

Switzerland

Bratschi Wiederkehr & Buob Rechtsanwälte | Attorneys-at-law

Bahnhofstrasse 106
Postfach 1130
CH-8021 Zürich
Switzerland

Tel +41 58 258 11 00
Fax +41 58 258 11 99
Website: www.bratschi-law.ch

1.Does your legal system provide specific procedures for the award of contracts by contracting authorities?

Yes, the legal system in Switzerland provides specific procedures for the award of public contracts¹:

–Open Procedure: General submission procedure. All interested competitors may submit tender offers.

–Restricted Procedure: Only those competitors invited by the contracting authority may submit tender offers.

–Negotiated Procedure: Direct consultation of one or more competitors by the contracting authority. Limited by law to specific cases².

Contracting authorities in Switzerland are either Federal authorities or

1 Federal Act on Public Procurement (SR 172.056.1); Ordinance on Public Procurement (SR 172.056.11)

2 Art. 13 of the Ordinance on Public Procurement: e.g. no tender offers received after deadline in open or selective procedure, only one bidder in the specific market, very urgent cases, purchase at commodity exchange etc.

Cantonal authorities. As far as the latter are concerned, specific Cantonal Acts might be applicable in addition to the relevant International and Federal Law.

2. Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?

Basically not. The above mentioned procedures are applicable on any kind of public contract except from specific distinctions which are inherent in the type of contract. The contracts are divided into: – works contracts; – supply contracts; – public service contracts.

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?

The procedures do basically not depend on the value of the goods, services etc. Thresholds according to Swiss law comply with GATT thresholds. For the year 2009 therefore: – CHF 9'575'000 for works contracts; – CHF 248'950 for supply and public service contracts³. Public contracts with values below these thresholds do not have to proceed according to the rules of public procurement.

4. In what way does the contracting authority have to inform the market about the intended procurement?

Public contracts of Federal Authorities have to be announced in the Swiss Commercial Gazette, public contracts of Cantonal Authorities have to be announced in their local Commercial Gazettes. International announcements according to a treaty have to comply with the specific announcement regulation.

5. Does a potential bidder which is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

According to the Federal Act on Public Procurement, the contracting authority is allowed to establish certain criteria for the bidder's financial, economical and technical abilities. Among these factors, the legal form can be of relevance especially for major projects. There are no strict requirements but at least there is some sort of optional provision. The competent authority has some leeway to weight the existence of a specific legal form.

6. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

Yes, both are possible.

7. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender offer for the contract directly from abroad?

It is possible to submit a tender offer for the contract from abroad. But since Switzerland is not a member of the EU, (all) foreign companies need to get permissions for employees that shall be sent to Switzerland in order to carry out a (public or private) contract. It depends on the country of the foreign company: if it is a EU member state, a declaration (for less than 90 work days per year) or a request for a work permit (for more than 90 work days per year) must be submitted to

3 estimated value of public contract ex VAT; different thresholds for telecommunication, electricity and railways [Art. 2a para. 3 Ordinance on Public Procurement (SR 172.056.11)]

the competent authority for foreign employees - the latter also if it is not a EU member state. EU member states are basically entitled to get such permission; for non EU member states the opposite is the case. Their chances to get a permission are significantly smaller and depend on the applicant's qualification. If he is able to show that his work in Switzerland requires specific knowledge, he has good chances to get the permission. In any case, either in case of a declaration or a request for work permit, the submission of the required documents must be filed with the competent authority⁴ before the beginning of the project in Switzerland.

8.If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

Foreign bidders and domestic bidders must basically be treated equally (equality principle)⁵. The principle is restricted to: a) GATT member states that grant the principle also for Swiss competitors; b) other states that also grant the equality principle⁶. Within the equality principle, the contracting authority has a vast leeway for awards of contracts. The applicable GATT sub-agreement GPA provides two basic principles for awards: either the lowest price or the most economically advantageous tender offer⁷. Switzerland does apply the principle of 'most economical'.

9.Is a multinational bidding consortium allowed to submit a bid?

Basically yes, but for the 'open procedure' only [see (1)] and if the contracting authority does not explicitly exclude consortia. All members of a bidding consortium have to be stated. Retirement of one member would be considered as significant change of the tender and must be disclosed immediately.

10.In which language do the tender offers have to/can be submitted and which form is required, e.g., written form, fax, e-mail or digital?

The contracting authority is stipulating the language in its public contract notice. It is either German, French or Italian, depending on the respective community language. Public contract notices according to GATT/WTO must be written in one of the official languages of WTO⁸.

11.Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

Deadlines must be appropriate to the particular case and its complexity and must basically not be shorter than 40 days⁹. Extensions of deadlines are valid for all bidders.

12.Can the bidders claim their costs for preparing their bid? If so what are the conditions for, and the maximum amount of, reimbursement?

Bidders can basically not claim their costs for preparing their bid. Exceptions can be granted by the contracting authority for special requirements but must be announced in the public contract

4 Declaration: Federal Migration Department; Request for work permit: Cantonal authority for foreigners
5 Art. 1 para. 2 Federal Act on Public Procurement
6 Art. 4 Federal Act on Public Procurement
7 Art. XIII para. 4 lit. b Government Procurement Agreement (GPA) of the World Trade Organisation
8 Art. XII para. 1 Government Procurement Agreement (GPA) of the World Trade Organisation
9 see Art. XI Government Procurement Agreement (GPA) of the World Trade Organisation for public contract notices according to GATT/WTO

notice.

13. Are there any selection criteria set by law that bidders have to satisfy in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

In the public contract notice and in compliance with the law, the contracting authority discloses the application criteria. They are binding. The authority is not allowed to apply unknown or later established application criteria. Bidders must be sure to submit all required answers, documents and references. Based on the application criteria, the contracting authority selects among the competitors according to the principle of the most economically advantageous tender offer [see (8)].

14. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

There is no specific legal protection before the award. The award is confirmed by appealable decree. Appellate court for decrees of Federal Authorities is the Federal Administrative Court. In cases of obvious violations of the awarding rules, competitors may antecedently appeal to the competent regulatory authority ('Aufsichtsbeschwerde').

Legal protection is available for any competitor.

15. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services etc. to be procured? If so, what are the conditions?

An appeal to the competent regulatory authority before the award is restricted to obvious violations of the awarding rules, e.g. the equality principle or the principle that the application criteria must not be altered during the procedure. The regulatory authority is an administrative authority but not a court.

16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, what are the principal conditions which have to be presented to a court in order to receive a damage award?

Together with an appeal against the decree, the competitor is legally allowed to claim for compensation of damages¹⁰. The latter is granted if the decree was unlawful. The damage compensation is limited to expenditures for the public procurement procedure and some possible costs of an appeal.

17. Can your office

–give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

–represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?

–Please name a contact person within your office for questions of public procurement law!

– “Yes, we can!”

–We have a department specialized in public law. Please get in touch with Dr. Anton W. Blatter or Karin Eisenring Hiestand in order to arrange for a first contact.