

Switzerland

The Revised Swiss Public Procurement Law: More Quality and Sustainability

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Switzerland was the last signatory state to ratify the WTO-Government Procurement Agreement (GPA) of 2012. The implementation of the GPA was an important reform objective of the Swiss procurement revision, as was the harmonisation between the federal and cantonal procurement rules. The reform has manifested in a new Federal Act on Public Procurement (PPA), which entered into force on January 2021, and the adoption of the Intercantonal Agreement on Public Procurement (IAPP). To date, about ten of Switzerland's 26 cantons have joined the IAPP. Important paradigms of the reform are competition based on quality, and the promotion of innovation and sustainable procurement. This report will explore whether the term 'paradigm shift' captures the result of the reform in full extent. According to the government, the political intention is clear: with the reform, not only the law, but also the culture, of Swiss public procurement should change.

I. Introduction: The GPA and the Strategic Use of Public Procurement

Aside from the harmonisation between federal and cantonal laws, the implementation and ratification

of the Government Procurement Agreement 2012 (GPA 2012)¹ was the main objective of the Swiss procurement revision, which resulted in the new Federal Act on Public Procurement (PPA) that entered into force in January 2021.² In line with the World Trade Organization (WTO) idea, the GPA 2012 intends to improve the conditions for expansion and liberalisation of world trade in the context of public procurement.³ What is new in the revised GPA 2021 (compared to its 1994 predecessor) is its explicit commitment to the fight against corruption, as well as GPA's statement of conformity with the pursuit of environmental goals.⁴ The GPA includes a work programme on the 'treatment of sustainable procurement'.⁵ This work programme is a commitment to further assess the opportunities of a more resilient (and more carbon-neutral) concept of economy and regulation. This commitment towards sustainability, along with the fight against corruption, is what we understand as 'paradigm shift' in both international and Swiss public procurement law.⁶

To underline the importance of this shift in Swiss government procurement practice and regulation, let us outline what we call the three 'layers' of Swiss public procurement regulation, inspired by the

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1 See Robert D Anderson and Anna Caroline Müller, 'Keeping markets open while ensuring due flexibility for governments in a time of economic and public health crisis: the role of the WTO Agreement on Government Procurement (GPA)' (2020) *Public Procurement Law Review* 189, 191; Patrick Leduc, 'Wesentliche Merkmale des revidierten WTO-Übereinkommens über das öffentliche Beschaffungswesen (GPA)' (2017) BR/DC 5.

2 PPA Dispatch, Federal Gazette of the Swiss Confederation (BBl, 2017) 1865.

3 Ibid, 1858.

4 Ibid, 1859; see Robert D Anderson et al, 'The WTO Agreement on Government Procurement as a Tool of Sustainability and Climate Change Mitigation: Background, Textual Analysis, Policy Debate and Future Prospects' (American Society of International Law: International Economic Law Interest Group Biennial Conference, Energy, Sustainability and International Economic Law, Texas A&M University, Fort Worth, Texas, 23 September, 2022).

5 World Trade Organization, 'Agreement on Government Procurement 2012' (30 March 2012) art XXXIV:7 <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf> accessed 5 April 2023.

6 On the fight against corruption as an issue of WTO procurement law and the PPA in detail see Elisabeth Lang & Marc Steiner, 'Public Procurement Regulation: Fostering Market Access and Simultaneously Preventing Corruption – A Swiss Perspective' (2018) 3:1 *The British Journal of White Collar Crime* 14.

archeological layers found in the soil.⁷ In Switzerland, before the 1990s, protectionist practices and favouritism were widely accepted. To shield the local economy from outside competition, authorities held the view that local goods and services were allowed to cost around 5% more than non-local goods. Also, the rules on competition were not as effective in preventing cartels and collusion. Lastly, firms had no legal remedies to challenge an award decision. We call this the ‘protectionist’ layer one.

The 1990s heralded the start of layer two, which is strongly influenced by prevailing economic and neoliberal principles of that time, such as free market access and open competition to increase efficiency – concepts that have led to negative externalities and social costs for both society and the environment. During that time, the agency’s discretion to freely assess the public tender and project’s quality was seen as a risk. To circumvent this risk, priority was given to the price, which was easier to measure and compare. Even though the legislator has encouraged procurement authorities to promote competition based on quality in the previous PPA of 1994, the public administration – because it was applying a layer two mindset – did not make the best possible use of this incentive,⁸ giving much weight to the price criterion. However, unlike many other countries at that time, Swiss authorities never solely relied on price, but also considered quality aspects when awarding contracts. Yet, pursuing environmental or social goals, also referred to as ‘horizontal goals’, were considered a risk of reintroducing protectionist practices and were often dismissed as ‘extraneous to public procurement’ (*vergabefremde Aspekte*).⁹ In the 1990s, it was the government’s mission to shield public procurement from political influence and favouritism.¹⁰

After the accession to the European Economic Area failed in December 1992, Switzerland opted for a self-construed liberalisation concept (*marktwirtschaftliche Erneuerung*). In this context, Switzerland adopted two new laws: the Internal Market Act of 1995, which abolished regional barriers to the labour market, and the Cartel Act of 1995, which prohibits anticompetitive agreements and the abuse of market power by dominant firms. In 1995, Switzerland joined the WTO and ratified the first GPA of 1994. The GPA, as well as the Internal Market Act, introduced legal remedies for Swiss contrac-

tors to challenge award decisions for the first time. The involvement of the judiciary in public procurement faced fierce resistance from the authorities. While the focus on market access, competition and legal remedies were and are important improvements to public procurement law and law more generally, the market-focused regulation fell short of assessing the total cost (*Vollkostenrechnung*) of purchased works, goods and services, neglecting the environmental and social aspects of public procurement.

This shortcoming has led to the formation of the third layer: the strategic use of public procurement. Since the total revision of the Swiss Constitution in 1999, sustainable development has become one of Switzerland’s national objectives. Even though a national objective is not a personal freedom that is legally enforceable, it is more than merely aspirational and guides all other areas of law. This angle offers a more holistic view of what economic international and economic administrative law should achieve. The important values of this new procurement layer are governance, quality, sustainability and innovation. The idea is not to abandon the values gained in the 1990s, but to achieve a better balance between economic and non-economic goals. Public procurement law is now officially recognised – in accordance with the UN Sustainable Development goals (SDGs)¹¹ – as a means of achieving sustainability. Hence, economic international and administrative law are understood as an integral part of the legal system that help to achieve public val-

7 Marc Steiner, ‘The revised WTO Government Procurement Agreement and its Impact on Sustainable Procurement: Swiss and EU perspectives’ (Conference presentation, World Trade Institute Bern, 24 May 2018).

8 Marco Fetz and Marc Steiner, ‘Öffentliches Beschaffungsrecht des Bundes’ in Thomas Cottier and Matthias Oesch (eds), *Allgemeines Aussenwirtschafts- und Binnenmarktrecht* (3rd edn, Helbing & Lichtenhahn 2020) 638 (n 143).

9 See J Wiedemann in Hans-Peter Kulartz et al (eds), *Kommentar zum GWB-Vergaberecht* (4th edn, Werner 2016) §97 GWB (n 92).

10 On such a ‘purity principle’ see Sue Arrowsmith, *Government Procurement in the WTO* (2003) 251 s, 331 s and 343 s. For the Swiss context, see Steiner, *Nachhaltige öffentliche Beschaffung – ein Blick auf das Vergaberecht des Bundes und die Perspektiven* in Jean-Baptiste Zufferey and Hubert Stöckli (eds), *Aktuelles Vergaberecht* (Schulthess 2014), 150 et seq.

11 SDG 12.7, see Désirée U. Klingler and Steven L. Schooner, ‘Promoting Sustainable Public Procurement Through Economic Policy Tools: From Moral Suasion to Nudging’ (2021) 4 *European Journal on Public Procurement Markets* 68-80.

ues established at the national and international level.

The GPA 1994, particularly the GPA 2012, is aimed at setting ‘minimum standards’ for different national policy systems, and is therefore formulated in an open way, with low regulatory density.¹² Hence, the WTO public procurement law aims to work both with and without energy transition. This liberal approach is necessary to reunite all parties under one agreement and explains the GPA’s clarifying words on the ‘admissibility’, rather than the prescription, of green public procurement (GPP).¹³ The GPA’s openness is also reflected in its rules on awarding contracts: both the GPA 1994 and the GPA 2012 allow agencies to award contracts either to the lowest bid or to the most advantageous tender.¹⁴ For sustainable procurement, this flexibility is both a blessing and a curse. It is a blessing because it allows states to promote GPP. It might be seen as a ‘curse’ by not requiring countries to take steps to promote sustainability. A good regulatory example of procurement regulation layer three are the EU public procurement directives, especially Directive 2014/24/EU. The Directive promotes the ‘strategic use of public procurement’

by referring to the promotion of sustainability goals as enshrined in the Strategy ‘Europa 2020’.¹⁵ Good governance and combatting corruption form part of the third (‘archaeological’) regulation layer and are explicitly addressed in the GPA and the Swiss PPA/IAPP adopted in 2019. Transparency and legal protection are no longer solely serving the purposes of free market access and open competition but also aim to promote good governance.¹⁶

The change in public procurement regulation towards more governance and sustainability is particularly noticeable and pronounced in the EU. As expressed in the legislative materials of the Swiss Federal Council on the revised Swiss PPA, the Directive 2014/24/EU is understood as enabling contracting authorities to make better use of public procurement to promote shared societal goals and account for ecological and social criteria.¹⁷ This new emphasis, especially in EU public procurement law, not only applies to sustainability goals, but also shifts the emphasis away from price-based competition and toward quality-based competition, leading to a more comprehensive use of award criteria.¹⁸ Similarly, the Swiss Federal Council finds that the principle of sustainability, especially with a view on ‘international developments’, should be anchored more firmly in Swiss law.¹⁹ For that reason, the new PPA puts particular emphasis on measures against collusion and corruption, and explicitly recognises sustainable procurement as a new goal.²⁰

II. Harmonisation of Federal and Sub-Federal Procurement Laws

15 November 2019 marks a historic milestone in Swiss public procurement law: the day that the cantons unanimously approved the Intercantonal Agreement on Public Procurement (IAPP) after years of negotiations.²¹ This Intercantonal agreement is of great political and economic importance because first, the federal government does not have the power to regulate procurement at the regional or local levels and second, an estimated 80% of the total procurement spending originates from cantonal and municipal procurements. Along with the implementation of the GPA 2012, the harmonisation of federal and sub-federal laws was one of the main goals of the Swiss public procurement reform.²² The goal of this parallel legislation to federal procure-

12 FAC Decisions BVGE 2018 IV/6 *Konsortium A-B v Swissgrid AG* [2018] consid 3.6.1 and BVGE 2017 IV/4 *Publicom AG v Bundesamt für Kommunikation* [2016] consid 3.5.

13 Marc Steiner, ‘The WTO Government Procurement Agreement: Assessing the Scope for Green Procurement’ (2015) *Biores*.

14 See Peter Trepte, ‘The Agreement on Government Procurement’ in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (vol 1, Springer 2005) 1148.

15 Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC recitals 2 and 47.

16 Fetz and Steiner (n 9), (n 44), (n 46a), (n 48) and (n 138).

17 PPA Dispatch (n 3) 1881.

18 ‘The new criteria will put an end to the dictatorship of the lowest price and once again make quality the central issue’. See ‘New EU-procurement rules to ensure better quality and value for money’ (Press release, European Parliament News, 15 January 2014) <<https://www.europarl.europa.eu/news/en/press-room/20140110IPR32386/new-eu-procurement-rules-to-ensure-better-quality-and-value-for-money>> accessed 4 April 2023; Abby Semple in Roberto Caranta and Albert Sanchez-Graells (eds) *European Public Procurement – Commentary on Directive 2014/24/EU* (Edward Elgar 2021) (n 1) to art 67; Lars Hettich et al, *Das neue Vergaberecht: Eine systematische Darstellung der neuen EU-Vergaberichtlinien* (Reguvis Fachmedien 2014) 64.

19 PPA Dispatch (n 3) 1884.

20 *Ibid*, 1867.

21 Intercantonal Organ for Public Procurement (InöB), Press Release, 18 November 2019.

22 PPA Dispatch (n 3) 1865, 1875.

ment law was to ‘align the cantonal decrees as far as possible and reasonable’ to avoid conflicting results.²³

In line with Swiss federalism, the approach of having two laws with nearly identical texts for the federal and the cantonal/municipal level has proven to be successful. Yet, a few issues were controversially discussed. One issue was the availability of legal remedies against procurement decisions outside the coverage of the GPA, especially below the relevant thresholds.²⁴ The other controversial topic was whether procurement authorities were allowed to use price negotiations (*Abgebotsrunden*) to lower the price.²⁵ While the previous federal law of 1994 allowed price negotiations, they are now prohibited at all government levels.²⁶ After these issues have been resolved, the new IAPP is largely aligned with the federal PPA of 2019, with a few deviations.²⁷

Two of those differences between the federal and cantonal procurement laws are noteworthy. In line with the federal Internal Market Act, cantons will continue to apply the place-of-origin principle (*Herkunftsordprinzip*) for domestic contracts, eg, requiring contractors to comply with the labour laws of their canton of origin, whereas the federal government now follows the place-of-performance principle (*Leistungsortsprinzip*).²⁸ The second difference concerns the award criteria. Article 29 of the revised PPA includes two new award criteria that can be considered by procurement officials when awarding a federal contract: 1) reliability of the price (*Verlässlichkeit des Preises*) and 2) the ‘different price levels of countries in which the service is performed’. These two award criteria have not been adopted in the IAPP. The ‘reliability of the price’ has raised criticism because it would – following the idea of relevant industry stakeholders²⁹ – reward the average or median price, decreasing the importance of the lowest price. To consider countries’ different price levels aims at shielding the Swiss economy from more competitive offers from abroad, in line with the protectionist rationale of layer one. This criterion constitutes a domestic preference requirement (similar to the Buy American rules), which is contrary to the GPA and the principle of non-discrimination.³⁰ To be ‘in compliance with Switzerland’s international obligations’ – the legal text was amended at the end of the legislative process so that the new award criterion can only be applied outside of the GPA’s scope, eg, for contracts below the thresholds.

III. The New Focus on Sustainability and Quality-Based Competition

1. Economic Efficiency and Sustainability as Part of the Same Concept?

The new Swiss procurement law still relies on the traditional procurement objectives: the efficient use of public funds, equal treatment and non-discrimination of suppliers, as well as the promotion of competition and transparency of procedures. But it also introduced a new principle: sustainability, which is mentioned together with the efficient use of public resources. The new combined goal aims to ‘promote the efficient [*wirtschaftlich*] use of public resources in a manner that is economically [*volkswirtschaftlich*], ecologically and socially sustainable’.³¹ This legislative choice tells us that the principle of efficiency is understood broadly in Swiss public procurement law. Departing from this premise, the new efficiency principle is to be understood as a relation between ends and means.³² It allows the pursuit of policy goals, which was not envisioned in a ‘layer two’ regulation. The concept aims to achieve an optimal relationship between economic and non-economic aspects when awarding a contract,³³ not limiting procuring agencies’ discretion or mandating them to procure as cheaply as possible. Hence, the broader efficiency principle would be violated if a low-quality product

23 Ibid, 1867.

24 Ibid, 1875; Explanatory Report on the Draft-IAPP (18 September 2014) 9.

25 Dispatch PPA (n 3) 1875; Explanatory Report (n 26) 9.

26 Swiss Public Procurement Act (PPA)/Intercantonal Agreement on Public Procurement (IAPP) art 11(d).

27 For the consultation among the cantons after the adoption of the PPA, see the IAPP model message of 15 November 2019, 22 <<https://bit.ly/3mmO9jV>> accessed 11 April 2023.

28 InöB (n 23); see also IAPP, Explanatory Notes on art 12 ss 1, 44, according to which the principle of the place of origin may be restricted in favour of the place of performance principle in individual cases.

29 Mario Marti, *Der Paradigmenwechsel im öffentlichen Beschaffungsrecht* (Stämpfli Verlag 2022) 54.

30 Désirée U. Klingler ‘Measuring what Matters in Public Procurement Law: Efficiency, Quality and More’ (2020) 21(3) *Journal of Management Policy and Practice* 75.

31 PPA/IAPP, art 2(a).

32 On the definition based on the Swiss PPA, see Fetz and Steiner (n 9) 581 s (n 46), and on the ends and means discussion in general Klingler, ‘Measuring what Matters’ (n 33) 75.

33 Fetz and Steiner (n 9), (n 48).

was purchased for a high price.³⁴, thus failing to strike an optimal balance between quality and price. As the legislative materials on the revised PPA make clear, the price must always be included as an award criterion.³⁵ At the same time, the Swiss Federal Administrative Court (FAC) – which hears challenges against federal awards – held that no claimant can demand the purchase of the ‘right’ product based on the principle of efficiency but that it is in the contracting authorities’ discretion to determine the relevant requirements.³⁶

As mentioned earlier, the revised PPA aims to ensure the ‘efficient use of public funds in a manner that is economically, ecologically and socially sustainable’.³⁷ While economic efficiency is a term used in microeconomics, referring to the optimal allocation of resources, the term ‘economically’ is understood as ‘national economy’ (*Volkswirtschaft*), which forms part of macroeconomics. This macroeconomic dimension of public procurement law was suggested and introduced by the Committee for Economic Affairs and Taxation of the Swiss National Council (WAK-N). Along those lines, the revised PPA not only aims to promote intensive, but also fair and effec-

tive, competition.³⁸ One implication of the macroeconomic dimension is that the government is not solely interested in low prices in the short term, but rather in a functioning supplier market and reasonable prices in the long term. For example, in concentrated markets, the Swiss procurement agencies can divide large contracts into lots and limit the number of lots that can be awarded to the same company. While this practice might not yield the most economically advantageous contract (or lowest price) in the short run,³⁹ it allows increased competition in an otherwise concentrated market and ensures that dominant firms cannot monopolise public demand and drive competitors out of the market.⁴⁰ In this case, the benefits of long-term competition outweigh the benefits of short-term efficiency, which is a typical conflict of interest between procurement goals.⁴¹ It is important to note that in Swiss procurement law, there is no hierarchy between the different procurement goals. The Federal Council stated that all goals deserve equal attention and that conflicting goals must be resolved by balancing the different interests against each other.⁴²

As mentioned earlier, the new catalogue of procurement goals is based on the concept that efficiency and sustainability are not irreconcilable, but are complements, especially when overlapping in the ‘total cost of ownership’ (TCO) approach. The TCO approach sums up all the costs that the government, and ultimately the taxpayers, incur when purchasing new goods, works or services over the entire lifecycle of the product.⁴³ The goal of TCO is to get closer to full costs accounting of a product (*Vollkostenrechnung*), which intends to reduce social, environmental and long-term economic costs, including negative externalities. The explanatory notes to IAPP Article 2 caution that this broader efficiency principle entails the risk that ‘protectionist practices may find their way into award practices’.⁴⁴ These are valid concerns and need to be addressed with safeguards, such as contracting authorities documenting and giving reasons for their award decisions.⁴⁵

2. Sustainable Procurement and the Constitution’s Objectives

In the interest of coherence, the new sustainability goal in Swiss public procurement law needs to be interpreted in line with the goals of the Swiss Consti-

34 FAC Decision B-4086/2018 X AG v *Schweizerische Bundesbahnen* [2019] consid 4.4; see also Hans Herbert von Arnim, *Wirtschaftlichkeit als Rechtsprinzip* (Duncker & Humblot 1988) 36.

35 PPA Dispatch (n 3) 1884.

36 Interim decision of FAC B-822/2010 A AG v *Eidgenössische Technische Hochschule Zürich* [2010] consid 4.2, ref in PPA Dispatch (n 3) 1884.

37 PPA/IAPP (n 28) art 2(a).

38 Fair means, for instance, in compliance with the participation conditions; *ibid* art 26.

39 FAC Decision BVGE 2018 IV/6 (n 14).

40 In this context, particular attention should be paid to framework agreements. See FAC Decision BVGE 2021 IV/6 *Google Commerce Ltd v Bundesamt für Bauten und Logistik* consid 5.4.3.

41 Cf on the inevitability of conflicts of interests, FAC Decisions BVGE 2018 IV/6 (n 14) consid 3.5 and BVGE 2017 IV/4 (n 14) consid 4.7.3.

42 PPA Dispatch PPA (n 3) 1884; see also Steiner, ‘Die Berücksichtigung sozialer Aspekte im Rahmen der öffentlichen Beschaffung’ Working Paper (4th version, 2017) 28.

43 Read more about the macroeconomic consequences of public procurement law in Klingler, ‘Government Purchasing During COVID-19 and Recessions: How Expansionary Legal Principles Can Stimulate the Economy’ (2020) 50(1) *Public Contract Law Journal* 3.

44 IAPP Sample Dispatch, 25.

45 See about transparency as a safeguard PPA/IAPP (n 28) arts 40 and 51; FAC Decision B-307/2016 X AG v *Eidgenössische Technische Hochschule Zürich* [2016]; Martin Beyeler, *Ziele und Instrumente des Vergaberechts* (Schulthess 2008) 21; Klingler, ‘Government Purchasing’ (n 46) 25.

tution. Article 2 of the Swiss Constitution not only promotes sustainable development but also social aspects, such as common welfare and cultural diversity. Similarly, the legislative materials of the revised Swiss PPA state that sustainability should be understood broadly and includes ‘socially responsible production’.⁴⁶ Hence, the Swiss Federal Council concluded that the award criterion of sustainability is to be understood in such a way that contracting authorities can reward or prefer the fair trade characteristics of a product.⁴⁷ In purchasing environmentally and socially sustainable goods, the Swiss government acts as a role model for individuals and private firms.⁴⁸ According to the Corporate Social Responsibility (CSR) Report of the Swiss Federal Office for Spatial Development (ARE), federal, cantonal and municipal authorities are constitutionally obligated to exercise social corporate responsibility when purchasing goods, works and services.⁴⁹ Hence, the objectives of economic constitutional and administrative law and the Constitution’s national objectives must be coordinated in the sense of ‘practical concordance’, which means that the Constitution’s guarantees or values (or similarly legislative goals) need to be balanced against each other in a way that allows for a suitable compromise.⁵⁰

3. The Double Role of Transparency – To Promote Competition and Prevent Corruption

The principle of transparency in Swiss public procurement law, as in many other procurement systems, is meant to increase the transparency of the procurement procedures. In Swiss procurement law, transparency takes a double role: it not only helps to promote competition but also to prevent corruption. While *ex ante* transparency focuses on making transparent the ‘rules of the game’, ie, the procurement procedure, which guarantees market access and promotes competition, *ex post* transparency, as traditionally understood in Swiss procurement law, focuses on the transparency of the agency’s decision-making process. It has been argued that *ex post* transparency, in conjunction with the rules on the agency’s impartiality, forms part of a broader ‘good governance’ concept.⁵¹

Preventing corruption forms part of the revised GPA 2012 and prominently features in the revised

PPA in the form of sanctions against corrupt behaviour. To promote effective and fair competition, the purpose article specifically mentions ‘measures against corruption’.⁵² In a 2016 decision, the FAC held that *ex post* transparency, most importantly the documentation obligation, serves as a precondition for effective legal protection.⁵³ Similarly, the GPA stresses the importance of transparency and integrity to achieve its goal of greater trade liberalisation and non-discrimination.⁵⁴ Whether anticorruption in the revised Swiss PPA is viewed as a means to achieve competition or as a separate goal, we can agree that market liberalisation and competition in the public sector requires a minimum of governance and integrity to avoid government failure.

4. Focus on Competition Based on Quality, Rather Than Price

According to the former law, the contract had to be awarded to the ‘most economically advantageous tender’ (MEAT; PPA 1994 Article 21, Section 1). The revised law now asks the contracting authority to award the contract to the ‘most advantageous tender’ (PPA 2019, Article 41), omitting the word ‘economically’. Even though the MEAT standard allowed for quality considerations,⁵⁵ and despite its similar wording, this change heralds a shift in Swiss public procurement culture. This reading is supported by the federal Parliament’s decision to adopt a new wording despite the pushback from the Cantonal Conference of Construction Ministries (BPUK), which feared that a new text could render previous case law of the Supreme Court irrelevant. Hence, the new

46 PPA Dispatch (n 3) 1885.

47 Ibid, 1943; see about the previous law Martin Beyeler, ‘Kaffee: Bio und Fair Trade’ (2012) BR/DC 106 and Steiner, *Aktuelles Vergaberecht* (n 11) 149, 170.

48 PPA Dispatch (n 3) 1885.

49 See CSR Report on the Federal Government as Procurer of 21 March 2018 <<https://bit.ly/2z2RYBq>> accessed 11 April 2023.

50 BGE 139 I 16 E. 4.2.

51 Fetz/Steiner (n 9), (n 46a) and (n 48) referring to PPA/IAPP art 11(a).

52 PPA art 2(d).

53 Decision of FAC B-307/2016 (n 48), consid 4.5.1; Lang and Steiner (n 7) 19.

54 WTO, GPA 2012 (n 6) Preamble.

55 See Steiner, *Aktuelles Vergaberecht* (n 11) 165.

wording is to be understood as an advocate for change: the procurement agencies should make full use of their discretion to promote competition based on quality. Hence, it can be argued that the Swiss procurement reform was less about regulatory changes than about a change of procurement culture. The two strategic organs in Swiss federal procurement – the BKB and the KBOB – confirm this reading in the Procurement Strategy of the Federal Government⁵⁶ and the fact sheet on the ‘New Procurement Culture.’⁵⁷ This new procurement culture goes beyond the federal level: the Swiss confederation, cantons and municipalities have developed guidelines to guarantee ‘the consistent enforcement’ of the new procurement principles across all government levels.⁵⁸

One of the intended goals of this new procurement culture – according to the Swiss Parliament and national construction industry – is to provide procurement officials and agencies with incentive structures to equate quality with price. To achieve this goal, pro-

curement officials when selecting bids should not only emphasize qualitative aspects (PPA/IAPP Article 29), but should also enforce the rules on and exclude abnormally low tenders (PPA/IAPP Article 38 Section 3). Fostering competition based on quality is reflected in a leading decision of the Swiss Federal Supreme Court (SC), which allows contracting authorities to both consider the experience and qualification of key personnel as part of both — the selection and award criteria (*Mehreignung*).⁵⁹ In its decisions on the methods used to evaluate quality criteria, the FAC reaffirms the importance of quality-based competition by ensuring that the effective quality weighting does not differ from the originally advertised quality weighting.⁶⁰ With the new standard of the ‘most advantageous tender’, the Swiss legislator seems to put the goal to foster competition based on quality on a *de facto* equal footing with the procurement goals enshrined in PPA, Article 2.

IV. Conclusion

Swiss public procurement reform has introduced significant legal changes to the revised Swiss PPA, such as the adjusted award standard of the ‘most advantageous tender’; the updated goal of not only effective, but also fair competition; the mentioning of anticorruption measures and the goal of spending public resources in an environmentally and socially sustainable manner. Whether the new law in itself can be seen as a ‘paradigm shift’ lies in the eyes of the beholder.⁶¹ But the authors argue that if the change in procurement culture, enabled by the new law, will be implemented in practice, the term ‘paradigm shift’ is no overstatement.

56 Koordinationskonferenz der Bau- und Liegenschaftsorgane der öffentlichen Bauherren (KBOB), ‘Beschaffungsstrategie der Bundesverwaltung’ (26 November 2020) <<https://www.kbob.admin.ch/kbob/de/home/themen-leistungen/revidiertes-beschaffungsrecht/beschaffungsstrategie.html>> accessed 9 March 2023.

57 Beschaffungskonferenz des Bundes (BKB), ‘Faktenblatt «Neue Vergabekultur»’ (2nd version, 24 January 2022) <<https://www.bkb.admin.ch/bkb/de/home/bkb/empfehlungen.html>> accessed 9 March 2023.

58 TRIAS, ‘Leitfaden für öffentliche Beschaffungen’ <<https://www.trias.swiss>> accessed 9 March 2023.

59 SC Decision BGE 139 II 489 AG v *Y-Verband* [2013].

60 FAC Decisions BVGE 2018 IV/2 X AG v *Schweizerische Bundesbahnen* [2018] and B-1185/2020 *Energie-Agentur der Wirtschaft (EnAW) v Bundesamt für Bauten und Logistik* [2020].

61 Critical on this: Hans Rudolf Trüeb, ‘Einleitung’ in Trüeb (ed), *Handkommentar zum Schweizerischen Beschaffungsrecht* (Schulthess 2020) XIV.