

GPA, Corruption, Collusion and Legal Review – a Swiss Perspective

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(The views expressed are those of the speaker and do not necessarily reflect the views of the Court.)

Topics / Overview

- Revised GPA 2012: Public procurement regulation is not only about market access
- Corruption: GPA and Swiss Approach (judgments and ongoing reform of public procurement regulation)
- Collusion in Switzerland (judgments and ongoing reform of public procurement regulation)
- Legal Review in Switzerland (judgments and Competition Commission)
- Conclusion

Swiss Judiciary / Competition law, public procurement and corruption

Since 2007 competition law cases and public procurement cases are dealt with by the same division of the Swiss Federal Administrative Court. Corruption Cases are dealt with by the Swiss Federal Criminal Court.

The revised GPA 2012 is more than a market access tool

“While benefits of the GPA are often seen in terms of providing market access rights for national suppliers in the other GPA parties’ markets, the Agreement can also be seen as a powerful tool for improving **governance** and promoting development.”

(Nicholas C. Niggli, former Chairman of the WTO Committee on Government Procurement)

New publication (also on GPA 2012)

Elisabeth Lang/Marc Steiner, Public Procurement Regulation: Fostering Market Access and Simultaneously Preventing Corruption – A Swiss Perspective,
The British Journal of White Collar Crime, Volume III/Number 1, p. 13 ff.

Revised Government Procurement Agreement (GPA) 2012 and Corruption I

Preamble:

Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption; ...

Revised GPA 2012 and Corruption II

Art. IV:4c General Principles

A procuring entity shall conduct covered procurement in a transparent and impartial manner that prevents corrupt practices.

Revised GPA 2012 and Corruption III

Art. VIII:4e Conditions for participation

... may exclude on grounds such as:
professional misconduct or acts or
ommissions that adversely reflect on the
commercial integrity of the supplier

Corruption: What is the problem?

Cases judged by the Federal Criminal Court:

Everyone thought that corruption is something happening somewhere in Africa, but

Sentence SK.2015.12 15th of September 2015
(129 pages)

Sentence SK.2016.5 6th of December 2016
(228 pages)

Preventing Corruption and Fostering Competition as Legislation Purposes (new Federal Act on Public Procurement [FAPP] as adopted by the National Council 13th of June 2018)

Art. 2 FAPP: Purpose

This law aims to [...]

d.

foster an effective and fair competition amongst bidders

e.

measures against inadmissible agreements restricting competition and corruption

Collusion as an Exclusion Ground (new Federal Act on Public Procurement [FAPP] as adopted by the National Council 13th of June 2018)

Art. 44 (2) FAPP: Exclusion of bidders

The procuring entity may exclude a bidder .. in case of [...]

b.

inadmissible agreements restricting competition

If a procurement procedure is «suspicious» in terms of inadmissible agreements the Competition Commission is informed of it by the procuring entity (Art. 45 [2] FAPP).

Corruption as an Exclusion Ground (new Federal Act on Public Procurement [FAPP] as adopted by the National Council 13th of June 2018)

Art. 44 (1) FAPP: Exclusion of bidders

The procuring entity may exclude a bidder .. in case of [...]

e.

violation of rules concerning the prevention of corruption

Corruption and collusion as reasons to impose sanctions (new Federal Act on Public Procurement [FAPP] as adopted by the National Council 13th of June 2018)

Art. 45 (1) FAPP: Sanctions

The procuring entity may exclude a bidder for a period of until five years in case of [...]

inadmissible agreements restricting competition and corruption

This presupposes a final conviction/sentence.

Reorganisation of the Competition Commission

On 1 September 2012, a new division was created. The Construction Division of the Competition Commission deals with restraints of competition in the construction and procurement industries. Competition law proceedings relating to the construction industry primarily concern horizontal agreements between companies (i.e. bid rigging).

Agreements relevant for public procurement

Pavimentazioni stradali in Ticino (dividing up public orders for road asphalt works; institutionalised bid-rigging), see court decisions B-420/2008 1st of June 2010 and B-380/2008 10th of June 2010

Agreements relevant for public procurement

Elektroinstallationsbetriebe Bern case: Hard-core cartel (institutionalised bid-rigging with monthly meetings of companies offering electrical installation services in the Berne region), amicable settlement including all parties (Comco decision 6th of July 2009).

Agreements relevant for public procurement

Aargau road construction cartel
(unlawful bid-rigging in around 100 cases from 2006 to 2009 in the sector of road construction; Comco decision 16th of December 2011; decisions of the Swiss Federal Administrative Court 25th June 2018).

The public procurement perspective

From the procurement perspective the key instruments are the exclusion of collusive bidders and the interruption of the procedure because of collusion.

The Importance of Judicial Review in Switzerland

In Switzerland there are financial market supervision (FINMA) and the Competition Commission, but there is no specific supervision authority on public procurement on federal level or an administrative review body. Appeals against decisions of procurement authorities are directly dealt with by the Federal Administrative Court. A public procurement judge on federal level must therefore be particularly “weatherproof”.

Transparency ex post I

Judicial review is not possible if the procurement procedure and the key steps from the public call for tenders to the decision on the award are not carefully documented.

This is particularly true when it comes to negotiations or if the bid is completed after having been submitted.

Transparency ex post II

If negotiations are allowed, but not documented in a satisfactory way, this fact alone is already enough to endorse an appeal, because the reviewability and the transparency ex post are not guaranteed.

Most famous example: VPB/JAAC 67.108

40 millions contract on outsourcing of IT-services. IBM Switzerland successfully complained against an award in favour of Swisscom IT Services. No satisfactory protocol of negotiations. Potential of abuse is obvious.

Transparency ex post III

If the procurement procedure is not documented in a satisfactory way, this fact alone can already be enough to endorse an appeal, because the reviewability and the transparency ex post are not guaranteed (see on documentation in general judgment B-307/2016; 23rd of March 2016).

Effective legal review

Switzerland has on federal level 1994 basically chosen not to go beyond the minimum of legal review imposed by the Government Procurement Agreement. Meanwhile there has been adopted in the Swiss constitution a guarantee of access to justice. So there is a certain pressure to go for more legal protection than required by the GPA.

The GPA influences legal protection beyond its scope. The same is true concerning the statistics obligations.

Thank you for your attention!

