

Public Procurement Guide

Switzerland

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A. Overview of Public Procurement

1. What are the principal elements of Public Procurement regulation in your jurisdiction?

The Swiss regulations on public procurement govern the procedures and legal remedies for the purchase of goods and services, including construction contracts, by public authorities. The applicable regulations intend to make these procedures transparent, to increase the competition between the bidders and to ensure the equal treatment of all bidders. Last but not least, public procurement regulations aim to enhance efficient use of public funds.

B. Legal Framework for Public Procurement

1. What are the basic principles applicable to Public Procurement?

The basic principles applicable to public procurement in Switzerland are non-discrimination and equal treatment of all bidders, including foreign ones, effective competition, immutability of the offers after submission and waiver of bidding rounds (cantonal procurements only), compliance with the rules on recusal, compliance with the rules on health, safety and working conditions of the employees, equal treatment of men and women as well as confidentiality of the information communicated in the offer. These principles are stated in article 8 of the FAPP (Federal Act on Public Procurement) as well as in article 11 of the IAPP (Intercantonal Agreement on Public Procurement).

2. What are the main regulations applicable to Public Procurement in your jurisdiction?

The general basis of Swiss public procurement law is the Agreement on the Government Procurement of the World Trade Organization in force in Switzerland since January 1, 1996 (GPA), the bilateral treaty between the Swiss Confederation and the European Community on certain aspects of government procurement in force since June 1, 2002, and the bilateral treaty between the Swiss Confederation and the other member states of the European Free Trade Association (EFTA) in the current form in force since June 1, 2002. These treaties contain numerous provisions that apply directly, without particular implementation by Swiss federal or cantonal laws. These provisions may be referred to directly in public procurement proceedings.

On the federal level, the above-mentioned treaties have been implemented by the FAPP (and its related ordinance).

On the cantonal level, they have been implemented by the IAPP and 26 cantonal laws or ordinances. In some cantons, there are even communal ordinances that apply in addition to the international, federal and cantonal laws.

3. What public agencies are subjected to the general Public Procurement regime?

On the federal level, the following public agencies are subjected to the general public procurement regime (article 2 para. 1 letter a - f FAPP):

- 1) the federal administration;
- 2) the Swiss Alcohol Board;
- 3) the Swiss Federal Institutes of Technology and their research institutions;
- 4) the postal and the automobile services of the Swiss Post (if not competing with third parties that are not subjected to the GPA);
- 5) the Swiss Federal Nuclear Safety Inspectorate;
- 6) the Swiss National Museum;
 - a. certain public and private law organizations being active in specific sectors (water and energy supply, transportation, telecommunications services).

On the cantonal level and within the scope of the above-mentioned international treaties, the following public agencies are subjected to the general public procurement regime (article 8 para. 1 letter a - d IAPP):

- a. the cantons, the communities and the bodies governed by public law on the cantonal and community level (with certain limitations);
- b. authorities as well as public and private companies that have certain exclusive or special powers in specific sectors (water and energy supply, transportation, telecommunications services);
- c. other public agencies determined by the relevant state treaties.

On the cantonal level and outside the scope of the above-mentioned international treaties, the general public procurement regime applies also to (article 8 para. 2 letter a and b IAPP):

- a. other institutions providing cantonal or communal services (with certain limitations);
- b. objects and services subsidized with public funds by over 50 % of their overall costs.

4. What public agencies are not subjected to the application of the general Public Procurement regime?

Certain exceptions apply with regard to the applicability of the general public procurement regime to the above-mentioned agencies. On the cantonal level, for instance, the general public procurement regime does not apply to commercial or industrial activities of the concerned agencies.

Also, public agencies with certain activities are not subjected to the general public procurement regime as the concerned activities are entirely carved out from public procurement laws. This applies to the procurement of certain military material, to certain contracts with institutions for disabled persons, charities and penal institutions, to contracts granted within the framework of agricultural or food aid programs, to contracts granted on the basis of an international treaty between GPA contracting states or Switzerland and third states in respect of an objective to be achieved and jointly funded, and to contracts that are awarded on the basis of a particular procedure of an international organization.

5. Are there any non-public entities subjected to the application of the general Public Procurement regime?

As mentioned above, public and private companies that have certain exclusive or special powers in specific sectors (water and energy supply, transportation, telecommunications services), other institutions providing cantonal or communal services as well as objects and services subsidized with public funds by over 50 % of the overall costs are also subjected to the application of the general public procurement regime even if they cannot be qualified as public entities.

C. Requirements for Foreign Companies to Participate in Public Procurement Processes

- 1. Are foreign companies required to set up branches or subsidiaries or otherwise enter into any commercial agreements with local partners in order to participate in Public Procurement Processes?**

On both the federal and the cantonal level, there is no general requirement for foreign companies to set up branches or subsidiaries or otherwise to enter into any commercial agreements with local partners in order to participate in public procurement processes.

- 2. Are there any reciprocity regulations?**

On the federal level, bidders from GPA contracting states benefit from the generally applicable public procurement regime and may participate in a public procurement process without any restrictions, provided that these states grant reciprocal rights. As to bidders from other states, they only benefit from the generally applicable public procurement regime if their state of origin and Switzerland have entered into corresponding contractual agreements or if the Swiss Federal Council has established that there will be no discrimination against Swiss bidders in the concerned state.

Likewise, on the cantonal level, only bidders from states being a party to an international treaty benefit from the generally applicable public procurement regime and may participate in a public procurement process without any restrictions.

As to bidders from other states, they are not generally excluded from participating in Swiss public procurement processes. As such bidder do not benefit from the generally applicable public procurement regime, however, their legal position is considerably weaker, especially in court proceedings.

- 3. Are there any contracts or matters from which foreign companies are restricted (eg. national defense, hazardous waste disposal, security services, etc)?**

No such general restrictions with regard to foreign companies exist.

D. Procedures for Awarding Public Procurement Contracts

- 1. Is there a Bidders' Registry?**

On both the federal and the cantonal level, the contracting authority must, upon expiry of the offer period, open the bids and thereby observe certain formal requirements and prepare minutes of the opening procedure with a minimal content defined by law (names of persons present, names of bidders, receipt date of bids, offered prices). Bidders are entitled to inspect these minutes at the latest after the award of the contract. In contrast, bidders have no general inspection right with regard to the other documents on the file of the contracting authority such as the offers of other bidders or the authority's assessment and evaluation of the offers.

- 2. Is electronic procurement fully implemented?**

On both the federal and the cantonal level, electronic procurement is implemented to a large extent. By law, invitations to bids must be published on an internet platform (www.simap.ch) and the access to information published on that platform is free of charge.

Electronic procurement is also implemented to a large extent with regard to the dispatch of the authorities' bid specifications and with regard to the filing of the offers. In many cases, bid specifications are available for download from the above-mentioned internet platform. Likewise, many contracting authorities allow or even request the filing of electronic offers. Bidders, however, have no right to the filing of their offers in electronic form.

3. What steps and measures should be addressed for a bidder to be able to present a bid in an electronic procurement procedure?

No steps and measures are required to have access to the information published on the electronic public procurement platform (www.simap.ch).

To participate in a public procurement procedure and in particular to download the relevant bid specifications, a bidder must register on the platform. The registration and all services provided by the platform are free of charge, but the contracting authorities may ask for a fee for the delivery of bid specifications.

As to offers in electronic form, no general requirement of encryption, electronic signatures or the like applies. Contracting authorities, however, may require that such requirements are fulfilled.

As mentioned above, presenting a bid in electronic form is only allowed if explicitly provided for in the bid specification.

4. What are the possible ways of association for participating in public procurement proceedings?

Contracting authorities may exclude bidder consortiums, syndicates and working groups from participating in a procurement proceeding. In the absence of such exclusion, associations may participate in a proceeding. If bidder consortiums and the like are excluded, however, the concerned bidder can organize themselves differently and participate in the concerned proceeding with one bidder taking the lead and the others acting as subcontractors, unless subcontractors are excluded as well.

Contracting authorities may also exclude the use of subcontractors or allow the use of subcontractors only upon the contracting authority's approval. Frequently, contracting authorities require that subcontractors fulfill the same requirements as the bidders and provide references for their contribution to the bid.

5. What type of procurement procedures exist?

On both the federal and the cantonal level, four different types of procedures exist: the open tendering procedure (*offenes Verfahren*), the selective tendering procedure (*selektives Verfahren*), the invitation tendering procedure (*Einladungsverfahren*) and the direct award (*freihändiges Verfahren*).

The invitation procedure is not explicitly regulated in the FAPP and only mentioned in its related ordinance. Therefore, on the federal level, the invitation procedure is only possible if the requirements for a direct award are fulfilled.

In addition, planning and full service competitions (*Planungs- und Gesamtleistungswettbewerbe*) are possible. However, such competitions are no particular types of procurement procedures, so they must follow the open, the selective or the invitation tendering procedure.

Due to the principle of legality, contracting authorities are bound by a *numerus clausus* and may only apply the above-mentioned procedure types.

6. What are the modes of selection processes and when are they applicable?

On both the federal and the cantonal level, the contracting authorities are free to choose between the open tendering procedure and the selective tendering procedure. However, contracting authorities should consider that selective procedures are more time consuming and therefore in particular useful if many offers are expected or if the assessment and evaluation of the offers is complex.

In contrast, direct awards may be granted only as an exception if certain particular requirements are fulfilled. For instance, a direct award is allowed if, for technical reasons, only one bidder is in the position to provide the required goods or services and no reasonable alternative or substitute is available. Likewise, a direct award is allowed for additional deliveries by the original supplier of replacement parts if a change of supplier would force the contracting authority to procure replacement parts not being interchangeable with already existing equipment.

7. Is the bidding company required to post any bond or insurance?

On both the federal and the cantonal level, there is no general requirement for bidders to post any bond or insurance or to provide any other security.

Nevertheless, the contracting authorities may require the bidders to post a bond or insurance if this correlates with the matter of the contract.

8. What are the criteria for evaluation and comparison of bid proposals?

On both the federal and the cantonal level, the contracting authority awards the contract to the bidder that submits the economically most advantageous offer.

To determine the economically most advantageous offer, the contracting authority must determine and consider the appropriate factors, depending on the goods or services to be procured. Relevant factors are, for instance, technical characteristics, price of investment, operating costs and profitability, quality standards and also experience, delivery deadlines, customer service, aesthetics and environmental sustainability.

The contracting authorities have a broad range of discretion when determining the criteria relevant for a particular procedure. However, they must always consider the offered prices. In the case of highly complex goods or services, the weight of the price may be as low as 20%, but not lower. In contrast, in the case of more standardized goods or services, the contracting authority must weigh the price higher, up to 100%. In any case, the contracting authority must publish the relevant criteria in the bid specifications with their order of weighting.

On the federal level, contracting authorities may negotiate the offers with the bidders, if the bid specifications provide for such negotiations and further provided that the authorities treat the bidders equally, conduct the negotiations in a written process and keep the relevant information confidential.

On the cantonal level, negotiations with bidders are strictly prohibited.

9. What are the requisites for execution of contracts after awarding?

On both the federal and the cantonal level, Swiss public procurement law distinguishes between the award of the contract on the one hand and the conclusion of the contract on the other. The entire procedure relating to the contract award and appeal proceedings against the contract award are

governed by public laws, whereas the conclusion of the contract and the contract itself are governed by private laws (mainly the Federal Code of Obligations).

The contract award is made in the form of a public law decision against which an appeal may be filed within a certain period of time. After the expiry of this period or after a final rejection of an appeal, if any, the award enters into legal force. Once the award has entered into legal force, the contracting authority and the winning bidder may conclude the contract. During an appeal proceeding, they may only do so if the court does not grant suspensive effect to the appeal.

E. Private Initiative Projects

1. Are there any regulations for Public Procurement of projects proposed by private companies?

On both the federal and the cantonal level, there are no particular regulations for the public procurement of projects by private companies.

As mentioned above, private companies are subject to the general public procurement regime for projects and services that are publicly subsidized by over 50 % of their overall costs, if private companies perform public tasks or if they perform activities and have certain exclusive or special powers in specific sectors (water and energy supply, transportation, telecommunications services).

2. Does the private company proposing the project have any advantage for purposes of bidding?

No, on both the federal and the cantonal level, a private company that is subject to the general public procurement regime must obey to the applicable rules in the same way as a public company.

F. Review Procedures

1. Are there any judicial review procedures applicable to the bidding processes?

On both the federal and the cantonal level, any important decision by a contracting authority (such as the invitation to bid with the bid specifications, the award of the contract, the cancellation of the contract award, the exclusion of a bidder from the procedure, the abortion of a procurement procedure) must be taken in the form of a public law decision. Against such orders, bidders may under certain circumstances file court appeals.

2. Are there any judicial review procedures applicable when the contract has been executed?

Generally, on both the federal and the cantonal level, once the contract has been executed, there is no possibility to revoke it by a judicial review procedure. Therefore, no appeal by an unsuccessful bidder is possible against the contract itself. Nevertheless, the competent court of appeal may determine that an underlying public law decision was unlawful, in particular the contract award.

While such a decision does not affect the validity of the contract, it may provide an unsuccessful bidder with a legal basis to claim damages from the contracting authorities. In any case, such a damage claim is limited to the expenses that the unsuccessful bidder had in connection with the procurement procedure. It does not cover lost profit.

G. Overview of Public Procurement Contracts

1. What are the regulations applicable to contract terms and its extension?

On both the federal and the cantonal level, there is no legal requirement to include the contract details into the bid specifications. Nevertheless, many contracting authorities do so to enhance transparency and to accelerate the process after the contract award.

The contract itself is subject to the applicable private law, mainly the Federal Code of Obligations.

On both the federal and the cantonal level, an extension of an existing contract is not possible. Certain exceptions apply, for instance to extensions of insignificant importance and to extensions that were already part of the bid specifications. Also, an exception applies to additional deliveries by the original supplier, which are intended either as replacement parts or as extension of existing supplies if a change of supplier would force the contracting authority to procure equipment or services that are not interchangeable with already existing equipment. Likewise, an existing contract may be extended by a limited volume (50% of the main contract value) to additional construction services that were not included into the initial contract but that are within the objectives of the original bid specification and that, through unforeseeable circumstances, became necessary to complete the concerned construction services, provided that procuring such services from a different contractor would be difficult for technical or economic reasons and cause significant inconveniences to the contracting authority.

If none of these exemptions apply, an extension of the contract must be made in accordance with the applicable public procurement regime. Therefore, a new procurement procedure is required.

2. Are there any guarantees that have to be posted for the performance of the contract?

On both the federal and the cantonal level, there is no general requirement to provide guarantees or other securities for the performance of the contract. Nevertheless, contracting authorities may ask for such guarantees.

3. Are there any special powers upon the State?

No.

4. Can fines or penalty clauses be agreed upon?

Yes, on both the federal and the cantonal level, contractual penalty clauses may be agreed upon, for instance with regard to delivery delays or quality deficiencies.

5. Can the contract be assigned?

On both the federal and the cantonal level, the contract may only be assigned if such an assignment is provided for in the relevant contract or if the contracting authority agrees upon such an assignment.

6. Can advance payments be established?

Yes, on both the federal and the cantonal level, advance payments may be established.

7. How is dispute resolution regulated?

On both the federal and the cantonal level, dispute resolution is subject to the general rules and principles of administrative court proceedings.

In addition, certain exceptions apply based on particular public procurement regulations, for instance with regard to the suspensive effect of an appeal. In contrast to other administrative court proceedings, an appeal in a public procurement proceeding has only suspensive effect if explicitly granted by the court.

8. Can international arbitration be agreed upon?

Yes.

9. Is there any procedure for liquidation of the contract?

On both the federal and the cantonal level, there is no special procedure for the liquidation of the contract. As the contract is not governed by the public procurement regime, the general rules and principles of private contract law apply.

H. Applicable Regulation

1. Please list any relevant regulation and, if possible, web links to up-to-date versions of the same.

Link to the Federal Act on Public Procurement (FAPP):

http://www.admin.ch/ch/d/sr/c172_056_1.html

Link to the Ordinance to the Federal Act on Public Procurement:

http://www.admin.ch/ch/d/sr/c172_056_11.html

Link to the Intercantonal Agreement on Public Procurement (IAPP):

<http://www.admin.ch/ch/d/as/2003/196.pdf>

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