

Country Reports

Switzerland

Main Developments between October 2018 and April 2020

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I. New Developments in Switzerland

The revised public procurement law¹ has been adopted. The revision process entailed the GPA 2012 (ratification still pending²), Federal Law (BöB) and Ordinances (VöB) as well as state law (Inter-cantonal Agreement on Public Procurement, IVöB). The BöB and VöB will enter into force on 1 January 2021. These legal acts will harmonise procurement regulations throughout Switzerland, thereby increasing legal certainty and user-friendliness. Public procurement will be more concerned with sustainability and quality competition.³ Whether the revision of the public procurement laws will provide a boost for PPP projects remains to be seen.

In 2018, the entire federal administration made 1,014 awards above the WTO threshold with a volume of CHF 4.9 billion⁴ and the central federal administration contributed over CHF 5.55 billion to the procurement of commercial services and supplies (goods and services)⁵.

II. PPPs – New Projects

1. Swiss Bacterial Cheese Cultures Jointly Owned by the Confederation and Industry

In order to secure bacterial cultures for cheese-making in the long-term, the Confederation entered into a public-private partnership with the dairy industry. In this context, two contracts were concluded, which came into force in 2019. One contract regulates the shared property of the dairy industry and the Confederation of the cheese cultures. The other one regulates the roles and responsibilities of the PPP partners.⁶

2. Sion Airport

Since January 2018 and the withdrawal of the air force, Sion Airport has been a civil airport with limited military use. The city of Sion and the canton have now developed a new strategy for the airport, which

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1 See EPPPL 3/2014; EPPPL 4/2015; EPPPL 4/2017; EPPPL 3/2018.

2 In this respect see the list of parties of the revised GPA at WTO, 'Parties, observers and accessions' (2020) <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm> accessed 11 May 2020.

3 BKB, 'Revision des öffentlichen Beschaffungsrechts' (2020) <<https://www.bkb.admin.ch/bkb/de/home/oeffentliches-beschaffungswesen/revision-des-beschaffungsrechts.html>> accessed 11 May 2020; see also EFD, 'Totalrevision des Beschaffungsrechts des Bundes', (2019) <<https://www.efd.admin.ch/efd/de/home/themen/bau-und-logistik/revision-des-beschaffungsrecht>

-des-bundes/fb-revision_beschaffungsrecht_bund.html> accessed 11 May 2020.

4 EFD, 'Reporting Set Beschaffungscontrolling 2018 Bundesverwaltung' (2019) 3 <https://www.bkb.admin.ch/dam/bkb/de/dokumente/Oeffentliches_Beschaffungswesen/beschaffungscontrolling/Reportingset_BC_2018_DE.pdf.download.pdf/Reportingset_BC_2018_DE.pdf> accessed 11 May 2020.

5 EFD, 'Beschaffungszahlungen 2018' (2019) 1 <https://www.bkb.admin.ch/dam/bkb/de/dokumente/Oeffentliches_Beschaffungswesen/Beschaffungszahlungen/Faktenblatt_SBez%20Auswertung_2018_DE_V1.pdf.download.pdf/Faktenblatt_SBez%20Auswertung_2018_DE_V1.pdf> accessed 11 May 2020.

6 Eidgenössisches Departement für Wirtschaft, Bildung und Forschung (ed), 'Schweizer Käsekulturen im gemeinsamen Eigentum von Bund und Branche' (2018) <<https://www.agroscope.admin.ch/agroscope/de/home/aktuell/medieninformationen/medienmitteilungen.msg-id-73134.html>> accessed 11 May 2020.

will leave the airport largely in public ownership with its operations entrusted to a private partner.⁷

3. Bern Airport

The Board of Directors of Flughafen Bern Corp. intends to position the regional airport as a mobility centre and infrastructure platform. The canton wants to create the legal basis for the permanent financial support for the services in the public interest. Should this law come into force, the canton would not only be able to support the airport financially, but could also acquire a substantial minority stake in the share capital of Flughafen Bern Corp.⁸

4. Marina Tiefenbrunnen

In the Tiefenbrunnen area in Zurich, a new marina with around 400 boat places as well as guest and dry berths, a water sports centre, catering facilities and an attractive public main jetty are planned to be built. The project is planned to be implemented as a public-private partnership.⁹

III. Public Procurement – New Decisions

1. Scope of Public Procurement Law (Ruling of 21 February 2019 by the Swiss Federal Supreme Court)

An entity whose shareholders are municipalities and which operates a hospital for public use has been

placed under the provisions of public procurement by a decision of the Government Council. It was disputed whether the company was to be qualified as an institution under public law. In particular, the question arose whether a commercial activity was present. According to the Swiss Federal Supreme Court, this is assessed according to whether there is a competitive situation in functioning markets. If there is such a situation, institutions, irrespective of their state affiliation, are induced by cost pressure to award their contracts as economically and non-discriminatory as possible on their own initiative, so that they do not have to be subject to public procurement law. After analysing the hospital planning and listing procedure, the competition situation, price formation and quality competition in this specific case, the court concluded that the company does not carry out any commercial activity in the sense of procurement law and is therefore subject to the provisions of public procurement. The fact that the supporting municipalities were not obliged under company law to support the company with public funds in the event of poor business performance was not decisive.¹⁰

2. Relevant Time for Meeting Selection Criteria (Rulings of 2 July 2019 by the Swiss Federal Supreme Court)

In connection with an invitation to tender for waste disposal, a contract was awarded to a tenderer who did not meet a selection criterion at the time of the award, since he was not in possession of the equipment necessary for the execution of the mandate. The tenderer only procured the necessary equipment after the contract was awarded. The question therefore arose as to when the selection criteria must be met – at the time of the award decision or only at the time of the implementation of the contract. The court stated that tenderers who do not fulfil the selection criteria are excluded from the tendering procedure. Thus, the awarding authority needs to make clear if it is sufficient that the tenderers need to meet certain criteria only at the time of performance of the contract. If the awarding authority does not make any statement on this point, and if such an intention is not clearly apparent from an interpretation of the invitation to tender, the contract cannot subsequently be awarded to a tenderer who does not meet a selection criterion at the time of the award.¹¹

7 Stadt Sitten/Kanton Wallis, 'Medienmitteilung' (2018) <<https://www.vs.ch/documents/529400/4295434/2018+10+08+-+Medienmitteilung+-+Flughafen+Sitten/97018b39-81de-45bb-9dd3-23e663c28562>> accessed 11 May 2020.

8 Regierungsrat Kanton Bern, 'Unterstützung für den Flughafen Bern' (2019) <https://www.be.ch/portal/de/index/mediencenter/medienmitteilungen.meldungNeu.html/portal/de/meldungen/mm/2019/05/20190516_1054_unterstuetzung_fuerdenflughafenbern?qck=1557997600981> accessed 11 May 2020.

9 Stadt Zürich, 'Marina Tiefenbrunnen' (2020) <<https://www.stadt-zuerich.ch/prd/de/index/Projekte/laufende-projekte/marina-tiefenbrunnen.html>> accessed 11 May 2020.

10 BGer 2C_196/2017 and BGE 145 II 49 with references to previous case law.

11 BGer 2D_25/2018 and BGE 145 II 249; see also BGE 143 I 177, in which the necessary severity of the reason for exclusion was discussed.

The same question arose in a case where the surveying of land was put out to tender in an open procedure. The central issue in that case was the timing, when the selection criterion of the "office location in the district" should be met. Based on reasoning referring to domestic common market law, such a criterion could infringe the right to non-discriminatory access to cantonal and municipal procurement markets, when it needs to be fulfilled at the time of the award decision. Therefore, the criterion needs only be fulfilled at the time of performance.¹²

3. Scope of Application of Public Procurement Law (Ruling of 29 August 2019 by the Swiss Federal Supreme Court)

The case concerned the award of a contract to manage a hotel and a restaurant owned by the city of Geneva. The question was whether public procurement law and domestic market law was applicable to the case. The court stated that it is characteristic of a public procurement that the public authorities, acting as buyers on the free market, acquire from a private undertaking, in return for payment of a price, the resources necessary to perform a public task. On the other hand, the mere fact that the public authority authorises a private undertaking to carry out a particular activity does not mean that that activity is subject to the rules on public procurement. In the case at hand, the city of Geneva acted as seller (and not as buyer), with the hotel and restaurant forming part of the financial assets of the city. Consequently, the subject matter of the dispute fell outside the scope of public procurement law.¹³

4. Lot Limit in a Public Tender (Ruling of 11 October 2018 by the Swiss Federal Administrative Court)

Swissgrid Corp. invited tenders for a service contract by open procedure. The contract was divided into six lots; a tenderer could only receive a certain number of lots. A consortium was not awarded a lot because one of its partners had already been awarded the maximum number of lots as a single tenderer. The court came to the conclusion that a lot limitation, which serves the purpose of ensuring economic procure-

ment or replacement procurement in the medium and long term in a supplier market characterised by sufficient competition, is not unlawful. Furthermore, according to the court, a lot limitation which is provided for the purpose of preserving competition or ensuring security of supply is also compatible with the GPA. In the present case, the lot limitation was permissible because the relevant supplier market was very small and the awarding authority was the largest, sometimes only, buyer. Furthermore, it was of great public interest that the services in question were reliably provided and that any replacement procurement could be made at very short notice. The court also held, that, in principle, lot restrictions must be announced in the invitation to tender.¹⁴

5. Obligation of an Authority to Provide Information on the Reasons for an Award Decision (Ruling of 1 November 2018 by the Swiss Federal Administrative Court)

The Swiss Federal Railways Corp. (SBB) published a call for tenders for a service contract in an open procedure. The awarding authority informed the unsuccessful tenderers of the decision in favour of the successful tenderer, stating the name of the tenderer, the price of the tender taken into consideration and the reason for the award (namely achievement of a higher score). The complainants were seeking more information, in particular their rank in the ranking list and the evaluation table with the notes for all the tenders submitted. The court reasoned that a summary statement of reasons for the decision is permissible. However, the awarding authority is obliged to provide, on request, additional information to tenderers who were not taken into account in the decision, to enable them to file a complaint. This can be done in an informal debriefing. Nevertheless, the court concluded that the reasons given by the authority did not meet the requirements for summary justification and that the authority has infringed its obligation to provide information. However, the court also held

¹² BGE 2C_111/2018 with references to previous case law.

¹³ BGE 2C_254/2018 and BGE 145 II 252 with references to previous case law.

¹⁴ BVGE B-4011/2018 and BVGE 2018 IV/6 with references to previous case law.

that this procedural mistake can be remedied in appeal proceedings.¹⁵

6. Conditions of Participation and Reasons for Exclusion from an Award Procedure (Ruling of 19 February 2019 by the Swiss Federal Administrative Court)

The Federal Roads Office (ASTRA) put a construction contract out to tender in an open procedure. One member of the winning consortium was in arrears with the payment of social security contributions at the time of submission of the tender. When the tender was submitted, it stated falsely that it was up to date with the payment of social security contributions and that it could provide evidence of this if requested. This evidence was not provided. Moreover, it was in bankruptcy at the time of the award, but the bankruptcy had been reversed at the time of the publication of the decision. The complainants (unsuccessful tenderers) alleged infringement of the principles of transparency and equal treatment. The court held that the conditions for participation must be fulfilled throughout the entire procedure; if not, the applicant needs to be excluded. The court found that the awarding authority had infringed the principles of transparency and equal treatment by failing to examine whether the defendant consortium fulfilled

the legal conditions for admission to the contract. The court concluded that the non-payment of social security contributions and the false statements made in this respect were reasons for exclusion. The court annulled the award decision and awarded the contract to another tenderer.¹⁶

7. Transfer time as Inadmissible Award Criterion in the Absence of Objective Reasons (Ruling of 24 April 2019 by the Swiss Federal Administrative Court)

Armasuisse Real Estate has tendered a contract for services of architecture and engineering offices as well as planning-related services in an open procedure, in particular about 'Federal Refuelling Facilities and Petrol Stations'. The court had to deal with the question whether the location-based award criterion 'transfer time' was permissible. According to the court, the principle of equal treatment has to be observed when defining and weighting the award criteria, and domestic suppliers have to be treated equally. Discriminatory or protectionist award criteria in particular were therefore inadmissible. The court stated, that the latter category includes, in particular, local residence. However, the court made it clear that it would not be inadmissible a priori or at all to take into account the geographical proximity of the provider to the place of performance for the award of the contract, if there are objective reasons for such a criterion. In the case at hand, the criterion put suppliers whose headquarters were centrally located in Switzerland at an advantage without objective reason. The award decision was overturned and the matter was referred back to the awarding authority.¹⁷

15 BVGer B-1831/2018 and BVGE 2018 IV/11 with references to previous case law.

16 BVGer B-396/2018, B-505/2018 and BVGE 2019 IV/1 with references to previous case law.

17 BVGer B-5601/2018 and BVGE 2019 IV/2 with references to previous case law.