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Public procurement law: Basics and Revisions

In order to harmonize the federal and cantonal public procurement regulations as far as possible and reasonable, the latest revision of the public procurement law comprehensively changed the Swiss procurement system. This article outlines the basics of procurement law and focuses on the revision, which came into force at the federal level on January 1, 2021.

A volume of around CHF 40 billion, 8 percent of Switzerland's gross domestic product and 25 percent of the Swiss national budget - that is public procurement in figures. These figures show: The Swiss public procurement market is an important economic factor and the public sector is therefore a significant contracting authority. With the latest revision of public procurement law, the Swiss public procurement system is being comprehensively revised. In addition to the implementation of the revised WTO Agreement on Government Procurement (GPA 2012), which was accepted by Switzerland, the revision aims to harmonize the procurement regulations of the federal government and the cantons as far as possible and reasonable. This has been a concern of the business community for years, as the current heterogeneous legal situation leads to unnecessary legal uncertainties and costly procedures.

Public procurement law

The public sector requires material resources and services for the fulfillment of its tasks. These are also purchased from private suppliers. In contrast to private companies, the public sector may not purchase these materials and services freely at its own will, but is subject to certain rules. Public procurement law regulates the procedure by which the public sector may or must purchase its materials and services.

Legal basis

Public procurement law is based on both national laws and international agreements. At the international level, the Agreement on Government Procurement (WTO Agreement on Government Procurement, GPA) is authoritative. This is a plurilateral agreement that contains minimum requirements. The GPA only binds those contracting parties willing to ratify it, which is the case for Switzerland. For Switzerland, the GPA entered into force on January 1, 1996, and it was subsequently transposed into national and cantonal law.

As mentioned above, the GPA has been revised in the meantime and has also been re-adopted by Switzerland. Furthermore, there is the CH-EU bilateral agreement, which entered into force on June 21, 1999. This secures Switzerland access to EU contracts after Switzerland refused to join the European Economic Area (EEA) in 1992.

These international agreements were implemented at the federal level with the Federal Law on Public Procurement (BöB, entry into force 16.12.1994) and the associated Ordinance on Public Procurement (VöB, entry into force 11.12.1995). At the cantonal level, there is the Intercantonal Agreement on Public Procurement (IVöB). This applies to all cantons and must be implemented by cantonal law. Accordingly, the cantons have enacted their own procurement laws. In the canton of Lucerne, these are the Law on Public Procurement (öBG, entry into force 19.10.1998) and the Ordinance to the Law on Public Procurement (öBV, entry into force 7.12.1998).

For public procurements by the cantons and municipalities and other bodies responsible for cantonal and municipal tasks, but not for federal authorities, the Internal Market Act (Binnenmarktgesetz, BGBM) is also authoritative, which applies in addition to cantonal public procurement law and contains certain additional requirements for contracting authorities.

The Reforms

The public procurement law with its fragmented legal situation is not easy to understand even for experts. The heterogeneous legal situation often led to unnecessary legal uncertainties and costly procedures. The joint project of the federal government and the cantons to revise procurement law, which began in 2012, therefore envisaged the extensive harmonization of BöB and IVöB.

There are now hardly any striking differences between the new BöB and the new IVöB. However, there are some innovations compared to the old law. The following stand out:

- **Electronic auctions:** Electronic auctions are already regulated in detail in the GPA 2012. They are now also being introduced at federal and cantonal level. The bids will be evaluated using an iterative, automated process. It is important to ensure that the participants' entries are made in pseudonymous form.
- **Dialogue:** What was already possible at the federal level is now also being introduced at the cantonal level. In the case of complex contracts, intellectual services or innovative projects, a contracting authority can conduct a dialogue with at least three bidders as part of an open or selective procedure with the aim of identifying and defining solutions or procedures. At the end of the dialogue, the bidders are informed of the results and invited to submit their final, complete bid within a specified period of time. It is not permissible to use the dialogue for price negotiations.
- **Prohibition of pure price negotiations:** Pure price negotiations, so-called bidding rounds, are now also no longer permitted at the federal level. However, it remains possible to adjust the bid.
- **Framework agreements:** The contracting authority may invite tenders for framework agreements with one or more suppliers. The aim is to define the terms and conditions for services to be procured over a certain period of time. This applies in particular to their price and the quantities envisaged. Based on such a framework agreement, the client may subsequently conclude individual contracts during its term. The term of a framework agreement may not exceed five years.
- **Quality competition:** The new procurement law is also intended to bring about a change towards greater quality and sustainability. Among other things, the non-exhaustive list of award criteria has been supplemented by criteria such as sustainability, life cycle costs, delivery conditions, creativity or innovative content.
- **Expansion of legal protection:** Under the new law, it is possible to have orders concerning contracts outside the scope of the state treaty reviewed by the courts. In this regard, however, the court can only request a declaration that the order issued is unlawful. This can also be combined with an application to award the complainant a claim for damages. This claim for damages is, however, limited to the necessary expenses incurred by the bidder in connection with the preparation and submission of its bid.

Revision at the federal level

The revised Federal Law on Public Procurement (BöB) and the associated Ordinance on Public Procurement (VöB) will enter into force on January 1, 2021, with the changes described above. They apply to public procurements by federal authorities.

Revision at cantonal level

At the cantonal level, a new IVöB, the IVöB 2019, has been drafted. In order for this agreement to enter into force, the cantons must accede to it.

More precisely, the agreement will only come into force when at least two cantons have joined. As of today (December 2020), the cantons of Bern, Aargau, Schwyz, Vaud and Appenzell Innerrhoden have initiated the cantonal accession procedure. However, they have not yet joined the agreement. The remaining cantons have not yet initiated an accession procedure. The cantons are therefore currently busy ratifying the agreement. Before a cantonal accession to the IVöB 2019, the previous law will continue to apply.

In response to a question, the government council of the canton of Lucerne replied on June 30, 2020, that the canton of Lucerne would start work on joining the IVöB 2019 in the second half of 2020. The aim of the canton of Lucerne is to be able to send a draft for consultation before the summer of 2021. The adoption of the message for the attention of the cantonal council is planned for the second half of 2021.

The other cantons are likely to follow the example of the canton of Lucerne. The cantonal accession procedure will take some time. Once an accession procedure has been initiated, a consultation process is opened in the respective canton, i.e. various parties and organizations can comment on it. Since this process takes time, the authors do not expect the agreement to enter into force before mid-2021.

Conclusion

The revision of the public procurement law will, especially at the beginning, raise some questions and ambiguities that need to be clarified. Overall, however, the authors believe that the revision has been successful and, provided the cantons declare their accession to the IVöB, should ensure greater legal certainty and a more homogeneous legal situation.

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