

**The paradigm shift from
competition based on price
to competition based on
quality in Swiss public
procurement law – a
precondition for green
public procurement and
innovation?**

Judge Marc Steiner,
Swiss Federal Administrative Court
(personal opinion)

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

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

Sustainable (Public) Procurement: WTO Symposium 2017



WORLD TRADE
ORGANIZATION

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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

The WTO-GPA-rules on award criteria

Article X GPA 2012

Technical Specifications and Tender Documentation

9. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery.

EU-Directive 2014/24/EU – Innovation

Recitals 47 and 95:

Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.

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

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

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

Procurement and Green Recovery

In addition to price, sustainability (such as labour or environmental protection conditions) can also be taken into account in particular when awarding services and contracts (Art. 29 BöB / IVöB). The most beneficial tender (previously "the most economically advantageous") will now be awarded the contract (Art. 41 BöB / IVöB).
[...] Quality competition among the tenderers is to be brought to the fore.
(www.mme.ch)

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 (“Buy Swiss”). 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).