



St. Gallen, 20 October 2021

## **Press Release**

**on interim decision of 18 October 2021 in case B-3238/2021**

### **“Public Clouds” award: contracts may be concluded**

**In an interim decision, the Federal Administrative Court rejects Google’s request to grant suspensive effect to its appeal. The Federal Office for Buildings and Logistics may therefore conclude the Public Cloud contracts with the selected tenderers.**

On 7 December 2020, the Federal Office for Buildings and Logistics (FOPL) issued a public invitation to tender with the title “(20007) 608 Public Clouds Confédération” for the award of a service contract. This invitation to tender came into force unchallenged. Five providers were sought for the supply of Public Cloud services. Based on a framework agreement, the providers are to deliver individual services, to be called up in mini-tender procedures, over a five-year term and for a total amount of up to CHF 110 million. On 24 June 2021, the FOPL disclosed the five tenderers selected. Google Commerce Ltd was not awarded any of the contracts, whereupon it filed an appeal with the Federal Administrative Court (FAC) on 13 July 2021.

#### **Google’s assertions**

The appellant alleges primarily that the awards and the invitation to tender are null and void. It also contests how its tender was evaluated under the award criterion “data processing centre locations in Switzerland” (data processing centres = DPC). Under this criterion, the contracting authority required tenderers to indicate “on the basis of publicly available information” by when they would be able to produce or operate the required services georedundantly on Swiss soil. Google claims that its tender was unjustly valued with nil points under this criterion, faulting the FOPL for failing in particular to define its requirements for georedundancy. Moreover, based on the indications contained in Google’s tender, the FOPL would have been obligated to ask Google for clarifications and to correct its evaluation.

The appellant requests that its appeal be granted suspensive effect and that the contracting authority be prohibited from signing contracts with the selected tenderers pending a final decision by the FAC.

#### **Summary examination by the Court**

After examining summarily the complaints, the FAC concludes, firstly, that the appeal is manifestly unfounded in its assertion that the invitation to tender (or the

tender documentation) are null and void. This even though, the invitation to tender and the tender documentation could very well have been contested, notably with regard to the mini-tender procedure and the related legal protection concept, had the invitation to tender been challenged.

Secondly, with reference to the criticised evaluation under the award criterion “DPC locations in Switzerland”, the Court notes that the FOPL-specification lies within the discretionary powers of the contracting authority and is in compliance with the law. The specification provides that only tenderers whose plans to achieve georedundancy are publicly available are given points. On the other hand, the FAC agrees with the appellant that the contracting authority has indeed omitted to define georedundancy. However, this does not mean that the appellant’s understanding of the term is authoritative. Rather the conventional meaning of the criterion should be considered, bearing in mind, however, that in this context prima facie the term is catastrophe-related. This argues in favour of a certain distance between the data processing centres.

Nor, lastly, was the contracting authority under any obligation to contact the appellant for explanations based on the indications in the latter’s tender; on the contrary, the contracting authority was entitled to give the appellant nil points for the criterion “DPC locations in Switzerland”. Accordingly, the appellant cannot rely on this argument either to challenge the award to tenderer 5, which is placed just ahead of it.

The summary examination shows that the appeal is manifestly unfounded. There is, therefore, no need for weighing up the interests between the urgency of concluding the contracts with the selected tenderers and the appellant’s interest in effective judicial protection.

This interim decision may be appealed to the Federal Supreme Court.

#### **Applicable Law**

The fully revised Federal Act on Public Procurement of 21 June 2019 (PPA) came into force on 1 January 2021. Pursuant to Article 62 PPA, award procedures initiated before the entry into force of the Act will be completed under the existing law.

The appeal at hand was initiated on 7 December 2020 by the invitation to tender and is therefore governed by the prior public procurement act (Federal Act of 16 December 1994 on Public Procurement [aBöB]).

#### **Trade secrets**

In order to safeguard the appellant’s trade secrets, only the operative part of the interim decision and this press release shall be communicated to the tenderers selected and media representatives. Once the trade secrets have been removed, the edited version of the interim decision shall be communicated to the tenderers selected and to the media representatives.

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### **About the Federal Administrative Court**

Located in St. Gallen, the Federal Administrative Court (FAC) was established in 2007. With its staff of 353 employees (297.3 FTE) and its 73 judges (65.15 FTE) it is the largest federal court in Switzerland. The Federal Administrative Court has jurisdiction to hear appeals against decisions rendered by Swiss federal administrative authorities. In specific matters, the FAC may grant review on decisions rendered by cantonal authorities. Recourse actions are also reviewed by the Court. The FAC is composed of six divisions. It renders an average of 7,200 judgments every year.