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Trends and Developments

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Introduction

On 1 January 2020, the revised Federal Act on Public Procurement (rPPA), regulating government contracts on the federal level, entered into force. In parallel, all Swiss cantons (ie, states) are expected to join the revised Intercantonal Convention on Public Procurement (rICPP), which applies to procurements on the sub-federal level. These adjustments paved the way for the ratification and implementation of the Revised WTO Agreement on Government Procurement (GPA 2012) and for the harmonisation of the heterogeneous Swiss public procurement landscape. In addition, the new laws strengthen competition among suppliers, reduce the complexity of the Swiss procurement regime and allow for new procedural instruments, including electronic auctions and competitive dialogue.

The next section of this contribution provides an overview of the key aspects of the revised law and their implications for procuring entities and suppliers. Under Important Decisions and Developments, we discuss recent landmark cases that will continue to shape Swiss public procurement practice under the revised law.

The Revised Swiss Procurement Law

The current Swiss procurement landscape

The Swiss procurement regime is divided into a federal and a sub-federal level. Since 1 January 2021, contracts of federal procuring entities have been governed by the revised rPPA. The rPPA implements the GPA 2012 as well as Switzerland's obligations arising from the Bilateral Agreement with the European Union on Public Procurement of 1999 (BilatAgr). In contrast, the legal situation on the sub-federal, ie, cantonal

(state), district and municipal level, is more complex as it is currently in a transition phase.

Since 1994, procurements of cantonal and municipal entities have been governed by the Intercantonal Convention on Public Procurement (ICPP) of 25 November 1994 and, in addition, by individual cantonal procurement laws. On 15 November 2019, the cantons approved the revised Convention on Public Procurement (rICPP). While the former ICPP has the character of a framework convention leaving the cantons a lot of room for individual regulations, the rICPP is not only more detailed but also largely assimilated into the rPPA. This allows for a harmonisation among the (previously heterogeneous) cantonal procurement regimes on one side and between the federal and the cantonal level on the other side. This harmonisation is intended to reduce costs, facilitate market entry for domestic and foreign suppliers and thus enhance competition.

All cantons are expected to join the rICPP within the coming two years. They will do so on an individual basis and in accordance with their cantonal ratification processes. With cantons joining the rICPP, the previous cantonal legislation will become largely obsolete. In contrast, public procurements of cantons which are not yet members of the rICPP are still subject to the previous ICPP and the cantonal legislation. This transitory phase leads to a complex situation where the previous ICPP (plus individual cantonal legislation) will exist, temporarily, in parallel with the rICPP. For this reason, it is important for suppliers to determine the status of the cantonal ratification process and the applicable law before participating in a tendering process.

Revision

Scope of application: procuring entities

The GPA 2012 applies to central entities of the federal government, to cantonal entities, and to certain public and private entities operating in the business sectors of water supply, electric power supply, public transport, air traffic and inland waterway transport (GPA 2012 Appendix I Annexes 1-3). By virtue of Article 2 et seq BilatAgr, the application of the GPA is extended to:

- authorities and public entities of the districts (*Bezirke*) and municipalities;
- authorities and public enterprises engaged in the railway, telecommunications and energy supply sectors; and
- private entities carrying out public service in the fields of water supply, electric power supply, local rapid transport systems and supply of air or waterway traffic enterprises.

The scope of application of the rPPA is aligned with Switzerland's international obligations and the GPA 2012 and the BilatAgr as mentioned above. In contrast to the scope of the former PPA, however, the scope of the rPPA comprises all authorities and public entities of the central and decentralised federal government by dynamic reference (Article 4 paragraph 1 litera a rPPA). Thus, the related list of government entities subject to procurement law contained in the Swiss Appendix 1 Annex 1 Section I GPA 2012 is not comprehensive. In addition, the revised law newly extends to the federal courts, the Federal Prosecutor and the parliamentary services.

As regards the sub-federal level, the GPA 2012 and rICCP operate with an abstract definition of procuring entities subject to procurement rules, as is the case under the GPA 1994 and the ICCP. In essence, centralised or decentralised authorities and administrative units at cantonal, district and communal level are covered. This definition includes bodies governed by public law, or asso-

ciations formed by one or more of such authorities or bodies governed by public law.

Cantonal procurement may thus even apply to private companies operating in the public sphere (eg, hospitals) if certain criteria are met. In addition, entities active in select business sectors and endowed with special and exclusive rights are also covered by both the rPPA and the rICCP irrespective of their legal form or shareholder structure.

Exemption procedure

Certain business sectors in which, according to the judgment of the Swiss Competition Commission, there is an adequate level of competition can be exempt from the scope of public procurement rules. Under the previous procurement law, this exemption mechanism has only been available to those procuring entities covered by the scope of the BilatAgr. Under the revised law, however, the exemption mechanism is extended to the sectoral markets covered by the GPA 2012 (Article 7 rPPA/rICCP). If the Federal Council wishes to exempt further business sectors under the rPPA/rICCP, it will first need to consult the Competition Commission, the cantons and the industries concerned. To date, exemptions have only been granted to the telecommunication services sector and the standard gauge railway freight transport sector.

Scope of application: transactions subject to procurement rules

While the PPA did not circumscribe the kinds of transactions subject to procurement rules, the rPPA sets forth that procurement rules shall be applied to public procurement (*öffentliche Aufträge*) and – explicitly – to the outsourcing of public services to private suppliers as well as to the award of public licences (Article 8 et seq rPPA/rICCP).

The term “public procurement” is now defined in the rPPA/rICCP in line with court practice as a contract concluded between the procuring entity and the supplier serving the fulfilment of a public task. The contract is characterised by an exchange of performance and counter-performance whereby the characteristic performance is rendered by the supplier in return for payment.

For suppliers, the inclusion of the outsourcing of public services and the award of public licences in the scope of procurement law bring new opportunities. The new law is explicit that, for instance, outsourcing contracts in the fields of waste disposal, maintenance of national roads, and collection of fees in accordance with the Radio and Television Act will be subject to public tender.

With the GPA 2012, the positive lists of covered procurement were extended to include various services as well as construction services not previously within scope. The same holds true, for example, for legal services. However, an exception applies to the representation of the federal government or public enterprises by lawyers in court, arbitration or conciliation proceedings, and to related services (Article 10, paragraph 1 litera g rPPA).

Special rules for non-treaty procurements

The rPPA and rICCP apply to both procurements covered by international treaties (*Staatsvertragsbereich*) and procurements regulated solely by national law (*Nichtstaatsvertragsbereich*) whilst setting forth a set of special rules for the second category. The types of procurement covered by international treaties are listed in Annexes 1-3 of the rPPA but only fall under this category if the procurement reaches or exceeds the thresholds set out in Annex 4 of the rPPA. Procurement regulated by national law only, as well as the special provisions applying thereto, are set out in Annex 5 to the rPPA.

The special rules applying to procurement only regulated by national law involve some facilitations; for instance, the option to conduct a tender invitation procedure (*Einladungsverfahren*, Article 20 rPPA/rICCP). Furthermore, foreign suppliers are only admitted to the tender:

- if their country of origin grants reciprocal rights; or
- with the consent of the contracting authority (Article 6 paragraph 2 rPPA).

Finally, on the federal level, legal protection is limited (see Legal Protection below).

General principles and objectives of public procurement

The general principles of public procurement are set out in a separate chapter in the rPPA, with only a few changes compared to previous law. The principles of non-discrimination, equal treatment of competitors, transparency and competition remain the pillars of the Swiss procurement law regime.

The few substantive changes follow the direction of the GPA 2012, one of the main objectives of which is to combat corruption. Against this background, procuring entities are now explicitly obliged to take measures against conflicts of interest, unlawful non-compete agreements and corruption (Article 11 litera b rPPA). In addition, bidding rounds – ie, pure price negotiations – are henceforth prohibited not only at the cantonal, but also the federal level (Article 11 litera d rPPA).

Finally, the violation of corruption provisions may lead to the exclusion of a supplier from future tenders by procuring entities for a maximum duration of five years and to revocation of an award (Article 44, paragraph 1 litera e in conjunction with Article 45 paragraph 1 rPPA).

New instruments

Under the revised law, the basic types of tender procedures (open tender, limited tender, tender invitation and direct award) remain unchanged. However, the rPPA presents a set of new instruments to make the tender procedure more flexible and to use the advantages of recent technological progress. These instruments do not constitute alternatives to the four above-mentioned procedures, but may rather be embedded therein if deemed appropriate. New instruments include the following:

Electronic auctions

This means an automated evaluation of certain parameters of a tender, namely the price (if the contract is awarded to the lowest price), or other quantifiable components (such as weight, purity, quality), whereby the contract is awarded to the most economically advantageous offer. Electronic auctions are only available for the procurement of standardised goods and services. The electronic auction is preceded by a (non-electronic) prequalification phase during which the suitability of the bidders is verified and an initial evaluation of the bids is made. The actual electronic auction of the tenders that passed prequalification follow in a second step (Article 23 rPPA/rICCP).

Competitive dialogue

This instrument enables the procuring entity and the tenderers to jointly define the object of procurement and to identify possible solutions thereto (Article 24 rPPA/rICCP). It is available for complex, intellectual and innovative services but must not be abused to conduct pure price negotiations.

Framework contracts

The revised law contains a new legal basis for the conclusion of framework agreements between a supplier and the procuring entity (Article 25 rPPA/rICCP). Framework contracts allow the

contracting authority to award individual agreements to its framework contract partners during a given period without a new invitation for tender. The most important contract parameters (in particular, price, type and amount of services) must be specified in the framework contract.

If framework agreements are concluded with more than one supplier, the call on services may be made either under the terms set out in the framework contract (without a new invitation to tender) or by means of a call-on-services procedure in which the parties to the framework contract are invited to submit a specific offer (so-called mini-tender).

Electronic tender procedure

The conduct of tender procedures by electronic means is regulated by Article 34 paragraph 2 rPPA/rICCP. Tenders may be submitted electronically if this is communicated in the invitation to tender or in the tender documentation.

Legal protection

With the revised Swiss procurement regime, legal protection in procurement procedures is (moderately) extended. On the federal level, suppliers can now appeal against decisions by the procuring entity in procedures concerning tenders for goods or services reaching or exceeding the threshold value applicable to the invitation tender procedure; ie, CHF150,000 for procurement by federal authorities. In relation to tenders for construction services, the threshold value will be CHF2 million (Article 52 paragraph 1 rPPA). Cantonal procurements are subject to the same principles although different threshold values apply (Article 52 paragraph 1 rICPP). Prior to the revision, in procedures concerning procurements not reaching the threshold values pursuant to the relevant international treaties, no appeals were possible on a federal level.

Non-treaty procurements

On the federal level, effective legal protection will be restricted for procurements covered by international treaties. In particular, a supplier is not entitled to challenge the tender award itself in court and the procuring entity is allowed to conclude a contract with the supplier immediately after the award has been granted without waiting for it to enter into force (Article 42 paragraph 1 rPPA).

Still, suppliers not winning the award are now, under the revised law, able to (i) request that the court declares the challenged award illegal and, (ii) if necessary, obtain damages for the costs incurred in connection with the tender procedure (Article 58, paragraphs 3 and 4 rPPA/rICCP). However, non-Swiss suppliers are only admitted to such legal action if their country of origin grants Swiss suppliers reciprocal rights (Article 52, paragraph 2 rPPA/Article 52, paragraph 3 rICCP).

Appeal of tender documentation

Article 53, paragraph 2 rPPA/rICCP clarifies that a supplier needs to challenge unlawful instructions in the tender documents, the significance of which is apparent along with the invitation to tender. This means that if the supplier fails to bring forward such complaint immediately, the complaint is forfeited. Practically speaking, under the revised law, suppliers are required to study the tender documents thoroughly immediately after publication, address any inconsistencies to the procuring entity without delay and, if necessary, file the complaint with the court within the time limit for appeal.

Time limits

The revision has brought about a harmonisation of the time limits for appeal. A 20-day time limit for appeal is applicable at both the federal and the cantonal level (Article 56, paragraph 1 rPPA/rICPP) while the ICPP only provides for a ten-

day period. In return, no court holidays apply to complaints under the revised law, regardless of their subject matter (Article 56, paragraph 2 rPPA/rICPP). This is an important contribution to an acceleration of tender procedures. By contrast, under the previous ICPP that will remain in force for a while in several cantons, a court holiday only applies to proceedings about injunctive measures.

Important Decisions and Developments

Scope of application – foundation under private law

Determining the (personal) scope of application of procurement law belongs to the most challenging tasks for procuring entities. In a judgment of 20 October 2020, the Swiss Federal Supreme Court had to assess this question with respect to a foundation for the construction of social housing which had been established by a municipality under private law. The court confirmed that the foundation falls within the definition of “a body governed by public law” contained in Swiss Appendix 1 Annex 3 to the GPA 2012 (see section “scope of application” above). The court held that:

- the foundation was established for the specific purpose of performing tasks of a non-commercial nature in the general interest, ie, the construction of social housing;
- it has, as a foundation under private law, legal personality; and
- the majority of its supervisory body (*Stiftungsrat*) consists of members appointed by a body governed by public law.

Hence, according to the Swiss Federal Supreme Court, the foundation is subject to public procurement law and must put its contracts out to public tender, providing that the relevant thresholds are met (BGer 2C_1060/2017).

Evaluation criteria – travel time

In a decision of 24 April 2019, the Swiss Federal Administrative Court dealt with the question of whether and in what circumstances a contracting authority may evaluate the “transfer time” or the travel route of the staff of a supplier. The challenged procurement included architecture, engineering and planning services with respect to gasoline stations run by the Swiss military throughout Switzerland. The court, referring to previous case law, held that the admissibility of such evaluation criterion must be assessed in light of the principle of equal treatment. More specifically, such criterion must be based on an “objective reason”; eg, if a standby service from the provider is required. According to the court, however, no such objective reason exists if the nature of the procurement and other evaluation criteria do not imply the necessity of urgent interventions (BVGer B5601/2018).

Scope of application – hospitals

In a landmark decision of 21 February 2019, the Swiss Federal Supreme Court put an end to a long-time controversy in procurement practice. It confirmed that Swiss hospitals are subject to government procurement law if they:

- are controlled by the (cantonal or municipal) government; and
- have a public mandate allowing them to directly charge Swiss healthcare insurances (*Obligatorische Krankenpflegeversicherung*) for medical treatments (*Listenspital*).

While the court decision focused on a public hospital (controlled by a group of municipalities), the court’s findings are relevant for all Swiss listed hospitals, including hospitals that are fully controlled by private entities. Hence, whenever a listed hospital intends to purchase goods or services (eg, medicinal products) that are designated to contribute to the execution of the public mandate and provided the relevant procurement

thresholds are reached, it is obliged to make a public call for tender.

However, whilst all Swiss listed hospitals (including private ones) are subject to domestic procurement law, only hospitals controlled by the government are subject to the WTO Agreement on Government Procurement (GPA). In contrast, procurements of hospitals that are fully controlled by private investors fall outside the scope of the GPA. With respect to these hospitals, non-Swiss providers are entitled to participate in the tendering procedure only to the extent their country of residence grants market access to Swiss suppliers in a reciprocal way (principle of reciprocity) (BGE 145 II 49).

Admission to tender – cross-subsidies

For many years, there had been an extensive doctrinal debate about whether and under what circumstances public entities, such as universities or other companies controlled by the government, are entitled to participate in tendering procedures as bidders. In 2017, the Swiss Federal Supreme Court examined a claim brought by a private telecommunications company against the Federal Office of Communications (OFCOM) (the procuring entity).

OFCOM had awarded a service contract to the University of Zürich, which is entirely controlled by the Canton of Zürich. The claimant criticised the award on the basis that OFCOM had acted in contravention of public procurement law by ignoring the fact that the University of Zürich is funded by the government and that such funding leads to an unlawful competitive advantage on the part of the University in relation to private bidders. The court found that bidders financed by the government must behave neutrally from a competition law perspective. In particular, such providers are required to completely separate their commercial from their monopolistic activi-

ties, failing which, they are not entitled to participate in tendering procedures.

According to the court, contracting authorities are required to seek additional clarifications if they obtain offers from such providers. In addition, public service providers must be excluded from the tendering procedure in the case of specific evidence of a distortion of competition. The judgment may have a significant impact on future procurement practice and the behaviour of publicly financed bidders. However, the scope of the procuring entities' duty to gather additional information is far from clear since the courts have not yet provided any guidance on this aspect (BGE 143 II 425).

Walder Wyss Ltd has around 220 legal experts and offices in six locations and is one of the most successful Swiss commercial law firms and one of the few with a dedicated team of public procurement specialists. The firm's clients benefit from its renowned specialist knowledge and wealth of experience, which cover all stages and aspects of a procurement project. Walder Wyss is well versed in sector-specific needs and offers customised solutions for infrastructure and construction projects, complex IT projects and procurements in the energy,

healthcare and pharmaceutical sectors. The firm's services include court representation, legal advice and legal training with respect to the structuring and implementation of procurement projects, tender offers, as well as assistance in related contractual, intellectual property and competition law issues. The firm's public procurement specialists are members of the Swiss Association for Public Procurement and have initiated the publication of the commentary of the revised Swiss Public Procurement Act.

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