for the consideration to consist in money; monetary benefits that are only indirectly exchanged are also covered.

Under Swiss law, the following contracts are generally covered by public procurement rules:

a supply contracts (i.e., contracts for the supply of movable goods, in particular by purchase, lease, rent or hire);
b service contracts (i.e., contracts for the rendering of services); and
c works contracts (i.e., contracts for building and civil engineering work).

In addition, the FAPP provides a list of contracts not covered by the law. If, for example, a public authority acquires, rents or leases real estate or enters into contracts regarding financial services, the FAPP does not apply. In addition, contracts to be concluded in certain sectors are excluded from the FAPP. Furthermore, the FAPP lays down thresholds (without value added tax) for contracts that can be awarded directly and without invitation to tender:

a 150,000 Swiss francs for supply and service contracts; and
b 300,000 Swiss francs for works contracts.

Pursuant to the FAPP, the competent federal department will periodically adjust these thresholds in accordance with international obligations.

With regard to the award of concessions, the FAPP stipulates that these are subject to procurement law if the tenderer thereby acquires exclusive or special rights that it exercises in the public interest and for which it receives remuneration or compensation directly or

© 2021 Law Business Research Ltd

indirectly in return. However, specific legal provisions (e.g., under the Waters Protection Act, the Electricity Supply Act or in telecommunications and broadcasting legislation) take precedence over this regulation.

If the contracting parties wish to vary a contract, the following applies: in general, Swiss public procurement law assumes that the project described in the invitation to tender materially remains the same during the entire procurement process. No new procurement procedure is therefore necessary unless the amendment materially changes the scope of the contract or the amendments exceed the applicable threshold values. However, if the contracting parties wish to transfer the contract to a different supplier, a new procurement procedure is required (i.e., the contract cannot be transferred to a different entity without conducting a new procurement procedure).

Follow-on procurements (i.e., procurements to replace, complement or expand already provided services) can be awarded directly and without invitation to tender under certain conditions; for example, in cases where a change of the supplier would result in substantial additional costs.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements, which do not aim at conclusively determining a certain volume of services to be put out to public procurement, but rather at determining the terms for the goods, work and services to be procured over a given period, are explicitly regulated by the FAPP.

In general, framework agreements are permissible provided they are not used with the intention or effect of impeding or eliminating competition. However, the FAPP provides that, apart from exceptional circumstances, framework agreements may be contracted for a maximum duration of five years and may not be automatically renewed.

ii Joint ventures

Swiss public procurement legislation does not contain a clear definition of public–public joint ventures (JVs). The FAPP provides, however, for specific rules in situations where a service is to be procured from an entity that is part of the procuring authority or controlled by the procuring authority or which is itself subject to public procurement law.

If the contracting authority and the supplier belong to the same legal entity (i.e., if the service is procured from a dependent organisational unit of the contracting authority and is thus procured in-house), the FAPP does not apply. In addition, the FAPP is not applicable if the contracting authority procures a service from an entity over which it exercises control. However, this exemption only applies if the controlled entity essentially provides its services for the contracting authority, which can be assumed if the entity provides at least 80 per cent of the services in a given market for the procuring authority. Finally, the FAPP does not apply to contracts where the contracting authority intends to procure a service from a legally independent entity that is also subject to procurement law and does not provide its services in competition with private third parties. This exception also requires that no private third party holds shares in the entity.

Swiss public procurement legislation does not provide special rules for public–private partnerships (PPPs). Also, there is no clear definition of a PPP in Swiss procurement legislation. Generally, procurement procedures apply, as PPPs are viewed as ordinary

© 2021 Law Business Research Ltd

procurements of supplies, services or works. However, the applicability of procurement laws to PPP projects has to be examined case by case, depending on the specific characteristics of the procured service. According to case law, once a PPP partner has been selected by the contracting authority in accordance with the FAPP, it is no longer subject to procurement laws when subcontracting. Despite the recognition of this one-time procurement principle, the contracting authority must ensure that the selected partner obligates its subcontractors to comply with the compulsory regulations.

V THE BIDDING PROCESS

i Notice

As far as regulated procurement contracts at the federal level are concerned, all calls for tender, as well as the awards of the contract, are published on Simap, the government's public procurement information system platform.

ii Procedures

Swiss public procurement law provides four main methods of procurement. The contracting authority may award a regulated contract by means of an open procedure, a selective procedure, an invitation procedure or a negotiated procedure. The applicability of these procedures depends on the contracting authority, the type of contract and the threshold values set out in the FAPP.

Under the open procedure, all interested bidders may submit a tender. In the selective procedure, all interested bidders may submit an application to participate, but the contracting authority identifies bidders who may submit a tender based on their suitability. In the invitation procedure, the contracting authority determines at least three suppliers, if possible, who will be invited to submit a tender. As far as the procurement of weapons, ammunition or military materiel is concerned, the invitation procedure may always be available. Under the negotiated procedure, the contracting authority negotiates a contract directly with a supplier of its choice without issuing any invitation to submit a tender. In general, the applicability of the negotiated procedure depends on the thresholds set out above in Section III.ii. However, under certain conditions set out in the FAPP, the contracting authority may apply the negotiated procedure even though the procurement exceeds the corresponding threshold value.

As far as electronic procurements are concerned, regulated procurement contracts at the federal level are advertised on the Simap[2] electronic platform. Electronic submissions are standard practice within federal administration.

Moreover, the revision of the FAPP intended to give the contracting authorities greater leeway in the use of modern technologies. To this end, the FAPP now provides for electronic auctions and the electronic processing of award procedures. Flexible procurement instruments such as the dialogue (competitive dialogue) are likely to be increasingly important in the future, especially in the awarding of intellectual services. Practical experience will show the extent to which these new instruments will be used and whether further need for modification of the provisions will result.

2 Available at www.simap.ch.

© 2021 Law Business Research Ltd

iii Amending bids

Modification to tender documents is limited and amendments are possible in the event that formal negotiations take place. However, bidders may submit alternative tenders in addition to their main offer, as long as such alternatives have not been excluded in the tender documents.

See also Section III.ii regarding options for the contracting parties to vary a contract or transfer the contract to a different supplier.

VI ELIGIBILITY

i Qualification to bid

The FAPP contains an exhaustive list of situations in which a bidder might be excluded from a specific tender or from future public contracts in general for a period of up to five years; for instance, if it has violated anti-corruption provisions or has been found guilty of a felony in a legally enforceable judgment. Details of excluded bidders, as well as the reasons and the length of their exclusions, are kept in non-public lists.

As mentioned in Section V.ii, the qualification to bid may also depend on the procurement procedure applicable to the tender. Only the selective procedure provides for a selection or shortlisting of the bidders that fulfil the qualification criteria established by the contracting authority. These criteria may concern the bidders' financial, economic and technical capacity. To meet the principle of transparency, the criteria are published in the invitation to tender or tender documents. The contracting authority can reduce the number of tenderers if the tender could not otherwise be processed in an efficient way. However, even when limiting the number of participants, the contracting authority has to guarantee an effective competition between the bidders.

In addition, in certain cases, the contracting authority may restrict or exclude the option for consortia to participate in the invitation to tender.

ii Conflicts of interest

The FAPP provides that the contracting authority must take measures to prevent conflicts of interest. It further provides a list of situations in which an individual acting on the contracting authority's behalf must recuse himself or herself.

The OPP stipulates that the employees of a contracting authority (as well as third parties commissioned by the contracting authority who are involved in an award procedure) are obliged to disclose any secondary employment and contractual relationships, as well as vested interests, that could lead to a conflict of interest in the award procedure, and to sign a declaration of impartiality. Moreover, the contracting authority must regularly instruct its employees who participate in award procedures on how to effectively prevent conflicts of interest and corruption. General principles of constitutional and administrative law, according to which members of the administration must recuse themselves if they have a personal interest or could be regarded as lacking impartiality, also apply to public procurements. The IAPP provides for persons concerned to recuse themselves if certain conditions are met but does not specify these conditions. The IAPP 2019, the date of entry into force of which is still unknown (see Section X), contains dispositions almost identical to those in the FAPP.

© 2021 Law Business Research Ltd

iii Foreign suppliers

Foreign suppliers coming from countries to which Switzerland has undertaken to grant market access on a contractual basis can participate in Swiss public procurement, provided the countries concerned have given the same commitment to Switzerland. Even in the case of public contracts outside the scope of international treaties (listed in an annex to the FAPP), foreign suppliers can participate in Swiss public procurement procedures if their countries of origin grant reciprocal rights or if the contracting authority allows it. The Federal Council must update its list of countries that grant reciprocal rights.

Although Switzerland is not a member of the EU, it has concluded a set of bilateral agreements with the EU (and EFTA), notably the EU-CH AAGP. Companies from the EU or EFTA have the right to participate in tenders in Switzerland and to second the necessary personnel to Switzerland.

Foreign companies must, however, apply for work permits for their seconded personnel in accordance with the applicable Swiss legislation. They must therefore comply with the requirements on social and working conditions applicable to the location of the awarded contract.

VII AWARD

i Evaluating tenders

The FAPP provides that the contract has to be awarded to the most advantageous offer. Tenders must therefore be evaluated using performance-related award criteria, such as the price and quality, appropriateness, time frames, technical value, economic efficiency, life cycle costs, aesthetics, sustainable development, plausibility of the tender, the different price levels in the countries where the supply is provided, reliability of the price, creativity, customer service, delivery conditions, infrastructure, innovation content, functionality, service readiness, expertise or efficiency of the methodology. The extent to which the tenderer provides apprenticeship places, jobs for older employees or jobs to reintegrate long-term unemployed people may additionally be taken into account outside the scope of international agreements.

The contracting authority must indicate the award criteria and their weighting in the invitation to tender or in the tender documentation. The weighting may be omitted if the procurement concerns solutions, possible solutions or procedures. Contracts for standard services may also be awarded solely on the basis of the lowest price, provided that the technical specifications for the goods, work or services guarantee high sustainability standards in social, environmental and economic terms.

The FAPP provides for an obligation for the contracting authority to request further information from bidders that file an abnormally low tender, and enables the contracting authority to exclude such bidders if they cannot respond adequately to the authority's request.

ii National interest and public policy considerations

The GPA 2012 lays down the principle that authorities are required to act in a non-discriminatory manner. National legislation shall not limit the market (i.e., encourage national or local companies or discriminate against foreign bidders).

© 2021 Law Business Research Ltd

The procurement may take into account social or environmental criteria, but these must have a relevance to the market in which the contract is awarded. Thus, to avoid discriminating against foreign companies, one must always ensure that such criteria are objectively necessary for the underlying market.

Furthermore, there are sectors that may be granted individual exemptions from tender procedures. These exemptions are exhaustively listed in the revised FAPP.

VIII INFORMATION FLOW

Invitations to tender must be published on the government's Simap platform. Tender documents containing all information relevant for a company to decide whether to participate in the tender procedure and to prepare its bid must also be available.

The contracting authority may set a date in the tender documents after which no questions will be answered by the contracting authority with respect to the tender documents. Awards must be published on Simap. Furthermore, the contracting authority has to communicate its decision to the bidders and must include a reasoned summary of its decision. The contracting authority may conduct a debriefing with an unsuccessful bidder upon request.

In addition, an unsuccessful bidder has the right to request the contracting authority to provide the following information on the award procedure:

a the type of tendering procedure used;
b the name of the successful tenderer;
c the value of the successful tender or the value of the highest and lowest tender taken into account in the tendering procedure;
d the main reasons for the rejection of their tender; and
e the characteristics and decisive advantages of the successful tender.

However, the awarding authority must not provide this information to unsuccessful bidders if disclosing such information would result in a violation of federal law, be against public interest, prejudice the legitimate commercial interests of the bidders or interfere with fair competition among bidders.

The contracting authority may provide this information in a written statement or invite the unsuccessful bidders for an oral debriefing, which is often the case in practice. Furthermore, other decisions listed in Article 48 of the FAPP, such as the interruption of an award procedure, the choice of participants in the selective procedure or the exclusion of a bidder, must also be communicated to the bidders with summary reasons or be published. During an appeal procedure, the appellant may, on request, consult the documents relating to the evaluation of the appellant's offer and the other documents of the procedure that are relevant to the decision, unless there is an overriding public or private interest that precludes this.

IX CHALLENGING AWARDS

i Procedures

Under the FAPP an appeal against a decision of the contracting authority is possible if the following conditions are met: (1) in the case of supplies of goods or services, when the contract value exceeds the applicable threshold for the invitation procedure, (2) in the case

© 2021 Law Business Research Ltd

of construction work, when the contract value exceeds the applicable threshold for the open or selective procedure, and (3) when the decision relates to bids that are not covered by international treaties on public procurement and violate federal law. Furthermore, the FAPP defines several (final and interim) decisions that can be independently contested by way of appeal. This non-exhaustive list includes (1) the award of contract or discontinuation of the award procedure; (2) the invitation to tender for the contract; (3) the decision on the selection of participants in the selective procedure; and (4) exclusions from the tender. Appeals against these decisions must be brought forward immediately. Their unlawfulness cannot be pleaded at a later point in the procedure.

Appeals against decisions issued by a contracting authority subject to the FAPP may be submitted to the Federal Administrative Court filed within 20 days of the notification of the decision. If the decision is published on the Simap internet platform before the tenderers are personally informed about the outcome of the procedure, the date of publication thereon will be relevant for the limitation period.

In addition, in the federal public procurement procedure, suspensive effect has to be requested by the appellant. If suspensive effect is not granted or not requested by the appellant, the contracting authority can conclude the contract with the successful bidder.

Appeals against decisions of cantonal or local procurement authorities may generally be submitted to the cantonal public law court within 10 days of the date of publication of the decision. The cantonal decision can then be appealed to the Federal Supreme Court within 30 days, although the Federal Supreme Court's power to review may be very restricted, depending on whether the thresholds are reached.

At cantonal level, there exists a standstill clause under which the contract may not be concluded before the expiry of the time limit for appeals against the award decision. Furthermore, the IAPP 2019 stipulates that, under the revised cantonal procurement laws, appeals against decisions of cantonal or local procurement authorities may generally be submitted to the cantonal public law court within 20 days of the date of publication of the decision (and not within 10 days, as is currently the case under the IAPP).

Decisions of the Federal Administrative Court or the cantonal public court can in general be appealed to the Federal Supreme Court within 30 days of the notification of the judgment of the Federal Administrative Court or the cantonal public court, although the Federal Supreme Court's power to review a decision may be very restricted, depending on whether the thresholds have been reached.

ii Grounds for challenge

The appellant may plead any violation of substantive or procedural law, including excess or abuse of discretional power. The appeal court will review the legality of contested decisions but not their appropriateness. The contracting authority has a great deal of discretion when taking decisions and the judge may only review the contracting authority's evaluation of the tenderer's bid in the light of the awarding criteria. The grounds may also relate to an incorrect factual situation. In practice, the judge's control in cases of this kind is limited to making a finding of arbitrariness.

An ordinary appeal to the Federal Supreme Court is limited to the ground of federal law violation and manifestly wrong factual assessment established in violation of the law. In the particular case of a subsidiary constitutional appeal, only those constitutional rights of which the unsuccessful bidder is the holder may be invoked.

© 2021 Law Business Research Ltd

Furthermore, according to the Federal Act on Administrative Procedure of 20 December 1968, an appeal against other separately notified interim orders is permitted if they may cause a non-redressable prejudice, or granting the appeal would immediately bring a final decision and would therefore obviate significant expenditure in time or money in prolonged evidentiary proceedings.

iii Remedies

A distinction ought to be made between the situation in which the unsuccessful tenderer appeals after the award but before the contract is signed with the successful tenderer and the situation in which the unsuccessful tenderer appeals after the contract has been concluded.

In the first case, the possibility to request suspensive effect to prevent the conclusion of the contract remains and, if granted, the unlawful award can be annulled or reformed by the appeal court.

In the second case, the appeal court can only determine the extent to which the contested procurement is in breach of federal (or cantonal) law. Under the FAPP, the appeal court may award damages, within the contested procurement procedure, in connection with expenses incurred by the bidder in preparing the procurement and the appeal procedures for the appellant.

Regarding remedies outside the legislation, the doctrine is divided on whether the remedies provided by the FAPP are conclusive or whether civil claims based on *culpa in contrahendo* are possible. As an informal remedy, a complaint to the supervisory authority of the contracting authority can be made.

X OUTLOOK

Following the revision of the GPA, the GPA 2012 improved transparency and market access and was ratified by the Swiss parliament on 21 June 2019.

The revised FAPP and OPP entered into force on 1 January 2021. At an extraordinary plenary meeting on 15 November 2019, the cantons also unanimously adopted the revised form of the IAPP, the IAPP 2019, which largely contains the same rules as the revised FAPP and will leave the cantons little room for their own regulations. The IAPP 2019 will enter into force as soon as it has been ratified by two cantons. As at March 2021, only one canton (Appenzell Innerrhoden) has ratified the IAPP 2019, with some other cantons having initiated cantonal procedures to do so. Furthermore, the IAPP 2019 has to be enacted by cantonal governments into cantonal law. The new cantonal acts are expected to enter into force in the course of 2021 or 2022.

Following the latest revision, procurement legislation has undergone important changes, therefore further changes are not to be expected in the near future.

© 2021 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

ASTRID WASER

Lenz & Staehelin

Dr Astrid Waser is a partner in the competition, regulated market and investigation group in Zurich. She specialises in all aspects of public procurement law, competition (antitrust) law, media and telecoms law and compliance. Dr Waser also advises on regulatory, administrative and internal investigations and has long-standing experience in the field of compliance matters. In the field of public procurement, she advises awarding authorities and bidders in preparation of, and during, award procedures and represents them before Swiss authorities and courts. She has acted in a large number of high-profile public procurement procedures. Dr Waser is a regular speaker at conferences and seminars.

BENOÎT MERKT

Lenz & Staehelin

Dr Benoît Merkt is a leading expert in competition law and is renowned for his first-rate practice. He specialises in all areas of Swiss and European merger control work and competition law, notably in the banking and finance, energy, high-tech, infrastructure (electricity), consumer goods, chemical, luxury goods, motor-car distribution, public broadcasting and retail sectors. He has been responsible for a large number of merger notifications to the Swiss Competition Commission and coordinated multi-jurisdictional merger filings. Dr Merkt advises in contentious and non-contentious matters and has acted in high-profile cases on alleged abuses of dominant positions, vertical restraints, cartels and public procurement.

© 2021 Law Business Research Ltd

LENZ & STAEHELIN

Route de Chêne 30
1211 Geneva 6
Switzerland
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01
benoit.merkt@lenzstaehelin.com

Brandschenkestrasse 24
8027 Zurich
Switzerland
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01
astrid.waser@lenzstaehelin.com

www.lenzstaehelin.com

© 2021 Law Business Research Ltd

an LBR business

ISBN 978-1-83862-783-6

© 2021 Law Business Research Ltd