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# The International Comparative Legal Guide to: Public Procurement 2012

A practical cross-border insight into  
public procurement

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# Switzerland



Peter Galli



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## 1 Relevant Legislation

### 1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

In Swiss public procurement law the following legal norms apply:

- The Federal Act of Public Procurement of 16.12.1994 (FAPP).
- The Ordinance of Public Procurement of 11.12.1995 (OPP).
- The World Trade Organisation Agreement on Government Procurement of 15.04.1994 (GPA).
- The bilateral Agreement between the European Community and the Swiss Confederation on certain Aspects of Government Procurement of 21.06.1999 (EU-CH AAGP).
- The Intercantonal Agreement on Public Procurement of 25.11.1994/15.03.2001 (IAPP).
- The Federal Act on the Internal Market of 16.12.1994 (FAIM).
- The cantonal public procurement regulations, over which each canton decrees autonomously.

The content of the above-mentioned statutes and laws will be dealt with in the subsequent questions. It is important to note that Swiss federal and cantonal procurement law apply different legal standards, whereby the federal law may partially apply in both areas. Despite this, legal standards on the federal and cantonal level are not fundamentally different. An essential difference is that under cantonal law negotiations on tenders between the contracting authority and the bidders are forbidden, but allowed under federal law if certain requirements are met.

Due to the different cantonal regulations, the following discussion will mainly focus on the federal law.

### 1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

In public procurement proceedings the state, acting through its public authorities, has an inherent influence over the market (market power). This market power is primarily regulated through the competition law. The methods for curtailing the public authorities' market power are mainly through the use of standardised contracts (General Terms and Conditions) and model contracts, as well as pricing guidelines. In particular, it is concerned with the form of civil law contracts that have a similar impact on bidders as promulgations if the public contracting body can one-sidedly enforce norms due to their market power in comparison to the bidders.

### 1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Apart from the treaties (GPA and EU-CH AAGP) already mentioned in question 1.1, there is the EFTA agreement on public procurement which extended the opening of the procurement markets between Switzerland and the European Union to the remaining countries of the European Free Trade Association (EFTA). This opening has been pursued through the bilateral agreements in place between Switzerland and the EU (EU-CH AAGP).

Principally, all these treaties are directly applicable law in Switzerland.

According to appendix I/annexe I of the GPA, the federal contracting authorities are subject to the GPA. Together with the EU-CH AAGP, there is a mutual agreement with the EU extending the liberalisation framework, as set out in the GPA, to procurement proceedings by public authorities to the districts and municipal level.

### 1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

Article 1 of the FAPP declares the underlying principles of public procurement to be as follows:

- to administer the proceeding of the awarding of public delivery orders, public service contracts and construction contracts transparently;
- to encourage competition between bidders; and
- to promote the economic use of public funds and means.

Additionally, the law intends to assure equal treatment of all bidders.

On the cantonal level, there are comparable regulations in the IAPP, and in the applicable cantonal regulations on public procurement.

### 1.5 Are there special rules in relation to defence procurement or any other area?

According to article 3, 1 lit. e of the FAPP, the law does *not* apply when dealing with: "the procurement of weapons, munitions or war material and the construction of buildings for the military infrastructure, overall defence and the army". In appendix I of the

GPA, there is a list of more closely defined civil ordinances that fall into the scope of the application of the agreement in relation to Switzerland.

## 2 Application of the Law to Entities and Contracts

### 2.1 Which public entities are covered by the law (as purchasers)?

In article 2 of the FAPP, the awarding authorities subject to the law are mentioned. These entities are: the general Federal Administration; the Federal Alcohol Board; the Federal Institutes of Technologies and their research centres; the Swiss Post for its monopolistic postal or transport services; and the federal enterprises in the sectors of telecommunications, railway, drinking water, energy, urban transport, airports and maritime or inland ports (in regard to the sectorial enterprises, see also article 2a of the OPP).

Despite the fact that the law (FAPP), the ordinance (OPP) and also appendix 1/annexe 1 of the GPA include lists of potential contracting bodies, questions of which bodies fall under the public procurement law belong to the most challenging issues. Indeed, for many organisations it is not clear if they are subject to public procurement law or not. Often this needs to be examined by way of a legal opinion. The same issue also arises on the cantonal level; questions of which bodies fall under public procurement law are issues that need clarification, despite the existing legal standards.

### 2.2 Which private entities are covered by the law (as purchasers)?

When the revised OPP came into effect on 1 January 2010, it underwent a fundamental revision. *Inter alia*, under the new article 2d OPP, civil entities (i.e. organisations under civil law) may also be subject to public procurement law. Also, the public procurement by-law subjects both public and private organisations for certain actions and under specific circumstances to the FAPP. These actions include: the initialisation or the operation of public telecommunication networks or the establishment of a public telecommunication service; and the construction and the operating of railway installations by the Swiss federal railways (SBB) by companies in which they are the majority stockholder or by other operators of railway installations in which the federal government holds a majority share. All actions that are not directly related to the area of traffic are exempted. Additionally, organisations which provide public services in the areas of production, transport or distribution of electrical power are also subject to public procurement law. A further prerequisite is that certain financial thresholds are met.

### 2.3 Which types of contracts are covered?

Article 5 of the FAPP distinguishes the following types of orders: contract for supply; for services; and for works. Supply contracts are contracts for the procurement of movable goods, in particular by method of purchase, lease, rental or hire purchase (article 5, 1 lit. a FAPP). Service contracts are contracts for the rendering of services as listed in appendix 1/annexe 4 of the GPA (article 5, 1 lit. b of the FAPP). Works contracts are contracts for building and civil engineering works in the sense of CPC (Central Product Classification of the United Nations) division 51 as per appendix

1/annexe 5 of the GPA. Finally, article 3 of the OPP refers to the appendixes of the OPP where there are also catalogues for delivery, provision of services and for building contracts. Those catalogues have to be considered when questions of imputation (i.e. to which body the law applies) are to be solved.

### 2.4 Are there financial thresholds for determining individual contract coverage?

In the enactment of the Federal Department of Economic Affairs (EVD) of 11 June 2010 on the adjustment of the financial thresholds in public procurement for the second semester of the year 2010 and the year 2011, the financial thresholds are CHF 230,000 as regards supply and services, CHF 8.7m. as regards works and CHF 700,000 as regards supplies and services procured by a contracting authority defined in article 2, 2 of the FAPP or by the Swiss Post for its activities in the public transport sector.

The financial thresholds triggering the applicability of the FAPP for tenders by the entities specified in article 2a of the OPP are:

- CHF 960,000 as regards supplies and services in the telecom sector;
- CHF 640,000 as regards supplies and services in the railway sector;
- CHF 766,000 as regards supplies and services in the electricity sector;
- CHF 8m. as regards works in the telecom or railway sector; and
- CHF 9.575m. as regards works in the electricity sector.

According to article 36 of the OPP, the contracting authority may award a contract to a supplier directly and without an invitation to tenders if the contract value is below the following thresholds:

- CHF 150,000 for works and services; and
- CHF 50,000 for supplies.

### 2.5 Are there aggregation and/or anti-avoidance rules?

The rules for calculating the threshold values are set forth in articles II GPA, 7 of the FAPP and 15a of the OPP. As for these rules, it is important to point out that an order may not be shared in order to avoid the application of public procurement law. Furthermore, the new regulation of article 15a of the OPP is interesting; it states that for recurring obligations, a contract may only be concluded for a maximum of five years. In justified cases, a longer period of the contract or a moderate extension of an already existing contract may be arranged.

### 2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

In Swiss public procurement law, an explicit regulation for the award of concessions is missing. In the so-called “Geneva Poster case” (“*Genfer Plakataushang-Fall*”), the Federal Supreme Court of Switzerland decided that the award of the concession on the monopolised usage of public ground for commercial reasons (posting posters or outdoor advertising) is not public procurement (BGE 125 I 212 ff). Article 2 paragraph 7 FAIM further states that the transfer of the usage of cantonal and communal monopolies to private persons has to be made by tender procedure. Moreover, in special laws, there are standards concerning the admission of concessions, for example in the area of railways (section 2, article 5 concerning “concession for usage of infrastructure”).

### 3 Award Procedures

#### 3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

There are four award procedures: The “open procedure”, whereby any interested bidder may submit a tender (article 14 paragraph 2 of the FAPP); the “selective procedure”, whereby any interested bidder may apply to participate in the procedure, but only those bidders who meet the qualification criteria and are invited by the contracting authority may submit a tender (article 15 paragraph 2 and 3 FAPP); the “negotiated procedure”, whereby the contracting authority negotiates a contract directly with a supplier of their choice (article 16 of the FAPP); and the “invitation procedure”, whereby at least three bidders are invited directly to tender (article 35 of the OPP).

Furthermore, the OPP regulates the “competition of planning and overall performance” which serves the contracting authority to do the evaluation of various solutions, especially in conceptual, artistic, ecological, economical and technological terms (article 40 OPP).

#### 3.2 What are the minimum timescales?

According to article 19 Paragraph 3 OPP, there are the following minimum timescales:

- 40 days after the publication for the submission of an offer in an “open procedure”; and
- in a “selective procedure”, there are 25 days after the publication for the submission of a request for participation and 40 days after the invitation for the submission of an offer.

Under the conditions set out in article XI, 3 of the GPA, the contracting authority may reduce the deadline for the submission of the offers. Usually, the deadline is at least 24 days and may not be less than 10 days (article 19 Paragraph 4 of the OPP).

#### 3.3 What are the rules on excluding/short-listing tenderers?

In articles 11 and 19 paragraph 3 of the FAPP, there is an exemplary list of reasons for exclusion. Such reasons may be the violation of certain formal conditions, the non-fulfilment of the criteria of the selective procedure, giving incorrect information to the contracting body, the failure to pay taxes and social security contributions or the breach of standards of procedure, for example concerning equal payment of women and men.

A “short-listing” of the bidders is part of the “selective procedure”. In this procedure, the contracting authority decides, on the basis of the submitted requests for participation, which bidder is to be invited to submit an offer, according to their suitability to take over a concrete procurement order (article 15 paragraph 3 of the FAPP).

In federal public procurement, short-listing-proceedings in the negotiation phase are prohibited. On the contrary, the contracting body is obliged to conduct negotiations with all bidders whose offers fulfil all the criteria for acceptance of the tender bid.

#### 3.4 What are the rules on evaluation of tenders?

Concerning the evaluation of tenders, the contracting body has to ensure equal treatment of all bidders. It is obliged to evaluate the offers solely on the basis of the awarding criteria that the bidders receive prior to the tender proceedings.

The contracting body has to keep the confidentiality of all information provided by the bidders. The publication of information after the order has been awarded and the information provided to the bidders that were not considered is possible. The latter mainly includes reasons for their failure to be considered, as well as the determining characteristics and advantages of the successful bid.

#### 3.5 What are the rules on awarding the contract?

According to article 21, 1 of the FAPP, the economically cheapest offer may be accepted. This is determined by considering various criteria, especially punctuality, quality, price, economic efficiency, operating costs, customer care, expedience of the performance, aesthetics, environmental sustainability and technical value. The contracting authorities have a wide discretion when deciding on the award criteria for the public procurement. The award criteria are to be listed in the tender documents, in order of their importance (article 2, 2 of the FAPP). Some courts have tightened this requirement and demand that the weight of each main and sub criteria is known to the bidders in advance.

If a certain bidder receives the acceptance of a tender, it does not mean that they can claim the completion of the tendering contract. Instead, the contracting authority has no duty to execute a contract.

#### 3.6 What are the rules on debriefing unsuccessful bidders?

According to article 23, 2 of the FAPP, the contracting authority has to give certain information to the unsuccessful bidder (*cf.* question 3.4 above). This kind of information is communicated in the so-called debriefing and, in principal, it is given in written form. In practice, however, contracting authorities often organise meetings with the unsuccessful bidders who request information. At these meetings, the reasons for non-consideration are orally explained and questions are directly answered.

#### 3.7 What methods are available for joint procurements?

According to article 2c, 2 of the OPP, federal law is applied if several contracting bodies that are subject to federal and cantonal law are cooperating as part of a tender bid and if a federal contracting body has the highest share in the financing. According to paragraph 2 of the provision, if there are several contracting bodies involved that are subject to the FAPP or the OPP and that have differing financial thresholds, then the lower financial thresholds are considered for the whole procurement.

#### 3.8 What are the rules on alternative bids?

According to article 22a, 1 of the OPP, the bidders are allowed to hand in additional variations of their initial bid. In special cases, the contracting body may limit or prevent this possibility in their call for tenders. In practice, however, the contracting authority has to explain the exclusion of additional variations. According to paragraph 2 of the provision, a variation is defined as an offer whereby the goal of the procurement is achieved in a different way from what the contracting authority envisaged. Different kinds of prices – like an offer with an inclusive price instead of an offer with a flat rate price (i.e. the price for the amount of a certain performance that is mentioned in the Devis) – are not considered to be a variation.

## 4 Exclusions and Exemptions (including in-house arrangements)

### 4.1 What are the principal exclusions/exemptions and who determines their application?

See question 3.3.

The contracting authority decides on the application of the rules of exclusion and if there is an objection by the bidder in question, the judge/court decides.

### 4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The awarding of orders to public administration bodies or to legal entities that are organisationally or financially linked with the contracting authorities is not subject to public procurement laws. Whether a government body fulfils its tasks by contracting other public bodies (so-called ‘in-house’ contracts) or if they assign the fulfilment of this task to an independent external provider (“make-or-buy”) is not a question answered by public procurement law. It is rather a political and organisational question on how far services are to be rendered by the local community or by independent external providers. Also the ‘quasi-in-house’ contract, whereby a public contracting authority awards a performance to a provider who is legally a different entity than themselves, but who is controlled by a public contracting authority and who typically only works for this contracting authority, is not subject to public procurement law. However, no relevant regulation exists yet. Finally, public procurement law does not apply to so-called ‘in-state’ contracts, where the awarding from one public contracting authority to another is at stake.

## 5 Remedies and Enforcement

### 5.1 Does the legislation provide for remedies/enforcement measures and if so what is the general outline of this?

The formal requirement for a legal remedy against decisions on public procurement law on the federal level is that the financial thresholds (without value added tax) of the tender in question are met. According to article 29 of the FAPP, the following decisions are considered to be reviewable by appeal: the awarding or termination of a competitive tender procedure; the tendering of an offer; the decision over the selection of the competitors in the selective procedure; the exclusion according to article 11 of the FAPP, and the decision on the acceptance of the bidders into the directory of reviewed bidders. By law, the appeals procedure has no suspensory effect, however, in a given proceeding the judge may allow it, if requested. Furthermore, in an appeals procedure, the judge merely has the power to adjudicate over the infringement of the law but cannot adjudicate over the discretionary power granted by law to the contracting authorities.

### 5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

For procurements not subject to ordinary legal remedies, a complaint to the supervisory authority of the contracting authority may be taken into consideration as an extraordinary remedy.

### 5.3 Before which body or bodies can remedies/enforcement be sought?

Contracting decisions from the federal authorities may be contested in the Federal Administrative Court (FAC) if the contracting authority and the procurement order in question are subject to the FAPP. Filing an administrative appeal with the Swiss Federal Tribunal (SFT) is only to be taken into consideration if a legal issue of fundamental importance is raised (see article 83(f)(2) of the Federal Tribunal act; FTA). The question of if the issue raised is of fundamental importance is not to be taken lightly. The mere fact that the question in dispute has never been heard by a court of law is not enough. Rather, it has to have the potential to be a landmark case of such importance that clarification needs to be sought from the highest court. The Swiss Federal Tribunal has to deem the question to be of fundamental importance, as was the case when adjudicating over the question of what the legal consequences of an awarded contract should be when it is proven to have been awarded under violation of procurement law.

According to article 9, 2 of the FAIM, cantonal procurement law has to provide at least one legal remedy to an independent authority. In most cantons, the legal remedy is addressed to the cantonal administrative court. The legal remedy against final cantonal decisions is the public administrative appeal that is filed with the Swiss Federal Tribunal if the statutory financial thresholds of the FAPP or the EU-CH AAGP are met and if a legal question of fundamental importance is raised. To enforce constitutional provisions, there is also the possibility of filing a so-called subsidiary constitutional complaint with the Swiss Federal Tribunal.

### 5.4 What are the limitation periods for applying for remedies/enforcement?

A review petition for the Federal Administrative Court has to be filed within 20 days of publication of the contested decision by publication or on service of the awards decision. The time period for the submission of a review application to the Swiss Federal Tribunal for public affairs (article 82 ff. of the FTA) is 30 days. Within the same time period, a subsidiary constitutional complaint can be made according to article 113 ff. of the FTA (article 117 of the FTA).

On the cantonal level, a review petition has to be filed with the administrative authority in question with a written explanation within 10 days of publication of the decision (see article 15, 2 of the IAPP). Court holidays do not apply (Art. 15, 2bis of the IAPP).

By law, there is no suspensory effect for review petitions of public procurement. Together with the petition application, suspensory effect has to be requested. If this is not done, the contracting authority is allowed to enter into a contract with the considered bidder when the appeal period for the remedy has expired.

### 5.5 What remedies are available after contract signature?

If the contract with the considered bidder has (lawfully) been concluded by the contracting authority, this contract may no longer be terminated, even if the review petition is successful. The deciding body may only state the legal wrong of the contested decision (article 32 Abs. 2 of the FAPP; article 9 Abs. 3 of the FAIM). The unconsidered bidder may claim for damages suffered in the tendering and complaints procedure with the contracting authority (see article 34 of the FAPP). Further compensation (e.g. for loss of profit) may be claimed through civil proceedings.

### 5.6 What is the likely timescale if an application for remedies/enforcement is made?

The length of the proceeding depends to a large extent on the factors of the specific case. Generally, public procurement law proceedings are subject to fast-track methods. Individual cantonal regulations of public procurement have put forward time restraints for the proceedings: a decision on suspensory effect needs to be decided within 20 days; and a material decision in case must be made within two months. On the cantonal level, the length of proceedings is usually between three and six months, on the federal level, it is between six and twelve months.

### 5.7 Is there a culture of enforcement either by public or private bodies?

Special enforcement agencies do not exist.

### 5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

After having launched a review petition, the chances to be considered for a public order that has already been awarded to another bidder are low. Typically, the request for suspensory effect is not granted, which means that the appeal board is only able to state the legal wrongfulness of the contested decision. Numerous complaint proceedings are settled with the bidders withdrawing their petition and without a material decision being made. In an intermediary decision by the Federal Administrative Court, the court ruled that the chances of success of a review petition filed by the underlying syndicate for the award of railway technology for the Gotthard base tunnel, an order worth approximately CHF 1.2 billion, were given. However, due to the urgency of the conclusion of the contract – which the governmental bodies enforced with considerable pressure – the suspensory effect was not granted and the review petition was withdrawn.

### 5.9 What mitigation measures, if any, are available to contracting authorities?

Mediation procedures are not provided for in Swiss public procurement law. Informal settlements can occur.

## 6 Changes During a Procedure and After a Procedure

### 6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) pre-contract signature? If not, what are the underlying principles governing these issues?

The goal of the competitive tendering procedure is the conclusion of a civil law contract with the considered bidder. When the award enters into legal force, thereby ending the public competitive tendering procedure, all main contractual points of the future contract have to be established. Essential changes to the contract are not to be made after the award. If the contracting authority wishes to make essential changes, (e.g. because they want to implement a different project), they have to waive the conclusion of the contract, to revoke the given award and to invite new tenders.

### 6.2 To what extent are changes permitted post-contract signature?

Changes in the procurement contract after it has been signed are governed by civil law principles. Under procurement law, the content of the procurement contract must meet the requirements of the tender documents.

## 7 Privatisations and PPPs

### 7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The relevant provisions do not contain special rules on privatisations. Is it not the question of the legal form, but of the fulfilment of public tasks that is the crucial criteria for being subject to public procurement law. Furthermore, entities that are subject to private law and that perform public tasks are subject to public procurement law; the exceptions are commercial or industrial tasks. The transferral of public tasks to a private organisation (outsourcing) is subject to public procurement law too.

### 7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

In Switzerland, PPP models are not very widespread yet. Accordingly, there are neither special legal norms nor significant case law in this area. According to Swiss law, the cooperation of the local communes and municipalities and private entities in order to achieve the financing, construction, renovation, operation and maintenance of an infrastructure or the provision of a service is generally permitted. The choice of private PPP partners by public authorities is fundamentally subject to public procurement law and therefore has to be decided in a respective proceeding. An encompassing PPP law, like in Germany, is not deemed necessary. An adjustment of the public procurement law to simplify PPP schemes is being pursued. In particular, the current exclusion of bidders from proceedings on the cantonal level is problematic.

## 8 The Future

### 8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Initially, a complete amendment of the federal public procurement law was planned. It was a project which pursued a modernisation, simplification and a nation-wide harmonisation of public procurement law. After having taken note of the results of the legislative consultation process, the Swiss Federal Council decided to aim for a step-by-step process. In the first place, the ordinance concerning public procurement law (OPP) was revised. The changes (*inter alia*, adherence of the ILO agreement, publication organ [www.simap.ch](http://www.simap.ch), possibility to forego written offers, length of contracts restricted to a maximum of five years, functional invitation to tender, dialogue, and prior involvement) came into effect on 1 January 2010. The process on the complete revision of the federal public procurement law have been suspended until there is clarity over the future development of the GPA. Due to the resistance of the cantons, the pursued harmonisation of procurement law is no longer a priority.

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