

Sustainable Procurement

Recommendations for the federal procurement offices



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I. PREFACE



Dr. Gustave E. Marchand

President of the Swiss Federal Procurement Conference

In the last couple of years the term «sustainability» has continuously gained on importance. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own need.

The Federal Constitution of 18 April 1999 makes sustainable development a long-term objective of the national policy: The Swiss Confederation strives to promote sustainable development and to secure the long-term preservation of natural resources and a just and peaceful international order. In order to implement its constitutional task of sustainable development the federal government has adopted the «Sustainable Development Strategy». The federal government should set an example in its own consumer behaviour by respecting social, economic, health and environmental factors in meeting its needs for goods, services and construction works. Therefore it needs to procure goods, services and construction works meeting a high standard of social, economic and environmental demands throughout their entire lifetime.

The aim of these recommendations is to show the federal procurement offices how to implement the Federal Council's objective of sustainable procurement practice, taking account of the stated procurement principles (equality of treatment, transparency, competition, and economical use of public funds). The recommendations provide guidance on how to address ecological and social aspects in a procurement process, without losing sight of the objective of economic efficiency.

II. OVERVIEW OF RECOMMENDATIONS

Recommendations for implementing sustainable procurement practice

Environmental factors

- **Mandatory participation conditions:** There is no legal basis for making environmental legislation a mandatory participation condition, so this is not permissible. However, it is possible to lay down eco-specific requirements on a contractual basis for the period of contract performance and to protect these by way of a penalty clause.
- **Technical specifications:** As federal procurement offices, you are free to define the requirements to be met by the object of procurement. You have the opportunity to make your procurement “greener” by setting technical specifications, incorporating certain minimum environmental requirements in the service description.
- **Suitability criteria:** For eco-relevant procurements, include some environmental suitability criteria (e.g. specific ecological know-how that can be backed up with the relevant certificates or documentation).
- **Award criteria:** If possible, include also some award criteria that allow for green procurement (e.g. environmental impact, emissions, energy efficiency).

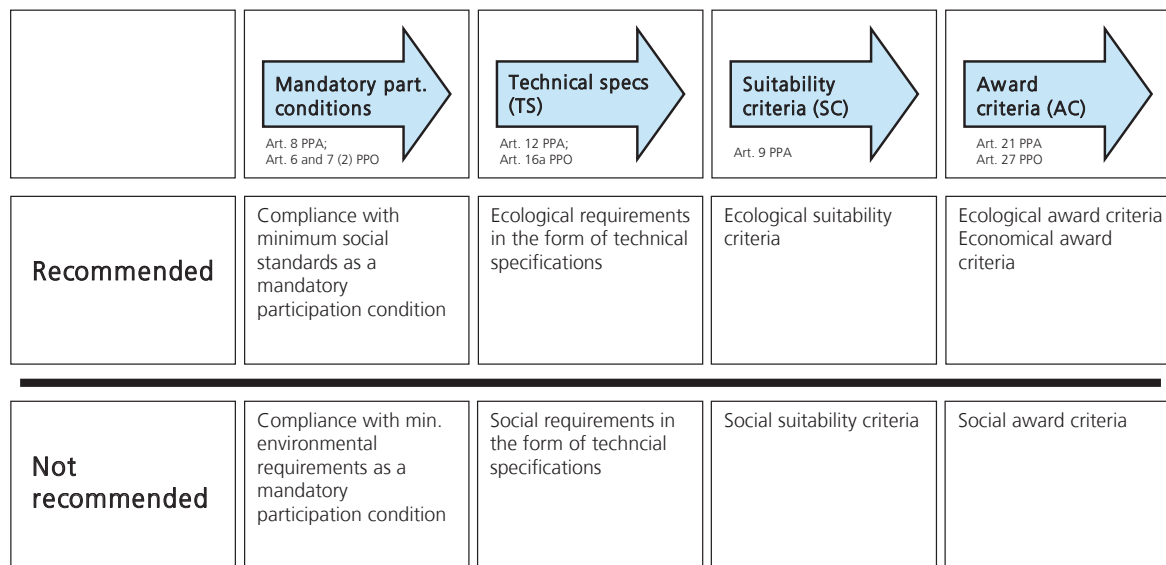
Social factors

- **Mandatory participation conditions:** You can include social aspects in the procurement process by specifying mandatory participation conditions. State that bidders performing their service in Switzerland must comply with the applicable health and safety regulations for Switzerland at the place of performance and guarantee equal pay for men and women (Art. 8 Public Procurement Act). Bidders performing their service abroad must comply with at least the ILO Core Conventions (Art. 7 (2) Public Procurement Ordinance; see below, Section 2.1.3, p. 10). Make sure that bidders realise they are also liable for their subcontractors and suppliers; these are also included when verifying compliance with the minimum social standards. When verifying compliance with the ILO Core Conventions, proceed as set out in the recommendation and, for the potential contractor, check that its key subcontractors and suppliers meet the minimum social standards.
- **Suitability and award criteria:** Be careful when using social aspects as award criteria: in general, it is not possible to create sufficient relevance to the object of procurement and so, in most cases, the criteria are irrelevant to the service provided.

Economic factors

- **Competition:** Create a competitive situation and award the contract under competitive conditions.
- **Award criteria:** Do not simply look for the cheapest option: look for good value for money. Apart from monetary criteria, define also some non-monetary criteria, and award the contract to the most economically advantageous tender that best fulfils the award criteria. For the monetary criteria, look beyond the purchase price: define all expected lifetime costs as an award criterion.

The diagram below outlines how to what extent to include environmental and social aspects in a procurement process in the form of mandatory participation conditions, technical specifications, and suitability or award criteria.



III. NOTES ON THE RECOMMENDATIONS

1. Taking environmental aspects into account

In the following section, we first look at whether compliance with local environmental legislation can be formulated as a mandatory participation condition (1.1). We then present some of the ways the procuring entity can include environmental concerns in the technical specifications (1.2), in the suitability criteria (1.3) as well as the award criteria (1.4).

1.1 Environmental aspects as mandatory participation conditions

The Public Procurement Act (PPA; SR 172.056.1) gives a non-exhaustive list in Art. 11 of the main grounds on which the procuring entity may revoke the contract or eliminate a bidder from the process. A breach of national environmental legislation is not included in this list.

Therefore, according to current federal procurement law, it is probably not allowed to define compliance with local environmental legislation as a mandatory participation condition and to exclude a bidder from the procurement process on this basis. There has not yet been a court ruling on this issue. However, the client can still set environmental requirements on a contractual basis for the period of contract performance and protect these by way of a penalty clause.

1.2 Environmental aspects as technical specifications

In principle, the procuring entity is free to decide on what it needs to best fulfil its requirements and how it wishes to procure this. Such wide-ranging discretionary freedom in defining the object of procurement may also be used to help promote environmental concerns.

Competition: In setting these environmental criteria, bear in mind that any bidder whose tender fails to meet the technical specifications (TS) is eliminated from the process. However, where a tender does not fulfil or only partially fulfils certain ecological award criteria, the bidder will be given a lower rating but is not actually eliminated. Therefore, ecological procurement requirements that are desirable but not absolutely necessary and thus restrictive on competition should be formulated not as TS but as award criteria (cf. comments in 1.4 below on the combination of eco-relevant award criteria and TS).

Method of production: TS may refer to the product itself or its desired effect when being used. The manner of production may be stipulated by way of TS provided that the means of production bears some relation to the object of procurement. The method of production does not necessarily have to be apparent in the end-product; however, it must at least modify the value and the nature of the product.

- **e.g.:** Electricity generated from renewable energy sources, organic foodstuffs or timber from sustainable forests, printed matter from low-VOC printing processes
- **but not:** A requirement that the employees of a bidder selling office materials have to wear organic cotton T-shirts at work, or that only organic food can be purchased in the staff canteen.

Environmental labels: TS must not constitute an unnecessary trade barrier. Therefore, whenever possible, international standards or national standards implementing international standards should be used (Art. 12 (2) PPA). Environmental labels are useful provided that they do not discriminate, are formulated in a clear and scientific manner and have been developed with the participation of all relevant players. It is important for a tender to meet the requirements underlying a label. Therefore, labels should not be made a condition but merely used as an indication for meeting the TS. Equivalent tenders without any labels must also be permitted.

Functional invitation to tender: Instead of the conventional tendering method with precisely defined specifications, it is possible to also specify only the objective of procurement on the basis of performance or functional criteria (Art. 16a (2) Public Procurement Ordinance of 11 December 1995 [PPO; SR 172.056.11]). Such a functional approach to the invitation to tender gives the bidder greater flexibility and more of an incentive to come up with innovative solutions. In the end, the procuring entity may thus obtain more potential solutions, specifically with respect to new and underdeveloped markets (e.g. in environmental technologies). One drawback of functional tendering, however, is that the tenders may differ quite substantially from each other, making it more difficult to compare them.

1.3 Environmental aspects as suitability criteria

Unlike technical specifications and award criteria, suitability criteria (SC) refer to the bidder and not the object of procurement. These are used to ensure that a bidder is financially, economically and technically capable of fulfilling the contract as required. Therefore, a bidder can only be asked to meet SC that are actually required for performing the contract. A bidder who does not fulfil these SC is eliminated from the process.

The actual object of procurement is the decisive factor in determining whether an environmental SC is permissible. Environmental SC can only be stipulated for procurements of particular relevance to environmental concerns (particularly services), for which the bidder is not required to have any special technical skills or know-how in ecological matters. In practice, the corresponding references play an important role. Bidders cannot be required to fulfil additional obligations that have no reference to the object of procurement.

- **e.g.:** Certification as a specialist disposal company for contracts in waste management.
- **but not:** Environmental management systems as organisation-specific tools for improving a company's overall environmental performance; normally, these have no direct reference to the object of procurement and therefore should not be stipulated as SC.

1.4 Environmental aspects as award criteria

The procuring entity has to select the “most economically advantageous tender” (Art. 21 PPA). This is determined on the basis of several predefined weighted criteria. The award criteria (AC) may be specified in monetary terms but may also be non-monetary in nature.

Environmental impact: Art. 21 PPA explicitly mentions environmental impact as an example of an AC. This criterion, though non-monetary in nature, may have repercussions on costs. An ecologically motivated purchase with a higher procurement price may end up being the cheapest solution in the long run, e.g. if it costs less to operate and maintain (e.g. energy-saving bulbs; cf. the AC “Life-cycle costs” under Section 3, p. 17).

Sustainability: Furthermore, the procuring entity may use sustainability as an AC (Art. 27 (2) PPO). This includes certain aspects that enable the procuring entity to purchase in accordance with high economic, social and ecological standards. However, sustainability as an AC – like all other ACs – must bear a direct relation to the object of procurement, must be defined with sufficient clarity and may not be discriminatory.

Combination of AC and TS: Environmental AC and TS may complement each other. For instance, the minimum level with regard to the energy efficiency of vehicles may be stipulated by means of TS as a precondition for each tender. Tenders involving vehicles that are clearly more energy-efficient can be “rewarded” on the basis of environmental AC with extra points in the award process.

Reference to contract & non-discrimination: Environmental AC must also bear some reference to the object of procurement and may not be used as a pretext for discriminating against non-local bidders. Therefore, for instance, different transport routes may only be taken as AC in well-founded, exceptional cases.

- **e.g.:** The transport route may be used as an AC, exceptionally, if the transportation process forms an important element of performance and does not play merely an incidental or one-off role (Federal Supreme Court ruling 2P.342/1999 of 31 May 2000 with reference to weekly waste collection) or if the transport route seems to be a justifiable criterion in objective terms (e.g. for emergency stand-by services with a short response time).

1.5 Further information

The following websites provide concrete illustrative material, contact points and additional links to a wealth of further information:

- **Links:** Federal Office for the Environment (FOEN): Integrated Product Policy: Green public purchasing: <http://www.bafu.admin.ch/produkte/02076/index.html?lang=en>

Federal Office for Buildings and Logistics (FOBL): KBOB publications / Recommendations for sustainable building: <http://www.bbl.admin.ch/kbob/00493/00495/index.html?lang=de>

Federal Office for Buildings and Logistics (FOBL): information from the FPC on sustainable procurement: <http://www.bbl.admin.ch/bkb/00389/02588/index.html?lang=de>

2. Taking social aspects into account

Social aspects are mainly included in the award process in the form of mandatory participation conditions. Unlike the environmental aspects, social aspects do have a legal basis for exclusion if a bidder fails to adhere to the minimum social standards. These serve to defend social standards, maintain peaceful industrial relations and prevent any unwanted repercussions in terms of social policy. However, a bidder who bases its price advantage on a violation of the minimum social standards should not be given preference over another in compliance with them. In particular, the recommendations clarify how a test of compliance with the International Labour Organisation's eight Core Conventions (ILO Core Conventions) is included in the procurement process (2.1) and look at whether social concerns can be taken into account as technical specifications or as suitability and award criteria (2.2).

2.1 Social aspects as mandatory participation conditions

2.1.1 Minimum social standards dependent on the place of performance

Federal procurement law provides for different minimum social standards, depending on the place of performance:

- If the **place of performance is in Switzerland**, the procuring entity may only award the contract to a bidder who can guarantee compliance with the health and safety regulations and working conditions as well as equal pay for men and women (Art. 8 (1) b and c PPA).
- If the **place of performance is abroad**, the bidder must guarantee compliance with at least the ILO Core Conventions in accordance with Annex 2a of the PPO (Art. 7 (2) PPO).

The **place of performance** is deemed to be the place at which the contract is actually performed. If *goods* are produced abroad and then shipped to Switzerland (e.g. textiles from Thailand), the place of performance is the country of production (Thailand). If a *service* is provided abroad (e.g. a call centre in India), the place of performance is the country in which the bidder provides its service (India). If *construction works* are carried out in Switzerland (e.g. road

construction in Switzerland), the place of performance is Switzerland (cf. example on p. 13). This also applies if a bidder who does not have its head office or a subsidiary in Switzerland sends its employees to Switzerland to carry out construction works here (e.g. a building site in Switzerland).

2.1.2 Taking the bidders' subcontractors and suppliers into account

A breach of the minimum social standards may occur with respect to the bidder or its **subcontractors and suppliers** (hereafter: third parties). Therefore, to guarantee compliance with the minimum social standards, these third parties must also be included, as appropriate. As procurement projects often include a very large number of third parties, it would not be feasible in practice to check all the subcontractors and suppliers throughout the entire supply chain.

In principle, the bidder is liable for all of its third parties. However, it would not make administrative sense to include all third parties when checking the minimum social requirements. It is therefore recommended that the procuring entity should concentrate only on the **key third parties** when checking the minimum social requirements.

It is up to the procuring entity to define on an individual basis whether a subcontractor or supplier is a "key third party" and to make this known in advance in the tender documents. The procuring entity does have a certain degree of flexibility in this respect. Basically, the key third parties are those that fulfil a **substantial part of the contract**. In determining the key third parties, the procuring entity should also weigh up the risks of the actual procurement. It may thus also define third parties from **particularly high-risk areas or production stages** as "key" and, in that way, subject them to a test of compliance with the social criteria.

Who are the key third parties?	
<ul style="list-style-type: none"> • A party fulfilling a significant part of the contract: <ul style="list-style-type: none"> - delivers an important component - furnishes an important partial service 	<ul style="list-style-type: none"> • A party operating in a particularly high-risk area

- **e.g.:** If the procuring entity is purchasing combat boots for the army, a bidder's suppliers of leather or soles are key suppliers, as these form an important component of the object of procurement (but not the bootlaces, eyelets, etc.). Meanwhile, the tanning of the leather is a particularly high-risk stage of production.

2.1.3 ILO Core Conventions

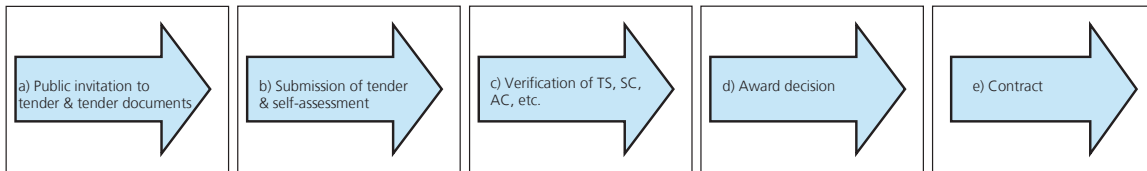
The ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session on 18 June 1998 in Geneva, obliges all 185 ILO members, purely on the basis of their membership of the organisation and irrespective of whether or not they have ratified the relevant conventions, to observe, promote and implement the principles of the fundamental rights forming the subject of these conventions, in good faith and in accordance with the Constitutions of the ILO, i.e.:

- freedom of association and recognition of the right to organise and collective bargaining (ILO Conventions no. 87 and no. 98)¹,
- abolition of all forms of forced or compulsory labour (ILO Conventions No. 29 and No. 105),

¹ If the national legislation restricts the freedom of association (ILO Convention No. 87 and No. 98) or makes no reference to it (e.g. China), the bidder must take steps to establish alternative forms of dialogue between management and workers and, in particular, give workers the possibility of formulating complaints and defending their rights with regard to working and hiring conditions.

- de facto abolition of child labour (ILO Conventions No. 138 and No. 182), and
- abolition of discrimination in employment and occupation (ILO Conventions No. 100 and No. 111).

The following shows how the procuring entity can incorporate a compliance audit of the ILO Core Conventions (Art. 7 (2) PPO) in the procurement process. This process is defined below in the following five stages:



- **Overview:** A graphic outline of this process is given in **Annex 1** of this document.

Armasuisse has tested this process within the scope of its pilot project on procuring textiles and found it to be positive overall. Testing compliance with the ILO Core Conventions gives the procuring entity greater security in procurement and can also mitigate the risk of loss of image. At the same time, bidders are made more aware of the liability they bear with respect to their subcontractors and suppliers. Finally, it has been noted that bidders wholly appreciate a positive audit conducted by the procuring entity and make use of this in the marketplace. A drawback for the procuring entity is the additional time required (four to six weeks, between the evaluations of tenders and the awarding of the contract) and audit costs of some CHF 3,000 to 4,000 per company audited.

a. Public invitation to tender and tender documents

Public invitation to tender: An initial reference to compliance with the ILO Core Conventions is made in the public invitation to tender on www.simap.ch.

- **Template:** A template for a public invitation to tender is given in **Annex 2**.

Tender documents: The tender documents reiterate in detail the reference to compliance with the ILO Core Conventions from the public invitation to tender. A distinction is made between contracts performed in Switzerland and those performed abroad.

The procuring entity informs the bidder that all third parties (subcontractors and suppliers) are also required to comply with the minimum social standards. The procuring entity's test of compliance with the ILO Core Conventions covers only the bidder and its key third parties. The tender documents specify who actually is classified as a key third party. The bidder is required to provide certain details about these key third parties in its tender. It is then asked to submit with its tender any evidence that may exist of its or its key third parties' compliance with the minimum social standards (e.g. a corresponding certificate, such as SA 8000, or other documents).

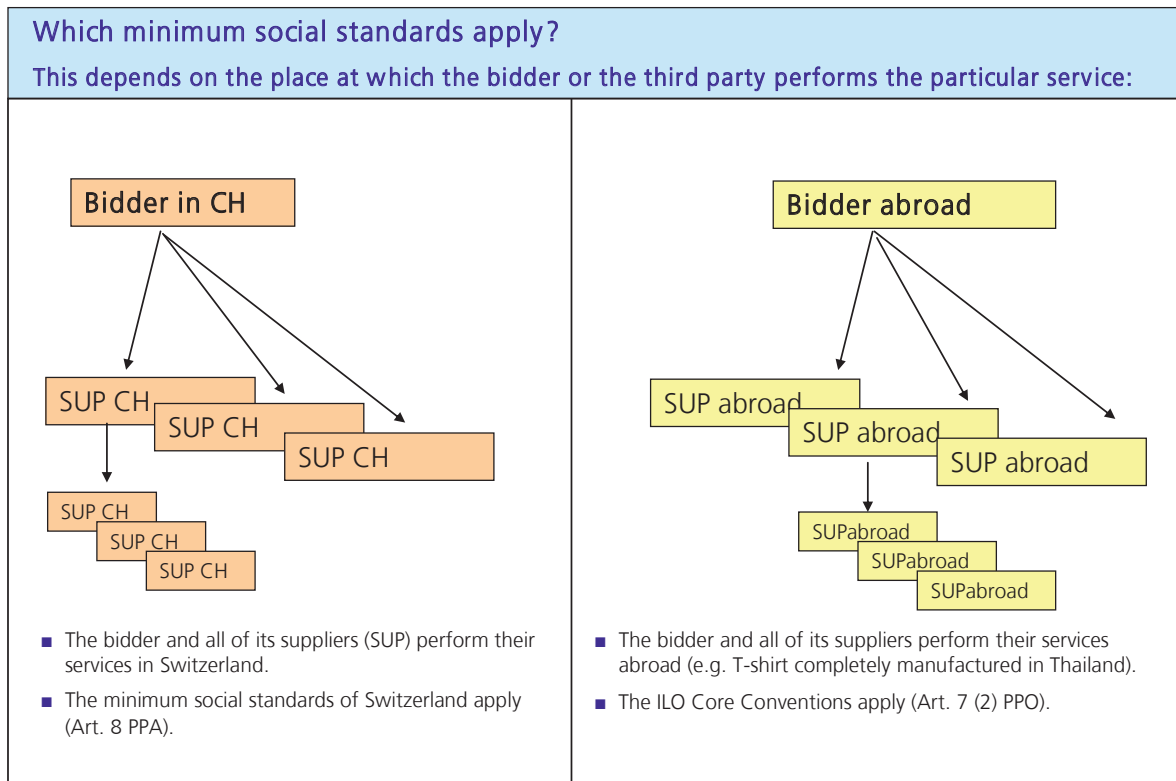
- **Template:** A template for the tender documents is given in **Annex 3**.

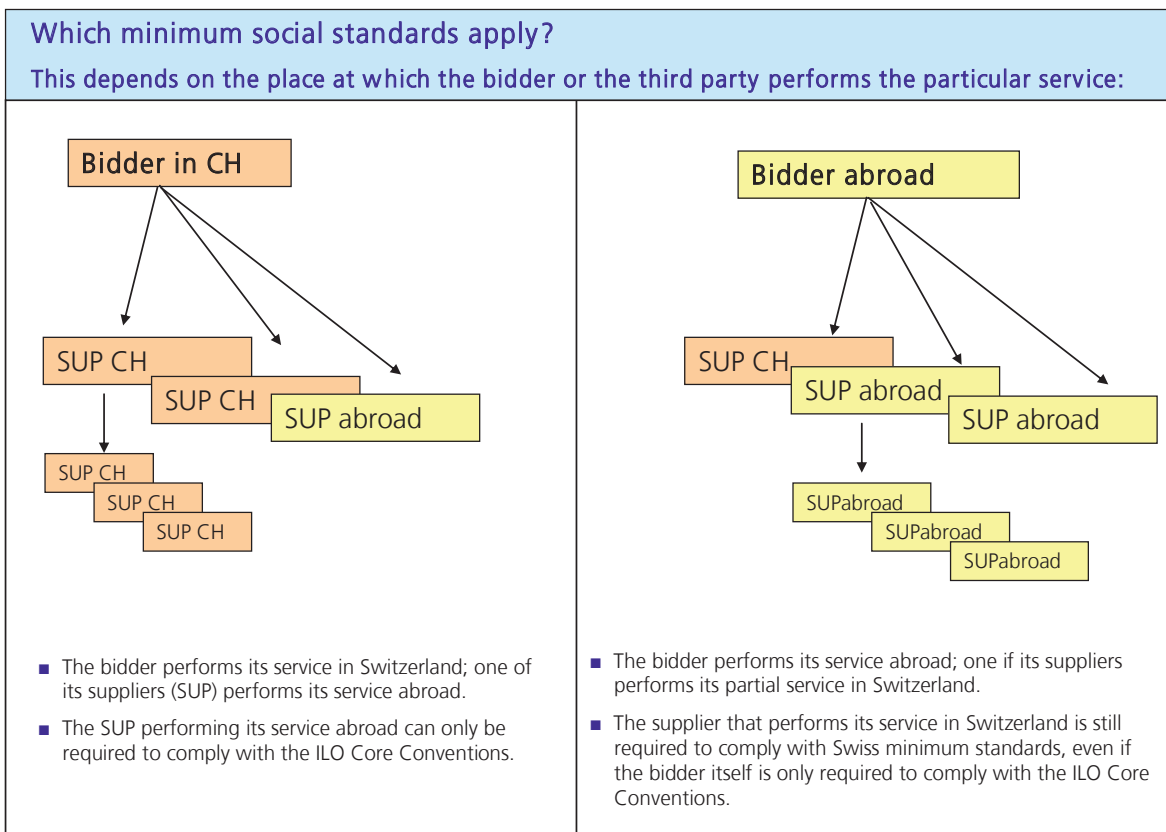
b. Submission of tender and self-assessment

Together with the tender, the bidder submits a self-assessment of its compliance with the minimum social standards. The self-assessment makes a distinction between contracts performed in Switzerland and those performed abroad. As already mentioned, the procuring entity also requires third parties to comply with the relevant minimum social standards.

- If a third party performs its service in Switzerland, it is subject to the minimum social standards applicable for Switzerland.
- If a third party performs its service abroad, it must observe at least the ILO Core Conventions.

This refers to not just the place at which the bidder performs its service but also the various elements of performance. Depending on whether the third party performs its partial service in Switzerland or abroad, it has to comply with different minimum social standards. The following constellations are conceivable:





- **e.g.:** If a bidder for services in Switzerland (e.g. production of goods in Switzerland; construction works in Switzerland) has in its supplier chain only third parties who also perform their services in Switzerland, these must comply with the minimum social standards applicable in Switzerland. However, if the bidder's supplier chain also includes third parties who perform their services abroad (e.g. manufacture of bricks abroad for construction works in Switzerland), then the bidder must be able to guarantee that these third parties comply with the ILO Core Conventions.

Further information on the self-assessment can be found in Annex 4. Here the bidder is also informed that the procuring entity reserves the right to verify compliance with these minimum social standards by conducting social audits on the bidder or its key third parties. In signing the document, the bidder confirms it has taken note of the information in the Annex.

- **Template:** A template for the self-assessment (incl. information) is given in **Annex 4**.

c. Verification of the technical specifications, suitability and award criteria and the mandatory participation conditions

The tender evaluation phase is followed by another testing stage for the potential contractor with the most economically advantageous tender, checking whether it and its key third parties comply with the minimum social standards. The test proceeds as follows (cf. diagram in Annex 1):

- First, a check is made to see whether the bidder's firm and those of the key third parties or the corresponding products have already been **certified/audited for compliance with the minimum social standards** and whether the certificate in question guarantees observance of the social criteria. If so, there is no need to continue testing, and the bidder is awarded the contract. If the bidder and/or key third parties have already been audited in the preceding 36 months for compliance with social standards and if this audit meets the procuring entity's quality standards, there is no need to conduct a separate audit.

- In the absence of such a certificate or positive audit, a **risk analysis** must be carried out on the bidder and its key third parties on the basis of objective factors (production location, sector, product). With this in mind, SECO has developed an instrument to facilitate country-specific risk assessments. The instrument is based on information from the ILO's system for monitoring the implementation of the conventions. Interested procurement offices can contact SECO to obtain access (dain@seco.admin.ch). If the procuring entity decides, based on its market knowledge and experience, that there is no risk of the bidder breaching the minimum social standards, the test is complete and the bidder may be awarded the contract.
- However, if the procuring entity concludes that the bidder or a key third party does pose such a risk, it will have an audit conducted by an external auditor (see 2.1.4 Conducting the audits). If the audit finds the audited firm to be in compliance with the minimum social standards, the test is complete and the bidder is awarded the contract.
- On the other hand, if the audit finds that the bidder or a key third party does not comply with the minimum social standards, the bidder may be **eliminated** from the award process. In such a case, the bidder has violated the mandatory participation conditions and, in addition, has entered false information in its self-assessment, which constitutes grounds for exclusion on the basis of Art. 11 PPA. The decision to exclude the bidder must be proportionate to the breach found (cf. also the overview on p. 15). The bidder who was ranked second under the award criteria is then tested in the same way for compliance with the minimum social standards.

d. Award decision

The procuring entity awards the contract to the most economically advantageous tender provided that the bidder audited and its key third parties comply with the minimum social standards.

e. Contract and General Terms & Conditions (GT&C)

Pursuant to Art. 6 (1) PPO, the procuring entity must specify in the contract that bidders

- must follow the procedural rules under Art. 8 (1) b and c PPA (health and safety regulations and working conditions as well as equal pay for men and women) (lit. a) and
- must contractually require their third parties to follow the same procedural rules (lit. b).

Art. 6 (5) PPO specifies that the procuring entity must provide for contractual penalties to safeguard implementation of these procedural rules. If the bidder itself fails to follow the procedural rules or if it does not contractually forward this obligation to its third parties, the bidder must pay a contractual penalty.

Liability for third parties: The mere act of imposing these obligations is not sufficient, at least with respect to the ILO Core Conventions. The bidder is liable for its third parties, and it will be subject to sanctions if any key third parties are found to be in breach of the minimum social standards. The procuring entity should observe the principle of proportionality in this respect. It may, for instance, impose a contractual sanction (e.g. a penalty clause) against the bidder if a key third party violates the minimum social standards. In the case of more serious violations by a key third party (e.g. proven cases of child labour), the sanction may be the complete revocation of the contract.

To what extent is the bidder liable for its third parties?

- **Bidder liable for all third parties:** The bidder should know its supplier chain. The bidder must be made aware that it is liable for its supplier chain, i.e. for all third parties (subcontractors and suppliers).
- **Contractually imposed obligations:** The bidder must contractually require all third parties to comply with the minimum social standards (Art. 6 (1) PPO). It does this directly by way of a contract with its third parties or, in turn, requires these to impose the same obligations on its own subcontractors or suppliers.
- **Verification restricted to the key third parties:** The procuring entity verifies only that the key third parties have observed the minimum social standards. Due to this limited verification, bidders actually only have to assume liability for their key third parties. If a key third party is in breach of the minimum social standards, the consequences for the bidder will depend on the circumstances and the severity of the violation. The procuring entity's response must be proportionate.

Minor

Minor

Minor violations
against working conditions & health & safety regulations

Serious violations
against working conditions & health & safety regulations

Violations of the ILO

Severity of the violation

Severity of the sanction

Serious

Serious

For example, a key third party violates the working conditions or health & safety regulations in Switzerland. Depending on the severity of the violation and the circumstances, this will have different consequences for the bidder:

- In the case of **minor violations**, exclusion or revocation of the contract and a contractual penalty may be a disproportionate response if the bidder has contractually imposed the same obligations on third parties and has nothing to reproach them for.
- In the case of **serious violations**, exclusion or revocation of the contract and a contractual penalty are possible.

In principle, zero tolerance in the case of ILO

The bidder is liable for its third parties and must vouch for them.

Sanctions: Exclusion or revocation of contract and a contractual penalty if, for instance, key third parties use child labour or forced labour. N.B.: A sense of proportionality must be maintained in the case of the more "minor" violations (e.g. equality of pay).

Subsequent audits: If it is suspected during performance of the contract that the bidder or a key third party is in breach of the minimum social standards, the procuring entity will have an audit conducted. If a breach of the minimum social standards is confirmed, the procuring entity will impose the relevant sanction (contractual penalty, revocation of contract).

Formulation in the GT&C: The GT&C reiterate the bidder's obligation to comply with the minimum social standards (cf. proposed text in Annex 5). They then specify the contractual transfer of these obligations to third parties. Both obligations are protected by way of a penalty clause. The wording is formulated such that the bidder is liable for at least its key third parties and must expect sanctions if these third parties violate the minimum social standards. If, for example, the bidder or a key third party is found to have committed a serious violation of the ILO Core Conventions (e.g. a proven case of child labour), the procuring entity is free to revoke the contract. As social audits are also conducted after the contract has been awarded, the procuring entity's right to conduct social audits, already noted in the self-assessment, is mentioned again in the contract.

- **Template:** A template for the GT&C is given in Annex 5.

2.1.4 Conducting the audits

For services performed abroad, the following is recommended: in the absence of a certificate or positive audit and if there is a risk of the bidder or one of its key third parties breaching the minimum social standards, the procuring entity should commission independent external experts to perform an audit onsite. Compliance with the requirements of the ILO Core Conventions will be checked as part of the audit.

Quality standards should ensure that the offices commissioned by the procuring entity for the onsite audit (1) have the necessary skills and specific knowledge for performing an inspection of working conditions, and (2) adopt an independent, consistent and impartial approach. In addition, a sufficient number of auditing offices that fulfil these quality standards must be available so that an element of competition is created and these audits can be carried out in every country in the world.

Given these conditions, the FPC recommends involving auditing offices accredited by the SAAS (Social Accountability Accreditation Services)³ for audits performed abroad. An updated list of SAAS-accredited offices is available at <http://www.saasaccreditation.org/accredcertbodies.htm>.

A duration of four to six weeks and costs between CHF 3,000 and 4,000 can be expected per company audited (depending on the place of the audit and the size of the company audited).

In the procurement process outlined here, audits may be conducted at two points in time: before the contract is awarded, to test the minimum social standards as grounds for exclusion, but also after the contract has been signed, if there is any reason to suspect during contract performance that the minimum social standards have been violated.

- **Audit before the award decision:** It is recommended that the procuring entity should bear the costs for this audit. If the audit findings are negative, the bidder may be excluded from the process and, consequently, no contract is signed. In such a case, where there is no contract, it would be difficult to reclaim the audit costs from bidders who have been excluded. Moreover, the costs may act as a deterrent to SMEs, with some smaller companies actually unable to participate in the process. As an audit is only conducted where there is neither a suitable certificate/positive audit nor a satisfactory result in the risk analysis, the costs borne by the procuring entity should remain manageable.
- **Audit during contract performance:** The costs for any audits conducted during contract performance could be passed on to the bidder if the contract specifically states that, under certain circumstances, a subsequent audit may be conducted at the bidder's expense. However, here too, it is again recommended that the procuring entity should conduct the audit at its own expense. Some form of compensation could potentially be recuperated by earmarking a certain amount of the contractual penalty to cover the audit costs.

2.1.5 Certificates/proof

Procuring entities are advised to keep a list of the certificates/labels they accept as sufficient proof of fulfilling the social criteria set in the invitation to tender.

³ The SAAS accreditation body licenses and monitors specialist units permitted to certify companies that comply with SA8000.

2.2 Social aspects as technical specifications or as suitability and award criteria

Unlike the ecological aspects, the social aspects generally do not offer sufficient relevance to the object of procurement. In most cases, therefore, social aspects cannot be taken into account in public tenders.

e.g.: Whether a certain construction firm has a social management system is irrelevant in terms of its suitability to perform a certain construction contract.

From 1 April 2015, the training of apprentices in basic vocational training may be considered as a possible award criterion, except in the international treaty area, in accordance with Article 21 paragraph 1 of the PPA.³ The consideration of this award criterion is at the procuring entity's discretion and should comply with the principle of equal treatment. The number of training places must be set in proportion to the bidder's total number of jobs so as to prevent discrimination against small businesses.

3. Taking economic efficiency into account

Creation of competition: The Public Procurement Act requires the procuring entity to use public funds economically. The procuring entity is thus obliged to create a competitive situation among bidders, if possible, and to award its contracts under competitive conditions.

Not cheap, but good value for money: The Public Procurement Act also requires the procuring entity to award the contract to the most economically advantageous tender (Art. 21 (1) PPA). The most economically advantageous tender does not mean the cheapest tender but the one that best fulfils the specified monetary and non-monetary (qualitative) AC. To take account of economic efficiency, the procuring entity should thus select both monetary and non-monetary AC and weight these to allow it to purchase its requirements at economically advantageous conditions. Only in the case of commoditised goods can the contract be awarded solely on the basis of the criterion of the lowest price (Art. 21 (3) PPA).

Life-cycle costs: For many procurement projects for goods and construction works, the operation and maintenance costs are several times higher than the actual acquisition costs. Therefore, in addition to the AC under Art. 21 PPA, Art. 27 (2) 2 PPO explicitly includes the expected lifetime costs as AC.

Dumping bids: It may happen in practice that tenders with an extraordinarily low price are submitted (known as dumping bids). Basically, the procuring entity is permitted to award the contract to such a dumping bid. In the case of such a bid, it is recommended that the procuring entity should seek information from the bidder in question so as to ensure that there are no grounds for exclusion and that the terms and conditions for contract performance can be met (Art. 25 (4) PPO).

³ The earlier provision of Article 27 paragraph 3 of the PPO, whereby training places were taken into account in the case of equivalent tenders from Swiss bidders, was repealed on this date.

IV SAMPLE TEMPLATES FOR THE SOCIAL ASPECTS

Annex 1: Flow chart

1. Public invitation to tender and tender documents

In the **public invitation to tender** (www.simap.ch), compliance with the minimum social standards is formulated as a mandatory participation condition for services performed in Switzerland or abroad by the bidder and its third parties (subcontractors and suppliers).

In the **tender documents**, additional information is given:

- The procuring entity defines the precise circumstances under which a third party is classified as “key” and asks the bidder to include information on its key third parties in its tender.
- The bidder is asked to submit any existing proof of its or its key third parties' compliance with the minimum social standards.



2. Submission of tender and self-assessment

Submission of tender

- Based on the information in the tender documents, the bidder provides details of its key third parties in its tender.
- Together with its tender, the bidder submits any certificates or other documentary proof of its or its key third parties' compliance with the minimum social standards (e.g. SA 8000 or a positive audit).

Self-assessment

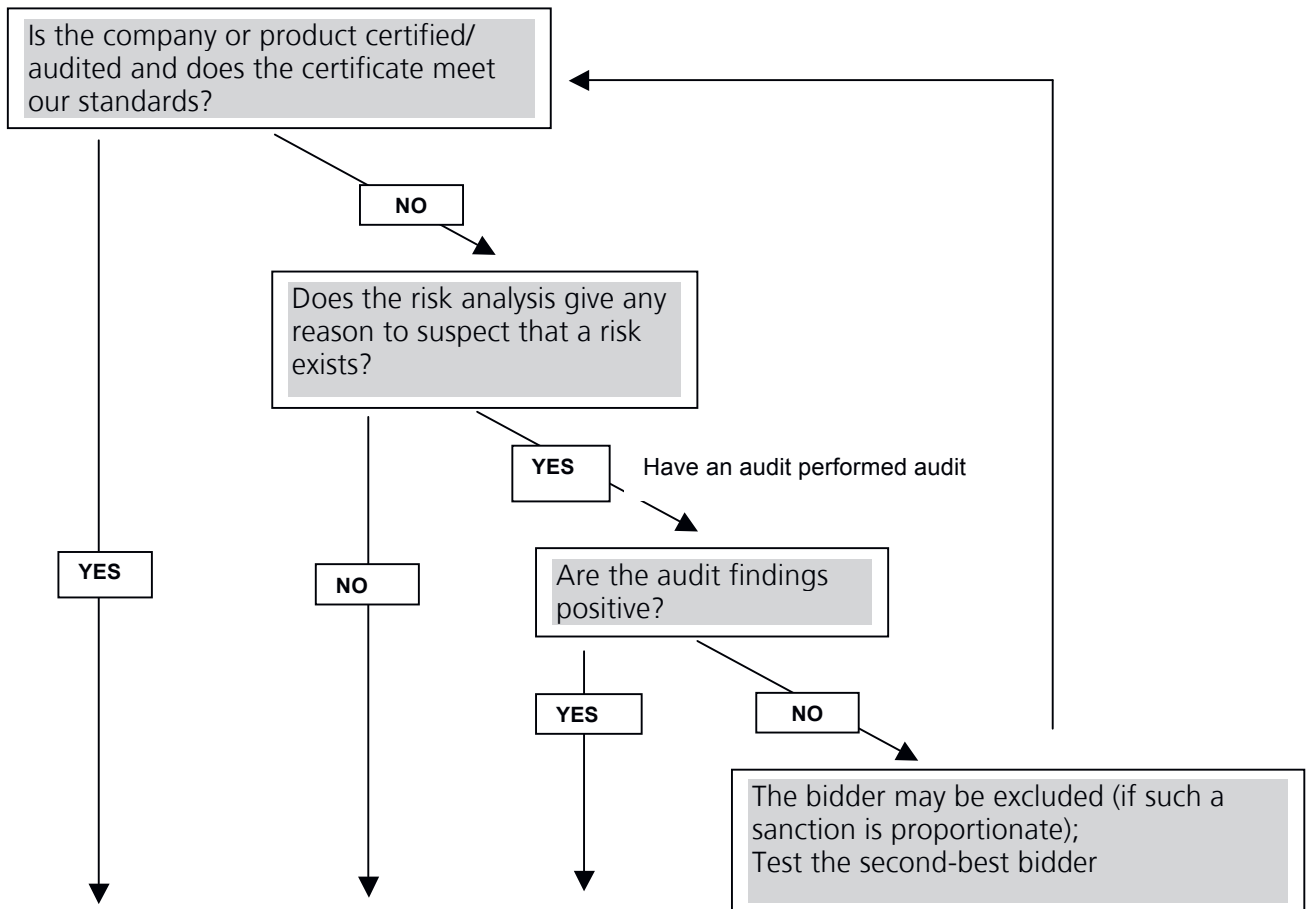
- In submitting its self-assessment, the bidder confirms that it and its third parties comply with the minimum social standards.
- Furthermore, the bidder is informed that the procuring entity reserves the right to conduct social audits on the bidder or its key third parties.



3. Technical specifications, suitability and award criteria and mandatory participation conditions are tested

- The procuring entity checks that the potential contractor (the bidder ranked no. 1 following the evaluation) and its key third parties comply with the minimum social standards. Thus, not only the bidder is verified.
- If the bidder and/or a key third party is found to be in breach of the minimum social standards, the bidder may be excluded from the procurement procedure (a sense of proportionality should

Testing of the potential contractor and its key subcontractors or suppliers:



4. Awarding of contract

5. Signing of contract

- The bidder is obliged to comply with the minimum social standards during contract performance. In turn, the bidder is also required to contractually impose the same obligations on its third parties.
- Protection by way of a penalty clause: Basically, the bidder must pay a contractual penalty if it or one of its third parties violates the minimum social standards. In the case of serious violations, the contract may also be revoked (if such a sanction is proportionate).
- As social audits can also be conducted after the contract has been awarded, this possibility of conducting social audits, already noted in the self-assessment, is mentioned again in the contract.

Annex 2: Proposed text for the public invitation to tender

Procedural rules

The bidder awards public contracts for goods, services or works in Switzerland only to bidders who guarantee compliance with health and safety regulations and working conditions as well as equal pay for men and women.

If the place of performance is abroad, the bidder must comply with at least the Core Conventions of the International Labour Organisation in accordance with Annex 2a of the Public Procurement Ordinance (PPO; SR 172.056.11).

The bidder must guarantee that its subcontractors and suppliers also comply with the above-mentioned minimum social standards.

Annex 3: Proposed text for the tender documents

Procedural rules

1a. Services performed in Switzerland⁴

The procuring entity awards public contracts for goods, services or works in Switzerland only to a bidder who guarantees compliance with health and safety regulations and working conditions as well as equal pay for men and women.

1b. Services performed abroad

If the service is performed abroad, the bidder must guarantee compliance with at least the following Core Conventions of the International Labour Organisation (ILO Core Conventions):

- Convention No. 29 of 28 June 1930 on forced or compulsory labour (SR 0.822.713.9);
- Convention No. 87 of 9 July 1948 on the freedom of association and protection of the right to organise (SR 0.822.719.7);
- Convention No. 98 of 1 July 1949 on the application of the principles of the right to organise and the right to collective bargaining (SR 0.822.719.9);
- Convention No. 100 of 29 June 1951 on equal remuneration between men and women for equal work (SR 0.822.720.0);
- Convention No. 105 of 25 June 1957 on the abolition of forced labour (SR 0.822.713.9);
- Convention No. 111 of 25 June 1958 on discrimination in employment and occupation (SR 0.822.721.1);
- Convention No. 138 of 26 June 1973 on the minimum age for employment (SR 0.822.723.8);
- Convention No. 182 of 17 June 1999 on the prohibition of and immediate measures to abolish the worst forms of child labour (SR 0.822.728.2).

2. Compliance with the minimum social standards by subcontractors and suppliers

The procuring entity requires that subcontractors and suppliers also comply with the above-mentioned minimum social standards. If a subcontractor or supplier performs its service in Switzerland, it must observe the minimum social standards applicable in Switzerland in accordance with Section 1a; if it performs its service abroad, it must comply with at least the ILO Core Conventions in accordance with Section 1b above⁵.

⁴ *Explanation:* The place of performance is deemed to be the place at which the service to be procured is actually performed. Examples: If goods are manufactured abroad and shipped to Switzerland, the place of performance is the country of production. If a service is performed abroad, the place of performance is the country in which the bidder actually provides its service. If a bidder who does not have its main office or a subsidiary in Switzerland sends its employees to Switzerland to perform work here, the place of performance is Switzerland.

⁵ *Explanation:* If a bidder for services in Switzerland (e.g. production of goods in Switzerland; construction works in Switzerland) has only subcontractors and suppliers who perform their services in Switzerland, it must guarantee that these also comply with the minimum social standards applicable in Switzerland in accordance with Section 1a. However, if its supplier chain also includes subcontractors or suppliers who perform their services abroad (e.g. manufacture of bricks abroad for construction works in Switzerland), it must be able to guarantee that these subcontractors and suppliers comply with at least the ILO Core Conventions.

In this procurement process, the procuring entity asks at the start of the process⁶ for information about the following subcontractors and suppliers⁷:

1	<i>[The procuring entity indicates the main components of the object of procurement or the main parts of performance and the most important stages of production. It also defines the high-risk areas in this particular case.]</i>
2	
3	

The bidder must indicate in the tender⁸ who its key subcontractors and suppliers are, as described above. Such information must include at least the name/company, address, telephone no., e-mail and the name of a contact person with decision-making powers.

The bidder is asked to include with the tender any proof it may have that it and/or the third parties listed in the tender documents comply with the minimum social standards (e.g. a certificate or attestation of a social audit previously conducted).

⁶ *Explanation:* The authority leaves scope for also asking for information on other third parties at a later stage. The bidder does not get the impression it need only supervise the named third parties and, as far as the others are concerned, is not subject to verification from the outset.

⁷ *Explanation:* In checking compliance with the ILO Core Conventions, the procuring entity should concentrate on those subcontractors and suppliers it classifies as being “key”. A subcontractor or supplier is said to be “key” if it performs a substantial part of the contract. Key subcontractors and suppliers may also include those deemed by the procuring entity to be operating in a particularly high-risk area. The procuring entity indicates these key subcontractors or suppliers in the tender documents and asks bidders to provide further information on these in their tender.

⁸ *Explanation:* Depending on how the self-assessment is formulated, this information may also be entered directly on the self-assessment.

Annex 4: Self-assessment by the bidder on compliance with the minimum social standards

1a. Services performed in Switzerland

The bidder confirms that, for services performed in Switzerland, it complies with the following working conditions, health and safety regulations and equal pay for men and women:

- **Working conditions:** The working conditions are based on the collective employment contracts and standard employment contracts or, where these do not exist, the usual working conditions for the particular professional and location;
- **Health and safety regulations:** Federal Act on Employment in Trade and Industry (Employment Act; SR 822.11) and Federal Act on Accident Insurance (Accident Insurance Act; SR 832.20);
- **Equal pay for men and women:** Federal Act on Gender Equality (Equality Act; SR 151.1).

1b. Services performed abroad

The bidder confirms that, for services performed abroad, it complies with at least the following Core Conventions of the International Labour Organisation (ILO Core Conventions):

- Convention No. 29 of 28 June 1930 on forced or compulsory labour (SR 0.822.713.9);
- Convention No. 87 of 9 July 1948 on the freedom of association and protection of the right to organise (SR 0.822.719.7);
- Convention No. 98 of 1 July 1949 on the application of the principles of the right to organise and the right to collective bargaining (SR 0.822.719.9);
- Convention No. 100 of 29 June 1951 on equal remuneration between men and women for equal work (SR 0.822.720.0);
- Convention No. 105 of 25 June 1957 on the abolition of forced labour (SR 0.822.713.9);
- Convention No. 111 of 25 June 1958 on discrimination in employment and occupation (SR 0.822.721.1);
- Convention No. 138 of 26 June 1973 on the minimum age for employment (SR 0.822.723.8);
- Convention No. 182 of 17 June 1999 on the prohibition of and immediate measures to abolish the worst forms of child labour (SR 0.822.728.2).

2. Compliance with the minimum social standards by subcontractors and suppliers

The bidder hereby declares that its **subcontractors and suppliers** also comply with the above-mentioned minimum social standards. If a subcontractor or supplier performs its service in Switzerland, the minimum social standards for Switzerland in accordance with Section 1a are applicable; if it performs its service abroad, it must comply with at least the ILO Core Conventions in accordance with Section 1b.

Further, in signing below, the bidder confirms it has taken note of the information set out in the Annex to this self-assessment.

Place and date:

Legally binding signature:

Information for bidders

1. Legal basis and purpose

The legal basis for this self-assessment is set out in Art. 8 of the Public Procurement Act (PPA; SR 172.056.1) and in Art. 6 and 7 of the Public Procurement Ordinance (PPO; SR. 172.056.11). The objective of this legislation is to defend social standards, maintain peaceful industrial relations and prevent undesirable repercussions in terms of social policy. It also seeks to prevent competitive distortion among bidders: Bidders who abide by the above regulations should not be placed at a disadvantage compared to those who don't respect them. Nonetheless, compliance with these minimum social standards does not confer a claim to awarding of a public contract.

2. Minimum social standards for services performed in Switzerland or abroad

The procuring entity awards a public contract for *goods, services or works in Switzerland* only to a bidder who guarantees compliance with working conditions and health and safety regulations as well as equal pay for men and women (Art. 8 PPA).

If the *place of performance is abroad*, the bidder must guarantee compliance with at least the Core Conventions of the International Labour Organisation (ILO Core Conventions) in accordance with Annex 2a of the PPO (Art. 7 (2) PPO).

Place of performance

The place of performance is deemed to be the place at which the contract is actually performed:

- If goods are produced abroad and then shipped to Switzerland (e.g. textiles from Thailand), the place of performance is the country of production (Thailand);
- If a service is provided abroad (e.g. a call centre in India), the place of performance is the country in which the bidder provides its service (India);
- If construction works are carried out in Switzerland (e.g. road construction in Switzerland), the place of performance is Switzerland. This also applies if a bidder who does not have its head office or a subsidiary in Switzerland sends its employees to Switzerland to carry out construction works here .

ILO Core Conventions

The ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session on 18 June 1998 in Geneva, obliges all 182 ILO members, purely on the basis of their membership of the organisation and irrespective of whether or not they have ratified the relevant conventions, to observe, promote and implement the principles of the fundamental rights forming the subject of these conventions, in good faith and in accordance with the Constitutions of the ILO, i.e.:

- freedom of association and protection of the right to collective bargaining,
- abolition of all forms of forced or compulsory labour,
- de facto abolition of child labour, and
- abolition of discrimination in employment and occupation.

With the self-assessment, the bidder confirms that:

Guarantee of the freedom of association and the right to collective bargaining

- it does not restrict or impede the right, without previous authorisation, to establish free and independent worker and employer organisations (social partners) to promote social dialogue and improve the conditions of production (ILO Convention No. 87);
- it does not restrict or impede free collective bargaining and does not cause the dismissal of or otherwise prejudice a worker by reason of union membership (ILO Convention No. 98);
- if the national legislation restricts the abovementioned freedom of association according to ILO Conventions No. 87 and No. 98 or makes no reference thereto, it takes or has already taken steps to establish alternative forms of dialogue between management and workers and, in particular, give workers the possibility of formulating complaints and defending their rights in terms of working and hiring conditions;

Ban on forced labour

- it does not accept or make use of forced or compulsory labour, any work exacted involuntarily from the inmates of private prisons or any involuntary and/or underpaid work by the inmates of public prisons (ILO Convention No. 29 & No. 105);

Ban on child labour

- it allows children under 18 to participate in the manufacturing or production process only for educational purposes or as a short-term stopgap solution and that the work done is not likely to harm the health, safety or morals of children (ILO Convention No. 182);
- it does not admit children under 15 to employment or work in the manufacturing or production process (ILO Convention No. 138);

Ban on discrimination in employment and occupation

- it does not make any distinction, exclusion or preference on the basis of race, colour, sex, religion, political opinion, national extraction or social origin or use these to nullify or impair equality of opportunity or treatment in employment or occupation (ILO Convention No. 111);
- it guarantees equal remuneration and does not distinguish on the basis of gender in the calculation and payment of the usual wage, basic or minimum wage or the usual salary, basic or minimum salary and all other payments and benefits for work of equal value (ILO Convention No. 100).

3. Compliance with the minimum social standards by subcontractors and suppliers

The procuring entity requires that the bidders' subcontractors and suppliers (hereafter: third parties) also comply with the above-mentioned minimum social standards.

- If a third party performs its service in Switzerland, it is subject to the minimum social standards applicable for Switzerland in accordance with Section 1a of the self-assessment;

- If a third party performs its service abroad, it must observe at least the ILO Core Conventions.

The bidder must contractually oblige its third parties to comply with the corresponding minimum social standards.

Example: If a bidder for services in Switzerland (e.g. production of goods in Switzerland or construction works in Switzerland) has in its supplier chain only third parties who themselves perform their services in Switzerland, the bidder must contractually oblige these to comply with the minimum social standards applicable for Switzerland in accordance with Section 1a of the self-assessment. However, if the bidder's supplier chain also includes third parties who perform their services abroad (e.g. manufacture of bricks abroad for construction works in Switzerland), then the bidder must oblige these to comply with the ILO Core Conventions.

4. Controls and duty to cooperate

4.1 Services in Switzerland

The procuring entity reserves the right to verify the minimum social standards in the case of services in Switzerland (Art. 8 (2) PPA). It may delegate such verification of working conditions to the joint employer-worker organisation, where one exists. The executive body specified in the Employment Act and in the Accident Insurance Act is responsible for verifying compliance with health and safety regulations. The Federal Office for Gender Equality is responsible for verifying the equality of pay for men and women.

Important: The tests carried out to verify compliance with the above minimum social standards look at each contractual provision separately. Failure to comply with one particular provision cannot be offset by exceeding the minimum standards in another area.

The bidder is obliged to provide the data and information required for the audit free of charge. Compliance with the requirements of equal pay for men and women is verified on the basis of the individual, anonymised wage data.

4.2 Services abroad

In the case of services performed abroad, the procuring entity is entitled to verify (or have verified on its behalf) the bidder's or its third parties' compliance with the ILO Core Conventions at its own expense (social audit).

The bidder is asked to include with the tender any evidence it may have that it and/or the third parties listed in the tender documents comply with the ILO Core Conventions (e.g. a certificate or attestation of a social audit previously conducted).

The bidder must provide or grant the procuring entity unrestricted access to its premises or those of third parties within the framework of social audits and provide all data and information required for the audit free of charge.

5. Legal protection and sanctions

5.1 Services in Switzerland

a) Violation of working conditions and health and safety regulations: The procuring entity notifies the bidder of the violation by means of a court order. The bidder then has 20 days to file an appeal against the order with the Federal Administrative Court.

Further, the procuring entity may exclude the bidder from the ongoing procurement process or revoke a contract previously awarded (Art. 11 PPA) and/or claim a

contractual penalty in accordance with the General Terms and Conditions of the Confederation (Art. 6 (5) PPO).

b) Violation of the requirement of equal pay for men and women: The Federal Office for Gender Equality agrees with the bidder on objectives and measures to implement equality of pay and verifies at an agreed point in time that such objectives have been met and the measures implemented. If the agreed measures have not been implemented, the procuring entity may take the same measures as in the case of violation of working conditions and health and safety regulations.

c) Readmission to the procurement process: Bidders found to have breached Art. 8 PPA are readmitted to the Confirmation's public procurements if:

- the Employment Office has issued confirmation that the bidder complies with the working conditions;
- the executive bodies specified in the Employment Act or in the Accident Insurance Act confirm that the bidder complies with the health and safety regulations;
- the Federal Office for Gender Equality confirms that the bidder has successfully implemented the measures agreed on.

5.2 Services abroad

If the bidder or one of its third parties is found to have violated the ILO Core Competencies, Section 5.1 a) above applies *mutatis mutandis*.

6. No obligation to join CLA; amendment to the CLA

The procuring entity does not require bidders to join the non-binding CLA (collective labour agreement). It merely requires compliance with the contractual provisions of the CLA, so as to prevent unfair competitive distortion among bidders. If the social partners enter into a new CLA, the new contractual provisions form the basis for the audits.

Annex 5: Proposed text for the General Terms & Conditions

Procedural rules

For **services performed in Switzerland**, the bidder offers its employees the applicable health and safety regulations and working conditions at the place of performance. It guarantees equal pay for men and women for equal work. The applicable working conditions are those set out in the collective employment contracts and standard employment contracts or, where these do not exist, the usual working conditions for the particular professional and location.

If the **service is performed abroad**, the bidder must guarantee compliance with at least the Core Conventions of the International Labour Organisation (ILO).

The bidder is liable for its **third parties** (subcontractors and suppliers) and contractually obliges these to comply with the corresponding minimum social standards.

If the bidder or one of its third parties (subcontractors or suppliers) fails to adhere to these procedural rules, the bidder must pay a **contractual penalty** of 10% of the contract total, at least CHF 3,000 but no more than CHF 100,000. In addition, in the case of serious violations, the procuring entity is authorised to **revoke the contract**.

The bidder accepts that a **social audit** may be conducted in the course of contract performance, at the procuring entity's expense, to verify compliance with the minimum social standards. The procuring entity must be given all the data it requires for such verification free of charge. In turn, the bidder also obliges its key third parties to conduct a social audit.

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