Switzerland

Current Developments in Switzerland in October 2012 – September 2013

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Over the last few years, PPPs have remained a rarity in Switzerland. At the federal level, the government is still reluctant to cooperate with private partners (see below Gotthard road tunnel); the cantons' experiences with PPP, however, have been mostly positive so far. During the past year, the Federal Supreme Court has ruled in two interesting cases regarding Public Procurement. Particularly the one concerning open-source software reached quite strong media attention. Only recently, the report on procurement-controlling was published. It provides an overview of the amounts spent on public procurement by the Federal Administration in 2012.

I. PPPs – New Projects

1. Stadiums of Biel

In December 2012, construction work began on a new PPP project in Biel (canton of Bern). The project includes the construction of two new stadiums, a curling arena and several sports fields. The PPP contract, which was concluded in August 2007, requires the city of Biel to concede the building rights to the private partner, who then builds the complex. As remuneration for the building right, the city receives about CHF 1,7 million from the private partner. After the completion of the construction works, the municipality of Biel will take over the buildings as a condominium owner, while the private partner is granted the right to operate the commercial spaces in the complex. The total investment volume reaches CHF 77 million.[1]

2. Center for Senior Citizens in Opfikon

Another PPP project in Switzerland entered into the construction phase in April 2013. The center for senior citizens in Opfikon (canton Zurich) including residential homes, a nursing home for the elderly, a public restaurant, a library and a gym is expected to be finished in early 2015. In 2008 the contract with a term from 2015 (expected beginning of operation) to 2048 was approved by the municipal council of Opfikon. The private partner (a company which runs several retirement homes all over Switzerland) bought the property from the city of Opfikon, provides the financial resources for the construction and is contractually obligated to run the center. The investment volume is about CHF 36 Million and is entirely borne by the private partner.[2] The city will provide compensation to the company in case of vacant apartments/rooms but also will be able to take some influence in the manner the center is operated. Furthermore the city will be given a share of the annual profits between 10–30 % depending on business performance.[3]

3. Gotthard Road Tunnel

While the above-mentioned projects have so far been successful, the PPP infrastructure project for the Gotthard road tunnel has still not made any progress. In an opinion of March 2013 the conference of the can-

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1 A detailed description of the project is available on the official website of the city of Biel: www.biel-bienne.ch/de/pub/wirtschaft/stadtentwicklung/stades_de_bienne.cfm.

2 www.ppp-schweiz.ch/de/ppp-wissen/ppp-projekte-in-der-schweiz/articles/seniorenzentrum-bubenholz-opfikon/.

3 Resolution by the municipal council of Opfikon, 4th of March 2008: www.opfikon.ch/de/politik/legislative/politbusiness/?action=showinfo&info_id=71723.

tonal directors of construction, planning and environment (Bau-, Planungs- und Umweltdirektoren-Konferenz, BPUK) advised the Federal Council of Switzerland against any form of PPP for the realization of the project. The conference believes that the State is able to finance the tunnel at a more favorable rate than any private company. Furthermore it raises concerns over the State's ability to exert influence on the project in case of a Public Private Partnership. [4] In September 2013 the Federal Council decided that a new tunnel shall serve as replacement while the existing tunnel is being renovated. After the renovation works, both tunnels shall coexist, but only one traffic lane in each direction will be opened at a time. There will be no fee for the use of the tunnel in deference to the residents. The possibility of a Public Private Partnership was not mentioned in the Federal Council's press release.

4. Traverse over the Lake of Geneva

The region of Geneva has been facing serious problems with increasing traffic congestion. As a consequence, the cantonal government of Geneva decided to build a new street, which will either traverse the lake on a bridge or in an underground tunnel and therefore decrease traffic around the lake. The Swiss Federal Council has not considered the project yet, since the Federation is not financially able to bear the costs of the construction. A feasibility study conducted by several experienced consulting firms confirms that the traverse would have a significant impact on the traffic situation in the region. Furthermore, the study arrives at the conclusion that the financing of the project could successfully be done with the support of private partners. According to the experts many private companies are interested in participating in a PPP-Project. The traverse of Geneva, which will cost between CHF 2.55 billion and CHF 3.56 billion (depending whether there will be a tunnel or a bridge), would be the biggest PPP-Project in Switzerland so far.[5]

II. Public Procurement – New Decisions

1. Parking Garage in Basel

The Swiss Federal Supreme Court's ruling of the 16th of October 2012 contains some interesting aspects regarding the obligation of the government to put out a public tender for a project. In Basel (canton Basel-Stadt) a private company is planning to build a public parking garage on public ground in the city. The project was presented to the Department for Construction and Traffic of Basel (Bau- und Verkehrsdepartement Basel- Stadt), followed by similar projects submitted by other companies. The cantonal government agreed to support the general idea of a new parking garage and therefore to grant a concession to one of the projects. The government's decision in favor of a certain project was challenged by the initiator of another project in 2010: He claimed that the construction of a new parking garage on public ground is subject to a government tender and therefore a regular procurement procedure must take place. The Swiss Federal Supreme Court dismissed the complaint in 2012 by denying the application of the Law of Public Procurement in this specific case. According to the court, the typical attributes of a public procurement in Switzerland are the following: The State as a prospective buyer (on the "demand-side") demands a certain good or service in order to fulfill a public duty and offers a consideration in return. In the case at hand the State only regulates private activities and does not actively demand a good or service. The initiative for a new parking garage emerged from the private sector and the State was only asked to grant the right to build on public ground. In fact the State stands on the "supply-side" in this specific situation; it grants the right of special use to the private company and is given a financial compensation in return. Moreover, the court states, that the construction of a parking garage on public ground must not necessarily be considered as fulfillment of a State function. Since the private company came up with the idea in the first place and was neither charged nor financially supported by the State, the parking garage is a private building and therefore only subject to the usual regulations of the construction law.[6]

4 Statement by the Conference of the cantonal directors of construction, planning and environment (BPUK), 7th of March 2013: www.bpuk.ch/Dokumentation/Stellungnahmen.aspx.

5 The results from the feasibility study are available on the following website: www.economiesuisse.ch/de/PDF%20Download%20Files/dp12_PPP_20131109.pdf.

6 The complete ruling by the Swiss Federal Supreme Court is available on the following website: www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2012/Entscheide_2C_2012/2C.198__2012.html.

2. Software for the Federal Administration

In May 2009 the Federal Agency for Buildings and Logistics (Bundesamt für Bauten und Logistik, BBL) – responsible for the public procurement of the Federation – published the decision to renew its contract with Microsoft concerning the IT-Infrastructure for the Federal Administration. The contract (Investment volume: CHF 42 million) was not put up for tender by the BBL, but offered to Microsoft directly. Several Swiss providers of Open-Source-Solutions felt discriminated by this decision and appealed against it, demanding an open tender. The Swiss Federal Supreme Court had to judge the matter in March 2011 and concluded that the providers of Open-Source-Solutions did not have the right to appeal. Under Swiss Law, procurements may be awarded by limited tender if the contract has special technical or artistic features, which can only be provided by one specific supplier, and in the absence of adequate alternatives. In case all these criteria are met, the direct award of a contract is justified.[7] In the case at hand, the appellants stated, that the object of procurement was too narrowly defined (Microsoft-Products). As a consequence of this narrow definition, only one supplier (Microsoft itself) was able to provide the service and the above-mentioned exception could be applied.

The Federal Supreme Court negated the other providers' right of appeal because no concrete alternatives to the offer by Microsoft were presented. It stated that it was not the duty of the agency to make evident that there are no alternatives to the chosen offer, since the purpose of the exception in Art. 13 VöB is to facilitate the procurement procedure in certain cases. In the case at hand, the Open-Source-Providers only submitted a list with several Open-Source-Solutions, which could possibly meet the needs of the Agency and did not present a concrete project.[8] The ruling by the Swiss Federal Supreme Court caused disappointment and anger among Open-Source-Companies in Switzerland, in particular because the BBL apparently has been negotiating contracts with Microsoft freely for over 20 years, without publishing those procurements. In 2009 the parliamentary group "Digital Sustainability" (Parlamentarische Gruppe "Digitale Nachhaltigkeit")[9] was founded; it is trying to encourage the Federal Administration and all the public agencies to start using Open-Source-Solutions.

Only recently (September 2013) the State Secretariat for Economic Affairs (SECO) directly awarded a contract regarding the migration of the software technology of the Unemployment Fund's payment system. The mandate worth CHF 22 million was awarded to the previous provider of software. However, the development and maintenance of the system in the future shall be subject to a government tender.

III. Public Procurement – Annual Report

In September 2013 the BBL published its report on procurement- controlling for 2012. The total amount of payments for the procurement of goods and services by the Federal Administration in 2012 reaches CHF 5.359 billion. The highest amount of financial resources was spent for the construction of national streets. The statistic does not reflect payments by the Federal Supreme Court and decentralized parts of the administration.[10]

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7 Art. 13 para. 1 lit. c VöB.

8 The complete ruling by the Swiss Federal Supreme Court is available on the following website: www.polyreg.ch/d/informationen/bgeleitentscheide/Band_137_2011/BGE_137_II_313.html

9 www.digitale-nachhaltigkeit.ch/.

10 A short overview on the payments for procurement is available on the following website: http://www.news.admin.ch/NSBSubscriber/message/attachments/32029.pdf.