

# Update

## Newsflash June 2019

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### New Swiss Public Procurement Law

**The Swiss Parliament adopted the revised Federal Act on Public Procurement. Some significant changes compared to the previous regulation and possible effects on practice are outlined below.**

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#### Baseline

The new regulation seeks both to transpose the revised WTO Agreement on Government Procurement of 30 March 2012 ("**GPA 2012**") into Swiss law and to harmonise the legal bases of the Confederation and the Cantons as far as possible. Harmonisation on a regional level (i.e. in the Cantons) will be achieved by the Cantons joining the new Intercantonal Agreement on Public Procurement. It is currently expected that the revised regulations will enter into force on 1 January 2020.

The new procurement law, which was adopted last week, will bring significant changes for both contracting authorities and tenderers. A selection of the most important changes will be briefly presented below.

#### Paradigm shift in award criteria

With the new procurement law, Parliament has initiated a paradigm shift. The contract will in the future be awarded to the "most advantageous offer" and no longer to the "most economically favourable" one. The numerous awarding criteria contained in the new law – which will be applicable to the extent that they do not violate international obligations of Switzerland – 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 or efficiency of the methodology. The overall aim is to place greater emphasis on quality competition.

As a result of the new rules, the contracting authorities will have more leeway with regard to the awarding criteria and will in future have the opportunity to give greater weight to the quality of the offer. Also, awarding criteria such as sustainability can be given greater consideration under the revised public procurement law. The award criterion "different price levels" (i.e. the consideration of a possibly lower price level abroad), which was highly debated in Parliament, is likely to remain controversial in practice.

#### Objective scope of application

The law applies to "*public contracts*", which are defined as transactions by which a contracting

authority subject to the law procures (i) *against payment* the products or services for (ii) *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* which are only indirectly exchanged are also covered.

With regard to *the award of concessions*, the law now stipulates that these are subject to procurement law if the tenderer (i) thereby acquires exclusive or special rights which it (ii) exercises in the public interest and (iii) receives remuneration or compensation directly or indirectly in return. However, specific legal provisions (e.g. under the Water Act, the Electricity Supply Act or in telecommunications and broadcasting legislation) take precedence over this new regulation.

### **Prohibition of bidding rounds**

As in the past in the Cantons, bidding rounds (i.e. negotiations with the sole purpose of reducing the price offer) will now also be prohibited at federal level.

Price adjustments, however, are not absolutely precluded. For example, in the context of a bid adjustment or special procedures such as the dialogue, the procurement will often be subject to minor modifications resulting in a corresponding adjustment of the price offer. Moreover, price adjustments can be made within the framework of an electronic auction or during the negotiation of an offer in an invitation procedure.

### **Modernisation of procurement law through new instruments**

The revised law is intended to give the contracting authorities greater leeway in the use of modern

technologies. To this end, the revised law 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 to what extent these new instruments will be used and whether further need for modification of the provisions will result.

### **Legal protection – moderate changes**

Legal protection in procurement law is to be harmonized across the federal and cantonal levels. Noteworthy is the unification of the appeal period which will be 20 days at both cantonal and federal level. In addition, legal protection for federal procurement has been moderately improved.

### **Conclusion**

The adjustments to the GPA 2012 as well as the harmonisation of the procurement law provisions of the Confederation and the Cantons are to be welcomed. On certain aspects, the proposed wording of the new law will lead to greater legal certainty and will, partially, even improve legal protection. However, the revision also raises a series of new questions, in particular regarding the new award criteria, which will have to be dealt with after the entry into force of the new act.

**Please do not hesitate to contact us in case of any questions.**

**Legal Note:** The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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