

EURORAI seminar
Audit of public procurement at regional and local level
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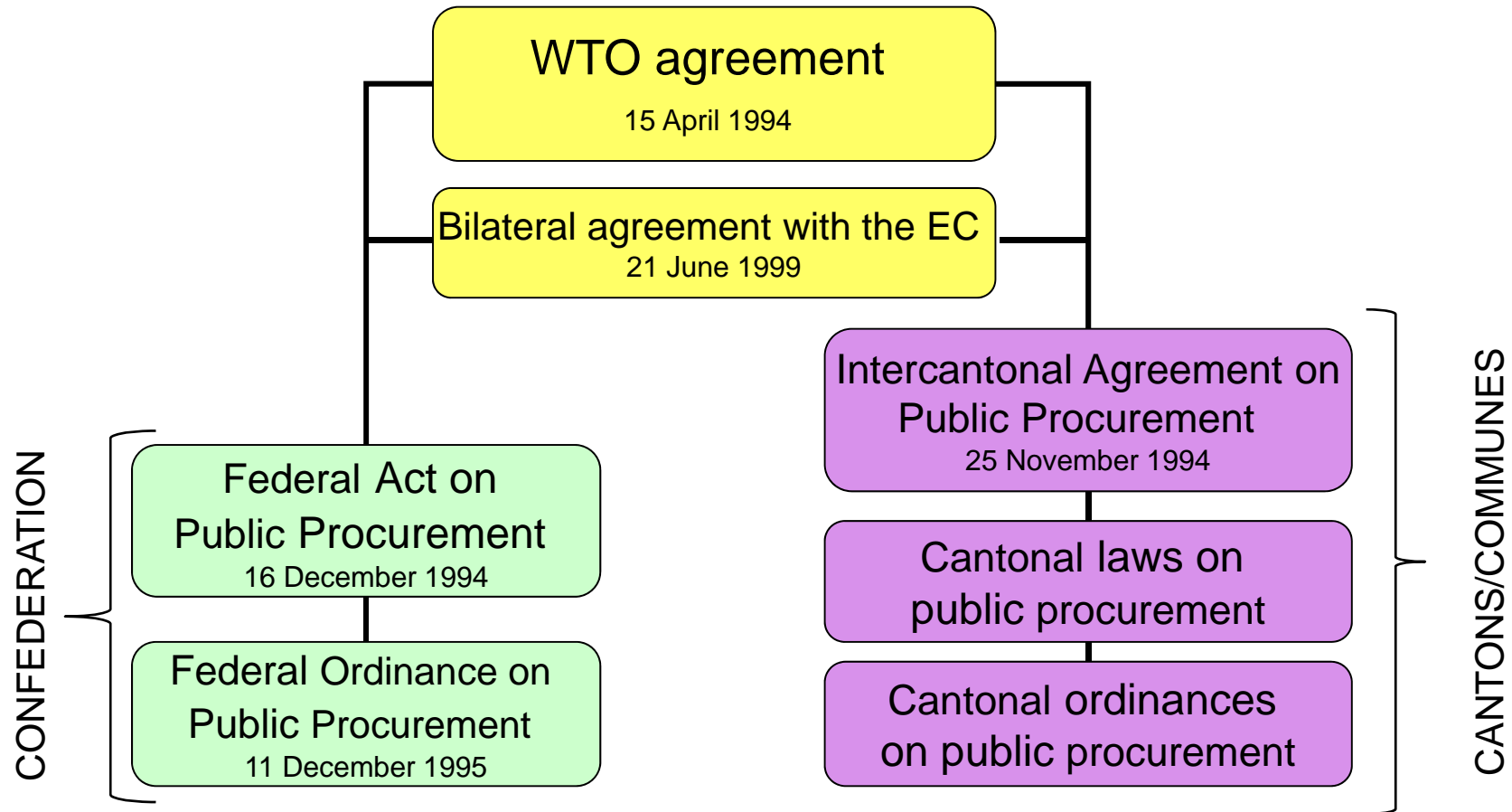
Public procurement audit From theory to practice

Charles PICT
Director of the Internal Audit Service for
the State of Geneva



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Internal Audit Service for the State of Geneva

The Swiss legal framework



Federal acts and ordinances

- Federal Act on Public Procurement (FAPP):
 - Supply, service and construction contracts referred to in Annexes 4 and 5 of Appendix I of the Agreement on Government Procurement.
 - Concerns the federal offices referred to in Annex 1 of Appendix I of the Agreement on Government Procurement.
 - Value greater than the following thresholds:
 - 230,000 CHF for supply and service contracts on a national level (EC = 134,000 EUR);
 - 8,700,000 CHF for construction contracts (EC = 5,186,000 EUR);
 - 700,000 CHF for supply and service contracts in the drinking water and energy distribution, transport, and telecommunications sectors (EC = 414,000 EUR).
 - The Act enables the provisions from the WTO Agreement on Government Procurement to be implemented on a federal level.
 - It guarantees non-discriminatory access to public procurement contracts for suppliers established in Switzerland and countries that have signed the Agreement, as well as in other countries, provided that they have a reciprocal agreement.
 - Contracts with a value greater than the threshold must be made public and must be awarded using an open or selective procedure.

Federal acts and ordinances

- FAPP (*cont.*) :
 - The contract is awarded to the bidder who presents the most economically advantageous bid, specified according to objective criteria which must be listed in the publication.
 - The Act also makes it possible for any candidate in the procurement process to contest a contract in front of an independent body.
 - A bidder whose bid has been rejected can claim damages if the rejection has breached regulations.
- Ordinance on Public Procurement (OPP):
 - The Ordinance provides some clarification on the provisions stated in the Federal Act.
 - It regulates supply, service and construction contracts that are awarded by the federal offices referred to in Annex 1 of Appendix I of the Agreement on Government Procurement and that are below the threshold values.
 - It also regulates supply, service and construction contracts awarded by Swisscom and by Swiss Federal Railways (CFF) as well as those awarded by bodies in the military sector.

Intercantonal agreement (infra-national)

- Intercantonal Agreement on Public Procurement (AIMP):
 - Supply, service and construction contracts referred to in Annexes 4 and 5 of Appendix I of the WTO Agreement.
 - Agreement entered into by:
 - Cantonal bodies and public companies owned or controlled by the cantons
 - Local authorities and other legal persons under public law
 - Private or public bodies that engage in activities in the drinking water and energy distribution, transport, or telecommunications sectors and that are controlled by the local or cantonal offices referred to
 - Any contract subsidised to a degree of 50% or more by the Swiss federal government or by cantonal bodies or public companies
 - Threshold values:
 - 350,000 CHF for supply and service contracts (EC = 207,000 EUR);
 - 8,700,000 CHF for construction services
 - 700,000 CHF for supply and service contracts in the drinking water and energy distribution, transport, and telecommunications sectors.

Liability

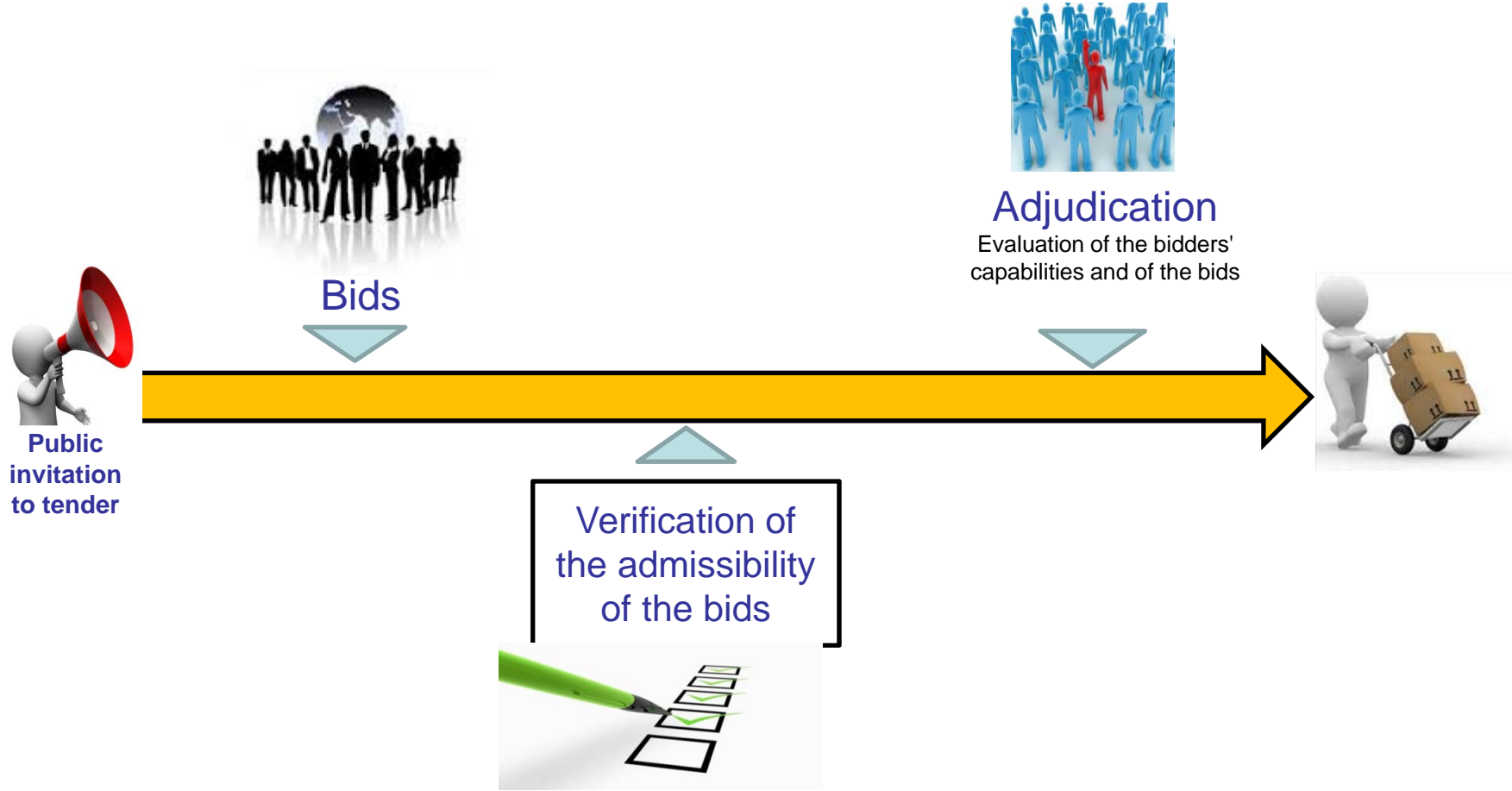
- Public administrations on a federal, cantonal and commune level.
- Public law contractors and private contractors that are predominantly subsidised by public funds or that require the publicly funded amount in order to carry out the contract.
- Public or private bodies with contracts in the water, energy, transport and telecommunications sectors, and which undertake cantonal or commune-related tasks in the form of a concession or something else.
- Public bodies who undertake commercial or industrial activities open to competition (Swisscom, for example) may be exempt from liability.

Some figures

Public procurement in Switzerland:

- 5500 public bodies
- 90,000 invitations to tender each year
- 44 billion CHF each year

Public procurement procedure



The fundamental principles

- Non-discrimination
- Transparency
- Reinforcing competition between bidders
- Economically efficient use of public funds
- Equal treatment of all bidders
- Impartial adjudication

Types of procedure

There are **4 types of officially recognised procedure**:

- The open procedure (a one-step procedure; all bidders may submit a bid)
- The selective procedure (a two-step procedure; only the bidders selected after the 1st round may submit a bid)
- The “by invitation” procedure (direct adjudication after at least three bids have been examined)
- The private arrangement procedure (direct adjudication to one bidder).

Inspection programme

- Strategic planning for launching the public procurement process
- Formalising the internal inspection system (directives, procedures, inspections)
- Submitting the contract concerned (in-house)
- Evaluating the contract correctly
- Applying the correct procedure
- Respecting the thresholds (“salami slicing”)
- Applying the "minimis clause" and other exceptions correctly
- Ensuring transparency for the bids
- Formalising the invitation to tender
- Ensuring coherence in the criteria; moderation process
- Ensuring a lack of discriminatory criteria

Inspection programme (*cont.*)

- Receiving and handling bids
- Ensuring each bidder is treated equally and without discrimination
- Encouraging effective competition
- Abandoning the negotiation rounds
- Respecting the conditions of the challenge put forward by the people concerned
- Respecting the provisions relating to the protection of workers and to working conditions
- Ensuring men and women are treated equally
- Treating information confidentially
- Respecting the conditions for opening bids (report, signatures, deadlines)
- Ensuring the bidder is chosen in a consistent manner (no arbitration, criteria respected)
- Archiving documents and determining how long they should be retained

Anomalies raised

- Lack of strategic planning
 - Consequences
 - Procedures used for awarding contracts are not compliant
 - The "minimis clause" is not used effectively
 - Supervision and inspection are difficult
- Weaknesses in the SCI used for awarding contracts
 - Consequences
 - Difficult to detect or prevent any fraud that occurs when contracts are awarded
 - Jeopardises the principle of transparency which is so important in public procurement
 - Additional orders may be accepted at prices higher than those in the initial adjudication
 - Risks
 - Irregularities in the event of an appeal

Anomalies raised (*cont.*)

- Contracts awarded using private arrangements or by-invitation procedures instead of open procedures
 - Risks
 - A more costly contract may be awarded
 - The execution of the contract may be delayed if there is an appeal which leads to financial losses
 - The execution of the contract may be delayed if there is an appeal which could damage reputation
- Certain contracts cut in a non-compliant manner (“salami slicing”)
 - ➔ The concept of a contract must be viewed on a larger scale, particularly in the case of recurring contracts lasting for an indefinite amount of time (article 9 of the RMP – regulation on executing public contracts). The threshold values should not be applied to each order in respect of a supplier, but according to the type of contract.
 - Risks
 - A more costly contract may be awarded
 - A third party may appeal the decision

Anomalies raised (*cont.*)

- Poor application of the "minimis clause"
 - ➔ Contracts awarded according to open procedures that are not subject to international treaties rather than open procedures that are subject to international treaties.
 - ☐ Risks
 - A more costly contract may be awarded
 - The execution of the contract may be delayed if there is an appeal which could cause financial losses and damage reputation
- Other issues
 - Abuse of the provisions in article 15 of the RMP (paragraph 3)
 - In certain cases, appealing the private arrangement procedure is not justifiable, e.g. unforeseeable events, particularities, technical issues, etc.
 - Failure to respect the provisions relating to publication (article 52.3 of the RMP) in the context of adjudications according to article 15 of the RMP
 - Incorrect estimation of the total value of the contract to be awarded
 - Applications not retained as part of the AIMP are not preserved
 - Not possible to carry out ex post monitoring as specified in article 19 of the AIMP
 - Bids evaluated in a way that does not comply with the criteria specified in the invitations to tender
 - Failure to apply AIMP and RMP provisions by certain subsidised bodies

THANK YOU FOR LISTENING



ANY QUESTIONS?