

The most economically advantageous tender – notion and practical issues

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Purpose and topics of the presentation

- GPA: No preference whether the lowest price or the best price-quality-ratio should be decisive when awarding contracts
- New “classical” directive 2014/24/EU; paradigm shift / price, cost or best price-quality-ratio
- Interplay between public procurement and competition law concerning best price-quality-ratio / sustainability issues
- Practical issues: The margin of appreciation when evaluating tenders and its limits

Testimonial on legal history from a Swiss perspective I (3 archaeological layers)



Testimonial on legal history from a Swiss perspective II (3 archaeological layers)

- Layer 1: Swiss internal market not really stimulated, market opening not the main focus, political environment favouring protectionism and collusion of bidders
- Layer 2: Swiss Internal Market Law, Cartel Act, GPA 1994, Public Procurement Regulation 1994; open markets, competition (based rather on price?); bidders can challenge award decisions
- Layer 3: GPA 2012 / EU directives 2014: Governance/preventing corruption, competition based on quality, sustainability and innovation (completing the goals according to layer 2)

WTO Government Procurement Agreement 1994 – Rules on Award Criteria

Art. XIII: [..] the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender [...] is **either** the lowest tender **or** the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

Revised GPA 2012 – Rules on Award Criteria

Art. XV: [..] the entity shall make the award to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the notices, has submitted

- a) the most advantageous tender; **or**
- b) where price is the sole criterion, the lowest price.

GPA 1994 – Basic Rule on Award Criteria (unchanged in revGPA 2012)

Given the objective of the GPA of laying down minimum standards to be applied, it has opted for flexibility and, in addition to allowing awards on price, also allows other criteria to be taken into account, provided they have been set out in the tender documentation (Peter Trepte).

GPA 1994 – Abnormally Low Tenders

One can realistically not expect from an international framework like the GPA a substantial contribution to the solution of the problem when discussing abnormally low tenders (Gerhard Kunnert), because the GPA is about minimum standards.

EU: Green Paper COM(2011)15 final (I)

The **first** objective [of public procurement] is to increase the efficiency of public spending (**best value for money**; p. 4).

Directive 2004/18/EC Art. 53

The criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) various criteria linked to the subject-matter of the contract -> tender most economically advantageous

(b) the lowest price only.

Swiss Approach on Award Criteria I

Art. 21 (1) FAPP: Contracts will be awarded for the economically most advantageous offer (“wirtschaftlich günstigstes Angebot”). In seeking the economically most advantageous offer, a number of criteria will be taken into account, particularly deadlines, quality, price, profitability, operating costs (“Betriebskosten”), customer service, expediency of the service, aesthetics, environmental impact aspects (“Umweltverträglichkeit”) and technical value.

Swiss Approach on Award Criteria II

Art. 21 (3) FAPP: Contracts for broadly standardised goods may also be awarded solely on the basis of the lowest price criterion.

Swiss Approach on Award Criteria III

According to the press release of the Economic Affairs and Taxation Committee of the Swiss Parliament (National Council) of 28th March 2018 the focus on competition based on quality should be confirmed if not stressed even more when reframing the regulation on public procurement in Switzerland.

Swiss Approach on Award Criteria IV

Interestingly enough, the construction industry, engineers and architects back home complain about the focus of the procuring entities on price. Lesson learned: It is not enough to change the law, it's about procurement culture (“Vergabekultur”). There are no exact legal rules on the weighting of the award criteria; accordingly there are policy choices to make.

European Parliament Resolution “Modernisation of Public Procurement” (25 October 2011)

Takes the view that [...] the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender [...] taking into account the entire life-cycle costs of the relevant goods, services or works;

EP Resolution “Modernisation of Public Procurement” 25 October 2011

[...] stresses that this would not exclude the lowest price as a decisive criterion in the case of highly standardised goods or services; [...]; stresses that supporting the criterion of ‘maximum economic benefit’ would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy

Directive 2014/24/EU – Philosophy I

Recital 2: Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. [...]

See also recital 17 on buying innovative goods.

Directive 2014/24/EU – Philosophy II

Recitals 47 and 95:

Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.

Directive 2014/24/EU – Award Criteria I

Art. 67 / Recital 92: When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria **linked to the subject-matter of the contract** that they will use for that purpose.

Communication COM(2008) 400 final

Such a shift (to a greener economy) could also boost the competitiveness of European industry by stimulating innovation in eco-technologies – which have been recognised as a high-growth sector where Europe is already a world leader (p. 2).

Directive 2014/24/EU – Award Criteria II

Art. 67 (2): The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of

- a) price
- b) cost
- c) best price-quality-ratio.

Directive 2014/24/EU / minimum relevance of the costs

Art. 67 / Recital 92: To identify the most economically advantageous tender, the contract award decision should not be based on non-cost criteria only.

[...] cost criterion that could, at the choice of the contracting authority, be either the price or [...] life-cycle costing.

Directive 2014/24/EU – Award Criteria III

Art. 67 (2): Award criteria may comprise organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract, ..

Directive 2014/24/EU – Award Criteria IV

Art. 67 (2): Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

Directive 2014/24/EU – Award Criteria V

Recital 92: Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

Again: Procurement culture of contracting authorities is decisive when using their margin of appreciation.

Directive 2014/24/EU – Award Criteria VI

Thanks to the new criterion of the "most economically advantageous tender" (MEAT) in the award procedure, public authorities will be able to put more emphasis on quality, environmental considerations, social aspects or innovation while still taking into account the price and life-cycle-costs of what is procured. "The new criteria will put an end to the dictatorship of the lowest price and once again make quality the central issue," Mr Tarabella explained. (press release EP)

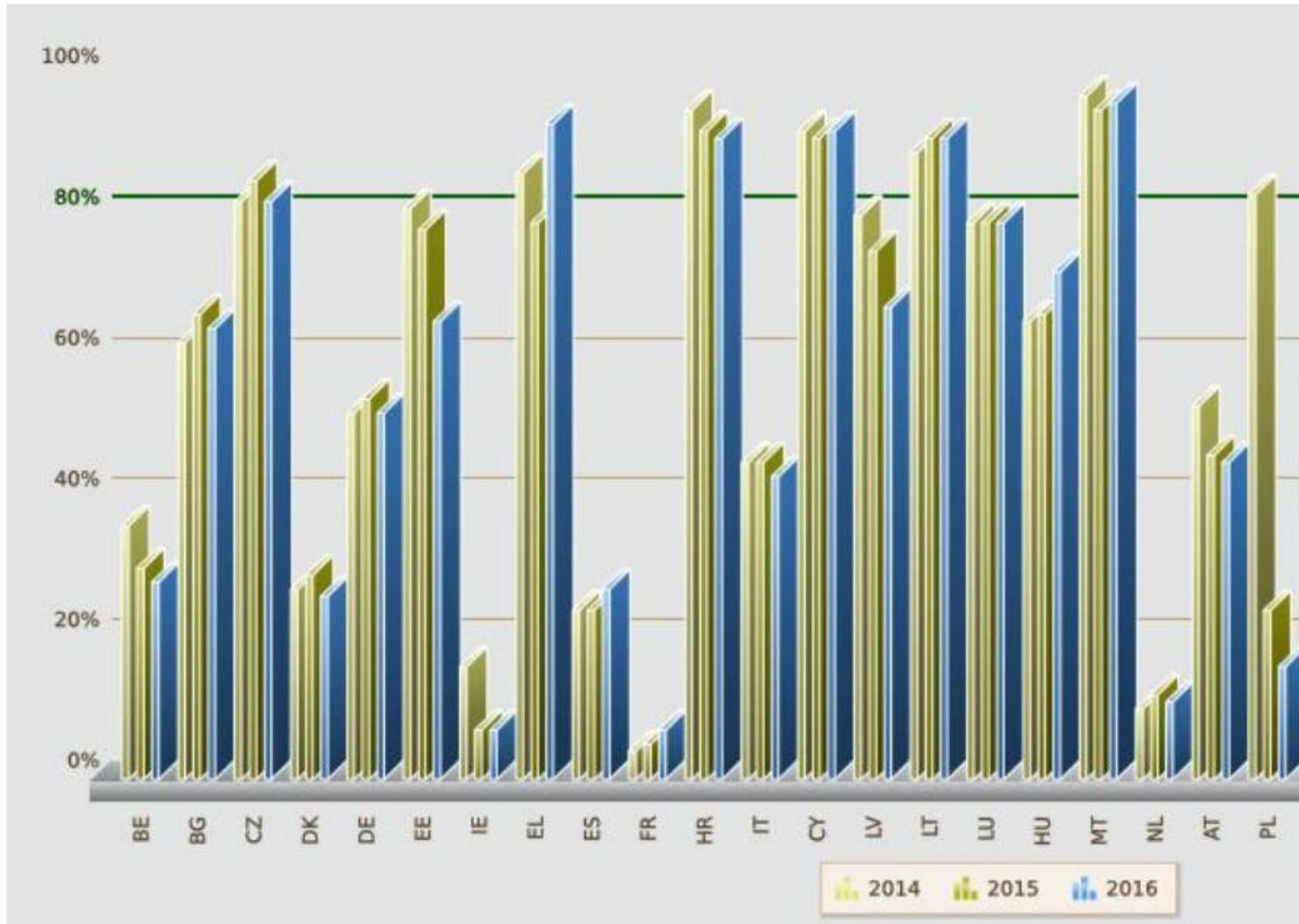
EU Commission study 2017 on the performance of Member States in public procurement I

This indicator shows how public buyers choose the companies they award contracts to. In particular, this indicator measures whether they decide based on price alone, or if they also take quality into account.

EU Commission study 2017 on the performance of Member States in public procurement II

While the choice of criteria depends on what is being purchased, over-reliance on price suggests better criteria could have been used – and thus a better purchase made. The "Award Criteria" indicator measures the proportion of procedures which were awarded only on the basis of lowest price.

EU Commission study 2017 on the performance of Member States in public procurement III



Side remark on competition

Competition based on price used to be the “holy grail” of every economist during the 90ties of the last century. The new public procurement philosophy could contribute to the ongoing mindset change. All depends – as competition lawyers know - on the relevant market.

Side remark on sustainability

Discussing sustainability issues and strategic use of public procurement is bound to fail if there is not at the same time a strategic commitment to competition based on quality.

Practical issues – margin of appreciation when evaluating bids

The Court (of Justice of the EU) has held that an evaluation committee must be able to have some leeway in carrying out its task and, thus, it may [...] structure its own work of examining and analysing the submitted tenders (judgment C-6/15 of 14th July 2016 para. 29 “Dimarso”).

Side remark on corruption I

The new EU directives as well as the Swiss public procurement regulation are aimed at fostering competition based on quality and innovation promotion by public demand. This presupposes a certain leeway / margin of appreciation for the procuring entities. This leeway can on the other side (depending on the country in question) be a governance and corruption risk.

Side remark on corruption II

Latest publication on corruption in public procurement: Elisabeth Lang/Marc Steiner, Public Procurement Regulation: Fostering Market Access and Simultaneously Preventing Corruption – A Swiss Perspective, in: The British Journal of White Collar Crime, Volume III/1, p. 13 ss. (forthcoming)

Practical issues – published weighting of the award criteria and method of evaluation

The Court (of Justice of the EU) has held that the method of evaluation used by the contracting authority may not have the effect of altering the award criteria and their relative weighting (judgment C-6/15 of 14th July 2016 para. 36 s. “Dimarso”).

Practical issues – method of evaluation I

Are the three possibilities “High – satisfactory – low” sufficiently nuanced as an evaluation method in order to assess the differences of the bids in terms of quality?

Practical issues – method of evaluation II

The evaluation matrix should serve the purpose of assessing the quality in a sufficiently differentiated way (judgment Swiss Federal Administrative Court B-4287/2017 8th February 2018).

Practical issues – documentation of the evaluation is key

Transparency ex post means that the award procedure must be verifiable. The documentation of the award is a precondition for a credible system of legal review (remedies). This is especially true if the procuring entity wants to withdraw an award and to consider another bidder instead (judgment Swiss Federal Administrative Court B-307/2017 23rd March 2016).

Practical issues – obligation to state reasons when evaluating bids

Water treatment plant:

The solution offered by the appellant is not suited to eliminate as much solid particles as needed (98 percent of the particles).

Could you please indicate why that is so? (judgment Swiss Federal Administrative Court B-743/2017 16th December 2011).

Conclusion

Competition based on quality is one of the purposes of the EU directives 2014.

Leeway or margin of appreciation doesn't mean a legal vacuum.

Thank you for your kind attention!

Questions?

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