

Is there a “Swiss Approach” on Competition based on Quality and Sustainable Public Procurement?

Judge Marc Steiner,
Swiss Federal Administrative Court

(personal opinion)

Caution: prior involvement



Public Hearing IMCO, Brussels, May 2011

Purpose and topics of the presentation

- The WTO Government Procurement Agreement
- The approach of the EU public procurement directives on sustainable public procurement
- The Swiss reform of the regulation on public procurement (keywords: competition based on quality, sustainability, innovation)

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 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: 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



WORLD TRADE
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Committee on Government Procurement

KEY TAKE-AWAYS FROM THE COMMITTEE'S SYMPOSIUM ON SUSTAINABLE PROCUREMENT

HELD IN THE CENTRE WILLIAM RAPPARD (WTO HEADQUARTERS), GENEVA, ROOM W,
22 FEBRUARY 2017

Report by the Secretariat

Art. 7 TFEU

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Communication COM(2008) 400 final

Such a shift (to a greener economy) could also boost the competitiveness of European industry by stimulating innovation in eco-technologies – which have been recognised as a high-growth sector where Europe is already a world leader (p. 2).

European Parliament Resolution “Modernisation of Public Procurement” (25 October 2011)

Takes the view that [...] the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender [...] taking into account the entire life-cycle costs of the relevant goods, services or works;

Competition based on quality as a new paradigm

"The new criteria will put an end to **the dictatorship of the lowest price** and once again make quality the central issue," Mr. Tarabella explained.

(EP press release of 26th June 2013: "Procurement package: New deal to ensure more responsible public spending")

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).

The Concept of the Directive 2014/24/EU on Innovation

It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth. In this context, it should be recalled that public procurement is crucial to driving innovation, which is of great importance for future growth in Europe (Recital 95 of the Directive 2014/24/EU).

Directive 2014/24/EU – Principles

Article 18 Principles of procurement

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X

Judgment of the CJEU C-395/18 Tim SpA c/ Consip SpA (30 January 2020)

The principles of procurement enshrined in Article 18 of Directive 2014/24/EU reflect the fact that compliance with sustainability standards provided for in paragraph 2 must be seen like the principles referred to in paragraph 1 as “**a cardinal value**” with which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that directive.

Directive 2014/24/EU – Annex X

ANNEX X

LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS REFERRED TO IN ARTICLE 18(2)

— ILO Conventions on Forced Labour and on Worst Forms of Child Labour; etc.

— Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;

Directive 2014/24/EU – Life-cycle costing

Art. 68:

Life-cycle costing shall .. cover parts or all of the following costs:

(b) costs imputed to **environmental externalities** linked to the product ... during its life cycle, provided their monetary value can be determined and verified; ... costs such as emissions of greenhouse gases ...

Green Public Procurement as an indispensable part of every kind of Green New Deal

COM (2020) 640 final of 11.12.2019

2.1.3. Mobilising industry for a clean and circular economy

Public authorities, including the EU institutions, should lead by example and ensure that their procurement is green.

The Commission will propose further legislation and guidance on green public purchasing.

§ 97 of the Act against Restraints of Competition (GWB) implementing the new mindset

The mindset of the 90ties [as trying to avoid the integration of sustainability aspects] must (meanwhile) be considered as not being suited to gather a majority in a democratic process of decision-making (Jörg Wiedemann, Kulartz et alii [ed.], *GWB-Kommentar*, Cologne 2016, para. 92 on § 97 GWB).

For an average German public procurement lawyer this finding was like an earthquake.

The Purposes of the new (Swiss) Federal Act on Public Procurement (PPA)

The purpose of this Act is to ensure:

- a. the cost-efficient use of public funds in a manner that is (overall) economically (including “volkswirtschaftlich”), ecological and socially **sustainable**
- b. the transparency of the award procedure
- c. equal treatment and non-discrimination of tenderers
- d. the promotion of effective, fair competition among tenderers, in particular by means of measures against collusion between bidders and corruption

Compliance with social minimum standards, equal pay for men and women, and environmental law (art. 12 / 26 PPA)

Social and environmental minimum standards inspired by art. 18 (2) of the directive 2014/24/EU including annex X (ILO core labour standards and particularly important international conventions for the protection of the environment)

Compliance with workplace health and safety regulations (art. 12 / 26 PPA)

(2) For goods, work and services to be provided abroad, the contracting authority shall award a public contract only to tenderers that comply as a minimum with the Core Conventions of the International Labour Organization (ILO) in accordance with Annex 6. In addition, the contracting authority may require compliance with **other important international labour standards**, as well as appropriate evidence, and may **arrange for checks to be carried out**.

Award criteria (art. 29 PPA)

The contracting authority evaluates the tenders using performance-related award criteria. [...] it shall in particular take into account, besides the price and quality, criteria such as ... life cycle costs (including the internalisation of green externalities) ... sustainable development (including fair trade issues) ..., innovation content ...

Switzerland becomes a “fair trade country”

In the dispatch of the Swiss Federal Council of 15 February 2017 concerning the Federal Act on Public Procurement (award criteria) it is explicitly stated, that it will in the future be possible to procure fair trade products (Bundesblatt [= Federal Gazette] 2017 1851 ss., p. 1943).

GPA 1994 – Abnormally Low Tenders

Following more or less the example of the EU regulation (art. 68 directive 2014/24/EU) Swiss procuring entities will be obliged to ask questions to a supplier presenting an abnormally low bid (Art. 38 PPA). According to the former Swiss law procuring entities **may** ask questions if they want to (discretion).

Award (art. 41 PPA)

The most advantageous tender (previously "the most economically advantageous") will now be awarded the contract (Art. 41 BöB / IVöB). [...] Competition based on quality among the tenderers is to be brought to the fore. (www.mme.ch)

Procurement culture

Competition based on quality does not only mean to pay a higher price to a bidder offering convincing quality, but also to have enough smart people on the demand side being able to foster innovation.

#Education

Procurement culture (“Vergabekultur”) of contracting authorities is decisive when using their margin of appreciation. The question is: In which system of incentives do buyers live?

Preventing Corruption and Fostering Sustainability – Conflicting Goals?

The amount of leeway therefore tends to depend on how much discretion the contracting authorities can be granted without actually promoting corruption. The appropriate margin of discretion can be defined by assessing the level of maturity/governance of a country (cf. publication Elisabeth Lang/Marc Steiner on preventing corruption).

Common ground of EU and Switzerland

Despite Switzerland not being part of the European Economic Area the new regulation of Switzerland has obviously been inspired by the EU directives on public procurement. But for political reasons this has rather not been mentioned when selling the project to the politicians.

Post Covid-19 response: Sustainable Public Procurement and Green Recovery

Switzerland should – considering the importance of its export industry – not envisage a concept of a post Covid-19 protectionism. Instead a Green Recovery Plan should apply. Sustainable Public Procurement can and must be seen as a key element of every strategy on Green Recovery / de iure or de facto Green New Deal (USA, EU and Switzerland).