



The
LEGAL
500

**COUNTRY
COMPARATIVE
GUIDES 2024**

The Legal 500 Country Comparative Guides Switzerland **PUBLIC PROCUREMENT**

Contributor

Schellenberg Wittmer Ltd



David Mamane

Partner | david.mamane@swlegal.ch

Tobias Magyar

Associate | tobias.magyar@swlegal.ch

This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Switzerland.

For a full list of jurisdictional Q&As visit legal500.com/guides

SWITZERLAND

PUBLIC PROCUREMENT



*"Complex contracts" refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.

1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL).

For Switzerland, the most important international treaties are the **WTO's Agreement on Government Procurement (GPA)** and the **Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement (Procurement Agreement with the EU)**.

The above-mentioned treaties are implemented at the federal level by the **Federal Act on Public Procurement (PPA)** and the **Ordinance on Public Procurement (PPO)**. At the sub-federal level, the treaties are implemented by the **Intercantonal Agreement on Public Procurement (IAPP)** and the **26 enactment laws** of the Swiss Cantons.

The PPA and IAPP guarantee the minimum standards specified in the international treaties. In addition, they contain various provisions which exceed those standards. In particular, they also apply to public contracts that are not covered by the international treaties because they do not meet the required thresholds (see Question 3 below), or because they concern goods or services outside of the scope of the treaties (as stipulated in Appendix I, Annexes 4-6, of the GPA).

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

Swiss public procurement law applies to the **awarding of public contracts by contracting authorities**.

The term "**contracting authority**" covers all central and decentralized **government and administrative units** at the federal and sub-federal (i.e. the cantonal and communal) level. In addition, it covers **public and private undertakings** which provide public services and have been granted certain exclusive or special rights if they carry out activities in one of the following sectors: the provision of drinking water, electricity, public transportation, airports, ports, postal services, railways, gas or heat, or the exploitation of geographical areas for the purpose of exploring or extracting mineral oil, gas, coal or other solid fuels.

The following **types of public contracts** are subject to public procurement law:

- Contracts regarding construction;
- Contracts regarding the supply of goods;
- Contracts regarding services;
- Contracts regarding the delegation of a public task or the granting of a concession if they confer on the tenderer exclusive or special rights to be exercised in the public interest and for which the tenderer receives direct or indirect remuneration.

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction? Does the financial threshold differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules on the valuation of a contract opportunity.

The financial thresholds depend on the applicable legislation (the PPA at the federal level and the IAPP at the sub-federal level), the contracting authority in question and the contract type (construction, delivery of goods or provision of services).

The GPA and the Procurement Agreement with the EU stipulate the financial thresholds for public contracts falling within their scope. These thresholds have been incorporated in Annex 4 No. 1 of the PPA and Annex 1 of the IAPP. They are as follows (all values in Swiss francs):

Contracting entities	Construction	Goods	Services
Central and decentralized government and administrative units at the federal level	8.7 million	230,000	230,000
Central and decentralized government and administrative units at the sub-federal level	8.7 million	350,000	350,000
The public and private undertakings mentioned under Question 2 above which provide services in one of the following sectors: the provision of drinking water, electricity, public transportation, airports, ports or postal services	8.7 million	700,000	700,000
The public and private undertakings mentioned under Question 2 above which provide services in one of the following sectors: the provision of railways, gas or heat, or the exploitation of geographical areas for the purpose of exploring or extracting mineral oil, gas, coal or other solid fuels	8 million	640,000	640,000

Table 1

All public contracts falling within the scope of the above-mentioned treaties must be awarded either in an **open or a selective procedure** (subject to some exceptions).

If a public contract does not fall within the scope of the treaties, the following thresholds and procedures apply at a federal level (see Annex 4 No. 2 of the PPA; all values in Swiss Francs):

Contracting entities	Construction	Goods	Services
Open or selective procedure:			
Central and decentralized government and administrative units	from 2 million	from 230,000	from 230,000
The public and private undertakings mentioned under Question 2 above which provide services in one of the following sectors: the provision of drinking water, electricity, public transportation, airports, ports or postal services	from 2 million	from 700,000	from 700,000
The public and private undertakings mentioned under Question 2 above which provide services in one of the following sectors: the provision of railways, gas or heat, or the exploitation of geographical areas for the purpose of exploring or extracting mineral oil, gas, coal or other solid fuels	from 2 million	from 640,000	from 640,000
Invitation procedure:			
All contracting entities	from 300,000	from 150,000	from 150,000
Direct award procedure:			
All contracting entities	below 300,000	below 150,000	below 150,000

Table 2

At a sub-federal level and outside the scope of the treaties, the following thresholds and procedures apply (see Annex 2 of the IAPP):

Procedure types	Construction		Goods	Services
	Main	Ancillary		
Open or selective	from 500,000	from 250,000	from 250,000	from 250,000
Invitation	below 500,000	below 250,000	below 250,000	below 250,000
Direct award	below 300,000	below 150,000	below 150,000	below 150,000

Table 3

The contracting authority estimates the **value of a contract**. For contracts with a fixed term, the value is calculated on the basis of the total remuneration over the entire term, including any extension options. For contracts with an indefinite term, the contract value is calculated by multiplying the monthly remuneration by 48.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

As mentioned under Question 3 above, if the contract is subject to the GPA or the Procurement Agreement with the EU and the contract value reaches the thresholds listed in Table 1, the open procurement procedure (characterized by a public invitation to tender) or the selective procurement procedure (characterized by the selection of bidders allowed to participate after a public invitation to tender) apply.

If the contract does not fall within the scope of the treaties, a set of special rules applies. E.g., any invitation to tender does not have to be published in a WTO official language, and the courts cannot set aside a contracting authority's award decision (only at a federal level). The applicable procurement procedure depends on whether the contract value reaches the respective thresholds set out in Tables 2 and 3 above. Depending on the threshold value reached, either the open procedure, the selective procedure, the invitation procedure or the direct award procedure applies.

For a description of the different procurement procedures see Questions 8 and 9 below.

5. For the procurement of complex contracts*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes? What is the typical period from the publication of the advert that bidders have to respond to the advert for a complex contract?

Public invitations to tender are generally published on the procurement platform SIMAP (www.simap.ch).

If a contract falls within the scope of the GPA or the

Procurement Agreement with the EU, the following minimum deadlines apply:

- in an open procedure: 40 days from publication of the invitation to tender for the submission of tenders;
- in a selective procedure: 25 days from publication of the invitation to tender for the submission of requests to participate and 40 days from the invitation to participate for the submission of tenders.

Outside the scope of international treaties, the deadline for submitting tenders is usually at least 20 days.

These deadlines may be extended or shortened. When setting a deadline, the contracting authority has to consider the complexity of the contract, the likely number of required subcontracts and the required time for the transmission of submissions.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.

The criteria for the selection of bidders are defined in the public invitation to tender. The contracting authorities have great discretion in defining the selection criteria. However, the criteria have to be verifiable and objectively necessary for the procurement project.

In particular, the selection criteria may relate to the bidder's professional, financial, economic, technical and organizational capabilities and experience. E.g., the contracting authority may require that certain quality and environmental standards are met, that sufficient human resources and know-how are available, or that similar projects have been executed in the past.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so, what are

those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers of excluded suppliers? Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?

A contracting authority may exclude a bidder from an ongoing tender (or even revoke an award), e.g. if the bidder or persons associated with the bidder (non-exhaustive list):

- have been found guilty of a misdemeanor against the contracting authority or of a felony;
- are subject to bankruptcy proceedings;
- have violated anti-corruption provisions;
- refuse to allow inspections;
- have failed to pay taxes or social security contributions;
- are reasonably suspected to have made untrue or misleading statements to the contracting authority;
- are reasonably suspected to have entered into unlawful agreements affecting competition.

If some of the above offenses (e.g. the violation of anti-corruption provisions) are committed in a serious manner, the contracting authority may also exclude a bidder from future tenders for a maximum period of five years. The authorities keep a non-public list of bidders excluded from future tenders.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.

The procedure varies depending on the contract value (see Questions 3 and 4 above). Assuming that complex contracts are generally valued higher than less complex ones, either the open or the selective procedure would apply.

In the **open procedure**, the contracting authority first issues a public invitation to tender. The invitation contains information on the procurement project, such as a description of the object to be procured, any technical specifications, the deadline for the submission

of tenders, or the eligibility and award criteria. The bidders have time until the end of the bidding deadline to enter their tenders (see Question 5 above). The contracting authority verifies the tenders received for compliance with the formal requirements. If the eligibility criteria and technical specifications are fulfilled, the tenders are examined and evaluated based on the award criteria. The contract is awarded to the bidder with the most favorable tender.

The **selective procedure** is largely the same as the open procedure but is preceded by a prequalification stage, in which the contracting authority selects the bidders that may submit a tender (see Question 6 above).

The duration of the procurement procedure depends to a large extent on the subject matter of the public contract, the time and effort required for the evaluation of the tenders and the internal decision process of a particular contracting authority. In the Canton of Zurich, an open procedure usually takes at least 4 months, a selective procedure at least 5-6 months.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)

For procurements of contracts with a relatively low value, the invitation or the direct award procedure applies (for more specific information on the applicability of these procedures, see Questions 3 and 4 above).

In the **invitation procedure**, the contracting authority selectively invites potential bidders to submit a tender without issuing a public invitation to tender first. If possible, it invites at least three bidders.

In the **direct award procedure**, the contracting authority directly awards the contract without issuing an invitation to tender first.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

Bids must be submitted in writing within the specified deadline and be complete. There should be one person

in charge of the tender which can answer any questions the contracting authority may have. Any questions a bidder may have should be asked immediately as they arise and through the channels provided by the authority.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

The contracting authority evaluates bids based on performance-related award criteria. Besides the price and quality of an offer, it also has to consider other criteria such as, e.g., practicality, technical value, economic efficiency, life cycle costs, aesthetics, sustainability, plausibility of the tender, customer service, delivery conditions, innovative value, functionality, expertise or efficiency of the methodology. Bids must be evaluated in an objective, uniform and verifiable manner. The contract is awarded to the bidder with the most advantageous bid.

12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?

If a bidder submits a tender which is unusually low in comparison with the other tenders submitted, the contracting authority has to inquire as to whether the bidder complies with the participation conditions and understands the other requirements of the invitation to tender. The contracting authority may exclude the bidder from the procedure, if the bidder does not respond to the inquiry satisfactorily and does not guarantee the provision of the procured object in accordance with the bid.

13. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning

bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?

The contracting authority is not required to provide reasons for its decision prior to the award. The award decision contains a summary of the reasons for awarding a contract to a particular bidder. The decision is either published on SIMAP (see Question 5 above) or sent to the bidders directly. An unsuccessful bidder can also request a debriefing, in which the contracting authority has to disclose the main reasons for the unsuccessful bidder's score.

14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has occurred?

Unsuccessful bidders can appeal the award decision within 20 days from being notified of the decision.

At a federal level, an appeal is only possible if the total value of the public contract in question reaches the amount of 150,000 Swiss francs for goods and services, or 2 million Swiss francs for construction work. If a public contract falls outside the scope of international treaties, the award decision cannot be set aside. Instead, the court may only declare that a decision violates federal law.

At a sub-federal (i.e. cantonal or communal level), the IAPP similarly holds that an appeal is possible if the total value of the public contract in question reaches the amount of 150,000 Swiss francs for goods, services and ancillary construction work, or 300,000 Swiss francs for main construction work. However, these are minimum requirements and some Cantons have stipulated in their enactment laws that appeals are also possible below these thresholds. Unlike at a federal level, an award decision can be set aside even if a public contract falls outside the scope of international treaties.

The courts may set aside an award if it violates federal law or, at a sub-federal level, cantonal law, or if the contracting authority has established the facts incorrectly or incompletely. Once a contracting authority and a successful bidder have concluded a contract based on the award decision, the courts cannot terminate it anymore. However, if the contract falls within the scope of international treaties or if has been awarded at the

sub-federal level, the contract may not be concluded before the appeal period has expired. If an appeal is filed, the courts may grant it suspensory effect, which prevents the conclusion of a contract for the duration of the appeal proceedings.

15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?

Public procurement law challenges have become more common in recent times. Bidders used to have more reservations against filing appeals. With the recent revision of the public procurement laws, this seems to have changed. In our experience, bidders generally do not perceive their challenges of appeal decisions to harm their prospects in future tenders.

Court fees depend on the complexity of the case and the contract value in dispute. Attorney's fees generally depend on the complexity of the case. Both the court fees and, at least in part, the attorney's fees are borne by the losing party. E.g., if the contract value amounts to 10 million Swiss francs and the legal issues raised are highly complex, the Federal Administrative Court is likely to charge 50,000 Swiss francs for its decision, which is the maximum amount foreseen by the law. Attorney's fees may be significantly higher.

16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.

After the contract has been awarded, an appeal can be filed with the court of first instance within 20 days. If requested by the appellant, the court will *provisionally* grant the appeal suspensory effect and normally set a deadline of 10 days for the opposing party to submit its comments. The court will then decide whether to grant the appeal suspensory effect for the duration of the

appeal proceedings.

The duration of the proceedings for a decision on the merits depends on the complexity of the case and usually ranges between 4 and 15 months.

The first instance decision can be appealed to the Federal Supreme Court within 30 days, but only if the contract value exceeds the relevant thresholds and a legal question of fundamental importance arises.

17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your jurisdiction? To what extent are those rights dependent on whether the host state of the bidder is a member of a particular international organisation (i.e. GPA or EU)?

Within the scope of international treaties, foreign bidders are afforded the same rights and remedies as bidders domiciled in Switzerland (subject to some exceptions depending on the international treaty in question). Outside the scope of international treaties, foreign bidders are given the same rights and remedies as bidders domiciled in Switzerland if the state in which they have their registered offices grants reciprocal rights.

18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the same rights and remedies as a nationally owned company bidding in your jurisdiction?

An overseas-based bidder with a subsidiary in Switzerland is deemed a Swiss bidder if the bid is submitted by the subsidiary. The subsidiary would be afforded the same rights and remedies as a Swiss-owned company.

19. In your jurisdiction is there a specialist court or tribunal with responsibility for

dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?

There is no specialist public procurement court in Switzerland. At the federal level, the Federal Administrative Court has jurisdiction; at the sub-federal level, the cantonal administrative courts have jurisdiction. The final court of appeal is the Federal Supreme Court.

20. Are post-award contract amendments/variations to publicly procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?

Post-award contract amendments (so-called contract details negotiations) are permissible as long as the amendments do not deviate substantially from the award decision. If amendments are substantial, a new procurement procedure has to be conducted. In principle, changes of the supplier's identity (e.g. through mergers or demergers) are unproblematic provided that the new supplier still fulfills the eligibility and award criteria. This has to be assessed on a case-by-case basis.

21. How common are direct awards for complex contracts (contract awards without any prior publication or

competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?

Direct awards for complex contracts are not unusual. The contracting authority may award a contract in the direct award procedure irrespective of the threshold value if, e.g. (non-exhaustive list):

- no tenders or requests to participate are received in the open, selective or invitation procedure;
- only one tenderer is eligible (for technical, artistic or intellectual property reasons) and there is no appropriate alternative;
- the contracting authority is procuring supplies on commodity exchanges.

The award decision has to give the reasons for the use of the direct award procedure.

22. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?

Procurement law in Switzerland is rather flexible, especially in emergency situations.

Note that, due to the war in Ukraine, the Federal Council has prohibited the award of public contracts to Russian nationals and legal entities, to persons residing in Russia or to persons or legal entities associated with the aforementioned persons/entities.

Contributors

David Mamane
Partner

david.mamane@swlegal.ch



Tobias Magyar
Associate

tobias.magyar@swlegal.ch

