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New Procurement Law strengthens Competition on Quality

On 1 January 2021 the new federal procurement law comes into force. This law substantially changes the procurement criteria, whereby the quality of bids will play a more important role. The criteria for the most advantageous bid provides greater discretionary powers to public procurement authorities. In addition, the revision tightens the provisions regarding sanctions and will harmonise federal and cantonal procurement law.

While the new federal procurement law is set to come into force on 1 January 2021, the revised inter-cantonal concordat on public procurement will enter into force as soon as two cantons have joined it. The first joinings of the cantons can be expected as of end of 2020.

The objectives of public procurement law are supplemented by the need for the economic, ecological and socially sustainable use of public funds. In addition to the already well established principles of transparency and equal treatment, the revised law also focuses more strongly on combatting cartels and corruption.

Competition on Quality

Currently, the bidder with the most economic offer wins the contract. As of next year the bidder with the most advantageous offer wins the tender. Therefore, in addition to economic aspects, qualitative criteria such as sustainability, including environmental and social aspects, can be given greater consideration. This should enable a more comprehensive assessment with a long-term planning horizon and strengthen Switzerland as a business location. In practice, it is unlikely that the new criteria may be taken into account by way of an exact and comprehensible calculation of the direct and indirect costs. Nevertheless, it is to be expected that award decisions can be better jus-

tified in economic and ecological terms. However, this will also make the award more vulnerable with respect to an appeal. This is in line with the general trend in economic regulation to move away from simple and clear rules towards individual case assessments. The ambition to reach the best solution in each individual case is, however, not beneficial for legal certainty in relation to public procurement.

Recommendations

- Documentation of sustainability criteria such as environmental and social criteria is becoming a central success factor
- Definition of a quality management process including full cost considerations (purchasing, production, maintenance and recycling)
- Written enquiries in the event of unclear award criteria effectively reduce the discretion of the awarding authority

Adjustment of Offers

The harmonised procurement law follows the previous approach of the cantons with regard to the adjustment of tenders: pure price negotiations are now prohibited at federal and cantonal level. In

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contrast, technical corrections of tenders remain possible if it is the only way to clarify the offer or to make the offers comparable. In addition, changes in service remain possible. In both cases mentioned, a request for price adjustments is also permissible. If the performance is enhanced, the price may also have to be increased under certain circumstances. Otherwise there would be a risk that the technical adjustment could be qualified as an inadmissible indirect price negotiation.

Dumping

Unusually low offers do not per se pose a problem under public procurement law. Predatory pricing can be problematic from an antitrust point of view in cases of market power. In the event of a possible dumping bid, however, the Swiss Parliament obliges the awarding authority to obtain additional information on whether all mandatory requirements are effectively met. With a dumping price the bidder also runs the risk of triggering an initial warning signal, which could call into question the reliability and trustworthiness of the bid.

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tender can be used in many different situations. The legal grounds for exclusion are sometimes very broad and not precisely formulated. For example, a bidder can be excluded for having performed previous public contracts inadequately or if other indications lead to the presumption that the bidder is not a reliable and trustworthy contractual partner. In addition, certain indications that the bidder has disregarded health and safety regulations, working conditions or environmental protection requirements may lead to an exclusion. Strict proof of such conduct is not required. Furthermore, evidence of a violation of antitrust and unfair competition laws may also be sufficient.

In addition, the following public procurement sanctions were introduced: Warning, ban and, at cantonal level, fines. Procurement authorities are obliged to report bans, although they only have a binding effect vis-à-vis the authority that issued the order. The fine can amount to up to ten percent of the adjusted bid amount.

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Framework Contracts

The tendering of framework contracts (with or without purchase obligation) is common practice, especially when purchasing services. This possibility is now explicitly regulated in the revised procurement law, whereby the framework contract can be concluded with one supplier (single contract) or several suppliers (parallel contract). The maximum procurement value including potential term extension and additional options is relevant for the calculation of the procurement thresholds. The content of the service must be described in such detail that the procurement requirements and thus the eligible suppliers do not change during the term of the framework agreement. Individual contracts that go beyond the content of the framework agreement constitute a violation of law. The maximum duration of a framework contract is five years – automatic renewal is not possible. In justified cases, a longer term may be provided for, for example, in the case of IT services. Another new feature is the explicit regulation of the concrete call for services, which is based on the framework agreement. In addition to a direct call for services, an abbreviated tender procedure (the so-called «mini-tender») is also addressed by the revised law.

Recommendations

- Documentation of all efforts to comply with applicable regulations, including compliance management system
- Investigation of possible violations and documentation of measures (operational adjustments, controls, training)
- Plausibility check of the successful tenderer's compliance with the rules

Conclusion

Due to the newly formulated criteria of sustainability, such as ecological and social aspects, the revised law places greater emphasis on quality competition between suppliers. Even if important principles of procurement law remain unchanged, suppliers should review their (existing) offers and documentation with regard to these criteria and, where necessary, adapt them to the changed conditions in order to maintain their own competitiveness. In addition, it is also advisable to study or document the new instruments of procurement law, such as framework agreements, as these are likely to be used more frequently by procurement authorities in the future.

Sanctions

The revised law provides the awarding authorities with a comprehensive range of sanctioning instruments. The existing possibility of exclusion from a

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