

Switzerland

New Developments in Switzerland: October 2014–September 2015

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I. Current Developments

As pointed out in the last review of developments in Switzerland, the Swiss law on public procurement is revised at federal and cantonal level.¹ Main object of the revision is to implement the changes of the revised WTO-GPA, and hence to maintain access for Swiss companies to foreign markets. Furthermore, the revision seeks to harmonise federal and cantonal public procurement law.

Consultation procedures with regard to the amendment of the relevant statutes, i.e. BöB/VöB (for procurement at the federal level) and IVöB (for procurement at the cantonal level), have been completed. Based on the results of the consultation procedures, the Federal Council and the intercantonal institution for public procurement (InöB) now have to elaborate a draft of the revised BöB/VöB respectively the IVöB. The drafts are expected in the second half of 2016.²

II. PPPs – New Projects

1. System for Bicycle Hiring «Velo Züri» in Zurich

In the city of Zurich, an automatic system for bicycle hiring will be implemented in form of a PPP. While the private partner is in charge of the planning, operation and financing of the project, the city provides support mostly by marketing the project and by paying a subsidy. Ownership of the infrastructure remains with the private partner. The estimated investment volume amounts to six to nine million Swiss Francs. Estimations for operational costs are about four million Swiss Francs per year. The PPP's duration is set for five years, with the possibility for further extension. The bi-

cycle rental shall become operational in spring 2016.³

2. Association Against Cyber Attacks

The Confederation and the association «Swiss Cyber Experts» agreed on a PPP against cyber-attacks, which aims to efficiently provide diagnoses in cases of serious cyber-attacks. The PPP operates since March 2015. The cooperation contract between the Federal Confederation and «Swiss Cyber Experts» initially runs for 5 years.⁴

3. Institute for Radiology in the Bernese Jura

In the Bernese Jura, the public hospital «Hôpital du Jura bernois (HJB)» and a Swiss private clinic group cooperate in the field of radiology. The contract was concluded in September 2014 with an unlimited term. Their joint institute became operational in

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1 Hettich Peter/Galbraith Louisa, Country Report Switzerland: Current Developments in Switzerland in October 2014 – September 2015, in: European Procurement & Public Private Partnership Law Review EPPPL 3/2014, 221–225, 225.

2 <<https://www.bkb.admin.ch/bkb/de/home/oeffentliches-beschaffungswesen/revision-des-beschaffungsrechts.html>>; <<http://www.bpuk.ch/bpuk/konkordate/ivoeb/e-ivoeb/>>.

3 <<http://www.ppp-schweiz.ch/de/ppp-wissen/ppp-projekte-in-der-schweiz/articles/veloverleih-zuerich/>>.

4 Juris, Gemeinsam gegen schwere Cyber-Attacken, in: Jusletter 30. März 2015, point 1–4.

June 2015. While the public hospital contributes its facility in Saint-Imier (canton of Berne) and manages the institute's operations, the private partner acquires a magnetic resonance scanner (MRI scanner).⁵

4. «Check your Chance»

In April 2015, a private project against youth unemployment was transferred to an independent association called «Check Your Chance», which is borne by the State Secretariat for Economic Affairs (SECO), six NGOs and several private corporations. The project seeks to help young people to enter into employment. «Check Your Chance» wants to improve the occupational outlook of young people.⁶

5. «Tissot Arena» in Biel

The PPP of the city of Biel (canton Bern) and a private investor to construct two new sport stadiums, a curling arena and several sports fields in Biel is completed.⁷ The private partner handed the stadiums, bearing the name «Tissot Arena», over to the city of Biel in July 2015.⁸

6. Senior Center Bubenholz in Opfikon

The construction of a retirement home for senior citizens in Opfikon (a PPP⁹), which began in April 2013, has been finished in April 2015. The contract between the private partner and the municipality of Opfikon will expire in 2048.¹⁰

III. Public Procurement – New Decisions

1. Vaud: Rubbish Bags

Appeal against a decision concerning the choice of the public procurement procedure (Ruling of 31 March 2015 by the Swiss Federal Supreme Court):

In April 2012 Tridel Corp., whose share capital is owned by different municipalities, launched a tender invitation procedure for the production, distribution and collection of rubbish bags. The Swiss Competition Commission (COMCO) lodged an appeal at the cantonal administrative court of Lausanne, claiming that the invitation procedure illegitimately limits access to market and that an open tender should have been carried out (art. 12 para. 2 lit. a IVöB¹¹). The cantonal court dismissed the case and COMCO appealed the decision with the Federal Supreme Court, which supported COMCO's view. It states that a tender procedure by invitation is insufficient, because the service contract is subject to the GPA¹². The court dismissed Tridel's argument that an urgent situation justified the limited tender. According to the court, an urgent situation is subject to the conditions laid out in Art. XV lit. c GPA and art. 8 lit. e RLMP-VD¹³: Occurrence of an unforeseeable event, causal link between unforeseeable event and urgent situation, urgent situation is not caused by the tendering authority, open tender is impossible due to the urgent situation, and invitation procedure is the only possible way to restore normality. In the case at hand, the court considered whether the short period of time between the parliament's decision to amend legislation and the enforcement of the new provision might establish such an urgent situation. However, Tridel Corp. initiated the invitation procedure just one day before the amendment and concluded the contract one day after the amendment. Thus, Tridel Corp. would have had enough time for an open tender. No urgent situation was at hand here. Therefore, awarding the contract with a

5 <<http://www.ppp-schweiz.ch/de/ppp-wissen/ppp-projekte-in-der-schweiz/articles/institut-de-radiologie-du-jura-bernois-sa/>>.

6 <http://www.arbeitgeber.ch/wp-content/uploads/2015/02/20150225_Medienmitteilung-Check-your-Chance.pdf>.

7 For a detailed description of the project see Hettich Peter/Galbraith Louisa, Country Report Switzerland: Current Developments in Switzerland in October 2012 – September 2013, in: European Procurement & Public Private Partnership Law Review EPPPL, 4/2013, 350-352, 350.

8 <<http://www.ppp-schweiz.ch/de/ppp-wissen/ppp-projekte-in-der-schweiz/articles/stades-de-bienne/>>; <http://www.ppp-schweiz.ch/tl_files/Nachrichten/Attachments/2015/BielerTagblatt_2015-07-24.pdf>.

9 For a detailed description of the project see Hettich Peter/Galbraith Louisa, Country Report Switzerland: Current Developments in Switzerland in October 2012 – September 2013, in: European Procurement & Public Private Partnership Law Review EPPPL, 4/2013, 350-352, 350.

10 <<http://www.ppp-schweiz.ch/de/ppp-wissen/ppp-projekte-in-der-schweiz/articles/seniorenzentrum-vitadomo-bubenholz-opfikon/>>.

11 Intercantonal agreement on public procurement of 25 November 2001, IVöB, SR 172.056.5.

12 Agreement on government procurement entered in on 15 April 1994 in Marakesh and approved by the Federal Assembly on 8 December 1994, WTO-GPA, SR 0.632.231.422.

13 Decree on the application of the Law of 24 July 1996 on public procurement of the canton of Waadt, RLMP-VD, RSN 726.01.1.

limited tender was in breach of Swiss Law (BGBM¹⁴).¹⁵

2. Rehtobel: Winter Service

Appeal against the award decision from the commission for maintenance and operation of the municipality of Rehtobel (Ruling of 31 July 2015 by the Swiss Federal Supreme Court):

The commission for maintenance and operation of the municipality Rehtobel (canton of Appenzell Outer-Rhodes) launched a tender invitation procedure for winter services. The contract was awarded in August 2012. Two unsuccessful tenderers launched an appeal against this decision, claiming that the contract was awarded arbitrarily due to the evaluation of two criteria: machine operator and machinery.

Concerning machine operator, the appellants noted that the tendering authority arbitrarily deviated from its evaluation system. The court agreed that a tendering authority is generally bound to the announced criteria. Nevertheless, it is not required under constitutional law to also declare sub-criteria. By setting further sub-criteria during the evaluation process, the tendering authority is not acting arbitrarily.

Regarding machinery, the appellant claimed that the principle of transparency (Art. 17 para. 1 lit. f VöB¹⁶) was infringed, as not even the plough, but also the vehicle was evaluated, which differed from the tender documents. The court held that the evaluation of the car was implied by other criteria and thus foreseeable. It also held that the tendering authority disposes of substantial discretion when evaluating different criteria.

The court concluded that the tendering authority did not act arbitrarily, and that the award was not in breach with Swiss law. It rejected the appeal.¹⁷

3. Construction of the Intercantonal Hospital Riviera Chablais

Appeal against an award decision for construction contract (Ruling of 4 September 2015 by the Swiss Federal Supreme Court):

This Swiss Federal Supreme Court's ruling contains some interesting aspects regarding the annul-

ment of a procurement decision as well as the cancellation of the procurement procedure itself by the judge. In June 2013, a call for tender in an open procurement procedure for the construction of an intercantonal hospital in Rennaz (canton of Vaud) was launched. In January 2014, a private construction company was chosen, against which the unsuccessful bidders filed an appeal with the cantonal court, which in turn annulled the decision and ordered a complete restart of the procedure. The Federal Supreme Court sustained the appeal against the decision of the cantonal court. In its ruling, the Federal Supreme Court sets out the general prerequisite for the annulment of a procurement decision and the restart of the procedure. The court held that a public procurement procedure can only be annulled for important reasons in exceptional cases (*ultima ratio*). In the case at hand, the court took the view that no such important reasons for an annulment were present.¹⁸

4. Grisons: Art in Connection with Architecture Project

Appeal against the cancellation of procurement procedure (Ruling of 12 June 2015 by the Swiss Federal Supreme Court):

In a municipality in Grisons, a public procurement procedure for art in connection with an architecture project was cancelled after the artist won the competition. The tendering authority justified its decision with austerity measures. The artist filed an appeal with the cantonal administrative court seeking the cancellation to be revoked. The Court dismissed the appeal.

14 Federal Law on domestic market from 6 October 1995, SR 943.02.

15 BGE 141 II 113; Klaber Fabian, 2C_1131/2013: Die Vergabe eines Auftrages im Staatsvertragsbereich anhand eines Einladungsverfahrens verstösst gegen das Binnenmarktgesetz (amtl. Publ., frz.), accessed on 22 September 2015 under: <<http://www.swissblawg.ch/2015/04/2c11312013-die-vergabe-eines-auftrages.html>>.

16 Decree on the public procurement from 11 December 1995, SR 172.056.11.

17 BGER 2D_19/2015.

18 BGER 2C_876/2014; Klaber Fabian, 2C_876/2014: Die Annullierung eines gesamten Vergabeverfahrens und die Anordnung eines neuen Ausschreibungsverfahrens setzen voraus, dass wichtige Gründe des öffentlichen Interesses vorliegen amtl. Publ., frz.), called on 21 September 2015 under: <<http://www.swissblawg.ch/2015/09/2c8762014-die-annullierung-eines.html>>.

The appellant took the decision to the Swiss Federal Supreme Court, claiming the decision was arbitrary and done in bad faith. The Supreme Court held that a procurement procedure can only be cancelled for important reasons according to Art. 13 lit. I IVöB and Art. 25 para. 2 SubG-GR¹⁹. The court considered that requirements concerning an important reason are more stringent than requirements concerning a legitimate reason. In the case at hand, pressure for austerity measures increased during the procurement procedure. The court held that it is not arbitrary to assume an important reason for cancelling a procurement procedure in order to decrease expenses. The cancelling was therefore lawful.²⁰

5. Zurich: Software

Appeal against a decision on the awarding of a contract through invitation tendering procedure (Ruling of 21 August 2015 by the Swiss Federal Supreme Court):

In 2014, a municipality in the canton of Zurich invited six companies to submit an offer for the acquisition, installation and operation of a new software infrastructure. In April 2014 the contract was awarded. One of the unsuccessful tenderers filed an appeal with the cantonal administrative court of Zurich, arguing i.a. that a tender invitation procedure should not have been carried out. The cantonal court rejected the appeal reasoning that the appellant was not at a disadvantage because of the tender invitation procedure.

The COMCO filed a complaint with the Swiss Federal Supreme Court. According to COMCO, the court should have assessed whether an open tender procedure would have been appropriate.

First, the court held that the relevant thresholds are met and that, therefore, a tender invitation procedure is not possible (Art. 12 para. 2 IVöB). Second,

the court held that the appellant has a legitimate interest to appeal; in a new procurement procedure, he would have a chance to submit a new offer. This would increase his chances of getting the award. In conclusion, the administrative court of Zurich unlawfully dismissed the appellant's claim for conducting an open procurement procedure.²¹

6. Geneva: Cleaning of Public Buildings

Appeal against an award decision of the municipality of Geneva (Ruling of 24 September 2015 by the Swiss Federal Supreme Court):

In this case, the Federal Supreme court had to deal with public interest criteria in public procurement. The city of Geneva launched an open tender procedure for service contracts with regard to the cleaning of public and administrative buildings. The wage level of the cleaning staff was an award criteria. The association of cleaning and service companies as well as some offering companies lodged an appeal against this public tender, criticizing the criterion regarding wage level. The cantonal court approved the appeal and annulled the tender. It instructed the tendering authority to launch a new tender without an award criterion regarding wage level. The municipality lodged an appeal against this decision claiming an infringement of its municipal autonomy.

According to the court, a municipality enjoys certain autonomy in public procurement. However, the municipality's autonomy is limited regarding the choice of award criteria not directly linked to the subject-matter of procurements. The court held that it is not arbitrary if the cantonal court sees no direct link between wage level and the procurement at hand. Further, the court held that public interest factors like wage levels may only be considered in public procurement if laid down in the law. The court went on and noted that on federal level, Art. 21 BöB²² provides a non-exhaustive list with admissible award criteria. At cantonal level, the IVöB does not provide such a list. Nevertheless, cantonal procurement laws may allow for public interest criteria (e.g. Art. 24 and Art. 33 RMP/GE²³). Since wage levels are not embedded in the cantonal procurement law of Geneva, the court concluded that it is not arbitrary to see it as inadmissible award criteria. Therefore, the cantonal administrative court did not infringe municipal autonomy.²⁴

19 Law on public procurement of the canton of Grisons from 10 February 2004, SubG, BR 803.300.

20 BGer 2D_18/2015.

21 BGer 2C_919/2014.

22 Federal law on public procurement of 16 December 1994, SR 172.056.1.

23 Regulation on public procurement of the canton of Geneva of 17 December 2008, RMP, L 6 05.01.

24 BGE 140 I 285.

7. Geneva: Security at the Airport of Geneva

Appeal against an award decision of the Airport of Geneva (Ruling of 9 May 2015 by the Federal Supreme Court):

The Airport of Geneva called for tender in an open procedure for different security tasks. An unsuccessful tenderer filed an appeal against the award decision with the cantonal court and eventually with the Swiss Federal Supreme Court. The appellant claimed that the contract was awarded arbitrarily. The Supreme Court rejected the appeal mostly for formal reasons.

The court held that an appeal requires that the appellant has a reasonable chance to be awarded the contract. In the case at hand, the appellant only was ranked fifth, and therefore very unlikely to get the contract awarded. As a consequence, the court declared the appeal as inadmissible.²⁵

8. Canton of Valais: Excavation Work and Equipment for Laying Pressure Pipes

Appeal against a decision concerning exclusion from a procurement procedure (Ruling of 12 February 2015 by the Swiss Federal Supreme Court):

In this case, the Swiss Federal Supreme court had to deal with the exclusion of a tenderer in a public procurement procedure. A municipality in the canton of Valais excluded a tenderer in a procurement procedure concerning work for excavation and equipment for laying pressure pipes. The excluded tenderer filed an appeal with the cantonal court of Valais, which was rejected. With the Federal Supreme Court, the appellant asked the court to annul the award decision because of an arbitrary assessment of the facts, because of excessive formalism and because of unequal treatment.

Stressing the discretion of the procuring authority, the court argued that it exercises restraint when scrutinizing procurements. Nevertheless, in the case at hand, the court determined the tendering authority's evaluation of references as excessive formalism. The appellant was excluded from the procurement procedure only because he did not use the form provided. Thus, the court admitted the appeal and annulled the award decision.²⁶

9. Neuenburg: Combined Heat and Power Plants (CFF)

Appeal against a decision to exclude a tenderer in public procurement procedure (Ruling of 9 February 2015 by the Swiss Federal Supreme Court):

The city of Neuchâtel called for tender for a contract on the replacement of combined heat and power plants (CFF), in particular the module of heat co-generation. In the tender documents the authority noted, that partial tenders will be excluded from the procedure. After reviewing the offers, one company was excluded from procedure. The excluded company filed an appeal with the cantonal court against its exclusion, which was rejected. The appellant then asked the Federal Supreme Court to annul the decision of the cantonal court, thereby seeking access to the procurement procedure.

The Federal Supreme Court sustained the appeal, because the appellant was excluded on grounds of a mere formality (not filing a collective bargaining agreement to prove adequate protection of workers but a similar declaration). The cantonal law of the canton of Valais authorises an exclusion of an offer only in case of significant errors in form (Art. 23 para. 2 LCMP²⁷). Therefore, the court held that the exclusion constitutes excessive formalism.²⁸

10. Swiss Post: Procurement of Power

Appeal against award decision of the Swiss Post (Ruling of 25 March 2015 by the Federal Administrative Court):

The Swiss Federal Administrative Court's ruling deals with the procurement of goods or services by entities (Swiss Post), which only partly fulfil essential services mandated by law.

The Swiss Post called for tenders for providing power to several of its facilities. Following the award decision, an unsuccessful tenderer filed an appeal with the Federal Administrative Court. The Swiss

²⁵ BGer 2C_203/2014.

²⁶ BGer 2C_785/2014.

²⁷ Law on public markets of the canton of Valais of 23 March 1999, RSN 601.72.

²⁸ BGer 2C_1078/2014.

Post disputed the applicability of Federal Procurement Law (BöB), because it does not only carry out essential services mandated by law, but also participates in the private sector. The court held that it is impossible to separate the supply contracts in parts which supply power for essential services and parts which supply power for competitive services. As a consequence, the contract as a whole is subject to public procurement law.²⁹

Against this decision of the Federal Administrative Court, the Swiss Post filed an appeal with the Swiss Federal Supreme Court, which refused to deal with the question (no legal issue of fundamental importance, Art. 83 lit. f nr. 2 BGG).³⁰

11. Vaud: Concession for Billboards on Public and Private Grounds

Appeal against award decision of a concession for billboards within the territory of Lausanne (Ruling of 31 August 2015 by the administrative court of the canton of Vaud):

The building department of the municipality of Lausanne invited tenders for the renewal of the concession for providing billboards within the territory of Lausanne. A competitor filed an appeal with the cantonal administrative court of Vaud.

The court held that the law on public procurement is not applicable on the award of concessions. Nevertheless, the law requires that cantonal and communal monopolies have to be awarded by public tender (art. 2 para 7 BGBM). By doing this, the authority has to respect the principles of non-discrimination and transparency.

The court mainly had to assess the use of public interest criteria, which are not directly linked to the service. It held that such criteria require a legal basis and need to be applied without discrimination. In the case at hand, the municipality wanted to use criteria referring to social responsibility, e.g. wage level, coverage rate of pension fund, work safety and health, employment of previously unemployed persons and number of young trainees. In the case at hand, the municipality based its decision mainly on the number of young trainees and the fact that these trainees are located in Lausanne. The court held this to be discriminatory and protectionist. Further, the court held that a successful bidder cannot be chosen because of its location in Lausanne. The court awarded the concession directly to the appellant.³¹

29 BVGer B-428/2014.

30 BGER 2C_409/2015.

31 CDAP Vaud: MPU.2015.0011.