

# Public Procurement

An overview of regulation in 40 jurisdictions worldwide

**2012**

Contributing editor: Hans-Joachim Prieß



Freshfields Bruckhaus Deringer



**Published by**  
*Getting the Deal Through*  
**in association with:**

- AB & David Law
- Allende & Brea
- Aluko & Oyeboode
- Andreas Neocleous & Co LLC
- Arthur Cox
- Arzinger
- Barretto Ferreira, Kujawski e Brancher
- Sociedade de Advogados (BKBG)
- Bech-Bruun
- Capital Legal Services LLC
- Crowell & Moring LLP
- Debarliev, Dameski & Kelesoska Attorneys at Law
- Difi – Agency for Public Management and eGovernment
- Dittmar & Indrenius
- Freshfields Bruckhaus Deringer LLP
- Gide Loyrette Nouel
- Grasty Quintana Majlis & Cia
- Hamilton Advokatbyrå
- Heenan Blaikie LLP
- Hoet Peláez Castillo & Duque
- Kachwaha and Partners
- Kalo & Associates
- Kalo & Associates Kosove SHPK
- LetLaw
- Mohammed Muigai Advocates
- Oppenheim
- Peterka & Partners
- Prager Dreifuss Ltd – Attorneys at Law
- Sabev & Partners Law Firm
- Sérvulo & Associados
- Stellenbosch University
- Varul



## Public Procurement 2012

### Contributing editor:

Hans-Joachim Prieß  
Freshfields Bruckhaus Deringer LLP

### Business development managers

Alan Lee  
George Ingledew  
Robyn Hetherington  
Dan White

### Marketing managers

Ellie Nottley  
Alice Hazard

### Marketing assistants

William Bentley  
Zosia Demkowicz

### Admin assistant

Megan Friedman

### Marketing manager (subscriptions)

Rachel Nurse  
Subscriptions@  
GettingTheDealThrough.com

### Assistant editor

Adam Myers

### Editorial assistant

Lydia Geroges

### Senior production editor

Jonathan Cowie

### Chief subeditor

Jonathan Allen

### Subeditors

Anna Andreoli  
Davet Hyland  
Caroline Rawson  
Charlotte Stretch

### Editor-in-chief

Callum Campbell

### Publisher

Richard Davey

### Public Procurement 2012

Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910  
© Law Business Research Ltd 2012

No photocopying: copyright licences do not apply.

ISSN 1747-5910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of May 2012, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112

Law  
Business  
Research



<b>Global Overview</b> Hans-Joachim Prieß, Diana Harvey and Pascal Friton <i>Freshfields Bruckhaus Deringer LLP</i>	<b>3</b>
<b>Albania</b> Dorian Kashuri <i>Kalo &amp; Associates</i>	<b>8</b>
<b>Argentina</b> María Morena del Río <i>Allende &amp; Brea</i>	<b>14</b>
<b>Austria</b> Axel Reidlinger and Stephan Denk <i>Freshfields Bruckhaus Deringer</i>	<b>19</b>
<b>Brazil</b> Fabio Ferreira Kujawski and Thays Castaldi Gentil <i>Barretto Ferreira, Kujawski e Brancker Sociedade de Advogados (BKBG)</i>	<b>25</b>
<b>Bulgaria</b> Boryana Boteva and Emilia Petkova <i>Sabev &amp; Partners Law Firm</i>	<b>32</b>
<b>Canada</b> Paul M Lalonde <i>Heenan Blaikie LLP</i>	<b>40</b>
<b>Chile</b> José Francisco Sánchez and Jorge Meneses <i>Grasty Quintana Majlis &amp; Cia</i>	<b>46</b>
<b>China</b> Melissa Thomas and Christian Zeppezauer <i>Freshfields Bruckhaus Deringer LLP</i>	<b>52</b>
<b>Cyprus</b> Chrysanthos Christoforou and Loukia Kanarini <i>Andreas Neocleous &amp; Co LLC</i>	<b>59</b>
<b>Czech Republic</b> Hynek Peroutka <i>Peterka &amp; Partners</i>	<b>64</b>
<b>Denmark</b> Jesper Kaltoft <i>Bech-Bruun</i>	<b>72</b>
<b>Estonia</b> Jaak Parre and Triinu Kinkar <i>Varul</i>	<b>79</b>
<b>European Union</b> Hans-Joachim Prieß and David Broomhall <i>Freshfields Bruckhaus Deringer LLP</i>	<b>86</b>
<b>Finland</b> Hanna Laurila and Suvi Knaapila <i>Dittmar &amp; Indrenius</i>	<b>95</b>
<b>France</b> Pascal Cuche, Marc Lordonnois and Juliette Deslandres <i>Freshfields Bruckhaus Deringer LLP</i>	<b>101</b>
<b>Germany</b> Hans-Joachim Prieß, Pascal Friton and Eva-Maria Meister <i>Freshfields Bruckhaus Deringer LLP</i>	<b>110</b>
<b>Ghana</b> David Oforu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB &amp; David Law</i>	<b>119</b>
<b>Hungary</b> Mariann Erdei and Petra Tasi <i>Oppenheim</i>	<b>125</b>
<b>India</b> Sumeet Kachwaha <i>Kachwaha and Partners</i>	<b>130</b>
<b>Ireland</b> Patrick McGovern <i>Arthur Cox</i>	<b>135</b>
<b>Italy</b> Marcello Clarich and Giuseppe Urbano <i>Freshfields Bruckhaus Deringer</i>	<b>143</b>
<b>Kenya</b> Mohammed Nyaoga and Muthomi Thiankolu <i>Mohammed Muigai Advocates</i>	<b>148</b>
<b>Kosovo</b> Atdhe Dika and Vegim Kraja <i>Kalo &amp; Associates Kosove SHPK</i>	<b>154</b>
<b>Latvia</b> Kristine Gaigule-Saveja and Sintija Radionova <i>LetLaw</i>	<b>159</b>
<b>Lithuania</b> Robert Juodka, Tomas Venckus and Lina Stroputė <i>Varul</i>	<b>165</b>
<b>Macedonia</b> Jasmina Ilieva-Jovanovic and Dragan Dameski <i>Debarliev, Dameski &amp; Kelesoska Attorneys at Law</i>	<b>171</b>
<b>Netherlands</b> Winfred Knibbeler, Nadiah Al-Ani, Alvaro Pliego Selie <i>Freshfields Bruckhaus Deringer LLP</i>	<b>178</b>
<b>Nigeria</b> Gbenga Oyebode and Olunmi Fayokun <i>Aluko &amp; Oyebode</i>	<b>184</b>
<b>Norway</b> Trygve Olavson Laake <i>Difi – Agency for Public Management and eGovernment</i>	<b>192</b>
<b>Poland</b> Grzegorz Banasiuk and Piotr Brzeziński <i>Gide Loyrette Nouel</i>	<b>200</b>
<b>Portugal</b> João Amaral e Almeida and Paula Bordalo Faustino <i>Sérvulo &amp; Associados</i>	<b>206</b>
<b>Russia</b> Pavel Karpunin and Rimma Leshcheva <i>Capital Legal Services LLC</i>	<b>211</b>
<b>South Africa</b> Phoebe Bolton <i>Stellenbosch University</i>	<b>216</b>
<b>Spain</b> Javier Gómez-Acebo and Manuel Martínez <i>Freshfields Bruckhaus Deringer LLP</i>	<b>223</b>
<b>Sweden</b> Fredrik Linder, Emma Berglund and Mikael Dubois <i>Hamilton Advokatbyrå</i>	<b>230</b>
<b>Switzerland</b> Bernhard C Lauterburg and Philipp Zurkinden <i>Prager Dreifuss Ltd – Attorneys at Law</i>	<b>237</b>
<b>Ukraine</b> Sergiy Shklyar and Oleksander Dyakulych <i>Arzinger</i>	<b>244</b>
<b>United Kingdom</b> Sally Roe and Diana Harvey <i>Freshfields Bruckhaus Deringer LLP</i>	<b>250</b>
<b>United States</b> Alan W H Gourley and Adelia Cliffe <i>Crowell &amp; Moring LLP</i>	<b>258</b>
<b>Venezuela</b> José Gregorio Torrealba <i>Hoet Peláez Castillo &amp; Duque</i>	<b>265</b>

**Global Competition Review** is delighted to publish the fully revised and updated eighth edition of *Public Procurement*, a volume in the **Getting the Deal Through** series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

*Public Procurement 2012* addresses the most important issues facing private enterprises competing for government contracts. Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 40 jurisdictions featured. New jurisdictions this year include Finland, Hungary, Poland and Switzerland.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. **Getting the Deal Through** publications are updated annually. Please ensure you are referring to the latest print edition or to the online version at [www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com).

**Global Competition Review** gratefully acknowledges the efforts of all the contributors to *Public Procurement 2012*, who were chosen for their recognised expertise. **Global Competition Review** would also like to extend special thanks to contributing editor Hans-Joachim Prieß of Freshfields Bruckhaus Deringer LLP for his continued assistance with this volume.

### **Global Competition Review**

London

May 2012



# Switzerland

**Bernhard C Lauterburg and Philipp Zurkinden**

Prager Dreifuss Ltd – Attorneys at Law

---

## Legislative framework

### 1 What is the relevant legislation and who enforces it?

Due to Switzerland's federal structure, public procurement legislation is very fragmented and can be found on both a federal and a cantonal level, and to a certain extent even on municipal level. Switzerland's international obligations are incorporated in the GPA, the bilateral Agreement between Switzerland and the European Union and the EFTA agreement.

The relevant federal law is the Federal Act on Public Procurement of 16 December 1994 (SR 172.056.1) (FAPP) and the corresponding Ordinance on Public Procurement (SR 172.056.11) (OPP) which apply to the federal administration and the federal agencies enumerated therein.

The FAPP was enacted to implement Switzerland's GPA obligations. The OPP contains both executing regulations with respect to the FAPP and further regulates the applicable procedure for procurement projects which are not subject to the FAPP, namely those below the GPA's threshold values.

Both the Law on Cartels and the Law on Internal Markets complement the legislative framework on public procurement. The competent enforcement authority is the Federal Competition Commission, subject to review by the Federal Administrative Court.

Within their sphere of sovereignty, the cantons enacted public procurement legislation to regulate procurement of the cantonal administration. For harmonisation purposes among the cantons, all cantons entered into the Inter-cantonal Agreement on Public Procurement (IAPP).

Federal public procurement legislation is enforced by the Federal Administrative Court and cantonal public procurement legislation by the cantonal administrative courts. Appeals from the Federal Administrative Court to the Federal Supreme Court are possible provided that the procurement project exceeds the relevant threshold values set forth in the FAPP and raises a fundamental question of law.

---

### 2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Both the FAPP and the IAPP were enacted with a view to implementing Switzerland's obligations arising out of GPA. Effective 1 June 2002, a bilateral agreement between Switzerland and the European Union on public procurement entered into force to extend the regulations set forth in the GPA to regions and municipalities, public and private companies in the rail transport, gas and heating supply sectors, as well as procurement by private companies based on special and exclusive rights transferred by a public authority, in the sectors of drinking water, electricity and urban transport, airports as well as river and sea transport.

---

### 3 Are there proposals to change the legislation?

See 'Update and trends'.

---

### 4 Is there any sector-specific procurement legislation supplementing the general regime?

In principle, exceptions emanate from the relevant procurement statutes directly. For example, article 3 of the FAPP specifies contracts to which the FAPP does not apply, in particular those relating to national defence.

---

## Applicability of procurement law

---

### 5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

Owing to the fact that public procurement law in Switzerland is highly fragmented, the following answers relate solely to federal procurement law, unless an express reference to cantonal public procurement law is made.

It should first be mentioned that, unlike in the EU, Switzerland did not opt for a functional definition of a contracting authority for the purpose of the FAPP but for a positive-list approach (article 2(1) of the FAPP). With respect to certain sectors, the contracting authorities are described in abstract terms and relative to certain activities (article 2(2) of the FAPP and article 2a of the OPP). On the other hand, the IAPP seems to have incorporated a functional definition of a contracting authority (article 8 of the IAPP).

With the coming into force of the bilateral Switzerland–EU agreement, procurement by public and private entities providing public services active in certain sectors (see Switzerland–EU bilateral agreement, art. 3(2)(f)) was liberalised and the application of the FAPP broadened (article 2a of the OPP).

Entities active in the relevant sectors (see question 7) may be granted individual exemptions from public procurement law by the Federal Department of the Environment, Transport, Energy and Communications (DETEC) provided that competition exists among them (cf. Ordinance of the DETEC Concerning the Exemption from Public Procurement Legislation [SR 172.056.111]).

---

### 6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

None currently known. Entities which are subject to cantonal and federal public procurement laws by virtue of the Switzerland–EU agreement on public procurement and the EFTA agreement may apply to the DETEC to be exempted from public procurement legislation (see question 5).

**7** Are there specific domestic rules relating to the calculation of the threshold value of contracts?

The relevant threshold values are set out in the FAPP and the corresponding ordinance, as well as the cantonal public procurement statutes. The threshold values are subject to periodical revision. The threshold values on a federal and a cantonal/municipal level are not necessarily the same.

In terms of federal threshold values, as a result of the fragmentation of federal public procurement legislation and different international obligations, there are five sets of threshold values for those areas and sectors covered by Switzerland’s international obligations:

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Government entities (GPA)	230,000	230,000	8,700,000
Postal coach service (GPA)	700,000	700,000	8,700,000
Entities active in the electricity sector (CH-EU)	766,000	766,000	9,575,000
Entities active in the telecommunications sector (CH-EU)	960,000	960,000	8,000,000
Entities active in the rail transportation sector (CH-EU)	640,000	640,000	8,000,000

The current threshold values are valid until 31 December 2013. The applicable threshold values are available at [www.simap.ch](http://www.simap.ch).

In the case of construction works exceeding the applicable threshold value, if the contracting authority awards more than one contract then it is not bound to follow the procedures set forth in the FAPP as long as the value of each single contract is below 2 million Swiss francs and the value of all such contracts does not exceed 20 per cent of the total construction value (article 14 of the OPP).

Express provisions in the calculation of the contract value can be found in article 7 of the FAPP (eg, if the contracting authority awards a number of similar contracts for: supplies and services; dividing of projects into different lots; and option contracts) and article 14a of the OPP.

For those areas and sectors not covered by Switzerland’s international obligations, the contracting authorities will award contracts by virtue of a limited tendering procedure or a tender by invitation, subject to the following threshold values:

	Supplies	Services	Construction
Limited tendering procedure	Below 50,000 Swiss francs	Below 150,000 Swiss francs	Below 150,000 Swiss francs
Tender by invitation	Between 50,000 Swiss francs and the applicable threshold value	Between 150,000 Swiss francs and the applicable threshold value	Between 150,000 and 2,000,000 Swiss francs

Bids by foreign tenderers in those areas and sectors not covered by Switzerland’s international obligations must only be considered under the condition of reciprocity by the foreign tenderer’s home state.

Cantonal threshold values for those areas and sectors captured by Switzerland’s international obligations, as shown in the following table.

	Supplies (Swiss francs)	Services (Swiss francs)	Construction (Swiss francs)
Cantons (GPA)	350,000	350,000	8,700,000
Public authorities and undertakings in the water, energy, transport and telecommunications sector (GPA)	700,000	700,000	8,700,000
Municipalities and regions (CH-EU)	350,000	350,000	8,700,000
Private undertakings with exclusive or special rights in the water, energy and transportation sector (CH-EU)	700,000	700,000	8,700,000
Private undertakings operating under special or exclusive rights and public undertakings active in the rail transportation, gas and heating supplies sector (CH-EU)	640,000	640,000	8,000,000
Private undertakings operating under special or exclusive rights and public undertakings active in the telecommunications sector (CH-EU)	960,000	960,000	8,000,000

**8** Does the extension of an existing contract require a new procurement procedure?

Provided that the planned contract is within the field of application of the public procurement legislation and, in particular, exceeds the threshold values, a tender must be issued, unless a statutory exception applies. Thus, the extension of an existing contract does not necessarily require a new procurement procedure.

Two principal exceptions shall be mentioned here: firstly, the contracting authority may include, in a tender, an option for subsequent contracts (article 7(4) of the FAPP); and secondly, if for technical reasons, there is only one suitable supplier for the product or service in question and there is no reasonable alternative thereto, then the above obligation does not apply. This second exception was recently the subject of an action raised by several suppliers of open-source software before the federal courts. In 2009, the contracting authority awarded Microsoft Ireland Ltd an extension of an existing software licence and maintenance contract, worth over 42 million Swiss francs, without issuing a new tender. The courts dismissed the action because the relevant suppliers of open-source software were not able to provide the services requested in the tender, and for this reason could not be considered potential suppliers.

**9** Does the amendment of an existing contract require a new procurement procedure?

As a general principle, unless the amendment does not materially change the scope of the contract, no new procurement procedure is necessary. When amendments to an ongoing project are necessary and these amendments exceed the applicable threshold value, a new tender may be necessary; unless, for example, for organisational or technical reasons the amendment can be solely implemented by the original contractor.

If after the award the contracting authority and the successful bidder have not yet entered into the procurement contract, the award may be revoked. The relevant threshold is whether the amendment of the project would likely have resulted in a different award.



- 10** May an existing contract be transferred to another supplier or provider without a new procurement procedure?

The contract will be awarded to the most economically advantageous bid. Therefore, it cannot be transferred to another supplier without a new procurement procedure.

- 11** In which circumstances do privatisations require a procurement procedure?

The transfer of a public function to a private entity ('contracting out') is subject to the general principles of administrative law. To the extent that the state procures services from a private entity against payment, the transaction may be subject to public procurement regulation.

- 12** In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

Roughly three types of PPP may be distinguished: (i) the state establishes a joint-venture with a private entity; (ii) the state transfers the provision of a public function to a private entity by way of a concession (see question 13); and (iii) the state enters into a long-term contractual relation with a private partner for the provision of certain services to the public.

There is no clear definition of PPP in Swiss procurement legislation. With respect to the infrastructure sector, PPP is commonly defined to encompass a long-term cooperation between polity and a private entity to build and operate certain infrastructure.

Procurement law applies in cases where a private entity will assume a public function against remuneration.

- 13** What are the rules and requirements for the award of works or services concessions?

Concessions are generally not covered by procurement legislation. Only if a public function or service (ie, all activities which result from a public interest) is outsourced to a private entity by way of a works or services concession will public procurement regulation apply. Accordingly, it can be said that the determining factor for the application of public procurement regulation is whether the state or the relevant state entity has an interest in the provision of a particular service by a private entity.

The Law on Internal Markets provides in article 2(7) that the transfer of a right to exploit a cantonal or municipal monopoly may only occur upon a tendering procedure. The law itself does not contain any prescriptions on the procedure to be followed; however, it is generally accepted that the fundamental principles of transparency and non-discrimination should apply.

- 14** To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

'In-house' contracts are not subject to public procurement legislation. The decision on whether to have a particular service being supplied by another administrative body ('make not buy') cannot be appealed based on procurement legislation.

Special rules apply to 'quasi-in-house' contracts: if the supplier is controlled by the public administration as though it were a unit of the public administration and almost exclusively provides goods or services to the public administration, it is not covered by public procurement law. However, if third parties have a shareholding interest in the supplier or the supplier has significant business activities on the market, public procurement law will apply.

Whether or not the Swiss judiciary will eventually apply the jurisprudence of the European courts on in-house procurement remains unclear.

## The procurement procedures

- 15** Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

Article 1 of the FAPP states that the purpose of the Act is to regulate and transparently organise the award of public contracts and to strengthen competition between bidders. Article 8(1)(a) of the FAPP requires the contracting authority to ensure equal treatment of domestic and foreign bidders in all phases of the procurement proceeding. The contracting authority is entitled by law to verify that the principles of procurement procedure are followed by tenderers (eg, health and safety regulations and the terms and conditions of employment, including equal treatment of men and women). Finally, in article 21(1), the FAPP sets out another fundamental principle of Swiss public procurement law: 'best value for money'.

- 16** Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Neither federal nor cantonal procurement laws specifically prescribe that the contracting authority must be independent and impartial. However, they are bound by the fundamental principles of the Federal Constitution, whereas a public authority must act in good faith and in a non-arbitrary manner. Moreover, administrative principles require that any person who is responsible for preparing or issuing a ruling shall recuse itself from the case if, among other reasons, they have some form of personal interest in the matter or could be regarded as lacking impartiality in the matter. This principle essentially mirrors the constitutional guarantee that everyone has a right to equal and fair treatment in proceedings before administrative bodies.

- 17** How are conflicts of interest dealt with?

As mentioned in question 16, members of the administration must recuse themselves from a matter if they have a personal interest in the matter or could be regarded as lacking impartiality. In principle, statutory grounds for recusal must be followed ex officio and no specific motion shall be necessary; however, if a bidder becomes aware of a conflict of interest, he should immediately raise the issue and file a motion with the supervisory authority that the particular person be removed from the case. It would be regarded as an abuse of law by the courts if a bidder, knowing of a potential conflict of interest, would let the procedure move ahead and only upon receiving a negative award claim that a member of the contracting authority had a potential conflict of interest.

- 18** How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The involvement of a potential bidder in the preparation of the tender will not necessarily result in his exclusion from the bidding process. The threshold is whether the bidder concerned obtained, by virtue of his involvement in the preparation of the tender, a competitive advantage which cannot be remedied (eg, through a prolongation of the relevant time limits or disclosure of all relevant information on the preparatory tasks that were assigned to him) and whether the exclusion of the bidder concerned will not negatively affect competition among the remaining bidders.

- 19** What is the prevailing type of procurement procedure used by contracting authorities?

As a rule, procurement projects within the scope of the applicable rules and regulations should be undertaken in either the open or selective procurement procedure.

**20** Can related bidders submit separate bids in one procurement procedure? If yes, what requirements must be fulfilled?

Federal procurement law does not contain an express provision on related bidders. Related bids can occur in various forms, such as within the same group of companies, in the participation in more than one bidding consortium or in subcontractors participating in more than one bid. As a matter of transparency, the contracting authority must clearly and unambiguously state in the tender documents whether and to what extent it will accept related bids.

**21** Are there special rules or requirements determining the conduct of a negotiated procedure?

The equivalents of the EU's negotiated procedure in Switzerland are the tender by invitation, where the contracting authority will normally solicit offers of three potential suppliers (article 35 of the OPP), and the limited tendering procedure in which the contracting authority will award a contract to a supplier directly and without issuing any invitation to tender (article 16 of the FAPP; articles 13 and 36 of the OPP). In areas and sectors covered by Switzerland's international obligations, the restrictive conditions under which a tender by invitation and the limited tendering procedure may be used are the same and basically mirror the conditions set forth in article XV of the GPA.

**22** When and how may the competitive dialogue be used? Is it used in practice in your jurisdiction?

There is no similar provision as in article 29 of Directive 2004/17/EC in Switzerland.

In 2010, the Federal Council amended the OPP to include a so-called 'dialogue' (article 26a of the OPP). This form of dialogue, however, must be clearly distinguished from the competitive dialogue in the aforementioned Directive. Unlike in the EU, it is not a procurement proceeding of its own kind. Rather, the contracting authority may, for the purposes of complex projects or the procurement of 'intellectual services', enter into dialogue with the tenderers to further develop the proposed solutions, provided that it has included this option in the invitation to tender. It is an instrument that may be used in open and selective procedures, as well as in tenders by invitation.

Further, contracting authorities may initiate a planning and global solution competition for complex and novel projects to evaluate different solutions therefrom. A planning and global solution competition must be tendered in the open or selective tendering procedure if it exceeds the applicable thresholds in article 6(1) of the FAPP (goods and services) or 2 million Swiss francs for construction projects. Whether the contracting authority will initiate such competition is within its discretion; however, if it initiates a competition, it may require that in a selective tender young entrepreneurs and developers must be invited to tender.

**23** What are the requirements for the conclusion of a framework agreement?

Unlike in the EU, for example, there are no specific rules on framework agreements in Switzerland. However, the federal contracting authorities regularly enter into framework agreements. To our knowledge, framework agreements have not yet been subject to scrutiny by the Federal Administrative Court as to their overall validity under procurement regulation.

**24** May a framework agreement with several suppliers be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

See question 23. If a framework agreement was concluded with several suppliers, the contracting authority must initiate a 'mini tender'

among these suppliers for each contract under the framework agreement, unless otherwise stipulated.

**25** Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Bidding consortia are generally permitted; however, the contracting authority may limit or exclude the possibility for bidding consortia. The contracting authorities will examine each member of a bidding consortium as regards its required eligibility criteria.

Since a change of a member of a bidding consortium may have an impact on the overall offering, it must be transparent and requires reasonable grounds. Moreover, the new member of the bidding consortium must satisfy the required eligibility criteria (articles 8 and 11 of the FAPP).

Note that members of a bidding consortium are subject to the rules of the simple partnership. For this reason, they are also subject to a compulsory joinder for an appeals proceeding. If not all members of the bidding consortium join the appeals proceeding, the Federal Administrative Court will not review the matter.

**26** Are unduly burdensome or risky requirements in tender specifications prohibited?

There are no express provisions in this regard.

**27** What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

The contracting authorities are subject to the fundamental principles of the procurement procedure set out above. It is explicitly bound by the principle to award the contract only to the bid which is economically most advantageous (article 21 of the FAPP). As a matter of transparency, the contracting authority must set out the eligibility criteria in the invitation to tender.

Federal and cantonal contracting authorities may establish a verification system to examine the eligibility of tenderers. The decision on the application of a potential tenderer to be included in the list of eligible tenderers or the revocation of a tenderer from such list can be appealed.

**28** Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

There are no express provisions in this regard.

**29** What are the requirements for the admissibility of alternative bids?

Bidders are free to offer, in addition to their complete offer, alternative bids. In exceptional circumstances, the contracting authority may prohibit or limit this possibility in the tender.

**30** Must a contracting authority take alternative bids into account?

See question 29.

**31** What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Bidders cannot change the tender specifications. Amendments are possible to the extent that formal negotiations take place. Also, bidders may submit alternative bids to the extent that such bids were not excluded in the tender documents.

**32** What are the award criteria provided for in the relevant legislation?

The contracting authority will enter into a contract with the bidder that made the most economically advantageous bid (article 21(1) of the FAPP). In determining the most economically advantageous bid, a number of criteria will be taken into account by the contracting authority, such as quality, price, deadlines, profitability, operating costs, customer service, expediency of the service, aesthetics, environmental sustainability and technical value. The criteria mentioned in the law are not exclusive and the contracting authority may take into account other criteria it deems appropriate and which are reasonable and justified. Generally not permitted are criteria related to fiscal or structural policy. As a matter of transparency, all award criteria must be listed in the tender documentation according to their relevance and weight.

In 2010, the federal government published guidelines on sustainable procurement. These guidelines describe how contracting authorities may include social and ecological criteria in a tender. With respect to social criteria, particular attention is given to the principles set forth in the eight core-ILO agreements. The FAPP only makes reference to the bidder's obligation to adhere to the relevant employment regulation (article 8(1)(b) of the FAPP; domestic bidders) and treat men and women equally in terms of wage payments (article 8(1)(c) of the FAPP; international bidders). Article 7(2) of the OPP makes a direct reference to the eight core-ILO agreements.

With respect to selective proceedings, jurisprudence provides that criteria which have already been examined for the purposes of a bidder's admissibility to the tender procedure may not be considered for the purposes of the award again.

**33** What constitutes an 'abnormally low' bid?

Federal procurement legislation does not contain an express definition; however, given the purpose of the FAPP, the definition set forth in article XIII(4)(a) of the GPA will likely be taken into account. On a cantonal level, eg, in the cantons of Berne (article 28 of the cantonal procurement ordinance) or Zurich (§32 of the cantonal procurement ordinance), the definition set forth in the GPA was incorporated.

Tenderers are generally free to calculate their bids; however, a bid which does not correspond to the principles set forth in article 8 of the FAPP may be subject to disqualification.

**34** What is the required process for dealing with abnormally low bids?

As federal procurement law does not contain an express provision on abnormally low bids, it is likely that the contracting authorities will apply the remedy set forth in article XII(4)(a) of the GPA and make appropriate enquiries with the concerned bidder. On a cantonal level, the proceeding set forth in the GPA has been incorporated in the relevant ordinances.

See also question 32. Pursuant to article 11(d) of the FAPP, the contracting authority may withdraw the award or disqualify tenderers if they fail to adhere to the principles set forth in article 8 of the FAPP.

**35** How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is not known in Switzerland. Bidders that violate, for example, employment regulations (namely laws regarding illegal employment) may be disqualified from the tender (articles 11 and 8 of the FAPP) or be excluded from any public tender for a period not exceeding five years (see, eg, article 13 of the Law on Illegal Employment; SR 822.41). The State Secretariat for Economic Affairs publishes a list of temporarily disqualified tenderers.

**Review proceedings and judicial proceedings****36** Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The competent authorities for review proceedings are the administrative courts. On a federal level, review applications are only possible for tenders subject to the FAPP (article 39 of the OPP).

Decisions rendered by the Federal Administrative Court based on the FAPP may be appealed to the Federal Supreme Court, if the threshold levels of the FAPP are reached and the issue raises a question of fundamental nature.

**37** How long does an administrative review proceeding or judicial proceeding for review take?

The length of a review proceeding depends on the complexity of the case and may take between four and 15 months before the Federal Administrative Court, mainly depending on whether interim measures have been ordered.

**38** What are the admissibility requirements?

The applicable threshold is whether an applicant has an immediate and legitimate interest that the decision of the contracting authority be revoked. According to general principles of administrative law, this normally requires that the applicant participated or was denied the opportunity to participate in the bidding procedure, was specifically affected by the contested decision, and has an interest that is worthy of protection in the revocation or amendment of the decision. The latter is normally considered to exist when the outcome of the proceeding is capable of affecting the legal position of the applicant. Two clarifications must be made to the aforementioned general principles:

- Limited tendering procedure: here, the applicant neither participated nor was denied the opportunity to participate in the bidding procedure for lack of knowledge thereof. Accordingly, the focus is confined to the other elements of admissibility. Accordingly, the applicant must establish that he has an immediate interest in supplying the goods and services requested by the contracting authority and that the good and services he would have proposed to deliver were capable to substitute those the contracting authority purchased directly. For the latter element, the Federal Administrative Court looks into the methodology according to which the competition authorities determine the relevant market. In the above-mentioned case regarding the procurement of IT services, the suppliers of open-source solutions could not establish that their solution was capable to substitute the solution chosen by the contracting authority for which reason their application was not admissible.
- Where the contract was already entered into: if after the award the procurement contract has already been entered and the applicant's application for review was not granted suspensive effect, the Federal Administrative Court will only determine whether and to what extent the award was in breach of federal law and thus lay ground for a potential damages claim.

**39** What are the deadlines for a review application and an appeal?

Appeals must be lodged within 20 days of the notification of the award on a federal level (article 30 of the FAPP) and within 10 days on a cantonal level (article 15(2) of the IAPP). An appeal to the Federal Supreme Court must be lodged within 30 days from the notification of the judgment of the lower court, subject to the above limitations (see question 36).



**Update and trends**

A first proposal to amend the federal procurement legislation failed during public consultation in 2009. An important part of the proposal was an attempt by the federal government to harmonise the public procurement laws of the cantons with those on a federal level. With the one exception all cantons opposed the proposal, which led to its withdrawal. In addition, the proposal aimed at implementing new rules on e-procurement, making the procurement proceeding more flexible (functional call for tender, dialogue) and clarifying existing uncertainties with respect to prior involvement and time limits.

Later, in 2010, certain elements of the proposed FAPP revision were implemented through amendments to the OPP in particular with a view to making public procurement more flexible and thus having a positive impact on the overall economic situation.

A further proposal by the federal government to prohibit the courts from granting appeals against certain projects of national importance (suspensive effect) failed in the Swiss parliament in 2011. The proposal was brought to parliament in the context of several large construction projects having been blocked for years in the courts, and which accordingly could not be pushed forward.

On 21 March 2012, the Federal Council (executive branch) adopted the revised WTO GPA, subject to parliamentary approval, which may give rise to another attempt to revise federal procurement legislation.

- 40** Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The application for review does not entail suspensive effect (on either a federal or a cantonal level) and, accordingly, the appellant must file a motion to the Federal Administrative Court or the cantonal administrative courts and request that the application will have suspensive effect.

Whether or not the suspensive effect will be granted depends on the outcome of a two-stage exercise: the court will first assess whether the applicant's matter brought before it is not obviously unfounded; if so, the court will then assess whether the applicant's individual interests outweigh those of the state to have the procurement project immediately implemented.

- 41** Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

The contracting authority is required to publish any decision, including a reasoned summary, against which an appeal can be lodged before the Federal Administrative Court on [www.simap.ch](http://www.simap.ch). If requested by an unsuccessful bidder, the contracting authority must promptly disclose the award procedure applied; the identity of the successful bidder; the price of the successful bid from the highest and lowest prices of the bids included in the award procedure; the essential reasons why the bid was not considered; and the determining characteristics and advantages of the successful bid, unless statutory exceptions apply.

- 42** Is access to the procurement file granted to an applicant?

Access to files for the purposes of a review proceeding is governed by the general rules set forth in the Law on Federal Administrative

Procedure (article 26 of the FAPP). Accordingly, the authorities must grant access to those files which are relevant to the reasoning of the award; however, the authorities are under a duty to preserve confidential information (eg, competing bids) and therefore may restrict or deny access to the files.

If a party is refused the right to inspect a document, this document may be relied upon for the prejudice of that party only if the party has been notified by the authority, either verbally or in writing, of the content of the document that is relevant to the case and the party has been given the opportunity to state its position on the document and to provide counter-evidence.

- 43** Is it customary for disadvantaged bidders to file review applications?

It is not customary. For the years 2010–11 there are around 40 decision of the Federal Administrative Court concerning federal procurement projects published; only about 20 are review decisions on the merits, while the other decisions concern procedural matters or are to close a proceeding because it had become a matter without object.

- 44** May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

If a contract has been concluded between the contracting authority and the successful bidder, the Federal Administrative Court may only determine the extent to which the award was in breach of federal law (article 32(2) of the FAPP).

Although the Federal Administrative Court may only determine the extent to which the award was in breach of federal law, court practice suggests that the award may be revoked and/or the contracting authority instructed to suspend or terminate a contract that was concluded.

## Prager Dreifuss Ltd – Attorneys at Law

**Bernhard C Lauterburg**  
**Philipp Zurkinden**

**[bernhard.lauterburg@prager-dreifuss.com](mailto:bernhard.lauterburg@prager-dreifuss.com)**  
**[philipp.zurkinden@prager-dreifuss.com](mailto:philipp.zurkinden@prager-dreifuss.com)**

Schweizerhof-Passage 7  
30011 Berne  
Switzerland

Tel: +41 31 327 54 54  
Fax: +41 31 327 54 99  
[www.prager-dreifuss.com](http://www.prager-dreifuss.com)

The contract which follows the award – note that the contract may not be entered until the deadline to file an appeal lapsed or a decision on a motion to a grant suspensive effect was issued – is subject to the Code of Obligations; the award concludes the administrative proceeding, unless the award is subject to an appeal. The cancellation or termination of the contract is basically subject to the general and/or specific rules set forth in the CO and other applicable norms of civil law.

---

**45** Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Any award of the contracting authority which is subject to procurement legislation can be appealed to the Federal Administrative Court.

---

**46** If a violation of procurement law is established in an administrative or judicial review proceeding, can disadvantaged bidders claim damages? If yes, please specify the requirements for such claims.

The contracting authority is liable for damages it caused by an award which was later declared unlawful in a judicial review proceeding. Damages are limited, however, to the amount of costs incurred by the appellant in connection with the tender procedure and the appeal.



### Annual volumes published on:

- |                                   |                              |
|-----------------------------------|------------------------------|
| Air Transport                     | Licensing                    |
| Anti-Corruption Regulation        | Life Sciences                |
| Arbitration                       | Merger Control               |
| Banking Regulation                | Mergers & Acquisitions       |
| Cartel Regulation                 | Mining                       |
| Climate Regulation                | Oil Regulation               |
| Construction                      | Patents                      |
| Copyright                         | Pharmaceutical Antitrust     |
| Corporate Governance              | Private Antitrust Litigation |
| Corporate Immigration             | Private Equity               |
| Dispute Resolution                | Product Liability            |
| Dominance                         | Product Recall               |
| e-Commerce                        | Project Finance              |
| Electricity Regulation            | Public Procurement           |
| Enforcement of Foreign Judgments  | Real Estate                  |
| Environment                       | Restructuring & Insolvency   |
| Foreign Investment Review         | Right of Publicity           |
| Franchise                         | Securities Finance           |
| Gas Regulation                    | Shipping                     |
| Insurance & Reinsurance           | Tax on Inbound Investment    |
| Intellectual Property & Antitrust | Telecoms and Media           |
| Labour & Employment               | Trademarks                   |
|                                   | Vertical Agreements          |



**For more information or to purchase books, please visit:**  
[www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com)



Strategic research partners of the ABA International section



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



The Official Research Partner of the International Bar Association