

Cross-sectional audit of the implementation of Articles 44 and 45 of the Public Procurement Act

Federal Office for Buildings and Logistics

Key facts

Certain tenderers repeatedly prove to be problematic contractual partners for the Federal Administration. The revised Public Procurement Act (PPA)¹ has made it possible to take action against such tenderers. The corresponding Articles 44 and 45 came into force on 1 January 2021. The Swiss Federal Audit Office (SFAO) examined how various federal procurement offices are implementing this legislation.

The audit results show that there are limits to the extent to which federal contracting authorities can take action against problematic tenderers in certain circumstances. At present, only a few natural persons and no legal entities (companies) are excluded from future public tenders.

Legislation only permits the listing of errant tenderers for a few offences

Article 44 of the PPA divides cases into two groups. Firstly, those in which the contracting authorities of a procurement can exclude a tenderer from an ongoing award procedure or revoke an award that has already been made. Secondly, those in which future public contracts can be blocked for up to five years (see Art. 45 of the PPA). The blocked tenderers are recorded on a non-public list maintained by the office of the Federal Procurement Conference (FPC) (FPC sanctions list). The distinction between these two groups is key. For example, anyone who has failed to execute previous contracts correctly belongs to the first group and can be excluded from a procedure under certain conditions. However, a block from future contracts is possible only in the case of more serious offences. For example, there must be a legally binding conviction for a felony.

The inclusion of tenderers on the FPC sanctions list can remain without consequences

The FPC sanctions list is still rarely used as a tool for imposing sanctions. A closer look at Article 45 of the PPA shows restrictions in when information from the sanctions list is exchanged. This results in the sanction having a limited effect. For example, the exchange of information within the central and decentralised Federal Administration, as well as within enterprises affiliated with the Confederation, is permitted only in cases of corruption and felonies. In all other cases, the block on contracts applies solely within the same legal entity, for example within the central Federal Administration or the respective independent unit. Therefore, the sanctions list is only effective to a limited extent.

¹ Federal Act of 21 June 2019 on Public Procurement (PPA), SR 172.056.1.

The benefits of excluding tenderers are often not recognised

Contracting authorities tend to have little interest in excluding a tenderer due to the incorrect execution of previous contracts. The organisations interviewed for the audit stated that poor performance could often not be blamed on an entire organisation, but rather on individuals. In numerous federal tenders, there is a struggle to obtain bids. An additional reduction in the size of the market must be avoided at all costs.

In future, a rethink will be needed – away from exclusion and towards supplier management and continuous evaluation. Supplier evaluation is part of supplier management. This is currently being developed by individual federal offices, but there is no standardised procedure across the procurement offices.

The legal basis for nationwide and systematically integrated supplier management, as required by the federal procurement strategy, is inadequate. There is currently no legal basis either for the systematic exchange of information between federal contracting authorities or for responsibilities in the planning and implementation of this complex interdepartmental task.

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