

Public Procurement 2019

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Public Procurement 2019

Contributing editor**Totis Kotsonis**

Eversheds Sutherland

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Public Procurement*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Totis Kotsonis of Eversheds Sutherland, for his continued assistance with this volume.



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LEGISLATIVE FRAMEWORK

Relevant legislation

1 | What is the relevant legislation regulating the award of public contracts?

Owing to Switzerland's federal structure, public procurement legislation is very fragmented and can be found on both a federal and a cantonal level, and to a certain extent on a municipal level. Switzerland's international obligations are incorporated in the World Trade Organization's Agreement on Government Procurement (GPA), the bilateral agreement between Switzerland and the European Union (EU) and the European Free Trade Association agreement.

The relevant federal laws governing federal procurement projects are the Federal Act on Public Procurement of 16 December 1994 (SR 172.056.1) (FAPP) and the corresponding Ordinance on Public Procurement (SR 172.056.11) (OPP).

Within their sphere of sovereignty, the cantons enacted public procurement legislation to regulate procurement of the cantonal administration. For harmonisation purposes among the cantons, all cantons entered into the Inter-cantonal Agreement on Public Procurement (IAPP).

The Federal Administrative Court enforces federal public procurement legislation and the cantonal administrative courts enforce cantonal public procurement legislation. Appeals from a cantonal administrative court and the Federal Administrative Court to the Federal Supreme Court are possible, provided that the procurement project exceeds the relevant threshold values set forth in the FAPP and the bilateral agreement between Switzerland and the EU on public procurement, and raises a fundamental question of law.

Both the Law on Cartels and the Law on Internal Markets complement the Legislative framework

Relevant legislation on public procurement. The competent enforcement authority is the Swiss Competition Commission; its decisions can be appealed to the Federal Administrative Court. The Law on Cartels and the Law on Internal Markets apply cumulatively with the procurement laws. Whereas the FAPP, OPP and IAPP (and cantonal procurement laws) govern the procurement process as such, the Competition Commission can intervene (see question 2) to examine whether a procurement process violates the Law on Cartels (eg, possible abuse of dominance by the contracting authority or unlawful agreements) or violations of the Law on Internal Markets (eg, discrimination or failure to organise a public tender procedure).

The entire Legislative framework

Relevant legislation is currently under revision to implement the GPA 2012, which Switzerland signed but has not yet ratified. Both chambers of parliament have debated the proposal and are currently in the process of resolving differences that arose during their debates. Only when parliament adopts the revised FAPP and OPP may the Federal Council ratify the GPA 2012. Until then, the GPA 1994 remains effective

with respect to Switzerland. Accordingly, the following observations will focus on the existing Legislative framework

Relevant legislation (primarily federal procurement law) and not the reform proposal.

Sector-specific legislation

2 | Is there any sector-specific procurement legislation supplementing the general regime?

In principle, exceptions emanate from the relevant procurement statutes directly. For example, article 3 of the FAPP specifies contracts to which the FAPP does not apply, in particular those relating to national defence.

In relation to defence, a helicopter manufacturer applied to the Competition Commission in 2005 to investigate whether armasuisse, the Federal Office of Defence Procurement, infringed competition law in a procurement of light transport and training helicopters. The Competition Commission handed down an opinion (which is not an appealable decision) saying that armasuisse, although exempt from procurement law, is not exempt from competition law. Hence to the extent the procurement conditions would infringe competition law, the Competition Commission can intervene.

International legislation

3 | In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Both the FAPP and the IAPP were enacted with a view to implementing Switzerland's obligations arising out of the GPA. With effect from 1 June 2002, a bilateral agreement between Switzerland and the EU on public procurement entered into force to extend the regulations in the GPA to regions and municipalities, and public and private companies in the rail transport, gas and heating supply sectors, as well as procurement by private companies based on special and exclusive rights transferred by a public authority, in the sectors of drinking water, electricity and urban transport and airports, as well as river and sea transport.

Proposed amendments

4 | Are there proposals to change the legislation?

See 'Update and trends'.

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

5 | Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Owing to the fact that public procurement law in Switzerland is highly fragmented, the following answers relate solely to federal procurement

law, unless an express reference to cantonal public procurement law is made.

Unlike in the EU, Switzerland has not opted for a functional definition of a 'contracting authority' for the purpose of the FAPP, but for a positive-list approach (article 2(1) of the FAPP). With respect to certain sectors, contracting authorities are described in abstract terms and relative to certain activities (article 2(2) of the FAPP and article 2(a) of the OPP). On the other hand, the IAPP seems to have incorporated a functional definition of a 'contracting authority' (article 8 of the IAPP).

With the coming into force of the bilateral Switzerland–EU agreement, procurement by public and private entities providing public services active in certain sectors (see Switzerland–EU bilateral agreement, article 3(2)(f)) was liberalised and the application of the FAPP broadened (article 2a of the OPP).

Entities active in the relevant sectors may be granted individual exemptions from public procurement law by the Federal Department of the Environment, Transport, Energy and Communications (DETEC) provided that competition exists among them (see Ordinance of the DETEC Concerning the Exemption from public procurement legislation (SR 172.056.111)).

Contract value

6 | Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The contracting authority must apply procurement law, irrespective of the contract's value. The threshold values determine which legal framework applies and what remedies bidders may have.

In terms of federal threshold values, as a result of the fragmentation of federal public procurement legislation and different international obligations, there are five sets of threshold values for those areas and sectors covered by Switzerland's international obligations:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Government entities (GPA)	230,000	230,000	8.7 million
Postal coach service (GPA)	700,000	700,000	8.7 million
Entities active in the electricity sector (CH–EU)	766,000	766,000	9.575 million
Entities active in the telecoms sector (CH–EU)	960,000	960,000	8 million
Entities active in the rail transport sector (CH–EU)	640,000	640,000	8 million

The current threshold values are valid until 31 December 2019. The applicable threshold values are available at on Simap.ch, a joint electronic platform of the federal government, the cantons and the municipalities.

In the case of construction works exceeding the applicable threshold value, if the contracting authority awards more than one contract then it is not bound to follow the procedures set forth in the FAPP as long as the value of each single contract is below 2 million francs and the value of all such contracts does not exceed 20 per cent of the total construction value (article 14 of the OPP).

Express provisions in the calculation of the contract value can be found in article 7 of the FAPP (eg, if the contracting authority awards a number of similar contracts for supplies and services, dividing of projects into different lots, and option contracts) and article 14(a) of the OPP.

For those areas and sectors not covered by Switzerland's international obligations, the contracting authorities will award contracts by virtue of a limited tendering procedure or a tender by invitation, subject to the following threshold values:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Limited tendering procedure	Less than 50,000	Less than 150,000	Less than 150,000
Tender by invitation	Between 50,000 and the applicable threshold value	Between 150,000 and the applicable threshold value	Between 150,000 and 2 million

Cantonal threshold values for those areas and sectors captured by Switzerland's international obligations are as follows:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Cantons (GPA)	350,000	350,000	8.7 million
Public authorities and undertakings in the water, energy, transport and telecoms sectors (GPA)	700,000	700,000	8.7 million
Municipalities and regions (CH–EU)	350,000	350,000	8.7 million
Private undertakings with exclusive or special rights in the water, energy and transportation sector (CH–EU)	700,000	700,000	8.7 million
Private undertakings operating under special or exclusive rights and public undertakings active in the rail transportation, gas and heating supplies sector (CH–EU)	640,000	640,000	8 million
Private undertakings operating under special or exclusive rights and public undertakings active in the telecoms sector (CH–EU)	960,000	960,000	8 million

Cantonal threshold values for those areas not captured by Switzerland's international obligations are:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction-related (Swiss francs)	Construction (Swiss francs)
No-bid or direct award	Less than 100,000	Less than 150,000	Less than 100,000	Less than 300,000
Tender by invitation	Less than 250,000	Less than 250,000	Less than 250,000	Less than 500,000
Open bid or selective bid proceeding	Less than 250,000	Less than 250,000	Less than 250,000	Less than 500,000

Amendment of concluded contracts

7 | Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

As a general principle, unless the amendment does not materially change the scope of the contract, no new procurement procedure is necessary. When amendments to an ongoing project are necessary and these amendments exceed the applicable threshold value, a new tender may be necessary; unless, for example, for organisational or technical reasons the amendment can be only be implemented by the original contractor.

If, after the award, the contracting authority and the successful bidder have not yet entered into the procurement contract, the award may be revoked. The relevant threshold is whether the amendment of the project is likely to have resulted in a different award.

8 | Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

There is limited case law that can be applied to such cases by analogy; therefore, each case must be assessed individually. To what extent a Swiss court could be inspired by the thresholds included (eg, in the EU-Directive 2014/24 or the German Act against Restraints of Competition), remains to be seen.

Privatisation

9 | In which circumstances do privatisations require a procurement procedure?

The transfer of a public function to a private entity (contracting out) is subject to the general principles of administrative law. To the extent that the state procures services from a private entity against payment, the transaction may be subject to public procurement regulation.

Public-private partnership

10 | In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Procurement procedures are required whenever the project at issue, according to its characteristics, is a public procurement; that is whenever a private entity will assume a public function against remuneration or when the public entity procures services or goods. Generally, one may distinguish procurement PPPs (eg, the public entity contracts with a private entity to procure certain goods or services) or joint-venture PPPs. In procurement PPPs, roughly three types of PPP models may be distinguished:

- build-operate-transfer (BOT);
- design-build-operate-transfer (DBOT); and
- design-build-finance-operate-transfer (DBFOT).

There is no clear definition of 'PPP' in Swiss procurement legislation. With respect to the infrastructure sector, 'PPP' is commonly defined to encompass a long-term cooperation between a public and a private entity to build and operate certain infrastructure (eg, public administration buildings).

ADVERTISEMENT AND SELECTION

Publications

11 | In which publications must regulated procurement contracts be advertised?

At federal level, calls for a tender as well as the award of the contract are published on Simap.ch.

Participation criteria

12 | Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Any such conditions must be non-discriminatory. However, as a general rule, bids by foreign tenderers in those areas and sectors not covered by Switzerland's international obligations must only be considered under

the condition of reciprocity by the foreign tenderer's home state. Upon request, the State Secretariat for Economic Affairs informs prospective foreign bidders whether they home state grants reciprocity.

As a matter of transparency, the contracting authority must set out the eligibility criteria in the invitation to tender.

Federal and cantonal contracting authorities may establish a verification system to examine the eligibility of tenderers. The decision on the application of a potential tenderer to be included in the list of eligible tenderers or the revocation of a tenderer from such list can be appealed.

13 | Is it possible to limit the number of bidders that can participate in a tender procedure?

Contracting authorities may limit the number of bidders in a selective bidding procedure if the procurement procedure cannot be handled efficiently otherwise. Effective competition among bidders must be ensured at all times.

Regaining status following exclusion

14 | How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is unknown in Switzerland. Bidders that violate, for example, employment regulations (namely laws regarding illegal employment) may be disqualified from the tender (articles 11 and 8 of the FAPP) or be excluded from any public tender for a period not exceeding five years (see, eg, article 13 of the Law on Illegal Employment; SR 822.41). The State Secretariat for Economic Affairs publishes a list of temporarily disqualified tenderers.

THE PROCUREMENT PROCEDURES

Fundamental principles

15 | Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Article 1 of the FAPP states that the purpose of the act is to regulate and transparently organise the award of public contracts and to strengthen competition between bidders. Article 8(1)(a) of the FAPP requires the contracting authority to ensure equal treatment of domestic and foreign bidders in all phases of the procurement proceeding (but see question 12).

The contracting authority is entitled by law to verify that tenderers follow the principles of procurement procedures (eg, health and safety regulations and the terms and conditions of employment, including equal treatment of men and women). Finally, in article 21(1), the FAPP sets out another fundamental principle of Swiss public procurement law: 'best value for money'. The same principles are also restated in the IAPP and the cantonal laws.

Independence and impartiality

16 | Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Neither federal nor cantonal procurement laws specifically prescribe that the contracting authority must be independent and impartial. However, they are bound by the fundamental principles of the Federal Constitution, whereas a public authority must act in good faith and in a non-arbitrary manner.

Moreover, administrative principles require that any person who is responsible for preparing or issuing a ruling shall recuse themselves from the case if, among other reasons, they have some form of personal interest in the matter or could be regarded as lacking impartiality in the matter. This principle essentially mirrors the constitutional guarantee that everyone has a right to equal and fair treatment in proceedings before administrative bodies.

Conflicts of interest

17 | How are conflicts of interest dealt with?

As mentioned in question 16, members of the administration must recuse themselves from a matter if they have a personal interest in the matter or could be regarded as lacking impartiality. In principle, statutory grounds for recusal must be followed ex officio and no specific motion shall be necessary. However, if a bidder becomes aware of a conflict of interest, he or she should immediately raise the issue and file a motion with the supervisory authority that the particular person be removed from the case. It would be regarded as an abuse of law by the courts if a bidder, knowing of a potential conflict of interest, let the procedure move ahead and only upon receiving a negative award claim that a member of the contracting authority had a potential conflict of interest.

Bidder involvement in preparation

18 | How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The involvement of a potential bidder in the preparation of the tender will not necessarily result in his or her exclusion from the bidding process. The threshold is whether the bidder concerned obtained, by virtue of his or her involvement in the preparation of the tender, a competitive advantage that cannot be remedied (eg, through a prolongation of the relevant time limits or disclosure of all relevant information on the preparatory tasks that were assigned to him or her) and whether the exclusion of the bidder concerned will not negatively affect competition among the remaining bidders.

Procedure

19 | What is the prevailing type of procurement procedure used by contracting authorities?

As a rule, procurement projects within the scope of the applicable rules and regulations should be undertaken in either the open or selective procurement procedure.

Separate bids in one procedure

20 | Can related bidders submit separate bids in one procurement procedure?

Federal procurement law does not contain an express provision on related bidders. Related bids can occur in various forms, such as within the same group of companies, in the participation in more than one bidding consortium or in subcontractors participating in more than one bid. As a matter of transparency, the contracting authority must clearly and unambiguously state in the tender documents whether and to what extent it will accept related bids.

Negotiations with bidders

21 | Is the use of procedures involving negotiations with bidders subject to any special conditions?

In 2010, the Federal Council amended the OPP to include a 'dialogue' (article 26(a) of the OPP). This form of dialogue, however, must be clearly distinguished from the competitive dialogue in the pertinent EU Directives. Unlike in the EU, it is not a procurement proceeding of its own kind. Rather, the contracting authority may, for the purposes of complex projects or the procurement of 'intellectual services', enter into dialogue with the tenderers to further develop the proposed solutions, provided that it has included this option in the invitation to tender. It is an instrument that may be used in open and selective procedures, as well as in tenders by invitation.

Further, contracting authorities may initiate a planning and global solution competition for complex and novel projects to evaluate different solutions therefrom. A planning and global solution competition must be tendered in the open or selective tendering procedure if it exceeds the applicable thresholds in article 6(1) of the FAPP (goods and services) or 2 million francs for construction projects. Whether the contracting authority will initiate such competition is within its discretion; however, if it initiates a competition, it may require that in a selective tender young entrepreneurs and developers must be invited to tender.

Unlike Directives 2014/24/EU and 2014/25/EU, the consultation proposal of the revised FAPP/OPP/IAPP did not include a separate, competitive dialogue proceeding but a 'dialogue' as introduced in article 26(a) of the OPP.

22 | If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

Not applicable.

Framework agreements

23 | What are the requirements for the conclusion of a framework agreement?

Unlike in the EU, there are no specific rules on framework agreements in Switzerland, and Swiss courts, so far, have not ruled on the admissibility of framework agreements. However, the federal contracting authorities regularly enter into framework agreements. The tendering of framework agreements must generally follow the same principles as if a single contract was the tender's subject. Contracting authorities should further be careful not to foreclose the market for competing suppliers; hence, for recurring services or deliveries, the duration of the framework contract should not exceed five years.

24 | May a framework agreement with several suppliers be concluded?

See question 23. If a framework agreement was concluded with several suppliers, the contracting authority must initiate a 'mini-tender' among these suppliers for each contract under the framework agreement, unless otherwise stipulated.

Changing members of a bidding consortium

25 | Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Bidding consortia are generally permitted. However, the contracting authority may limit or exclude the possibility of consortia bidding. The

contracting authorities will examine each member of a bidding consortium as regards its required eligibility criteria.

Since a change of a member of a bidding consortium may have an impact on the overall offering, it must be transparent and requires reasonable grounds. Moreover, the new member of the bidding consortium must satisfy the required eligibility criteria (articles 8 and 11 of the FAPP).

Note that members of a bidding consortium are subject to the rules of the simple partnership. For this reason, they are also subject to a compulsory joinder for an appeals proceeding. If not all members of the bidding consortium join the appeals proceeding, the Federal Administrative Court will not review the matter.

Participation of small and medium-sized enterprises

26 | Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

There are no express provisions aimed at furthering the participation of small and medium-sized enterprises. Procurement projects may be divided into different lots. Such subdivision must be disclosed in the bidding documents (article 22 of the OPP) and the contracting authority must add up all lots of the project to determine whether the applicable threshold value (see question 7) is exceeded or not. A contracting authority may reserve the right to limit the number of lots it will award to a single bidder. However, this reservation should not be understood as a strict rule, as otherwise the contracting authority would unduly interfere in competition. The contracting authority may use such limits so as to award a bidder only as many lots as the concerned bidder may reasonably supply.

Variant bids

27 | What are the requirements for the admissibility of variant bids?

Bidders are free to offer, in addition to their complete offer, alternative bids. In exceptional circumstances, the contracting authority may prohibit or limit this possibility in the tender.

28 | Must a contracting authority take variant bids into account?

See question 27.

Changes to tender specifications

29 | What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders cannot change the tender specifications. Amendments are possible to the extent that formal negotiations take place. Also, bidders may submit alternative bids to the extent that such bids were not excluded in the tender documents.

Award criteria

30 | What are the award criteria provided for in the relevant legislation?

The contracting authority will enter into a contract with the bidder that made the most economically advantageous bid (article 21(1) of the FAPP).

In determining the most economically advantageous bid, a number of criteria will be taken into account by the contracting authority, such as:

- quality;
- price;
- deadlines;
- profitability;
- operating costs;
- customer service;
- expediency of the service;
- aesthetics;
- environmental sustainability; and
- technical value.

The criteria mentioned in the law are not exclusive and the contracting authority may take into account other criteria it deems appropriate and that are reasonable and justified, but criteria related to fiscal or structural policies are generally not permitted. As a matter of transparency, all award criteria must be listed in the tender documentation according to their relevance and weight.

In 2010, the federal government published guidelines on sustainable procurement. These guidelines describe how contracting authorities may include social and ecological criteria in a tender. With respect to social criteria, particular attention is given to the principles set forth in the eight core International Labor Organization (ILO) agreements. The FAPP only makes reference to the bidder's obligation to adhere to the relevant employment regulation (article 8(1)(b) of the FAPP for domestic bidders) and treat men and women equally in terms of wage payments (article 8(1)(c) of the FAPP for international bidders). Article 7(2) of the OPP makes a direct reference to the eight core ILO agreements.

With respect to selective proceedings, jurisprudence provides that criteria that have already been examined for the purposes of a bidder's admissibility to the tender procedure may not be considered for the purposes of the award again.

Abnormally low bids

31 | What constitutes an 'abnormally low' bid?

Federal procurement legislation does not contain an express definition; however, given the purpose of the FAPP, the definition set forth in article XIII(4)(a) of the GPA is (eg, in the cantons of Berne (article 28 of the cantonal procurement ordinance) and Zurich (section 32 of the cantonal procurement ordinance)), the definition set forth in the GPA was incorporated.

Tenderers are generally free to calculate their bids; however, a bid that does not correspond to the principles set forth in article 8 of the FAPP may be subject to disqualification.

32 | What is the required process for dealing with abnormally low bids?

As federal procurement law does not contain an express provision on abnormally low bids, it is likely that the contracting authorities will apply the remedy set forth in article XII(4)(a) of the GPA and make appropriate enquiries with the concerned bidder. On a cantonal level, the proceeding set forth in the GPA has been incorporated in the relevant ordinances.

See also question 32. Pursuant to article 11(d) of the FAPP, the contracting authority may withdraw the award or disqualify tenderers if they fail to adhere to the principles set forth in article 8 of the FAPP.

REVIEW PROCEEDINGS

Relevant authorities

33 | Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The competent authorities for review proceedings are the administrative courts. On a federal level, review applications are only possible for tenders subject to the FAPP (article 39 of the OPP).

Decisions rendered by the Federal Administrative Court based on the FAPP may be appealed to the Federal Supreme Court if the threshold levels of the FAPP are reached and the issue raises a question of fundamental nature.

34 | If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Not applicable.

Timeframe and admissibility requirements

35 | How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The length of a review proceeding depends on the complexity of the case and may take between four and 15 months before the Federal Administrative Court, mainly depending on whether interim measures have been ordered.

36 | What are the admissibility requirements?

The applicable threshold is whether an applicant has an immediate and legitimate interest that the decision of the contracting authority be revoked. According to general principles of administrative law, this normally requires that the applicant participated in or was denied the opportunity to participate in the bidding procedure, was specifically affected by the contested decision, and has an interest that is worthy of protection in the revocation or amendment of the decision. The latter is normally considered to exist when the outcome of the proceeding is capable of affecting the legal position of the applicant. Two clarifications must be made to the aforementioned general principles.

Limited tendering procedure

In these cases, the applicant neither participated in nor was denied the opportunity to participate in the bidding procedure for lack of knowledge thereof. Accordingly, the focus is confined to the other elements of admissibility and the applicant must establish that he or she has an immediate interest in supplying the goods and services requested by the contracting authority and that the goods and services he or she would have proposed to deliver were capable of substituting for those that the contracting authority purchased directly.

For the latter element, the Federal Administrative Court looks into the methodology according to which the competition authorities determine the relevant market. In the above-mentioned case, regarding the procurement of information technology services, the suppliers of open-source solutions could not establish that their solution was capable of substituting for the solution chosen by the contracting authority, for which reason their application was not admissible.

Where the contract was already entered into

If, after the award, the procurement contract has already been entered into and the applicant's application for review was not granted suspensive effect, the Federal Administrative Court will only determine whether

and to what extent the award was in breach of federal law and thus lay grounds for a potential damages claim.

It is important to note that appeals concerning the invitation for tender (in particular the tender criteria) may not be brought upon the award of the contract, but must be filed within the applicable appeals period upon notification of the invitation. According to jurisprudence of the Federal Supreme Court, this includes appeals against the tender documentation. A complaint against tender criteria and tender documentation upon awarding the contract is generally considered tardy and not protected by law.

37 | What are the time limits in which applications for review of a procurement decision must be made?

Appeals must be lodged within 20 days of the notification of the award on a federal level (article 30 of the FAPP) and within 10 days on a cantonal level (article 15(2) of the IAPP). An appeal to the Federal Supreme Court must be lodged within 30 days from the notification of the judgment of the lower court, subject to the above limitations (see question 33).

Suspensive effect

38 | Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The application for review does not entail suspensive effect (on either a federal or a cantonal level) and, accordingly, the appellant must file a motion to the Federal Administrative Court or the cantonal administrative courts and request that the application will have suspensive effect.

With regard to question 36, whether the suspensive effect will be granted depends on the outcome of a two-stage exercise: the court will first assess whether the applicant's matter brought before it is not obviously unfounded; if so, the court will then assess whether the applicant's individual interests outweigh those of the state to have the procurement project immediately implemented.

39 | Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

See question 38.

Notification of unsuccessful bidders

40 | Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The contracting authority is required to publish any decision, including a reasoned summary, against which an appeal can be lodged before the Federal Administrative Court on Simap.ch.

If requested by an unsuccessful bidder, the contracting authority must promptly disclose:

- the award procedure applied;
- the identity of the successful bidder;
- the price of the successful bid from the highest and lowest prices of the bids included in the award procedure;
- the essential reasons why the bid was not considered; and
- the determining characteristics and advantages of the successful bid, unless statutory exceptions apply.

Access to procurement file

41 | Is access to the procurement file granted to an applicant?

Access to files for the purposes of a review proceeding is governed by the general rules set forth in the Law on Federal Administrative Procedure (article 26 of the FAPP) and the pertinent cantonal legislation.

Accordingly, the authorities must grant access to those files that are relevant to the reasoning of the award; however, the authorities are under a duty to preserve confidential information (eg, competing bids) and, therefore, may restrict or deny access to the files.

If a party is refused the right to inspect a document, this document may be relied upon for the prejudice of that party only if the party has been notified by the authority, either orally or in writing, of the content of the document that is relevant to the case and the party has been given the opportunity to state its position on the document and to provide counter-evidence.

Disadvantaged bidders

42 | Is it customary for disadvantaged bidders to file review applications?

It is not customary. From January 2018 until March 2019, there were only around 35 decisions published on the website of the Federal Administrative Court concerning federal procurement projects.

Violations of procurement law

43 | If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

The contracting authority is liable for damages it caused by an award that was later declared unlawful in a judicial review proceeding. Damages are limited, however, to the amount of costs incurred by the appellant in connection with the tender procedure and the appeal.

44 | May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

If a contract has been concluded between the contracting authority and the successful bidder, the Federal Administrative Court may only determine the extent to which the award was in breach of federal law (article 32(2) of the FAPP).

Although the Federal Administrative Court may only determine the extent to which the award was in breach of federal law, court practice suggests that the award may be revoked or the contracting authority instructed to suspend or terminate a contract that was concluded.

The contract that follows the award – note that the contract may not be entered into until the deadline to file an appeal has lapsed or a decision on a motion to a grant suspensive effect has been issued – is subject to the Code of Obligations (CO). The award concludes the administrative proceeding, unless the award is subject to an appeal. The cancellation or termination of the contract is basically subject to the general or specific rules set forth in the CO and other applicable norms of civil law.

Legal protection

45 | Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Any award of the contracting authority subject to procurement legislation can be appealed to the Federal Administrative Court.

Typical costs

46 | What are the typical costs of making an application for the review of a procurement decision?

It depends on the amount in dispute. The amount in dispute is understood as the vested interest in the matter (ie, not the contract value).



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The Federal Administrative Court and some cantonal courts appear to define the vested interest as an amount corresponding to 10 per cent of the contract value (rule of thumb). In proceedings before the Federal Administrative Court, court fees are capped at 50,000 Swiss francs.

UPDATE AND TRENDS

Emerging trends

47 | Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or on the contrary been restricted?

In February 2017, the Federal Government submitted its proposal for a complete revision of the FAPP to Parliament. The structure of the proposal is based on the GPA 2012.

The proposal was debated in both chambers of parliament. Currently, the chambers are attempting to resolve any remaining differences. The lengthy preparatory debate as well as some returns to previous decisions show that certain aspects of the revision are quite controversial.

Apart from the currently pending revision of the Legislative framework

Relevant legislation governing public procurement, the Federal Supreme Court has handed down some noteworthy judgments:

- in October 2018, the Federal Supreme Court handed down a decision regarding the scope of applicability of the FAPP holding that a contract by which a municipality commissions a private Spitex organisation to provide care services outside of a hospital is a public contract falling under public procurements laws; and
- in February 2019, the Federal Supreme Court handed down a decision on list hospitals. These are hospitals (private or public) that may charge treatment costs to the patient's canton of residence and his or her basic insurance. These hospitals and clinics receive a performance mandate from the canton that defines the scope of services. The decision concerned a public list hospital, but it has implications also for privately held list hospitals. According to the decision, privately held list hospitals are subject at least to internal procurement laws.

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