

Switzerland, its reform of the legal framework on public procurement and the effects of Covid-19

Judge Marc Steiner,
Swiss Federal Administrative Court

(personal opinion)

Moscow, 23th June 2020

Purpose and topics of the presentation

- Three layers of mindsets on public procurement policy
- The Swiss reform of the regulation on public procurement (keywords: competition based on quality, sustainability, innovation)
- “Emergency protectionism” as a post Covid-19 response?
- No green recovery plan without fostering sustainable public procurement!

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 / new Swiss regulation on public procurement: Governance/preventing corruption, competition based on quality, sustainability and innovation (completing the goals according to layer 2)

Lived Legal History

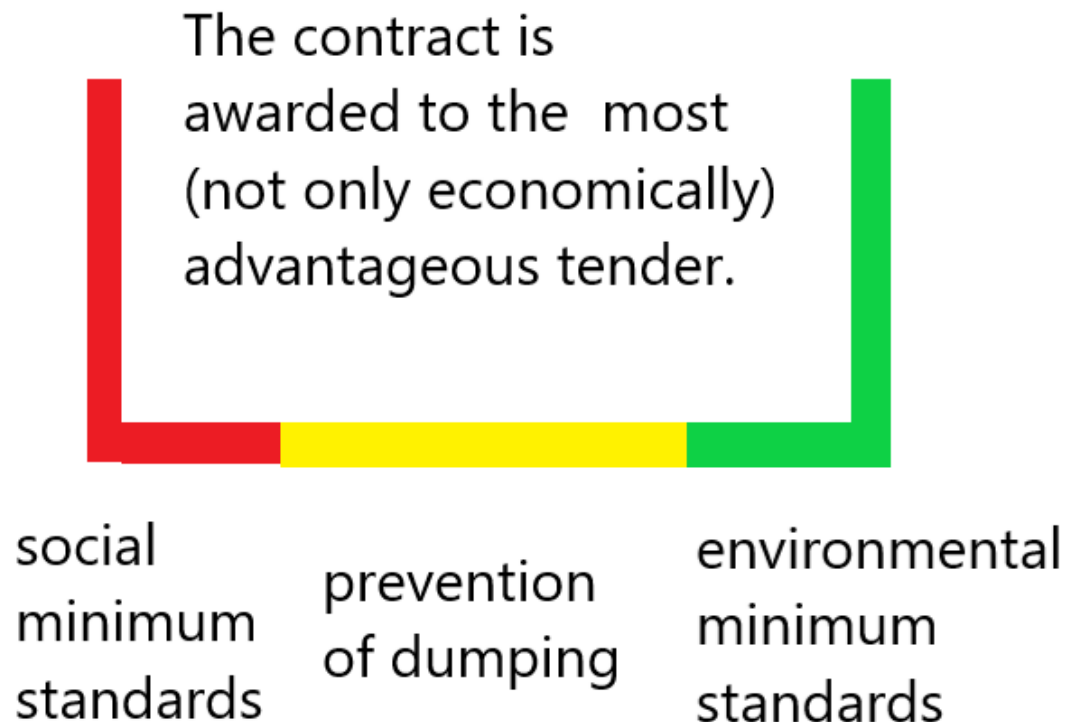
- 90ties (GPA 1994 / market access, competition [based to much on price] and money / purity principle concerning internal market / collateral damages of (simplistic form of) capitalism not considered as they should be
- 2002 “Helsinki Bus Case” CJEU (policy consistency requires substantial concept of green public procurement)
- 2004 Directives 2004 (notably 2004/18/EC)
- 2012 Revision WTO Government Procurement Agreement (stressing green public procurement)
- 2012 “Max Havelaar” Judgment CJEU (social aspects)
- 2014 New directives (notably 2014/24/EU; strategic use of public procurement / Europa 2020 / sustainability concept)
- 2016 Transposition in Germany (GWB; paradigm change)
- 2019 New Swiss Procurement Code including sustainability as aim and purpose of public procurement regulation

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

Aim and purpose(s) of the law shall be:

- a. Economic and the from an (overall) economic (“volkswirtschaftlich”), ecological and social perspective sustainable use of public funds
- b. Transparency of public procurement procedures
- c. Non-discrimination between bidders
- d. Promotion of an effective and fair competition including measures against collusion between bidders and corruption

The concept of the new Swiss regulation



China and USA / “buy Chinese” / “buy American”?

The EU has an open procurement market, which is the largest in the world. At the same time, EU companies often encounter difficulties to gain access to procurement opportunities in the Chinese as well as other foreign markets This protectionist trend is rising. (EU-China – A strategic outlook, 12 March 2019)

Switzerland first?

The Swiss Federal Councillor Guy Parmelin, head of the Federal Department of Economic Affairs, called for a “Switzerland first”-approach on public procurement as a Covid-19-response, i.e. a kind of “emergency protectionism”. Eminent legal scholars reminded him of the obligations arising from the WTO Government Procurement Agreement.

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 (especially EU and Switzerland).