Switzerland

New Developments in Switzerland: October 2013 – September 2014

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I. Current Developments

PPPs are becoming a bit more popular in Switzerland. Public authorities are increasingly considering entering a PPP when planning new projects. As shown in the example of the "Watercity of Solothurn" even private initiators create concepts that require PPPs. The youth hostel in Saas-Fee sets an example for a successful partnership and demonstrates how the public can conclude innovative projects in cooperation with a private partner.

With regard to procurement, much attention has been given to a recent recommendation by the Competition Commission (COMCO), while rulings by the Swiss Federal Supreme Court remain scarce. The revised GPA entered into force in April 2014 for 10 of the contracting States (Switzerland has yet to ratify). As a consequence, Swiss authorities on all levels have resumed the revision of the procurement laws.

II. PPPs – New projects

1. Bâtiment Skylab in Geneva

In the industrial zone of the suburb "Plan-les-Ouates" near Geneva a PPP-Project is expected to be ready for occupation by 2016. The complex of buildings includes offices for industrial corporations and the offices of the municipal administration as well as a fire station, a day-care center, a parking garage (700 parking spots), and a long-distance heating station. The municipality of Plan-les-Ouates concedes the building rights to a foundation that pays an annual remuneration in return. The foundation on its part enters into a contract with the private partner (a real estate company). This contract includes the assignment of the building rights to the private partner for a remuneration exceeding the value of the remuneration paid to the municipality. The private partner is in charge of the construction and the rental of the facilities. The total investment volume will reach CHF 150 million. Furthermore the municipality will acquire the offices for the administration and the fire station as a condominium owner. These acquisitions amount to CHF 16.7 million.[1]

2. Centre for sports and events in Lugano-Cornaredo

This PPP-Project is currently in its planning stage in Lugano-Cornaredo in the canton of Tessin. The plans provide for the construction of a whole new city district offering facilities for leisure and sports as well as exhibition spaces. The municipalities are not able to bear the full costs by themselves which lead to the decision to include private partners in the financing of the project. The planning and the search for private partners were delegated to a newly established agency under public law (the "Agenzia NQC").[2]

3. Underground Parking in Yverdon-les-Bains

As part of the redesign of the "Place d'Armes", a big square in the centre of Yverdon-les-Bains in the canton of Vaud, the authorities issued an invitation to

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1 A detailed description is available on the website of the Swiss PPP Association: http://www.ppp-schweiz.ch/fr/association-ppp-suisse/ppp-informations/actuel/view/items/le-nouveau-centre-multifonctionnel-a-plan-les-ouates-sappellera-skylab/

2 An overview over the project is available on the website of the Federal Office for Spatial Development (ARE): http://www.are.admin.ch/themen/raumplanung/modellvorhaben/03991/index.html?lang=de&ref=/themen/raumplanung/modellvorhaben/2007-2011/04969/index.html

tender for a public parking garage on 14 January 2014. The chosen private partners are required to conduct a cost-effectiveness analysis and present the framework requirements for the garage. Subsequently, the final number of parking spots is to be negotiated with the authorities.[3]

4. Bus-Center in Bassersdorf

A smaller PPP-Project with a total investment volume of about CHF 30 Million entered into the construction phase in December 2013 in Bassersdorf near Zurich. The new "bus center" consists of a spacious maintenance facility for buses and an office building. ZVV – the public transport association of Zurich – as well as the public transportation agency of Glattal entered into a partnership with a big private bus company, which is responsible for the construction of the new facilities. The private partner will be using parts of the center for its own purposes while the main part of the facilities will be rented by the public transportation services of Glattal.[4]

5. Water-City in Solothurn

The construction phase is still a long way off for an ambitious project in the city of Solothurn. A group of private investors developed the plans for the construction of a new city district directly on the shore of an artificial new river loop of the Aare. The new district is to be located on the old dumping ground of the city. The clean- up of the landfill will be financed with a loan taken out by the public partner (the Canton of Solothurn). After 3-4 years the Canton will start to repay the loan with the monetary surplus derived from the taxes paid by the inhabitants of the new district. The costs for the construction of the "Water-City" are completely borne by private investors. Currently the realization of the project remains still uncertain. Among other things, it is unclear whether the area can be zoned and to what extent the Confederation will participate in the clean- up costs. [5]

6. PPP in Tourism

PPPs have been gaining importance in the field of tourism. Two new projects are currently being carried out by Swiss Youth Hostels. In Saas-Fee in the canton of Wallis the local recreation center with pool area and wellness facilities is being renovated and modernized. The renovation costs of about CHF 6.8 Million are borne by the municipality. Next to the recreation center a modern energy-efficient youth hostel is being built and financed (investment volume: CHF 10.1 Million) by Swiss Youth Hostels, which will also be responsible for the future operation of the recreation center. The building rights for the parcel of land were conceded to Swiss Youth Hostels by the municipality, which will receive CHF 70,000 as annual remuneration in return. The so-called wellnesshostel4000 is the first hostel worldwide to offer its guests access to a wellness area. The opening of the new facilities is expected in September 2014.[6]

In Burgdorf in the Canton of Berne the municipality is to implement another project in a partnership with Swiss Youth Hostels. Since the community members were against the sale of the Castle of Burgdorf to a private owner, Swiss Youth Hostels will now run a hostel, a restaurant and event rooms and take care of the facility management in the Castle. Should the project be implemented as planned (the financing is not yet secured), the opening of the Castle will take place in 2018.[7]

III. Public Procurement – New decisions

1. Graubünden road tunnel

Appeal against the award decision by the Department for Construction, Environment and Forestry of

3 Further information is available on the website of Yverdon-les-bains: http://www.yverdon-les-bains.ch/se-developper/place-darmes/place-darmes-phase3/

4 For more information see the press release by the private prtner (EUROBUS): http://www.primcom.com/media/medialibrary/2013/12/20131217_MM_Eurobus_VBG_ZVV_Buszentrum.pdf

5 An article about the project in the „Sonntagszeitung" is available on the website of the Swiss PPP Association: http://www.ppp-schweiz.ch/tl_files/Nachrichten/Attachments/2014/Deponiesanierung_Solothurn_SonntagsZeitung_2014-01-05.pdf

6 A brochure with further information on the project is available on the following website: http://www.youthhostel.ch/system/ck_assets/uploads/1258/original/PDF_Infofaltblatt_FZZ%20Bielen_JH.PDF

7 See the press release by the Swiss Youth Hostels: http://www.youthhostel.ch/de/media/medienmitteilungen/schloss-burgdorf-fur-die-neue-nutzung-des-schlosses-wird-das-projekt-offenes-schloss-weiter-bearbeitet

Graubünden (Ruling of 26 July 2014 by the Swiss Federal Supreme Court)

The department of civil engineering of the canton of Graubünden invited tenders for the construction of a road tunnel. The offers by a consortium were declined on the grounds that they did not fulfill the requirements of the project. The consortium appealed against this decision. The Federal Supreme Court held that the basic offer by a bidder must include a detailed index of its deviations from the official tender specifications but that variations of the basic offer must not necessarily contain a separate index. Furthermore the complainant objected that the criterion "truth of price" has not been taken into consideration since the respective slot on the evaluation sheet remained empty. The court held that it is legitimate not to fill in the slot because the risk of price deviation was considered as negligible for all offers. Lastly, the court examined whether the rejection of the complainant's offer was legitimate. It concluded that an offer may provide for a deviant process from the one described in the tender specifications but that the outcome must accord exactly to the result specified by the awarding authority. Contrary to the complainant's opinion, the tender documents must not explicitly point out that fact.[8]

2. The position of the VRSG under procurement law

Recommendation of 30 June 2014 by the COMCO

The Swiss Competition Commission (COMCO) published a recommendation concerning the standing of a State-owned company under procurement law. In 1973, the Canton of St. Gallen and a few municipalities founded the VRSG (Verwaltungsrechenzentrum AG St. Gallen). The company develops and maintains IT solutions for the administration and for companies with a public function. The COMCO examined whether the acceptance of bids from the municipalities and the award of contracts to third parties by the VRSG fall within the scope of Article 5 BGBM.[9]

First, the COMCO considers whether the municipalities may directly award contracts to the VRSG without following the requirements of the Procurement Law based on the "in house privilege" (allowing the State to directly award contracts to its own suppliers or closely held service providers). The Swiss Law does not provide any clear prerequisites for the use of the in house privilege. Based mainly on the case law of the European Court of Justice and Swiss administrative bodies as well as doctrine, the COMCO concludes that the in house privilege may not be invoked in this case: First, the VRSG does not only render services to its shareholders/owners but also to other public entities. Second, the VRSG often participates in public tenders of its shareholders. Furthermore, the shareholders do not exercise enough control over VRSG to justify the application of the in house privilege. The conclusion by the COMCO is in line with a filing of the VRSG declaring that the municipalities and other companies with public functions do not directly award contracts to VRSG based on the in house privilege and that these entities always comply with the provisions under procurement law.

In addition, the COMCO analyses the award of contracts to third parties by the VRSG. Art. 5 BGBM is applicable to public institutions as defined in the WTO's Government Procurement Agreement as well as to institutions that bear cantonal or municipal functions. The article does not cover institutions that perform commercial or industrial activities. According to the COMCO an institution is governed by public law if (I) it is bound to the State, (II) it fulfills functions in the interest of the public and (III) it does not perform any commercial or industrial activities. In the case at hand the COMCO concludes, that the VRSG is bound to the State, since all of its shareholders are public entities. Furthermore the VRSG fulfills functions in the interest of the public, as those interests are to be interpreted in a very broad manner. Lastly, the COMCO states that the VRSG is under competitive pressure in the market for IT services and is forced to offer competitive prices. There are no competitive advantages since the administration does not grant any preferential treatment to the VRSG when awarding contracts. The VRSG therefore has the same incentives as the private companies on the market and must consider the costs of its own procurements. Hence there is no risk that the VRSG will award contracts in a discriminatory man-

8 BGer 2D_39/2014.

9 Art. 5 of the Federal Law on the domestic market requires Cantons, Municipalities and other entities with public functions to comply with the provisions under public procurement law.

ner; thus, Article 5 BGBM is not applicable to VRSG.[10]

3. COMCO's appeal against the direct award of a contract by the Canton of Lucerne

Ruling of 12 February 2014 by the Cantonal Court of Lucerne

In 2011 the canton of Lucerne started planning the construction of two new asylum centers. Due to the alleged urgency of the project, the canton did not invite tenders but awarded the contract (including the project planning, the realization and the renting of the buildings) directly to a charitable cooperative (Genossenschaft Pandocheion). The COMCO lodged an appeal at the cantonal administrative court of Lucerne on the 12 September 2013, claiming that the direct award of the contract illegitimately limits the access to the market. First, the court examined whether the project at hand is to be qualified as public procurement. The canton argued that the contract is not synallagmatic and does not include the payment of remuneration to the cooperative and that it therefore does not fall within the scope of procurement law. Nevertheless, the court held that the assignment of the building rights to the cooperative and the payment of a rent for the use of the new centers by the canton are to be qualified as remuneration. Since the investment volume of the project reaches CHF 5 Million, the direct award of the contract is not legitimate under procurement law. However, the authority is not obliged to invite tenders if the project is urgent (§ 6 para. 2 lit. a öBV[11]). Urgency is deemed to exist (1) when an unforeseeable event occurs and (2) when the task to be fulfilled is urgent. In the case at hand the court held that the scarcity of refugee centers has been a problem during the last few years and that Lucerne would have had enough time to invite tenders. Furthermore the court examined whether the cooperative Pandocheion can be qualified as a charity organization within the meaning of § 2 lit. d öBG[12] which would allow a direct award without considering the procurement law. The court concluded that the exception is not applicable because the cooperative was specifically founded for this particular project. Therefore the direct award of the contract limits the access to the market in an illegitimate manner. [13]

4. Binding Tender Requirements

Appeal against the ruling of 5 March 2013 by the administrative court of Graubünden (Ruling of 20 January 2014 by the Swiss Federal Supreme Court)

This ruling by the Swiss Federal Supreme Court concerns the evaluation of binding tender requirements. The complainant asserted that the authority evaluated the fulfillment of the tender requirements based only on the self-assessment by the respective bidder. The court held that the authority must verify the offers and also may request the opinions of experts, if necessary. However the authority cannot be required to have every single detail of an offer verified by an expert. It must be borne in mind that tenders are binding contract offers by the bidder. If the bidder's services do not correspond with the covenants in the offer, the authority may avail itself of the legal remedies under the provisions of the contract.[14]

5. Gotthard

Appeal against the award decision by the Alp Transit Gotthard AG (Rulings of 19 and 29 October 2013 by the Swiss Federal Administrative Court)

The Swiss Federal Administrative Court held that an awarding authority must take into account potential complaints against the award of a contract and the resulting delay in the planning of a project. The authority cannot dispose of procurement rules by invoking urgency if it would have been avoidable by planning ahead. For major long-term projects, which involve several simultaneous actions, including possible delays is not always appropriate. Such delays could then result in excessive costs[15]

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10 The recommendation by the COMCO is available on: http://www.news.admin.ch/NSBSubscriber/message/attachments/35637.pdf

11 Cantonal decree on public procurement of the canton Lucerne.

12 Cantonal law on public procurement of the canton Lucerne.

13 The ruling was published in RPW 2014/1 p. 336 et seqq. available on: http://www.weko.admin.ch/dokumentation/00157/

14 BGer 2C_346/2013.

15 BVGer B4902/2013 & BVGer B4904/2013; Stöckli, Hubert/Beyeler, Martin, Vergaberecht 2014: neue Themen, neue Urteile, in: Zufferey/Stöckli, Aktuelles Vergaberecht 2014, Rz. 102.

6. Nidwalden

Appeal against the ruling of the 16 April 2012 by the administrative court of Nidwalden (Ruling of the 23 July 2013 by the Swiss Federal Supreme Court)

The Swiss Federal Supreme Court's ruling concerns selection and award criteria in procurement law. The complainant asserted that the authority awarding the contract considered the better suitability of a certain bidder (which was higher than requested by the selection criteria) in the evaluation of his offer, although selection and award criteria should be considered in separate steps. The court held that the selection criteria are to be considered in a first step when evaluating the suitability of a bidder. In a second step the concrete offer by the bidder must be evaluated by applying the award criteria. In some cases though, especially when particular skills or professional experience are crucial, it is legitimate to demand certain minimum requirements in the selection criteria and to consider skills that exceed those minimum requirements in the scope of the award criteria. The court concluded that such aspects may be considered as indirect indicators for quality when evaluating an offer.

In the same ruling the Supreme Court had to decide whether the awarding authority may obtain references without the consent of the respective bidder and whether it may base its evaluation on such references. The court held that the authority must assess the relevant facts on its own and that it is not bound by the motions of the affected parties. Furthermore, the authority may consider cases based on its own knowledge and experience, in particular in local projects when most of the bidders are known to the authority. As a consequence it cannot be illegitimate for the authority to obtain such information. However the right to be heard still has to be granted to the bidder concerned, especially if the reference obtained puts the respective bidder at a disadvantage, he must be heard. The right to be heard can be restricted considering the special characteristics of procurement law. The actual offers are to be kept confidential and are not to be disclosed to other bidders. With regard to references, however, the parties have the right of access to any documents.[16]

16 BGE 139 II 489

IV. Public Procurement – Revision of the Legislation

On the 30 May 2008, the Swiss Federal Council opened the consultation process for a revision of the Federal Act on Government Procurement (BöB). In light of the mixed feedback, the Swiss Federal Council decided to some changes by decree (Ordinance on Government Procurement, VöB), hoping that this would positively affect the economy. The revision of the BöB was to be continued once the WTO concluded the revision of the GPA. In 2010 the amendments to the VöB came into effect. On the 6 April 2014 the GPA entered into force for the states that have ratified it so far. Switzerland has yet to ratify the agreement. The amendment of the BöB/VöB (for procurements at federal level) as well as of the Intercantonal Agreement on Government Procurement (IVöB, for procurements at cantonal level) is currently being drafted by a working group consisting of federal and cantonal experts. The legislative process at federal as well as at cantonal level is expected to begin in the second half of 2014.