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Switzerland
Trends and Developments

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Introduction

On 21 June 2019, the Swiss Federal Parliament adopted the Revised Federal Act on Public Procurement. In parallel, the Swiss cantons drew up a Revised Intercantonal Convention on Public Procurement. These adjustments of the law paved the way for the ratification and implementation of the Revised WTO Agreement on Government Procurement (GPA 2012) and for the harmonisation of the regulations on public procurement among the Swiss Federation and its 26 cantons (member states), thus strengthening competition among suppliers and overall reducing the complexity of the Swiss procurement regime.

The next section of this contribution provides an overview of the key aspects of the revision that will start to take effect on 1 January 2021 and their implications for procuring entities and suppliers. Under **Important Decisions and Developments**, the authors discuss recent landmark cases that will continue to shape Swiss public procurement practice both under the current and the revised law.

The Revised Swiss Procurement Law

The current Swiss procurement regime

The Swiss procurement regime is divided into a federal level on the one hand, currently regulated by the Federal Act on Public Procurement of 16 December 1994 (PPA), and a cantonal (member state) level, regulated by the Intercantonal Convention on Public Procurement (ICPP) of 25 November 1994 as well as separate procurement laws in each canton. The PPA regulates procurement by federal procuring entities, whilst the ICPP and the cantonal procurement acts address procurement by cantonal and municipal procuring entities. This regime was enacted in 1994 to implement Switzerland's obligations derived from international law, in particular the original WTO Agreement on Government Procurement of 1994 (GPA 1994) and further bilateral conventions.

Revision

Switzerland signed the GPA 2012 succeeding the outdated GPA 1994 on 30 March 2012. On 21 June 2019, the Swiss Federal Parliament, following extensive debate, finally enacted the completely Revised Federal Act on Public Procurement (rPPA).

The rPPA will implement the GPA 2012 as well as Switzerland's obligations arising from the Bilateral Agreement with the European Union on Public Procurement of 1999 (BilatAgr). The parallel revision of the ICPP, resulting in the Revised Intercantonal Convention on Public Procurement of 15 November 2019 (rICPP), allows the harmonisation of the federal and cantonal procurement regimes, particularly by introducing coherent terminology and procedural rules. This harmonisation is intended to reduce costs, facilitate market entry for domestic and foreign suppliers and thus enhance competition. The rPPA will enter into force on 1 January 2021.

Scope of application: procuring entities

On a federal level, the rules and procedures of public procurement apply to central entities of the federal government listed in the Swiss Appendix I Annex 1, to cantonal entities pursuant to Annex 2 GPA 1994, 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. By virtue of Article 2 et seq BilatAgr, the application of procurement rules is extended to (i) authorities and public entities of the districts and communes; (ii) authorities and public enterprises engaged in the railway, telecommunications and energy supply sectors; and (iii) 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 has been defined accordingly.

As under the PPA, the scope of application of the rules of public procurement under the rPPA will be aligned with Switzerland's international obligations; ie, Swiss Appendix I Annexes 1-3 of the GPA 2012 and Article 2 et seq of the BilatAgr. In contrast to the scope of the PPA, the scope of the rPPA will comprise all authorities and public entities of the central and decentralised federal fovernment by dynamic reference (Article 4 paragraph 1 litera a rPPA). The related list in the Swiss Appendix 1 Annex 1 Section I GPA 2012 is only indicative; ie, not comprehensive. In addition, the rPPA will newly extend to the federal courts, the Federal Prosecutor and the Parliamentary Services. The rICCP, too, will operate with an abstract definition of procuring entities subject to procurement rules.

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. The exemption mechanism has so far only been available to those procuring entities covered by the scope of the BilatAgr and exemptions currently apply to telecommunica-

tion services and standard gauge railway freight transport. The exemption mechanism will be 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.

Scope of application: transactions subject to procurement rules

While the PPA did not circumscribe the kinds of transactions subject to procurement rules, the rPPA will set forth that procurement rules shall be applied (i) to public procurement (*öffentliche Aufträge*) and – explicitly – (ii) to the outsourcing of public services to private suppliers as well as to the award of public licences (Article 8 et seq rPPA/rICCP). Under the PPA, it has not been entirely clear to what extent outsourcings and awards of public licences are subject to procurement rules.

The term "public procurement" will now be 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 for which the supplier receives remuneration. The contract must be characterised by an exchange of performance and consideration whereby the characteristic performance is rendered by the supplier.

For suppliers, the inclusion of the outsourcing of public services and the award of public licences in the scope of procurement law will also bring along attractive new opportunities. The new law makes 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 distinguish between procurement covered by international treaties (*Staatsvertragsbereich*) and procurement regulated solely by national law (*Nichtstaatsvertragsbereich*) and apply to both categories of procurement whilst setting forth a set of special rules for the latter. The types of procurement covered by international treaties will newly be listed in Annexes 1-3 of the rPPA but will 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, will be set out in Annex 5 to the rPPA.

The special rules applying to procurement only regulated by national law will involve some facilitations; for instance, the additional option to conduct a tender invitation procedure (*Einladungsverfahren*, Article 20 rPPA/rICCP). Furthermore, foreign suppliers will only be admitted to the tender (i) if their country of origin grants reciprocal rights or (ii) with the consent of the contracting authority (Article 6 paragraph 2 rPPA). On the federal level, restrictions to legal protection will also apply (see **Legal Protection** below).

General principles 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 current law. The principles of non-discrimination, equal treatment of competitors, transparency and competition will remain the pillars of the Swiss procurement law regime.

The few changes follow the direction of the GPA 2012, one of the main objectives of which is to combat corruption. Against this background, procuring entities will be expressly obliged to take measures against conflicts of interest, unlawful non-compete agreements and corruption (Article 11 litera b rPPA). Bidding rounds – ie, pure price negotiations – will henceforth also be prohibited at the federal level (Article 11 litera d rPPA). The violation of corruption provisions will potentially lead to the exclusion of a supplier from tenders by federal 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

In the revised law, the basic types of tender procedures (open tender, limited tender, tender invitation and direct award) will 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 will not constitute alternatives to the four abovementioned procedures, but can 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 will only be available for the procurement of standardised services. The electronic auction will be preceded by a (non-electronic) prequalification phase during which the suitability of the bidders will be verified

and an initial evaluation of the bids will be made. The actual electronic auction of the tenders that passed prequalification will follow in a second step (Article 23 rPPA/rICCP).

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

Framework contracts
Article 25 rPPA/rICCP will constitute a new legal basis for the conclusion of framework agreements between a supplier and the procuring entity. 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) shall 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 will be 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 enactment of the revised Swiss procurement regime, legal protection in procurement procedures will be moderately strengthened. On a federal level, suppliers will be able to 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). The same principles will apply at the cantonal level, whereby partially different threshold values apply (Article 52 paragraph 1 rICPP). Before 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, legal protection will be restricted for procurements not covered by international treaties. A supplier will not be given the right to challenge the tender award itself in court and the procuring entity will only be allowed to conclude a contract with the supplier immediately after the award has been granted without waiting for it to enter into legal force (Article 42 paragraph 1 rPPA). Still, suppliers not winning the award will now, under the revised law, be able to (i) demand that the court officially proclaim the illegality of an award and, (ii) if necessary, obtain damages for the costs incurred in connection with the tender procedure (Article 58 paragraphs 3 and 4 rPPA). It is important to note that a non-Swiss supplier will only be admitted to such legal action if its state of origin grants Swiss suppliers reciprocal rights (Article 52 paragraph 2 rPPA).

Appeal of tender documentation
Article 53 paragraph 2 rPPA clarifies that the supplier will need to challenge unlawful instructions in the tender documents, the significance of which is apparent along with the invitation to tender; ie, if the supplier fails to bring forward such complaint immediately, the complaint is forfeited (Article 53 paragraph 2 rPPA). Practically speaking, under the new law, suppliers will be 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.

Time limits
Finally, the revision will also bring about a harmonisation of the time limits for appeal. A 20-day time limit for appeal will be applicable at both federal and cantonal level (Article 56 paragraph 1 rPPA/rICPP). The previous intercantonal regulation only provided for a 10-day period. In return, no court holidays will 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 current law that will remain in force until the end of 2020, this is only the case with regard to injunctive measures.

Important Decisions and Developments
Evaluation criteria – travel time
In a very recent case (24 April 2019), the Swiss Federal Administrative Court dealt with the question of whether and in what circumstances a contracting authority may take into account the "transfer time" or the travel route of the staff of a provider. 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. In particular, such criterion may be permissible if it is 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 longtime controversy in procurement practice. It confirmed that Swiss hospitals are subject to government procurement law if they (i) are controlled by the (cantonal or municipal) government and (ii) 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 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 activities, 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).

Legal protection – locus standi

Challenging ordinances of contracting authorities in court is one of the more delicate tasks of bidders considering the numerous procedural pitfalls and obstacles. A major hurdle to overcome is the locus standi; eg, the question of whether an unsuccessful bidder is entitled to appeal against an award of a contract. With respect to this question, the Swiss Federal Supreme Court, in a landmark decision of 2015, established new criteria, thereby abolishing previous court practice that has since been retired in a series of judgments. In essence, any bidder challenging an award must still have a "realistic chance" to "win" the tendering procedure; ie, to obtain the contract. In other words, the mere participation in a tendering procedure is not sufficient with respect to the locus standi. For an appeal to be formally accepted, it must be established that either the appellant is ranked No 2 (and thus in a position to automatically take over from the winner in the event of a successful appeal) or all other bidders ranked in front of the appellant need to be excluded. As a third option, the appellant may request an annulation and repetition of the entire tendering procedure, arguing that the procedure as such (and not only the award challenged) violates government procurement law. As a consequence of this decision, unsuccessful bidders are required to carefully assess the chances of success of a potential appeal before taking legal action. By the same token, when confronted with an appeal brought by an unsuccessful bidder, contracting authorities may (at least as a first line of defence) simply show that such bidder has no realistic chance to win the tendering procedure (BGE 141 II 14).

Walder Wyss Ltd, with around 220 legal experts and offices in six locations, 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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