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Public procurement: can the bidder be compensated for the work done to prepare the bid?

Participating in a public procurement bid is a significant investment for any company.

The time devoted to the drafting of a bid is important and often mobilizes several people full time for several days or weeks. Unless we win the contract, the work done is not paid.

However, there is the possibility for bidders to **appeal** against the award decision if it violates the provisions of public procurement law. The aim of the appeal is usually to have the award decision annulled and to be awarded the contract in place of the successful bidder ("primary legal protection"). If the contract has already been concluded between the contractor and the contracting authority, however, it is no longer possible to revoke the decision. This leaves the possibility for unsuccessful bidders to claim **damages for expenses and costs incurred as a result of the tender**; this is the "secondary legal protection" provided for in the revised Federal Act on Public Procurement (PPA).

Contrary to the former provisions of the PPA, primary legal protection is only possible, according to the revised PPA, for contracts which are subject to international agreements (NB: contrary to the AIMP which provides for a remedy even for contracts not subject to international agreements). On the other hand, for contracts that are not subject to international agreements, the review can only aim at establishing that the contested decision violates federal law and thus at claiming damages (art. 52 al. 2 PPA). Secondary legal protection, on the other hand, always applies if the contracting authority has already concluded the contract with the successful bidder.

Specifically, an appeal may be filed against decisions regarding the tender documents, the award of the contract, as well as the revocation, interruption or exclusion of the procedure (Art. 53 para. 1 PPA). However, the appeal has no suspensive effect, so that the contracting authority can conclude the contract immediately after awarding the contract, without waiting for the outcome of the legal proceedings. It is therefore essential to **apply for the suspensive effect in the** appeal procedure.

If the court does not grant suspensive effect to the appeal and the contract is concluded, the unsuccessful bidder can only request a declaration that the award in question is unlawful (art. 58 para. 2 PPA), which will not get him very far.

However, the revised PPA now provides for the possibility for the courts to **rule simultaneously** on the determination of the violation of the law as well as on a possible claim for damages (art. 58 para. 3 PPA).

In order to be compensated for the work involved in the preparation of the bid, the bidder could then make a subsidiary claim for **damages based on art. 58 para. 4 of the PPA**. This provision provides that damages are limited to the **expenses incurred by the bidder in connection with the preparation and submission of its bid**. Please note that legal fees are not included in these expenses and will only be covered by any costs awarded by the court.

In practice, these expenses should be able to be justified in detail and must remain reasonable. It is therefore advisable for bidders to be able to demonstrate the time spent on preparing the bid (hours of work, number of employees involved and at what rate, costs

incurred, etc.).

Wilhelm Gilliéron Attorneys-at-law Corp. advises and assists you in the context of appeal procedures in public procurement law.

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