

# Legal Compass

## Public Procurement Law

December 2020



### Q&A on the Revised Procurement Law

**On 1 January 2021, the completely revised Federal Act on Public Procurement (PPA) and the associated ordinance will enter into force.**

**As before, the PPA is only applicable to awards at federal level. The Inter-Cantonal Agreement on Public Procurement (ICAPP) remains the cantonal «counterpart» to the PPA. The ICAPP has also been completely revised in 2019. On 15 November 2019 the Inter-Cantonal Body for Public Procurement adopted the revised Inter-Cantonal Agreement on Public Procurement (ICAPP 2019).**

**Below we explain individual key points of the revision, which are important for both awarding authorities and tenderers in their everyday work.**

#### 1. Is the revision based on a change of opinion?

The revised WTO Agreement on Government Procurement (GPA 2012) entered into force on 6 April 2014. As a result, the changed legal situation at the international level was the driving force behind the revision of the Swiss procurement law.

The totally revised PPA and the draft of the ICAPP 2019 contain the binding provisions of the GPA 2012 and the procurement related agreements with third countries. In addition to the alignment with international provisions, the revision aims to harmonize federal and cantonal legislation to a large extent. The principles developed by case law and legal doctrine have also been incorporated into the new laws.

The future public procurement law does not change the fundamental way of thinking in public procurement. However, there are some significant innovations when viewed in detail.

#### 2. Will there still be independent cantonal procurement laws and ordinances after the ICAPP 2019 enters into force?

The ICAPP 2019 claims to be the comprehensive legal basis for the award of public contracts at cantonal level. Each canton declares its accession to the agreement to the intercantonal body of the Conference of Building, Planning and Environmental Directors in accordance with its competence regulation. Cantonal procurement laws as we know them today will be repealed and will be replaced by short introductory laws.

The cantonal ratification process is currently underway in the cantons of Aargau, Berne and Schwyz. The agreement will enter into force as soon as two cantons have joined it, which is expected to happen in the course of 2021.

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### **3. Which transitional provisions apply?**

The relevant date is the date on which the award procedure is launched. The future procurement law will apply to those award procedures, which are put out to tender in the regular publication organ after its entry into force.

This means that award procedures initiated before the entry into force but not yet concluded by means of a legally binding award decision will be governed by the former law.

If an awarding authority has awarded a legally binding contract for a framework agreement before the entry into force, this is irrelevant to the question of the applicable public procurement law. A legally binding award decision for the framework agreement concludes the public-law award procedure and further performance is a matter of private contract law.

The situation will be different if the awarding authority intends to award a follow-up and/or additional contract to a tenderer after the new law has come into force, but the award of the original contract was made under the former law. In such cases, the future procurement law will apply to the follow-up and/or additional contract.

### **4. Is there an increased focus on ecologically and socially sustainable procurement?**

The respective purpose article of the revised procurement law now explicitly mentions the «use of public funds in a manner that is ecologically and socially sustainable». Sustainability is also listed in the non-exhaustive list concerning the award criteria. This is intended to focus even more strongly on resource and environmental criteria, which are already regularly included in public invitations to tender.

Insofar as environmental and social criteria have a factual reference to the respective procurement object, products should be in demand and structures should be realized which are economical, environmentally friendly and health-compatible and which are produced in a socially responsible manner. The prerequisite for the objective reference is intended to ensure that protectionist practices are not introduced into procurement practice under the guise of legitimate objectives.

### **5. What is meant by the two envelopes method?**

In the tender documents, the awarding authority may require that tenderers submit their tender in two envelopes, one containing the relevant service provision and the other the price. The inclusion of this method in the law is new, but the procedure was already applied under the former law in construction tenders.

The two envelope method gives the awarding authority a tool that allows it to assess the performance and quality part of the tender in ignorance of the price. This instrument gives the awarding authority certain advantages, particularly in terms of the new statutory obligations relating to abnormally low offers. In the case of abnormally low offers, for example, the awarding authority is now required to obtain appropriate information as to whether the participation conditions have been complied with and if the other requirements of the invitation to tender have been understood. If the tenderer is not able to provide convincing information in this respect, this will be a statutory ground for exclusion from the procedure.

### **6. Are there any changes with regard to the adjustment and evaluation of tenders?**

In the former public procurement law, there were considerable differences between the Federal Government and the cantons with regard to the adjustment and evaluation of tenders. In the future public procurement law, the regulations are standardized. Under the former federal public procurement law, negotiations were permitted under certain conditions. If these conditions were met, price negotiations, adjustments of tenders and changes to the service content were permissible. Both in the revised PPA and in the ICAPP 2019 the term «negotiation» no longer exists. So-called «bidding rounds» (pure price negotiations) are now inadmissible at both cantonal and federal level.

Under future law, a price adjustment can only take place within the framework of a tender adjustment. Both the revised PPA and the ICAPP 2019 set an exhaustive list of the reasons for allowing an adjustment, as follows:

- only after the adjustment can the contract or the tenders be clarified or the tenders made objectively comparable in accordance with the award criteria; or
- supply changes are objectively and materially necessary, whereby what is to be supplied, the criteria and the specifications may not be adapted in such a way that the characteristic supply or the potential group of tenderers changes as a result.

## **7. Who will be awarded with the contract under future public procurement law?**

Under the current legislation, the contract is awarded to the «most economically advantageous tender». Under the revised procurement law, the contract will be awarded to the «most advantageous tender».

Despite the different wording, the fact that the award of the contract may be based solely on the award criteria announced in advance has not changed. Under both the existing and the future law there is a non-exhaustive list of possible award criteria. Newly, however, award criteria are listed which can be used additionally outside the scope of international treaties. These are apprenticeships places or jobs to reintegrate long-term unemployed people.

In this context, it should also be emphasized that the obligation to state reasons in the award decision is increased under the future law. The awarding authorities are now required to actively present specific indications of the winning tender in the award decision. Under former law, these were only to be presented upon request by a tenderer. However, the debriefing, which is customary in practice, will also exist under future law.

## **8. What are the key changes regarding the rights of appeal?**

A new feature is that in all cantons, appeals against decisions of the awarding authority may be filed with the cantonal administrative court as the sole cantonal instance, starting from the value of the contract decisive for the invitation procedure. Previously, some cantons had an internal administrative appeal procedure.

Both at federal and cantonal levels, there is now a uniform appeal period of 20 days of the decision being notified.

In the former public procurement law of the Federal Government, there was no legal protection in the case of decisions outside the scope of international treaties. This has now changed insofar as appeals to the Federal Administrative Court are now possible, provided that the threshold is met both for the invitation procedure in the case of supplies of goods and services and the threshold for the open or selective procedure in the case of construction work. However, outside the area covered by state treaties, «only» so-called secondary legal protection is granted. This means that no amendment or annulment of the challenged decision can be sought, but only a declaration of unlawfulness. Such a declaration leads to payment of damages by the awarding authority

At the cantonal level, full legal protection has so far been granted for all public contracts at least above the threshold for the invitation procedure. This will also remain so under the ICAPP 2019.

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