

Legal Approaches to Reducing the Demand behind Human Trafficking – Public Procurement as a Blueprint for Conscious Capitalism?

Judge Marc Steiner,
Swiss Federal Administrative Court

Geneva, 12th October 2021

Wider context: What challenges need to be addressed to make the world a better place?

- Ask and make transparent how money is invested (especially in Switzerland considering the importance of its financial market)
- Ask how to design development aid and trade contracts and trade regulation (including dispute settlement)
- Ask how to make more transparent and how to regulate supply chain management of enterprises
- Ask how to make more transparent and how to regulate supply chain management of public entities

Purpose and topics of the presentation

- Legal history / tracing the mindset change
- The revision of the GPA (2012): Green Public Procurement endorsed, “constructive ambiguity” concerning social aspects
- Relevance of the EU public procurement reform 2014
- The Swiss regime on public procurement: Competition based on quality, innovation, sustainability

Testimonial on legal history from a Swiss perspective I (3 archaeological layers)



Testimonial on legal history from a Swiss perspective II (3 archaeological layers)

- Layer 1: Swiss internal market not really stimulated, market opening not the main focus, political environment favouring favouritism, protectionism and collusion of bidders
- Layer 2: Swiss Internal Market Law, Cartel Act, GPA 1994, Public Procurement Regulation 1994; open markets, competition (based rather on price?); bidders can challenge award decisions
- Layer 3: GPA 2012 / EU directives 2014 / new Swiss regulation on public procurement: Governance/preventing corruption, competition based on quality, sustainability and innovation (completing the goals according to layer 2)

The revised GPA is more than a market access tool

“While benefits of the GPA are often seen in terms of providing market access rights for national suppliers in the other GPA parties’ markets, the Agreement can also be seen as a powerful tool for improving governance and promoting development.”

(Nicholas C. Niggli, former Chairman of the WTO Committee on Government Procurement)

Sustainable (Public) Procurement: WTO Symposium 2017



GOVERNMENT PROCUREMENT: SYMPOSIUM – GENEVA 22 FEBRUARY 2017

Symposium on sustainable procurement

Work programme on sustainable procurement of the committee on government procurement⁽¹⁾

Centre William Rappard (WTO Headquarters), Room W

Geneva, 22 February 2017

Strategic use of public procurement as purpose of the EU directive 2014/24/EU

Public procurement plays a key role in the Europe 2020 strategy [...] for smart, sustainable and inclusive growth' ('Europe 2020'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds (Recital 2 of the Directive 2014/24/EU).

Directive 2014/24/EU – mandatory exclusion in case of trafficking in human beings

Art. 57 (1): Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established [...]

- child labour and other forms of trafficking in human beings

Directive 2014/24/EU – ILO Core Labour Standards – Exclusion

Art. 18 and Annex X / Art. 57 / Recital 101:
Contracting authorities should further be given the possibility to exclude economic operators ... because of violations of ... social obligations ...

SPP as a possible purpose of a modern public procurement regulation?

Reform of the Swiss public procurement law:

Art. 2 of a (entirely new) Federal Act on Public Procurement (FAPP):

The purpose of this law is [inter alia] to ensure that public resources are **sustainably** used from an economic, an environmental and a **social perspective**. Competition based on quality, innovation and sustainability are the key terms.

The concept of the new Swiss regulation

The contract is awarded to the most (not only economically) advantageous tender; procurement culture needs to be addressed.

social
minimum
standards

prevention
of dumping

environmental
minimum
standards

Bern becomes a “fair trade town”

14 February 2017: Bern, the capital of Switzerland, gets the label “fair trade town”. Accordingly a Bernese politician would argue that social award criteria should be endorsed during the ongoing reform of the Swiss public procurement law. Classical WTO-lawyers hate social aspects because of their potential to be abused as disguised protectionism. But these are local social aspects; influencing social conditions abroad (as a consumer) is different.

Conclusion

There can clearly be found a paradigm change when it comes to the modern way of regulating public procurement (WTO, EU, Switzerland). This means that the neoliberal mindset layer 2 (market access, competition [based on price], money and nothing else) is overlaid by a mindset layer 3 (competition based on quality, sustainability, innovation). This can make out of public procurement a blueprint for a conscious capitalism (especially concerning supply chains).

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