

## Chapter 40

### Switzerland

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## I. PUBLIC PROCUREMENT AND ITS LEGAL BASIS

### § 40:1 Overview of Swiss legal system

Switzerland is an atypical federal State, and this is reflected in the way public procurement is regulated. The 1999 Swiss Constitution<sup>1</sup> defines three tiers of government: The Confederation or federal government, the Cantons and the Communes. Under Articles 3<sup>2</sup> and 42<sup>3</sup> of the Constitution, the federal government only has those powers that are specifically allocated to it by the federal constitution and the

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#### [Section 40:1]

<sup>1</sup>Federal Constitution of the Swiss Confederation of 18 April 1999 (RO 1999 2556, modified as of 18 May 2014 (FF 2014 6121)).

<sup>2</sup>Article 3 of the 1999 Constitution states that “[t]he Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation.” This provision gives the residual powers to the Cantons who, in turn often confer these powers on the municipalities (*communes*).

<sup>3</sup>Article 42 holds that “The Confederation shall accomplish the tasks which are attributed to it by the Constitution.”

federal government shall only assume those tasks that require uniform regulation. As a result, those tasks that do not require uniform regulation throughout Switzerland are left to the cantons.<sup>4</sup> Additionally, according to the principle of subsidiarity, the powers should, as much as possible, be allocated to the lowest level of government that is able to properly fulfill the task in question.

As a general rule, Article 49 of the Constitution states the supremacy of federal law.<sup>5</sup> This principle means that federal law takes precedence over conflicting cantonal law: “federal law breaks the cantonal law.” The Cantons cannot enact a rule contrary to the Federal law.<sup>6</sup> Yet, this principle must be tempered, the Federal Supreme Court (*Tribunal fédéral, Bundesgericht*) having decided that this supremacy only exists if the division of powers is respected. Thus when the Constitution gives a specific competence to the Cantons, the cantonal regulation is superior to the federal regulation on the same matter.<sup>7</sup>

Numerous Articles of the Constitution give specific powers to the Confederation, yet the content and the scope of each of these powers can vary from one field to another, and in some fields the Cantons also may have competing powers. This is the case of public procurement where the Confederation and Cantons have such competing powers. As a result of this allocation of law-making powers, public procurement in Switzerland is regulated by three sets of rules: international treaties, federal law, and cantonal and intercantonal law.

Switzerland applies standard principles with respect to the hierarchy of legal norms, international treaties taking precedence over national norms; federal law being superior to cantonal law. Legislation enacted by parliament is implemented by ordinances that must comply with such legislation. Case law can in some situations replace legislation (Article 1 of the Civil Code); however, in general, court decisions are not an independent source of law.

In 2009, Government procurement in Switzerland represented CHF 36-billion (25% of government expenses) undertaken by the respective levels of State: Confederation (19%), Cantons (38%), and Municipalities (43%).

Public procurement by the Swiss Confederation (as well as the federal enterprises in the relevant sectors) is governed by federal law,<sup>8</sup> while each of the 26 cantons has its own procurement law. The international treaties ratified by the Confederation provide the basic

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<sup>4</sup>Cantons also have their own constitutions.

<sup>5</sup>Constitution, Article 49.

<sup>6</sup>ATF 120 Ia 299.

<sup>7</sup>FF 1997 I 218; ATF 128 II 112.

<sup>8</sup>The term “Swiss Confederation” is used within this article to cover all central government entities and their affiliates.

legal framework of rights and obligations for federal, cantonal as well as municipal public procurements and are binding on all federal and cantonal authorities.

### § 40:2 Applicable international law; treaties

The Swiss government has signed a number of multilateral and bilateral treaties with respect to public procurement. Switzerland is party to the World Trade Organization Agreement on Government Procurement (WTO-AGP),<sup>1</sup> to the European Free Trade Association (EFTA) public procurement rules,<sup>2</sup> and has entered into a bilateral Agreement with the European Community on Certain Aspects of Government Procurement (EU-CH BA-GP).<sup>3</sup> Certain provisions of these international treaties are directly applicable in Swiss law without needing an implementing act.

The proper implementation and application of Switzerland's treaty obligations are monitored by a special government-independent commission where the federal government and the cantons are equally represented and by the State Secretariat for Economic Affairs (SECO).<sup>4</sup> Furthermore, they are enforced by the competent judicial authorities upon review of applications filed by bidders.<sup>5</sup>

### § 40:3 World Trade Organization Agreement on Government Procurement (WTO-AGP)

The World Trade Organization Agreement on Government Procurement (WTO-AGP) was ratified by Switzerland on 19 December 1995.<sup>1</sup> Since its entry into force on 1 January 1996, the Agreement is the legal basis for public procurement in Switzerland. A revised version of the WTO-AGP was adopted on 30 March 2012 (WTO-AGP 2012) and entered into force on 6 April 2014 in most of the member States.<sup>2</sup> However, the WTO-AGP 2012 has not been ratified by Switzerland

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#### [Section 40:2]

<sup>1</sup>World Trade Organization Agreement on Government Procurement of 15 April 1994 (WTO-AGP), RS 0.632.231.422.

<sup>2</sup>EFTA Convention of 4 January 1960, revised 2 October 2014, Appendix R, RS 0.632.31.

<sup>3</sup>Bilateral Agreement on Certain Aspects of Public Procurement (EU-CH BA-PP), RS 0.172.052.68. This Agreement specifically applies to telecommunications, railroad and energy supplies.

<sup>4</sup>Ordinance on Public Procurement (OPP), Article 68a, RS 172.056.11.

<sup>5</sup>Federal Act on Public Procurement (FAPP), Article 27, RS 172.056.1.

#### [Section 40:3]

<sup>1</sup>World Trade Organisation Agreement on Government Procurement of 15 April 1994 (WTO-AGP), RS 0.632.231.422.

<sup>2</sup>World Trade Organisation Agreement on Government Procurement of 30 March 2012 (WTO-AGP).

yet but should be at the end of 2015. Public procurement under WTO-AGP is understood in a broad sense, defined by two elements: the conclusion of a contract by a public entity<sup>3</sup> and the supply of goods or services.<sup>4</sup>

It is a multilateral treaty administered by a Committee on Government Procurement, which includes the WTO Members that are parties to the Agreement.<sup>5</sup> Currently, the Agreement is the main instrument in the WTO that provides a framework of rights and obligations among its parties with respect to their national laws, regulations, procedures and practices in the area of government procurement.<sup>6</sup> Additionally, it can be considered to serve broader purposes relating to good governance and the attainment of value for money in national procurement systems.<sup>7</sup>

Like all international treaties in Switzerland, the Agreement is directly applicable without the need for domestic implementing legislation, provided the treaty provisions are sufficiently specific<sup>8</sup> and is therefore binding on all federal and cantonal authorities as soon as it enters into force. It provides the basic legal framework for federal, cantonal and municipal public procurements.

The WTO Agreement does not automatically apply to all government procurement of the parties. Rather, the scope of the Agreement is determined with regard to each Party in Appendix I and its Annexes (Article II 1. WTO-AGP). Annexes 1-3 of Appendix I specify the central<sup>9</sup> and sub-central government entities<sup>10</sup> as well as other entities,<sup>11</sup> such as public utilities (“contracting authority”), that each party has committed to complying with the Agreement.<sup>12</sup> Appendix I and its

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<sup>3</sup>The Swiss Federal Tribunal adds a third criterion: the conclusion of a contract by a public entity with a private entity (ATF 125/199 I 209/214, *JC Decaux Mobilier Urbain Genève SA et Decaux SA*).

<sup>4</sup>WTO-AGP, Article I-2.

<sup>5</sup>Canada, China, the European Union, Hong Kong, Iceland, Israel, Japan, Korea, Lichtenstein, and The Netherlands with respect to Aruba, Norway, Singapore, Switzerland, the United States, Armenia, Bulgaria, Romania, Croatia, Taipei, Montenegro and New Zealand.

<sup>6</sup>See [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

<sup>7</sup>See [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

<sup>8</sup>Constitution, Article 190, and Article 3 of the *Loi fédérale sur les recueils du droit fédéral et la Feuille fédérale (Loi sur les publications officielles, LPubl) du 18 juin 2004* (170.512).

<sup>9</sup>Switzerland—Appendix I, Annex I, of 29 September 2000.

<sup>10</sup>Switzerland—Appendix I, Annex II, of 7 February 2003.

<sup>11</sup>Switzerland—Appendix I, Annex III, of 1 March 2000.

<sup>12</sup>Switzerland—Appendix I, Annex I, of 29 September 2000.

Annexes also specify the threshold value above which individual procurements are covered by the Agreement.<sup>13</sup>

As a general rule, all goods are covered by the Agreement, while Annexes 4 and 5 to Appendix I specify each party's covered services and construction services. However, the notes applicable to Annexes 1 and 2 exclude activities in the field of water supply, energy, transportation, and telecommunication for such entities listed in Annex 1 and 2, i.e., essentially the Swiss federal government, Cantons and municipalities, and public organizations that do not have an industrial or commercial nature. The notes pertaining to Annex 4 list five exceptions to the application of the WTO-GPA, namely, contracts of services awarded to an entity that is itself a contracting authority; contracts awarded to a "linked entity," of which 80% of its average turnover over three years is due to services performed for the contracting authority; contracts for the acquisition or lease of buildings and real estate; contracts related to the labor market; and contracts related to broadcasting companies.

The Agreement is based on the principles of openness, transparency and non-discrimination. Non-discrimination is an important cornerstone principle in the area of government procurement. These principles apply to the parties' procurement covered by the Agreement, to the benefit of parties and their suppliers of goods and services. The text of the Agreement includes specific rules implementing those principles.<sup>14</sup>

In order to ensure that the basic principle of non-discrimination is followed and that foreign products, services and suppliers have access to procurement, the Agreement provides for procedures enabling transparency of laws, regulations, procedures and practices regarding government procurement.<sup>15</sup>

There is a general requirement to publish laws, regulations, judicial decisions, administrative rulings of general application and any procedures regarding government procurement covered by the Agreement.<sup>16</sup> The relevant publications are listed in Appendix IV WTO-AGP.<sup>17</sup> Furthermore, each government must collect and provide to the other parties, through the Committee, statistics on its procurement covered by the Agreement.<sup>18</sup> Disputes between parties under the

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<sup>13</sup>WTO-AGP, Article I-4.

<sup>14</sup>WTO-AGP, Articles III-1 and III-2.

<sup>15</sup>WTO-AGP, Articles VII-XVI.

<sup>16</sup>WTO-AGP, Article XIX-1.

<sup>17</sup>For Switzerland: Compendium of Federal laws; Decisions of the Swiss Federal Court; Jurisprudence of the administrative authorities of the Confederation and every Canton (26); Compendiums of Cantonal laws (26).

<sup>18</sup>WTO-AGP, Article XIX-5.

Agreement are subject to the procedures of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.<sup>19</sup>

**§ 40:4 World Trade Organization Agreement on Government Procurement (WTO-AGP)—Bilateral Agreement on Certain Aspects of Government Procurement**

Although Switzerland is not a member of the European Union (EU), it concluded on 21 June 1999 a set of seven bilateral agreements with the EU covering a wide range of areas, including an agreement concerning certain aspects of public procurement.<sup>1</sup> These seven agreements all entered into force on 1 June 2002.

The Agreement between Switzerland and the European Union on Certain Aspects of Government Procurement (hereafter EU-CH BA-GP) extends the area of application of the WTO regulations.<sup>2</sup> In particular, this Agreement also covers procurement by regions and municipalities, procurement by public and private companies in the rail transportation, 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. These fields were excluded in the WTO-AGP.

**§ 40:5 World Trade Organization Agreement on Government Procurement (WTO-AGP)—European Free Trade Association Public Procurement Rules**

The European Free Trade Association (EFTA) is a free trade organization between four European countries<sup>1</sup> that operates parallel to, and is linked to, the European Union. The Stockholm Convention, establishing EFTA, was signed on 4 January 1960 by seven countries, including Switzerland.<sup>2</sup> On 21 June 2001 in Vaduz, the EFTA member States signed an agreement on the revision of the EFTA Convention that came into force on 1 June 2002, at the same time as the seven bilateral agreements between Switzerland and the EU, signed in 1999.<sup>3</sup>

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<sup>19</sup>WTO-AGP, Article XXII-1.

**[Section 40:4]**

<sup>1</sup>Bilateral Agreement on Certain Aspects of Public Procurement, RS 0.172.052.68—OJUE 30.04.2002,L 114/430.

<sup>2</sup>1 EU-CH BA-GP, Article 2, al. 1.

**[Section 40:5]**

<sup>1</sup>Iceland, Liechtenstein, Norway, and Switzerland (Norway and Switzerland being the only remaining founding members of the European Free Trade Association).

<sup>2</sup>Initially, Austria, Denmark, Norway, Portugal, Sweden, Switzerland, Great Britain, and Northern Ireland.

<sup>3</sup>EFTA Convention, RS 0.632.31.

Switzerland therefore also applies EFTA's public procurement rules contained in Appendix R to the EFTA Agreement and EFTA's bilateral free trade agreements.<sup>4</sup> The State Secretariat for Economic Affairs (SECO) monitors their proper implementation and application as well as a special commission where the federal government and the cantons are equally represented.<sup>5</sup>

#### § 40:6 Federal law

At the Swiss national level, public procurement by the Confederation (as well as the federal enterprises in the relevant sectors) is governed notably<sup>1</sup> by the Federal Act on Public Procurement (FAPP),<sup>2</sup> the Ordinance on Public Procurement (OPP),<sup>3</sup> and the Ordinance on the Organization of Public Procurement (OOPP).<sup>4</sup> Furthermore, general terms and conditions of the federal government for the procurement of various goods, services, construction, and information technology services can be found on the Federal Administration's website.<sup>5</sup>

The 26 Swiss cantons have operated since November 25, 1994 under the Intercantonal Agreement on public procurement (IAPP), revised on March 15, 2001, and its Executive Directives. All cantons have joined the revised Agreement also called *concordat*. The objective of the *concordat*, defined in its Article 1, is to implement the commitments under international treaties (GPA, bilateral and FTA) at sub-territorial levels (cantons, municipalities, and utilities). The articulation of internal Swiss law is thus as follows.

#### § 40:7 Federal law—Federal Act on Public Procurement (FAPP)

In order to implement the WTO Agreement on Government Procurement (WTO-AGP), Switzerland adopted the Federal Act on Public Procurement (FAPP) on 16 December 1994, which entered into force

<sup>4</sup>EFTA Free Trade Agreements (FTA): Chile, Mexico Korea, Canada, Singapore, Israel, Macedonia, Croatia, Turkey, Tunisia, Palestinian Authority, SACU, Morocco, Jordan, Lebanon, Egypt, GCC, Colombia, Serbia, Albania, Bosnia, Costa Rica, Panama, Hong Kong, China, Montenegro Peru and Ukraine.

<sup>5</sup>OPP, Article 68a.

#### [Section 40:6]

<sup>1</sup>See also Article 13 of the *Loi fédérale relative à la construction de la ligne ferroviaire suisse à travers les Alpes (loi sur le transit alpin, LTrAlp) du 4 octobre 1991*, RS 742.104.

<sup>2</sup>Federal Act on Public Procurement (FAPP), RS 172.056.1.

<sup>3</sup>Ordinance on Public Procurement (OPP), RS 172.056.11.

<sup>4</sup>Ordinance on the Organisation of Public Procurement of the Federal Administration (OOPP), RS 172.056.15.

<sup>5</sup>See <https://www.bbl.admin.ch/bbl/fr/home/dokumentation/allgemeine-geschaefstbedingungen-des-bundes.html>.

on 1 January 1996.<sup>1</sup> The revised WTO-AGP 2012 which should enter into force in 2015 in Switzerland will first require a revision of the FAPP and related Ordinances. The OPP has been modified in 2010 to implement any modifications of international public procurement law.

The Federal Act states that the Confederation will establish the procedures for awarding public contracts of goods, services and construction and ensure transparency, increase competition among bidders and promote the attainment of value for money.<sup>2</sup> It also is intended to ensure equal treatment of all bidders.<sup>3</sup>

Furthermore, in conformity with the WTO Agreement on Government Procurement, the Federal Act specifies its scope,<sup>4</sup> details the principles and conditions for participation in the award of public contracts,<sup>5</sup> establishes the three federal tendering procedures available in Switzerland<sup>6</sup> and provides remedies for disputes arising out of its application.<sup>7</sup>

The Federal Act applies to the General Administration of the Confederation, the Swiss Alcohol Board, the Federal Polytechnic Schools and their research institutions, the Swiss Postal Services, provided that their activities do not compete with those of third parties not subject to the WTO Agreement on Government Procurement, the Federal Inspectorate for Nuclear Security, the Swiss National Museum and the Federal Institute of Metrology.<sup>8</sup>

The Federal Act however does not apply to contracts concluded with institutions for the disabled, charity organizations or penitentiaries, contracts awarded under agricultural or food aid programs, contracts awarded on the basis of an international treaty between the parties to the WTO Agreement or Switzerland and third countries in respect of an objective to be achieved and jointly funded. Nor does the Act apply to contracts awarded with an international organization on the basis of a special procedure or to contracts for the procurement of weapons,

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**[Section 40:7]**

<sup>1</sup>Federal Act on Public Procurement (FAPP), RS 172.056.1.

<sup>2</sup>FAPP, Article 1.

<sup>3</sup>FAPP, Articles 1 and 8.

<sup>4</sup>FAPP, § 2, Articles 2–7.

<sup>5</sup>FAPP, § 3, Articles 8–12.

<sup>6</sup>FAPP, § 4, Articles 13–25. See, however, Article 12 IAPP, which describes four procedures at Cantonal level.

<sup>7</sup>FAPP, § 5, Articles 26–35.

<sup>8</sup>FAPP, Article 2.

munitions or war materials<sup>9</sup> and the construction of fighting and command infrastructure for overall defense and the army.<sup>10</sup>

Furthermore, the contracting authority is not obliged to award a contract under the provisions of the Act when it would be contrary to morality, could endanger public order and safety, when the protection of health and life of people, animals or plants is required or when it violates existing rights of intellectual property.<sup>11</sup>

The Act applies to offers from bidders of States party to the WTO Agreement on Government Procurement, insofar as these States guarantee reciprocity, as well as to third countries, provided that Switzerland has concluded contractual agreements with them or that the Federal Council has found that these countries guarantee equal treatment to Swiss bidders.<sup>12</sup>

The Act only applies if the estimated contract value reaches the applicable threshold values excluding Value Added Tax.<sup>13</sup> The Federal Department of Economics, upon agreement with the Federal Department of Finance periodically adjusts these values, in accordance with the WTO AGP Agreement.<sup>14</sup>

The three specific procedures<sup>15</sup> for the award of federal public contracts in Switzerland are the Open Procedure (general submission procedure)<sup>16</sup> where all interested competitors may submit tender offers; the Restricted Procedure<sup>17</sup> where only those competitors invited by the contracting authority may submit tender offers and the Discretionary Procedure<sup>18</sup> where the contracting authority directly consults one or more competitors.

At the federal level, the Federal Administrative Court has jurisdiction to review applications provided that the tender is subject to the Federal Act (i.e., the estimated contract value must reach the relevant threshold provided in Article 6(1) FAPP).<sup>19</sup> The Federal Administra-

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<sup>9</sup>Swiss Federal Administrative Court Decisions of 27 March 2003 (BRK 2003-004 and BRK 2003-007).

<sup>10</sup>FAPP, Article 3(1).

<sup>11</sup>FAPP, Article 3(2).

<sup>12</sup>FAPP, Article 4.

<sup>13</sup>FAPP, Article 6.

<sup>14</sup>FAPP, Article 6, as revised by Article 1, *Ordonnance du DEFR sur l'adaptation des valeurs seuils des marchés publics pour le deuxième semestre de l'année 2014 et l'année 2015*, RS 172.056.12.

<sup>15</sup>FAPP, § 4, Articles 13–25. See, however, Article 12 IAPP that describes four procedures at cantonal level.

<sup>16</sup>FAPP, Article 14.

<sup>17</sup>FAPP, Article 15.

<sup>18</sup>FAPP, Article 16.

<sup>19</sup>FAPP, Article 27.

tive Court's decision may be appealed to the Swiss Federal Tribunal if a legal question of fundamental importance arises.<sup>20</sup>

### § 40:8 Federal law—Ordinance on Public Procurement (OPP)

The Ordinance on Public Procurement (OPP) was adopted on 1 December 1995 and entered into force on 1 January 1996.<sup>1</sup> A partially revised version of the Ordinance is in force since 1 January 2010. The revised version of the OPP has notably improved payment deadlines, reducing them to 30 days for the contracting authority and created a (controversial) preferential treatment for those Swiss tenderers (with respect to other Swiss tenderers) who offer training positions. The OPP applies to public procurement under FAPP, other contracts of the Swiss federal government and to design contests.<sup>2</sup>

The OPP transforms the Bilateral Agreement with the European Community on certain Aspects of Government Procurement (EU-CH BA-GP) into national law. The EU Procurement Directives, which came into force on 21 June 1999, are contained within the EU-CH BA-GP's *Acquis*.<sup>3</sup>

The OPP implements the FAPP, but it also is applicable to bodies that are not subject to the FAPP but set out in Article 2a OPP, i.e., organizations controlled by the federal government or organizations constituted by private law providing Swiss-wide services of general interest (telecommunications, railways, electricity) on the basis of exclusive rights. Entities listed in Article 2a OPP may, however, be exempted from applying public procurement rules if they act in a competitive market economy environment (Article 2b, paragraph 1, OPP). Exclusion does not come automatically. Article 2b OPP holds that organizations must seek a full or partial exemption from the Federal Department of Environment, Transport, Energy and Communications (FDET).

Thus far, the FDET has granted exemption only to telecommunications services (parts of fixed network and mobile communication, internet access and data communication) and to transportation of goods by rail on ordinary rails.<sup>4</sup> The Ordinance clarifies the Federal Act on Public Procurement, the latter having some aspects of a framework law. The Ordinance is therefore important for understanding how to apply and respect the Federal Law correctly in a given

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<sup>20</sup>Federal Tribunal Act, Article 83(f)(2), RS 173.110.

#### [Section 40:8]

<sup>1</sup>Ordinance on Public Procurement (OPP), RS 172.056.11.

<sup>2</sup>This chapter applies only to public procurement per se.

<sup>3</sup>Consequently, the amended EU Directives 2004/17/EC and 2004/18/EC are not included.

<sup>4</sup>FDET Ordinance on the Exemption from Applying Public Procurement Rules of 18 July 2002, revised on 25 September 2007, RS 172.056.111.

situation. In particular, the Ordinance describes the necessary procedure for tender solicitations,<sup>5</sup> as well as the opening of bids<sup>6</sup> and conditions under which a negotiation can intervene in the course of the procurement procedure.<sup>7</sup>

#### § 40:9 Federal law—Ordinance on the Organization of Public Procurement of the Federal Administration (OOPP)

The Ordinance on the Organization of Public Procurement (OOPP) was adopted on 24 October 2012 and entered into force on 1 January 2013.<sup>1</sup> It aims to centralize public procurement at federal level. According to Article 9 OOPP, goods in general and the services specified in the OOPP are procured by one of the four central federal procurement bodies, i.e., the Federal Office for Buildings and Logistics, a branch of the Federal Department of Finance, which undertakes most procurement activities, the Armasuisse Group, the Swiss Government Travel Centre and the Federal Roads Office.

The central federal procurement bodies may delegate a specific purchasing competence to other authorities.<sup>2</sup> This is the case, e.g., for universities, the Swiss Federal Railways, and Swiss Post. Services not specified in the OOPP also may be procured by other federal authorities.<sup>3</sup> For this purpose, these authorities are supported by special coordination offices, i.e. the Federal Chancellery and the Federal Personnel Office.<sup>4</sup> The Federal Office for Buildings and Logistics and other procurement bodies are further supported by the Federal Procurement Commission, an inter-departmental body, which exercises mainly a coordinating and advisory function.<sup>5</sup>

#### § 40:10 Cantonal and municipal law

Because Switzerland is a federal state, contracting authorities in Switzerland are either Federal authorities or Cantonal authorities. Therefore, as far as the latter are concerned, specific Cantonal Acts may be applicable in addition to the relevant international and federal Law. At the cantonal and municipal level, the most important pieces of legislation are the Intercantonal Agreement on Public Procurement

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<sup>5</sup>OOPP, Articles 16–19.

<sup>6</sup>OOPP, Article 24.

<sup>7</sup>Ordinance on Public Procurement, Article 26.

#### [Section 40:9]

<sup>1</sup>Ordinance on the Organisation of Public Procurement of the Federal Administration (OOPP), RS 172.056.15.

<sup>2</sup>OOPP, Article 13.

<sup>3</sup>OOPP, Article 19.

<sup>4</sup>OOPP, Article 21.

<sup>5</sup>OOPP, Articles 24–26.

(IAPP)<sup>1</sup> and the 26 individual cantonal laws. The Federal Act on the Internal Market (FAIM) also sets out general principles for cantonal public procurements.

Most cantons provide for review by the cantonal administrative court. The cantonal decision may be appealed to the Swiss Federal Tribunal if the estimated contract value reaches the applicable threshold values of the Federal Act on Public Procurement<sup>2</sup> or the Bilateral Agreement on Certain Aspects of Public Procurement,<sup>3</sup> and a legal question of fundamental importance arises,<sup>4</sup> if a violation of international or federal law or of the IAPP is at issue.<sup>5</sup> Subsidiarily, the cantonal decision may be appealed before the Swiss Federal Tribunal on grounds of unconstitutionality.

#### § 40:11 Cantonal and municipal law—Intercantonal Agreement on Public Procurement (IAPP)

The cantons remain competent - with some exceptions - in the award of public contracts pertaining to their fields of competence. Therefore they have adopted the Intercantonal Agreement on Public Procurement (IAPP)<sup>1</sup> to facilitate the implementation of the WTO Agreement at cantonal level. The Intercantonal Agreement, which entered into force on 25 November 1994 and was revised on 15 March 2001, provides a framework regulation for the 26 individual cantonal laws.<sup>2</sup> Guidelines for its implementation (DEMP) were published in 2002.<sup>3</sup>

The Agreement applies to cantonal and municipal public procurements as well as other entities undertaking cantonal or municipal work.<sup>4</sup> Its goal<sup>5</sup> is to harmonize the rules governing public procurement and implement obligations in accordance with the principles defined in the Agreement on Government Procurement (WTO) and the Agreement between the European Community and the Swiss Confederation on Certain Aspects of Public procurement.

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#### [Section 40:10]

<sup>1</sup>RS 172.056.5.

<sup>2</sup>Article 6 FAPP, as revised by Article 1, *Ordonnance du DEFR sur l'adaptation des valeurs seuils des marchés publics pour le deuxième semestre de l'année 2014 et l'année 2015*, RS 172.056.12.

<sup>3</sup>EU-CH BA-GP, Article 3(4).

<sup>4</sup>Federal Tribunal Act, Article 83(f) (1) and (2).

<sup>5</sup>Federal Tribunal Act, Article 95.

#### [Section 40:11]

<sup>1</sup>RS 172.056.5.

<sup>2</sup>Intercantonal Agreement on Public Procurement (IAPP), RS 172.056.5.

<sup>3</sup>Directives d'exécution (DEMP) de l'accord intercantonal sur les marchés publics (AIMP) du 25 novembre 1994/15 mars 2001, du 2 May 2002.

<sup>4</sup>IAPP, Article 8.

<sup>5</sup>IAPP, Article 1 al. 2.

In line with the Bilateral Agreements between Switzerland and the European Union on Certain Aspects of Public Procurement and the WTO Agreement on Government Procurement, the Intercantonal Agreement aims to ensure: wide access of tender notices through paper and electronic means; effective competition and equal treatment amongst bidders, access to the markets for foreign bidders on a reciprocal basis; implementation of internationally agreed mandatory thresholds; as well as impartiality, transparency of the tendering procedure and awarding of public contracts and a rational use of public funds.<sup>6</sup> It also enables respect of the provisions referring to workers' safety and working conditions for procurement in Switzerland and creates an efficient remedy system at cantonal levels.

Like the Federal Act on Public Procurement, the Intercantonal Agreement does not apply to contracts concluded with institutions for the disabled, charity organizations or penitentiaries, contracts awarded under agricultural or food aid programs, contracts awarded on the basis of an international treaty between the parties to the WTO Agreement or Switzerland and third countries in respect of an objective to be achieved and jointly funded.

Nor does the Act apply to contracts awarded with an international organization on the basis of a special procedure or to contracts for the procurement of weapons, munitions or war materials and the construction of fighting and command infrastructure for overall defense and the army.<sup>7</sup>

The 26 cantons retain the right to conclude bilateral or multilateral agreements between themselves in order to expand the scope of the Intercantonal Agreement or to develop their cooperation in any other manner. They also may enter into similar agreements with neighboring regions or states.<sup>8</sup> The implementation and application of the Intercantonal Agreement is monitored by an intercantonal supervisory body.<sup>9</sup> Furthermore, each canton is obliged to provide for adequate review proceedings<sup>10</sup> that, in most cantons, are dealt with by the appropriate cantonal administrative court.

The Intercantonal Agreement also places considerable emphasis on procedures like the publication of tenders for providing transparency of laws, regulations, procedures and practices regarding government procurement. Tenders for the City of Geneva and other contracting authorities of the canton are, for example, published in the Official

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<sup>6</sup>IAPP, Articles 1 and 11.

<sup>7</sup>IAPP, Article 10.

<sup>8</sup>IAPP, Article 2.

<sup>9</sup>Intercantonal Agreement on Public Procurement, Article 4—See <http://www.dt.ap.ch/fr/dtap/concordats/aimp/>.

<sup>10</sup>Intercantonal Agreement on Public Procurement, Article 15; Federal Act on the Internal Market, Article 9(2).

Notice of the Canton of Geneva. They also are available on the website (SIMAP), which includes the notices of procurement of most Swiss cantons and communes.<sup>11</sup>

### § 40:12 Cantonal and municipal law—Cantonal legislation

Cantonal procurement law is completely autonomous and therefore does not simply implement federal procurement legislation. Conversely, federal procurement legislation does not serve as the framework for cantonal public procurement. When federal law does interfere, it is only in very specific cases and through different legislation (e.g., the Federal Act on the Internal Market, discussed at § 40:13).

Each canton is, therefore, free to establish its own public procurement legislation, in accordance however with the Intercantonal Agreement on Public Procurement, the agreed framework at the cantonal level. An overview of the 26 cantonal laws can be found on the SIMAP's website.<sup>1</sup>

### § 40:13 Federal Act on the Internal Market (FAIM)

In addition to the Intercantonal Agreement on Public Procurement (IAPP), discussed at § 40:11, cantonal and municipal markets also are regulated by certain federal dispositions, in particular the Federal Act on the Internal Market (FAIM), which was adopted on 6 October 1995 and entered into force on 1 July 1996.<sup>1</sup>

The Federal Act on the Internal Market does not apply specifically to public procurement. Rather, its objective is to guarantee any person established in Switzerland free and non-discriminatory access to the market throughout Switzerland. Articles 5 and 9 of the Federal Act essentially set out general principles for cantonal and municipal public procurements. The Act only applies if the threshold for the contract is under the amounts stated in the IAPP; in this case, the principles of Article 5 are applicable, granting the tenderers a right to juridical review of the legality of the contracting authority's decision.

Article 5 FAIM simply states that the procurement of cantons, municipalities and other entities carrying out cantonal or municipal tasks are governed by cantonal or intercantonal law. These requirements, and any decision based thereon, may not discriminate persons having their registered offices or their establishments in Switzerland.

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<sup>11</sup>See <http://www.simap.ch>.

#### [Section 40:12]

<sup>1</sup>See <https://www.simap.ch/shabforms/COMMON/application/applicationGrid.jsp>.

#### [Section 40:13]

<sup>1</sup>Federal Act on the Internal Market (FAIM), RS 943.02.

Furthermore, the cantons, municipalities and other entities carrying out cantonal and communal tasks must ensure that public procurement projects of great importance covering goods, services or construction contracts, as well as participation criteria and award of the public contract are published in accordance with the Confederation's international commitments.

According to Article 9 FAIM, restrictions to the principle of free access to the Swiss market, in particular concerning public procurement can be made if such restrictions are open to appeal. Cantonal law must provide for at least one appeal in front of an authority independent from the administration. If, in procurement contracts, an appeal is well founded and a contract has already been concluded with the tenderer, the authority of appeal merely states how the controversial decision violates the given right.

#### § 40:14 Guidance documents and systems (SIMAP)

A dedicated website, [www.gimap.admin.ch](http://www.gimap.admin.ch), gives guidance to public entities and tenderers on all federal procurement procedures in Switzerland. The Information System on Public Procurement in Switzerland (SIMAP:<sup>1</sup> [www.simap.ch](http://www.simap.ch)) is the common electronic platform of the Confederation, cantons and municipalities in the area of procurement.<sup>2</sup> SIMAP is legally structured as an association between the Confederation and the Cantons. Management has been entrusted to the State Secretariat for Economic Affairs (SECO).

The development of the application has been financed by the Confederation (State Secretariat of Economic Affairs) and by the association. It runs and develops a common and centralized electronic gate for information covering government procurement in Switzerland. It aims to allow transparency for all tenders in Switzerland; harmonize the purchase processes in Switzerland; collect statistics in a direct and similar manner. Contracting entities may publish their offers in a simple manner and, if necessary, attach the submission forms. Businesses and interested bidders may inspect all proposed mandates in Switzerland and download forms for submission. The use by tenderers and entities is free of charge.

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#### [Section 40:14]

<sup>1</sup>See <http://www.simap.ch>.

<sup>2</sup>OPP, Article 8.

**§ 40:15 Court and administration decisions**

There are few court decisions. However, the Federal Office for Buildings and Logistics, a branch of the Federal Department of Finance publishes a compilation of such decisions every year.<sup>1</sup>

**II. PROCEDURES FOR AWARD OF PUBLIC PROCUREMENT CONTRACTS****A. GOVERNING LAW****§ 40:16 Generally**

Because of the diversity of the legal framework on public procurement and because of its often broad and undefined wording, the determination of the applicable law can turn out to be a difficult exercise.

For ease of use, and when relevant, the authors will, when analyzing a legal provision, cite all other comparable articles within the Swiss legal framework. It is, however, important to stress that even if articles are comparable their material and geographical scope of application may be drastically different.

Furthermore, the content of the different legal texts that apply to a same public procurement may differ from one legal text to another. This is notably a feature of the relevant thresholds where there are contradictory provisions between federal and intercantonal law due to the partial revision of the thresholds in 2010. The same also may be said of the definition of tenderers or of service and construction contracts.

In Switzerland, public procurement law applies if the transaction meets the definition of a “public procurement” and the procuring entity and the requested services are within the scope of the relevant public procurement law.<sup>1</sup> As a rule, five cumulative criteria have to be fulfilled for a procurement contract to be subject to public procurement rules. These criteria also define which legal basis will be applied.

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**[Section 40:15]**

<sup>1</sup>See <https://www.bbl.admin.ch/bbl/fr/home/dokumentation/faktenblaetter.html>.

**[Section 40:16]**

<sup>1</sup>Notably, if the contract is within the scope of FAPP, the OPP will also apply. On the other hand, if the contract is not included within the scope of the FAPP, only the OPP will be applicable. See Articles 2 (3) FAPP and Article 1c OPP.

**§ 40:17 Scope of public procurement**

“Public procurement” as such has not been defined in the applicable laws and regulations.<sup>1</sup> However, according to the Swiss Federal Court,<sup>2</sup> the acquisition of goods or services qualifies as public procurement if the public entity subject to the FAPP acts as an acquirer of goods or services that are necessary for the fulfillment of a public task from a private entity.

The contract to be awarded is subject to private law. In contrast, if the public entity acts as the provider of a service, but not as a consumer, the provision of that service does not qualify as public procurement.

In general, public procurement rules are not applicable to goods purchased or services sourced from a public entity’s in-house entities.<sup>3</sup> A public entity is thus free to buy a service from an external entity or to use its own resources to provide a service unless specific legislation provides otherwise. If the service is rendered in-house, private providers are not negatively affected, because none of them receives the award. Only if an award is given to a private provider without complying with the public procurement rules is the private provider given preferential treatment compared to other potential private providers.

Swiss internal public procurement legislation does not specify when a contract is to be considered an “in-house” contract. Two types of in-house procurement should be considered: a public entity may award the contract either directly to a department within the public entity itself (direct internal awards) or to a body which is legally distinct from the public entity, but which may still be considered in-house due to its “close relationship” with the public entity (indirect internal awards).

It is generally accepted that direct internal awards are not subject to public procurement regulations, but the treatment of indirect internal awards is complex and subject to an appreciation of the “close relationship” notably expressed in terms of “turnover.”<sup>4</sup> There appear

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**[Section 40:17]**

<sup>1</sup>Arrêt du Tribunal cantonal du Jura du 8 février 2011 (ADM 117/2010 et 118/2010).—See however WTO-AGP that lays down two criteria: the conclusion of a contract by a public entity and the supply of goods or services.

<sup>2</sup>ATF 125 I 209, 212, cons. 6b.

<sup>3</sup>See Commission Staff Working Paper (Brussels, 4.10.2011 SEC(2011) 1169 final) concerning the application of EU public procurement law to relations between contracting authorities (“public-public cooperation”), at p. 5. See [http://ec.europa.eu/internal\\_market/publicprocurement/docs/public\\_public\\_cooperation/sec2011\\_1169\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf).

<sup>4</sup>Notably, a turnover-based threshold of 80% above which the contracts awarded to so-called affiliated undertakings fall outside the scope of application. Switzerland, Appendix, I Annexe 4, note 2 WTO-AGP.

to be no Swiss decisions on indirect internal awards. In the EU, the European Court of Justice<sup>5</sup> has held that a call for tenders is not necessary if two conditions are met:

1. The public entity must exercise control over the contracting entity, similar to the control that it exercises over its own departments.<sup>6</sup> The manner in which control is exercised is irrelevant, i.e., this may be by means of private or public law powers. The assessment of the “similar control” requirement “must take account of all the legislative provisions and relevant circumstances. [. . .] It must be a case of a power of decisive influence over both strategic objectives and significant decisions.”<sup>7</sup>
2. The contracting entity must carry out the essential part of its activities with the local authority that controls it. This criterion is aimed at ensuring that EU public procurement law remains applicable in the event that an entity controlled by one or more contracting authorities is active in the market and therefore likely to be in competition with other undertakings.<sup>8</sup> It is likely that Swiss courts will take the European Court of Justice’s criteria into consideration.

It is unclear whether one or more private holdings in a contracting entity that is controlled by a public entity, such as a minority shareholding held by a private entity, always trigger public procurement rules. The European Court of Justice has a formal approach.<sup>9</sup> It held that even a minority ownership interest by a private undertak-

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<sup>5</sup>Case C-107/98, *Teckal*, paragraph 50. “As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons. In that regard [. . .] it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.”

<sup>6</sup>Case C-340/04, *Carbotermo SpA and Consorzio Alisei v. Comune di Busto Arsizio and AGESP SpA.*, [2006] ECR I-04137, paragraph 37: “the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, without being decisive, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments.”

<sup>7</sup>Case C-458/03, *Parking Brixen*, paragraph 65; Case C-371/05, paragraph 24.

<sup>8</sup>Case C-340/04, *Carbotermo SpA and Consorzio Alisei v. Comune di Busto Arsizio and AGESP SpA.*, [2006] ECR I-04137, paragraph 60, paragraph 55. (This judgment concerned the “old” Utilities Directive (93/38). However, Article 23 of the “new” Utilities Directive (2004/17/EC) provides, similarly, for a turnover-based threshold of 80% above which the contracts awarded to so-called affiliated undertakings may fall outside the scope of application of that Directive.)

<sup>9</sup>Case C-107/98, *Teckal*, paragraph 50. “As to whether there is a contract, the national court must determine whether there has been an agreement between two

ing in the capital of a contracting entity controlled by a public entity means that the public entity no longer exercises a sufficient degree of control over the contracting entity and therefore public procurement rules would apply to the relevant award.<sup>10</sup> “Thus, in line with contracting authorities’ power of self-organization, the Court found that EU public procurement law (i.e., not only the Directives, but also the Treaty principles) does not apply if a contracting authority concludes a contract with a third party that is only formally, but not substantially, independent from it. This case law covers situations in which there is no private capital involved in the third party and it depends in both organizational and economic terms on the contracting authority. Example: a city council provides for the transport services in its territory by using its wholly owned and controlled transport company.”<sup>11</sup> A minor private ownership interest in the contracting entity does not mean per se that the award is not an in-house procurement.

#### § 40:18 Contracting authority

The contracting authority has to comply with public procurement rules if it is a public authority or a public or private law entity providing water, energy, transport, and telecommunication services.<sup>1</sup> Depending on whether the contracting authority is a federal authority or a cantonal authority, the applicable law will be different.

As mentioned above, public procurements made by the Swiss Confederation are subject to the World Trade Organization Agreement on Government Procurement, the Bilateral Agreement on Certain Aspects of Public Procurement, the European Free Trade Associations’ public procurement rules, the Federal Act on Public Procurement and its ordinances and other specific laws.

Public procurements that are made under a cantonal or municipal

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separate persons. In that regard [ . . . ] it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.”

<sup>10</sup>According to the case law, a contracting authority cannot exercise in-house control over an entity when one or more private undertakings also participate in the ownership of that entity. Case C-26/03, Stadt Halle, paragraph 49.

<sup>11</sup>Commission Staff Working Paper (Brussels, 4.10.2011 SEC (2011) 1169 final) concerning the application of EU public procurement law to relations between contracting authorities (“public-public cooperation”), at p. 6. See [http://ec.europa.eu/internal\\_market/publicprocurement/docs/public\\_public\\_cooperation/sec2011\\_1169\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf).

#### [Section 40:18]

<sup>1</sup>FAPP, Article 2 al. 2; OPP, Article 2a; IAPP, Article 8.

authority are governed by the World Trade Organization Agreement on Government Procurement, the Bilateral Agreement on the System of Public Procurement, the Intercantonal Agreement on Public Procurement, and the Federal Act on the Internal market (FAIM). In sum, all contracting authorities in Switzerland are subject to the international rules described above, and additionally, federal contracting authorities must comply with federal law regulations whereas cantonal and municipal contracting authorities are submitted to specific cantonal and intercantonal laws.

#### **§ 40:19 Contracting authority—Federal contracting authorities**

Article 2 of the Federal Act on Public Procurement (FAPP) applies to the general administration of the Swiss Confederation, the Swiss Alcohol Board, the Swiss Federal Institutes of Technology and their research institutions, the Swiss Federal Nuclear Safety Inspectorate, the Swiss national museum, the Federal Institute of Metrology and, for certain contracts related to the postal and automobile services of the Swiss Post.<sup>1</sup>

Additionally, the Federal Council has the power to determine which public and private law organizations providing water, energy, and transport and telecommunication services in Switzerland also are subject to the FAPP. The list of such organizations has been set out in Article 2a of the Ordinance on Public Procurement (OPP), taking into account their governance, their activities and certain thresholds with respect to contracts.

This Ordinance targets public or private law entities that are under dominant influence of the Confederation, either because more than half of their capital is held by the Confederation or because more than half of the directorate or members of the supervisory body are representatives of the Confederation. Article 2a, paragraph 1b, OPP also includes private law entities that fulfill a public service throughout Switzerland benefiting from exclusive or special rights granted by a competent authority.

The Ordinance (Article 2, paragraph 2) specifies and lists the activities<sup>2</sup> of such organizations:

1. Providing or using public telecommunication networks or provid-

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#### **[Section 40:19]**

<sup>1</sup>Article 2 d in fine “To the extent that they are not competing with third parties to whom GATT does not apply: Furthermore, the automobile services of the Swiss Post will only be subject to the law in respect of contacts which it may award for its passenger transport business carried out within Switzerland.”

<sup>2</sup>See, however, the contradiction with the thresholds set out in Article 1, Ordonnance du DEFR sur l’adaptation des valeurs seuils des marchés publics pour le deuxième semestre de l’année 2014 et l’année 2015, RS 172.056.12.

- ing a public telecommunication service for more than CHF 960,000 (for supply and services contracts (Article 2a, paragraph 3b) and CHF 8-million for construction contracts (Article 2a, paragraph 3d);
2. Building or using of train infrastructures by the Swiss National Train Company (CFF) or by companies in which it holds a majority or by train operators under dominant influence of the Confederation for more than CHF 640,000 for supply and services contracts (Article 2a, paragraph 3b) and CHF 8-million for construction contracts (Article 2a, paragraph 3d); and
  3. Providing or use of stable networks deemed to offer a public service in the field of production, transport and distribution of electricity for more than CHF 766,000 (Article 2a, paragraph 3c) and CHF 9.575-million for construction contracts (Article 2a, paragraph 3e).<sup>3</sup>

These thresholds are revised on a periodic basis.

*Cantonal and Municipal Authorities.* The Intercantonal Agreement on Public Procurement (IAPP) applies to public procurement made by cantonal and municipal entities. Article 8 IAPP makes a distinction between the authorities bound by international treaties (Article 8, paragraph 1, IAPP) and authorities not bound by international treaties but who are nevertheless submitted to internal public procurement regulations (Article 8, paragraph 2, IAPP).

In particular, the Intercantonal Agreement on Public Procurement transposes into cantonal law the provisions applicable to public procurement contracts subject to international treaty obligations, such as WTO-GPA, whereas if the contract is not subject to international treaty obligations, the Intercantonal Agreement merely harmonizes the cantonal provisions on public procurement (Article 5 *bis*, paragraphs 1 and 2). The IAPP applies mainly to cantons, municipalities and other non-commercial or non-industrial cantonal and municipal entities.

When a cantonal authority initiates a public procurement procedure jointly with a federal authority, federal law applies if the federal authority bears the most important part of the financing (Article 2c al. 1 OPP). However, within the field of application of intercantonal law, Article 8(3) IAPP refers alternatively the law of the seat of the main contracting authority, to the law of the seat of the common contracting authority or to the law of the seat of the main activity or of the performance of the contract.

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<sup>3</sup>See, however the Ordonnance du DEFR sur l'adaptation des valeurs seuils des marchés publics pour le deuxième semestre de l'année 2014 et l'année 2015, RS 172.056.12 which did not modify this threshold for public services in the field of production, transport and distribution of electricity.

*Exceptions.* Under Federal<sup>4</sup> and Intercantonal law,<sup>5</sup> rules on public procurement do not apply to:

1. Contracts concluded with institutions for disabled persons, charities or penal institutions;
2. Contracts granted within the framework of agricultural or food aid programs;
3. Contracts awarded on the basis of an international treaty between the parties to the WTO Agreement or Switzerland and other States in respect of an objective to be achieved and funded jointly;
4. Contracts which are awarded on the basis of a particular procedure of an international organization; and
5. Contracts for the procurement of weapons, munitions or war materials and the construction of fighting and command infrastructure for overall defense and army.

In specific cases,<sup>6</sup> the contracting authority need not award contracts in compliance with public procurement rules if:

1. By doing so, public decency or public order and safety are put at risk;
2. It is necessary to protect the life and health of persons, animals, and plants; or
3. By doing so, existing intellectual property rights would be violated.

#### § 40:20 Tenderers

Swiss federal procurement law only applies to bids submitted by tenderers from GATT contracting States in relation to public procurement to the extent that these States grant reciprocal rights, or from third States with whom Switzerland has a contractual agreement<sup>1</sup> or of whom the Swiss government has established that there is no discrimination against Swiss tenderers.<sup>2</sup>

Within the framework of the IAPP, the tenderer must be resident or domiciled within a contracting canton<sup>3</sup> or within a State party to

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<sup>4</sup>FAPP, Article 3(1).

<sup>5</sup>IAPP, Article 10(1).

<sup>6</sup>FAPP, Article 3(2); IAPP, Article 10(2).

#### [Section 40:20]

<sup>1</sup>Typically European Union states as under the EU-CH BA-GP.

<sup>2</sup>FAPP, Article 4.

<sup>3</sup>Compare Article 5 of the Federal Act on the Internal Market (FAIM), which prohibits discrimination between cantons with respect to public procurement.

an international agreement on public procurement.<sup>4</sup> Tenders may be submitted by a consortium of tenderers, unless due to particular and justified circumstances, the contracting authority excludes or limits such a possibility in the procurement notice.<sup>5</sup> Depending on the procedure used, tenderers may have to comply with prequalification criteria before submitting a bid. This is specifically the case for the selective procedure. In general, all tenderers must comply with certain conditions relating to their financial and legal situation. In particular, tenderers may be disqualified in the following instances:

1. If they have provided the contracting authority with false information;
2. If they have not paid taxes or social security contributions;
3. If they fail to meet their obligations under Article 8;<sup>6</sup>
4. If they have entered into arrangements to avoid or substantially prejudice competition;
5. If they are the subject of insolvency proceedings; or
6. If they have committed a serious professional fault recognized by a judgment.

#### § 40:21 Type of market

Article 5 FAPP and Article 6 IAPP transpose the definition contained in Article I-2, WTO-AGP. Markets under Article I-2 WTO-AGP relate to “procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.”

The WTO-AGP has a very broad definition of what is included in the definition of public procurement, which is in fact determined by two main elements: the conclusion of a contract by a public authority and the provision of services or supply. The WTO-AGP “applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.”<sup>1</sup> Each party to the WTO-AGP has its own Appendix I containing five Annexes that define the coverage of the party’s obligations under the WTO-AGP agreement. Annex 4 specifies services, whether listed positively or negatively, covered by the WTO-AGP and Annex 5 specifies covered construction services. The member States which adopted the revised WTO-AGP 2012 have their own Appendix I containing seven Annexes that define the coverage of their obligations. Annex 5

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<sup>4</sup>IAPP, Article 9.

<sup>5</sup>OPP, Article 21.

<sup>6</sup>Certain principles must be adhered to in the award of public contracts.

#### [Section 40:21]

<sup>1</sup>WTO-AGP, Article I-1.

specifies services covered by the revised WTO-AGP 2012, while Annex 6 specifies the covered construction services.

*Supply Contracts, Services, and Construction Contracts.* Public procurement laws apply to three types of contracts, supply, services, and construction contracts.<sup>2</sup> Pursuant to Article 5 al. 1 lit. a FAPP, a supply contract is a contract made between the contracting authority and a tenderer for the procurement of moveable property, in particular, by way of purchase, hire, lease, or hire purchase.<sup>3</sup>

A contract for services is a contract made between the contracting authority and a tenderer for the provision of a service under the terms of Appendix 1, Annex 4, WTO-AGP. There is an exhaustive list for federal procurements<sup>4</sup> whereas there is no limit for cantonal procurements (Article 6 IAPP).<sup>5</sup>

A construction contract, under Article 5 al. 1 lit. c FAPP, is a contract made between the contracting authority and a tenderer for construction and engineering works at or below ground level within the meaning of Division 51 of the Central Product Classification list (CPC list) under the terms of Appendix I, Annex 5, of WTO-AGP.<sup>6</sup>

Here again, intercantonal law brings in a distinction not found in WTO-AGP: the distinction between the construction of the fundamental structure (*gros oeuvre*) and the construction of secondary elements (*second oeuvre*). This distinction has consequences on the applicable thresholds. Certain contracts may mix some of these features. To determine which legal framework is to be applicable, Swiss legal scholarship refers to the principle of predominance (*principe de la prédominance*) taking into account the services that make up most of the contract in terms of value to apply the relevant public procurement rules.

*Exclusions.* Annexes 1 and 2 of Appendix I WTO-AGP exclude from general public procurement regulations all activities such as production, transport and distribution of drinking water or energy, transports or telecommunications. Procurements in these fields are exclusively covered by Annex 3 that provides for specific proceedings.

This distinction relates to the specific structure of the Swiss federal State. These fields are not within the competences of the federal government or of the Cantons but have been delegated to public

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<sup>2</sup>Swiss Appendix I, Annexes 4 and, 5 WTO-AGP; Article 1 FAPP; Article 3 OPP; annex 1-2 OPP; Article 5 FAIM; Article 6 IAPP.

<sup>3</sup>OPP, Article 3(1), and its Annex 1.

<sup>4</sup>Swiss Appendix I, Annex 4, WTO-AGP.

<sup>5</sup>OPP, Article 3(2), and its Annex 1a.

<sup>6</sup>There is a limitative list under WTO-AGP which is not the case under inter-cantonal law. (Article 6 IAPP).

companies. Annex 4 contains also exceptions that exclude certain services from the application of the WTO-AGP.<sup>7</sup>

### § 40:22 Thresholds

The thresholds set out in the various regulations have three purposes: they allow the determination of the applicable procurement proceedings, they determine if an appeal is possible and they determine the access of foreign tenderers under the application of international agreements. The valuation of the projected contract is thus of paramount importance. In general, the total amount of the project is the relevant figure. However, in certain construction contracts, a subdivision of the contracts may take place, thus avoiding the law on public procurement, provided that the amount for each separate contract does not exceed CHF 2-million or 20% of the total value (Article 14 OPP—Article 7(2) IAPP: *de minimis* clause).

The value of the market must be estimated prior to publication of the public procurement notice.<sup>1</sup> Swiss law provides for two types of thresholds: those applicable to public procurement in general and those applicable to public procurement in certain sectors (notably transportation of people by the Swiss postal service, water, energy, transport, and telecommunication services). The general thresholds are specified in Article 6 of the FAPP. The amounts listed are those of the estimated value of the public contract before application of value added tax.<sup>2</sup> In 2014, the thresholds were set at:

1. CHF 230,000 for supplies and services;
2. CHF 8.7-million for construction works; and
3. CHF 700,000 for supplies and services under the terms of Article 2, paragraphs 1d and 2 FAPP (i.e., transportation of people by the Swiss postal service, water, energy, transport and telecommunication services).<sup>3</sup>

Specific thresholds apply to organizations and activities listed<sup>4</sup> in Article 2, paragraph 2, FAPP:

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<sup>7</sup>Notably, a turnover-based threshold of 80% above which the contracts awarded to so-called affiliated undertakings fall outside the scope of application. Switzerland Appendix I, Annexe 4, note 2 WTO-AGP.

#### [Section 40:22]

<sup>1</sup>Even if the final contract may be signed under the threshold value.

<sup>2</sup>Currently at 8%.

<sup>3</sup>Article 1, Ordonnance du DEFR sur l'adaptation des valeurs seuils des marchés publics pour le deuxième semestre de l'année 2014 et l'année 2015, RS 172.056.12.

<sup>4</sup>See, however, the contradiction with Article 2a, paragraph 3, OPP: In the public telecommunication field, thresholds are set at CHF 960,000 for supply and services contracts and CHF 8-million for construction contracts; In the railway industry, thresholds are set at CHF 640,000 for supply and services contracts and at CHF 8-million for construction contracts; contracts in the field of production, transport,

1. In the public telecommunication field, thresholds are set at CHF 700,000<sup>5</sup> for supply and services contracts and CHF 8-million for construction contracts;
2. In the railway industry, thresholds are set at CHF 700,000 for supply and services contracts and at CHF 8-million for construction contracts;
3. Contracts in the field of production, transport, and distribution of electricity for more than CHF 766,000 and at CHF 9.575-million for construction contracts.<sup>6</sup>

All thresholds are revised on a periodical basis. The current figures were set in 2013 by an Ordinance of the Federal Department of Economy.<sup>7</sup> However, this revision did not change the OPP, creating thus confusion with respect to the relevant thresholds. A splitting of the contract is not allowed to circumvent the threshold rules.<sup>8</sup> However, calculating the value of the contract is difficult. The contracting authority must estimate the maximum probable value of the contract taking into account all services that have a close legal and material link to the contract. It notably takes into account all elements of the price such as commissions, interest, fees and premiums.<sup>9</sup> Under federal law, a certain number of principles apply (Article 7 FAPP):

1. A contract may not be awarded with the intention of circumventing the application of the Law.
2. In the event that a contracting authority awards more than one construction contract in respect of building works, the determining factor will be the total value of the contracts. However, if the value of each of these construction contracts is less than CHF 2-million and each of the contracts represents less than 20% of

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and distribution of electricity for more than CHF 766,000 and CHF 9.575-million for construction contracts.

<sup>5</sup>As revised by Article 1 of the Ordonnance du DEFR sur l'adaptation des valeurs seuils des marchés publics pour le deuxième semestre de l'année 2014 et l'année 2015, RS 172.056.12.—Article 2a, paragraph 3, OPP still states CHF 960,000 for supply and services contracts.

<sup>6</sup>The Ordonnance du DEFR sur l'adaptation des valeurs seuils des marchés publics pour le deuxième semestre de l'année 2014 et l'année 2015, RS 172.056.12 did not modify this threshold.

<sup>7</sup>Ordonnance du DEFR sur l'adaptation des valeurs seuils des marchés publics pour le deuxième semestre de l'année 2014 et l'année 2015, RS 172.056.12.

<sup>8</sup>Article 7 FAPP. See also Article 7(2) IAPP and section 2-2 DEMP. - Swiss Federal Administrative Court Decision of 26 June 2002 (BRK 2002-003).

<sup>9</sup>OPP, Article 14a.

the total value of the contracts, the contracting authority may use the discretionary procedure (Article 14 OPP<sup>10</sup>).

In the event that the contracting authority awards a number of similar contracts for supplies or services, or divides one such contract into a number of similar individual contracts (batches), the value of the contract will be calculated on the following basis:

1. The actual value of recurring contracts awarded over the past 12 months; or
2. The estimated value of recurring contracts awarded in the twelve months following the award of the initial contract.

If a contract includes an option for subsequent contracts, the determining factor will be the total value. In the case of a contract unlimited in time,<sup>11</sup> the monthly price is to be multiplied by 48 whereas, if a contract is limited in time, the aggregate total value is the relevant price.<sup>12</sup> If a service is recurrent in time, it may be concluded only for a period of five years.<sup>13</sup>

## **B. BASIC PRINCIPLES APPLICABLE TO PUBLIC PROCUREMENT PROCEEDINGS.**

### **§ 40:23 Generally**

The Federal Act on Public Procurement (Article 1 FAPP)<sup>1</sup> aims to:

1. Regulate and organize in a transparent manner the procedure for the award of public contracts for supplies, services, and works;
2. Strengthen competition between tenderers and promote the efficient use of public funds; and
3. Ensure tenderers are treated in a non-discriminatory manner.

Article 8 FAPP states that following principles must be adhered to in the award of public contracts:

1. The contracting authority will ensure equal treatment of domestic and foreign tenderers in all phases of the procedure.<sup>2</sup>
2. The tenderer must guarantee compliance with health and safety regulations and the terms and conditions of employment of workers under the conditions applicable at the place of performance.<sup>3</sup> There are many such regulations, including in the Federal Labor

<sup>10</sup>IAPP, Article 7(2).

<sup>11</sup>Up to five years (Article 15a OPP).

<sup>12</sup>OPP, Article 15.

<sup>13</sup>OPP, Article 15 a.

#### **[Section 40:23]**

<sup>1</sup>IAPP, Article 1.

<sup>2</sup>IAPP, Article 11.

<sup>3</sup>OPP, Article 8. If the contract is performed abroad, ILO Conventions as listed

Act,<sup>4</sup> the Federal Law on Accident Insurance,<sup>5</sup> the Regulation on Accident Prevention,<sup>6</sup> and collective contracts of employment.

3. The tenderer must guarantee equal treatment of men and women providing services in Switzerland in respect of salary.<sup>7</sup>
4. The contracting authority must ensure the confidentiality of information provided by the tenderer except subject to communications to be published following the award of a contract and the information to be provided within the framework of Article 23, paragraphs (2) and (3), FAPP.<sup>8</sup>

The Intercantonal Agreement (IAPP)<sup>9</sup> additionally includes:

1. The exclusion of recourse to negotiations rounds; and
2. Conflict of interest provisions for persons concerned.
3. All public procurement is subject to free competition rules.<sup>10</sup>

#### § 40:24 Sources of publication of procurement opportunities

The Information System on Public Procurement in Switzerland (SIMAP)<sup>1</sup> is the common electronic publication platform of the Confederation, cantons, and municipalities in the area of procurement.<sup>2</sup> Useful material for foreign bidders also can be found on the website of the Swiss Society of Contractors.<sup>3</sup>

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in Annex 2a OPP must be respected. See also Article 6(1)b OPP, which applies such rules to sub-contractors.

<sup>4</sup>RS 822.11.

<sup>5</sup>RS 832.20.

<sup>6</sup>RS 832.30.

<sup>7</sup>Loi fédérale du 24 mars 1995 sur l'égalité entre femmes et hommes (Loi sur l'égalité, LEg), RS 151.1.

<sup>8</sup>FAPP, Article 23: (2) The contracting authority will, if requested to do so, promptly disclose the following to the unsuccessful tenderers: a. the award procedure applied; b. the identity of the successful tenderer; c. the price of the successful bid or the highest and lowest prices of the bids included in the award procedure; d. the essential reasons why the bid was not considered; e. the determining characteristics and advantages of the successful bid. (3) The contracting authority need not provide the information under paragraph 2 if, by doing so: a. it would be committing a breach of Federal law, or the disclosure would not be in the public interest; b. the justified commercial interests of the tenderers would be adversely affected or fair competition between them would be prejudiced.

<sup>9</sup>IAPP, Article 11.

<sup>10</sup>OPP, Article 4.

#### [Section 40:24]

<sup>1</sup>See <http://www.simap.ch>.

<sup>2</sup>OPP, Article 8.

<sup>3</sup>See <http://www.baumeister.ch/fr/documentations-soumissions-normes-recherisement/>.

**§ 40:25 Anti-corruption considerations**

Anti-corruption considerations are essential in Switzerland. The Federal Office for Buildings and Logistics has set out a number of guidelines aiming to prevent corruption:

1. Obligation to execute all contracts in writing;
2. Obligation to apply transparent procurement procedures;
3. Use (since 2007) of an Internal Control System for all procurement; and
4. Supervision of management within federal administration by the Federal Financial Control Office (*Contrôle fédéral des finances*).<sup>1</sup>

The Swiss federal administration trains its employees with respect to corruption issues: a Code of Conduct within Swiss federal administration was published in 2009 and information brochures are given to every employee. Bribery of Swiss and foreign public servants is a criminal offence that will trigger criminal prosecution (Articles 322 *ter et seq.* of the Criminal Code). Contracts that cover the payment of bribes are null and void (Article 20 CO). Individuals who have accepted bribes can be dismissed forthwith. Contracts obtained through bribery are not automatically void, but can be voided only if their content has also been affected by the act of corruption.<sup>2</sup>

Corruption of foreign officials is specifically prohibited by Article 322 *septies* of the Federal Criminal Code. The provisions cover any person who offers, promises or grants an undue advantage to a person acting for a foreign state or an international organization, as a member of a judiciary or other authority, public servant, expert, translator, arbitrator, or member of the military, in favor of such person or of third parties in relation to his official capacity. Likewise, the person who accepts or solicits such undue advantage is punishable under the Criminal Code.

As the central buying service of the Swiss Confederation, the Federal Office for Buildings and Logistics has implemented a number of technical and organizational measures to prevent corruption in the field of supplies.<sup>3</sup> Individual competencies to execute contracts are limited and systematically a double control of all procurement is performed. Specific internal regulations target the acceptance of gifts and other advantages. Contracts with third parties comprise an “Integrity Clause” worded as follows:

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**[Section 40:25]**

<sup>1</sup>Internal document: Prévention de la corruption, August 2010; see [https://www.bbl.admin.ch/dam/bbl/fr/dokumente/Faktenblaetter/Faktenblatt\\_Korruptionspraevention.pdf.download.pdf/Pr%C3%A9vention%20de%20la%20corruption.pdf](https://www.bbl.admin.ch/dam/bbl/fr/dokumente/Faktenblaetter/Faktenblatt_Korruptionspraevention.pdf.download.pdf/Pr%C3%A9vention%20de%20la%20corruption.pdf).

<sup>2</sup>Supreme Court Decision 129 III 320.

<sup>3</sup>Internal document: Prévention de la corruption, August 2010, see [https://www.bbl.admin.ch/dam/bbl/fr/dokumente/Faktenblaetter/Faktenblatt\\_Korruptionspraevention.pdf.download.pdf/Pr%C3%A9vention%20de%20la%20corruption.pdf](https://www.bbl.admin.ch/dam/bbl/fr/dokumente/Faktenblaetter/Faktenblatt_Korruptionspraevention.pdf.download.pdf/Pr%C3%A9vention%20de%20la%20corruption.pdf).

The bidder and the instructing party undertake to take all necessary measures to avoid corruption, in particular that no payments, gifts, or other advantage will be offered or accepted.

Should this integrity clause be disregarded, the contractor must pay a contract penalty. This will amount to 10% of the contract value, a minimum of CHF 3,000 per contravention.

The bidder should take note that a contravention of the integrity clause, for important reasons, generally results in the annulment of the tender and the premature termination of the contract by the instructing party.

#### § 40:26 Procurement notice requirements

Article 18 OPP lists the documents that should be included in the public procurement notice:

1. Compliance with the formal requirements of the procurement notice as specified in Annex 5 OPP (see text, below);
2. A full description of the goods, tasks or services; and
3. Specific contractual conditions applicable to the market as set out under Article 29(3) OPP.

The Procurement notice for open or selective procurement procedures must fulfill certain formal requirements listed in Annexes 4 and 5a to the OPP.<sup>1</sup> For example, the procurement notice must contain:

1. The name, address, and telefax of the contracting authority to whom the bids must be sent;
2. The address where further information may be obtained;
3. The acceptable language(s) of the bid;
4. The time limits for the bid;
5. The period within which the tenderer is bound by its bid;
6. The order of priority and evaluation of qualification criteria;
7. The costs such as transport, insurance, custom duties and other importation duties taken into account to set the prices in the tender; and
8. The currency and payment conditions.

#### § 40:27 Rules concerning description of goods or construction

Article 12(2) FAPP provides that the contracting authority should refer to international standards or to national standards implementing international ones, when defining the technical specifications.<sup>1</sup>

The notice of procurement shall include a complete description of

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#### [Section 40:26]

<sup>1</sup>OPP, Article 16, Annexes 4 and 5a to the OPP. See also WTO-GPA, Article XII.

#### [Section 40:27]

<sup>1</sup>WTO-AGP, Article VI: 1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety

the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials (Article 18(1) OPP).

### C. QUALIFICATIONS OF SUPPLIERS AND CONTRACTORS

#### § 40:28 Supplier and contractor pre-qualification procedures

Except for tenders within the open procedure, Swiss law requires the supplier and contractors to fulfill certain eligibility criteria. The qualification of suppliers and contractors may thus be evaluated by the contracting authority.<sup>1</sup> The tenderer may be requested to provide evidence of its financial, commercial, and technical capacity.<sup>2</sup>

Annex 3 of OPP lists the documents that can be requested to verify the eligibility of the Supplier. Financial capacity will be evaluated by taking into account the span of time a company has existed, the amount of its capital, its turnover, its profits, banking references and various guarantees such as insurance policies, banking guarantees. Technical capacity relates to the experience of the tenderer in the field with respect to the technical specifications of the projected contract, and to the aptitude of working with other firms. Pursuant to Article 10 FAPP (Article 10 OPP) a verification and registration procedure may be set up to identify eligible tenderers. These will be included in a list published on [www.simap.ch](http://www.simap.ch).<sup>3</sup>

In the selective procedure, the interested tenderers are short-listed based on eligibility criteria (Article 9 FAPP) designed to assess the necessary financial or economic standing of the tenderers and their technical capability. The contracting authority will set out the eligibility criteria (Article 9 FAPP) and the evidence required in the invita-

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and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, may not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2. Technical specifications prescribed by procuring entities shall, where appropriate: (a) be in terms of performance rather than design or descriptive characteristics; and (b) be based on international standards, where such exist; otherwise, on national technical regulations (3), recognized national standards (4), or building codes.

3. There may be no requirement or reference to a particular trade mark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as “or equivalent” are included in the tender documentation.

#### [Section 40:28]

<sup>1</sup>FAPP, Article 9. OPP, Article 9.

<sup>2</sup>FAPP, Article 9(1).

<sup>3</sup>OPP, Article 10.

tion to tender<sup>4</sup> or in the tender documentation.<sup>5</sup> The relevant criteria should be announced at the outset of the proceedings and may not be subsequently altered by the contracting authority.

In principle, all tenderers meeting the qualification criteria are to be admitted to the tender phase. A limitation of the number of admitted bidders is only permissible if such limitation is a prerequisite for an efficient tender procedure and does not materially reduce competition. A tenderer not retained for the tender phase may challenge this decision in judicial review proceedings.<sup>6</sup>

### § 40:29 Participation by suppliers and contractors

Swiss federal procurement law only applies to bids submitted by tenderers from GATT contracting States in relation to public procurement to the extent that these States grant reciprocal rights, or from third States with whom Switzerland has a contractual agreement<sup>1</sup> or of whom the Swiss government has established that there is no discrimination against Swiss tenderers.<sup>2</sup>

Within the framework of the IAPP, the tenderer must be resident or domiciled within a contracting canton<sup>3</sup> or within a State party to an international agreement on public procurement.<sup>4</sup>

Foreign contractors who wish to establish themselves in the Swiss market usually tie up on an ad hoc basis with a local contractor. Possible obstacles for the acquisition of a Swiss contractor by a foreign contractor include the Swiss legislation restricting the acquisition of Swiss real estate by foreign parties.<sup>5</sup> As major Swiss contractors sometimes have a large real estate portfolio, the acquisition of control in the Swiss contractor may be subject to restrictions.

As of 1 January 2008, the nationality and residence requirements of members of the board of a Swiss limited company have been abolished. As a result, the board of directors of a Swiss limited company may be composed entirely of foreigners not resident in Switzerland. The only requirement is the new Article 718(3) of the Swiss Code of Obligations

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<sup>4</sup>Such notices may be called: avis d'appel d'offres, avis de soumission, avis de candidature, avis de présélection.

<sup>5</sup>FAPP, Article 9(2).

<sup>6</sup>FAPP, Article 29(c).

#### [Section 40:29]

<sup>1</sup>Typically European Union states, as under the EU-CH BA-GP.

<sup>2</sup>FAPP, Article 4.

<sup>3</sup>Compare Article 5 of the Federal Act on the Internal Market (FAIM), which prohibits discrimination between cantons with respect to public procurement.

<sup>4</sup>IAPP, Article 9.

<sup>5</sup>Loi fédérale du 16 décembre 1983 sur l'acquisition d'immeubles par des personnes à l'étranger (LFAIE, RS 211.412.41).

(CO), providing that at least one individual (director or manager) with residence in Switzerland must be in a position to bind the company without requiring a co-signature of one or more non-Swiss residents. This Swiss resident signatory may, but does not have to be, a board member.

#### **D. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE**

##### **§ 40:30 Generally**

Federal Public Procurement Law (Article 13 al. 1 FAPP) states three methods of procurement, whereas the Intercantonal Agreement and OPP list four types of procurement (Article 12 IAPP and Article 34 OPP). Pursuant to Article 13 FAPP, the contracting authority may award a public contract by means of an open or selective procedure or, in certain circumstances, a discretionary procedure.<sup>1</sup>

Under the open procedure (Article 14 FAPP), the contracting authority issues public invitations to tender for the proposed contract and all interested suppliers may submit a bid.<sup>2</sup> Within the selective procedure (Article 15 FAPP), the contracting authority issues public invitations to tender for the proposed contract. All tenderers may submit an application to participate.<sup>3</sup> The contracting authority will identify tenderers who may submit bids on the basis of their suitability under the terms of Articles 9 or 10. The contracting authority may, whilst ensuring that an effective level of competition is retained, restrict the number of tenderers invited to submit bids if, otherwise, it would not be possible to carry out the award procedure efficiently.

Under the limited/discretionary tendering procedure (Article 16 FAPP), the contracting authority will award a contract to a supplier directly without issuing any invitation to tender.<sup>4</sup> The Intercantonal Agreement and the OPP add a procurement procedure upon invitation where the contracting authority will issue at least three requests to potential suppliers (Article 12 al. 1 b *bis* IAPP, Article 35(2) OPP). This procedure is, however, limited to certain contracts as listed in Article 35(2) OPP and Annex 2, IAPP.

The choice between the four different types of tender procedure

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##### **[Section 40:30]**

<sup>1</sup>The choice of the procedure is subject to legal requirements that are controlled by the Swiss Federal court: Decision of the Swiss Federal Administrative Court of 20 October 2008 (B-6177/2008).

<sup>2</sup>Compare Article VII-3a WTO-AGP, Article 14 FAPP, and Article 12 al. 1a IAPP. The open procedure is not defined in the OPP.

<sup>3</sup>Compare Article VII-3b WTO-AGP, Article 15 FAPP, Article 12 OPP, and Article 12 al. 1b IAPP.

<sup>4</sup>Compare Article VII-3c WTO-AGP, Article 16 FAPP, Article 13 OPP and Article 12 al. 1c IAPP.

relies, in general, on the value of the contract to be concluded. However, Article 13 OPP lists eleven cases where a discretionary/limited procedure may take place even if the contract value exceeds the threshold.

If the contract to be concluded is above the established threshold value, the contracting party can decide to conduct an open or a selective invitation to tender. For both procedures, the planned contract must be published on the information system for public procurement in Switzerland ([www.simap.ch](http://www.simap.ch)). If the contract to be concluded is below the threshold value or if a contract is not subject to the law for other reasons, the contracting party also may choose either the open or the selective invitation to tender. In these cases, the planned contract also is published on [www.simap.ch](http://www.simap.ch), as with contracts above the threshold value, but here there is no possibility of contesting the contract. However, the contracting party also may conduct an invitation procedure or award a contract on a discretionary basis, provided the necessary conditions have been met.

#### § 40:31 Solicitation and submission of tenders or proposals

##### *Solicitation of Tenders or Proposals*

When a contract is subject to international law, the contracting authority must choose either the open procedure or the selective procedure. In the open procedure,<sup>1</sup> the contracting authority will issue public invitations to tender for the proposed contract. All tenderers within the field of application of the relevant law or regulations may submit a bid. Public invitations are published on [www.simap.ch](http://www.simap.ch). Interested suppliers may submit an offer within 40 days.<sup>2</sup>

In the selective procedure,<sup>3</sup> the contracting authority will issue public invitations to tender for the proposed contract. All tenderers within the field of application of the relevant law or regulations may submit an application to participate. The contracting authority will identify tenderers who may submit bids on the basis of their suitability under the terms of Articles 9 or 10 FAPP. The contracting authority may, while ensuring that an effective level of competition is retained, restrict the number of tenderers invited to submit bids if, otherwise, it would not be possible to carry out the award procedure efficiently.

Public invitations are published on [www.simap.ch](http://www.simap.ch). All interested suppliers may submit a request to take part in the tender within 25 days. The contracting party decides which suppliers may submit an

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#### [Section 40:31]

<sup>1</sup>FAPP, Article 14; IAPP, Article 12(1)a.

<sup>2</sup>OPP, Article 19(3)a.

<sup>3</sup>FAPP, Article 15; IAPP, Article 12(1)b.

offer on the basis of suitability. They are invited to submit a bid within 40 days.<sup>4</sup>

In some cases reserved by international law, the discretionary procedure may be used. In the discretionary procedure,<sup>5</sup> the contracting authority will award a contract to a supplier directly without issuing any invitation to tender. This is possible as long as the laws and ordinances pertaining to public procurement explicitly grant this discretionary right. Such cases are listed under Article XV of WTO-AGP.<sup>6</sup> The same cases have been reproduced under Article 13 OPP:

1. In the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in the tender or from suppliers who do not comply with the conditions for participation;
2. When, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
3. Insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;
4. When additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity;<sup>7</sup>
5. For additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services;

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<sup>4</sup>OPP, Article 193b.

<sup>5</sup>FAPP, Article 16; IAPP, Article 12(1)c.

<sup>6</sup>Provided that limited (discretionary) tendering is not used with a view to avoiding maximum possible competition or constitutes a means of discrimination among suppliers of other contracting parties or protection to domestic producers or suppliers.

<sup>7</sup>However, the total value of contracts awarded for the additional construction services may not exceed 50% of the amount of the main contract.

6. When an entity procures prototypes or a first product or service that are developed at its request in the course of, and for, a particular contract for research, experiment, study, or original development;
7. For new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with open or selective procurement procedures and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that discretionary tendering procedures might be used in awarding contracts for such new construction services;
8. For products purchased on a commodity market;
9. For purchases made under exceptionally advantageous conditions which only arise in the very short term (notably disposal of assets of businesses in liquidation or receivership); and
10. In the case of contracts awarded to the winner of a design contest, provided that the contest has been organized in a manner which is consistent with WTO-AGP, notably as regards the publication, of an invitation to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners.

Under federal law, the contracting authority must draft a report on all such contracts stating: the name of the contractor or supplier, the type and value of the service, the country of origin of the service and the cases listed in Article 13 OPP granting the right to use the discretionary i.e., limited tendering procedure.

According to Article 36 OPP, the contracting authority may award a contract to a supplier directly and without invitation to tender if the contract value is below the following thresholds: CHF 150,000 for works and services; and CHF 50,000 for supplies.

Under intercantonal law there is no list of specific cases where discretionary procedure may be used. However, Annex 2 IAPP sets financial thresholds under which the procedure is discretionary. Above such thresholds, contracting authorities must justify the recourse to a discretionary or limited tendering procedure within the framework of Article XV WTO-AGP or Article 13 OPP.

In the invitation to tender procedure,<sup>8</sup> applicable under intercantonal law, the contracting authority determines which suppliers they want to invite directly to submit an offer without an open invitation. When possible, the contracting party obtains three different bids.

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<sup>8</sup>IAPP, Article 12(1)b bis.

**§ 40:32 Procedures for soliciting tenders or requests for proposals (contents, deadlines)**

Depending on the procedure chosen, the procedure has one or two phases. In the open procedure, the Contracted is awarded within a one-step phase: the eligibility and the bid are evaluated simultaneously. In the selective procedure, only successful eligible candidates in the first phase may submit a bid that is evaluated in a second stage.

Normally bids should be submitted for the entire contract, unless the contracting authority does not exclude partial submissions. If the contracting authority requires that partial bids be joined to a global bid, it must be specified in the notice of procurement (Article 22 OPP).

In some cases, the tenderer may submit, jointly with the bid, an alternative method (so-called “variant”) for fulfilling the contract (i.e., a cheaper or technically more adequate method). A contracting authority may exclude such alternative bids only in exceptional cases (Article 22a(1) OPP).

**§ 40:33 Clarifications and modifications to solicitation documents**

Pursuant to Article 17 OPP, contracting authorities must forward the tender documentation at the request of any supplier participating in the procedure and reply promptly to any reasonable request for explanations relating thereto.

They must reply promptly to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

The contracting authority may set a date from which no questions will be answered by the contracting authority with respect to the tender documents.<sup>1</sup> Modifications to the tender solicitation documents are limited. Notably additional criteria may only be added if the principle of transparency is respected.<sup>2</sup>

**§ 40:34 Submission of tenders or proposals**

The submission of tenders must be done in writing within the time limit (Article 19 FAPP) in a usual form applicable to commercial relationships (Article 20 OPP). The means of communication is speci-

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**[Section 40:33]**

<sup>1</sup>OPP, Article 18(3).

<sup>2</sup>Swiss Federal Administrative Court Decision, 22 January 2001 (CRM 2000-013); Swiss Federal Administrative Court Decision, 30 May 2001 (BRK 2005-002).

fied in the procurement notice. In particular, electronic submissions are possible and standard practice within federal administration.

The Federal Office for Buildings and Logistics (*Office Fédéral des Constructions et de la Logistique*, OCFL) now provides for tender submission in electronic format (electronic public procurement - eProcurement) besides the paper-based equivalent. The OCFL calls for tenders documents now stipulate that an entire bid also must be submitted in electronic form (CD or DVD).

It is a further step towards the establishment of a fully electronic flow for public procurement procedures, from the publication of calls for tenders to the conclusion of contracts. The Federal Procurement Commission (FPC) commissioned the eProcurement project coordinator for the publication of an eProcurement strategy for the Federal Administration on November 2008.

The strategy of the FPC serves the purpose of defining the positioning and focus of information technology-based procurement practices of the Federal Administration with a time horizon of three to five years.

#### **§ 40:35 Procedures for submission of tenders or proposals (language, deadlines)**

In principle, the contracting authority sets the deadlines to apply to tender or to bid in such a manner that all tenderers have sufficient time to study the documents and to draft their application or their bid. The contracting authority notably takes into account the complexity of the Market and the number of sub-contracting Markets.<sup>1</sup>

If a deadline is extended for one tenderer, it is extended for all tenderers. All tenderers must be informed of the extension timely and simultaneously.<sup>2</sup> Minimum deadlines are normally as follows:

1. In the case of an open procedure, interested suppliers may submit an offer within 40 days of publication;<sup>3</sup> and
2. In the case of a selective invitation to tender, interested suppliers may submit a request to take part in the tender within 25 days of publication.

The contracting authority decides which suppliers may submit an offer on the basis of eligibility. They are invited to submit a bid within 40 days of the invitation to tender.<sup>4</sup> However, the contracting authority may shorten the deadline to present bids from 40 to 24 days if it

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#### **[Section 40:35]**

<sup>1</sup>OPP, Article 19(1).

<sup>2</sup>OPP, Article 19(2).

<sup>3</sup>OPP, Article 19(3)a.

<sup>4</sup>OPP, Article 19(1)b.

announced in the tender for periodic services that it would reduce the deadlines for subsequent tenders.<sup>5</sup> Moreover, the said deadline can even be reduced to 10 days if an announcement of the future notice of procurement was published at least 40 days and at most 12 months before the publication of the notice of procurement containing all indications set out in Annex 5a OPP<sup>6</sup> or if the market is urgent and would not be performed timely if the deadline were not shortened.<sup>7</sup>

Switzerland is a multilingual country. Depending on the project, the official language may be French, German or Italian. The bidding documents must be prepared in the applicable language. Article 25 FAPP provides that the invitation to tender must be published at least in the official language of the location of the construction site, and in at least two official languages in respect of all other supplies and services.<sup>8</sup> In the event that a proposed invitation to tender is not issued in the French language, a summary in either the French, English or Spanish language must be enclosed with the invitation.

#### § 40:36 Period of effectiveness of tenders or proposals

The contracting authority sets the period during which a bid is effective. This period may not exceed 6 months.<sup>1</sup>

#### § 40:37 Modification and withdrawal of tenders or proposals

The contracting authority may withdraw the award or disqualify tenderers from the procedure, and may remove them from the register referred to in Article 10 OPP, particularly<sup>1</sup> in the following instances:

1. If they no longer meet the eligibility criteria;
2. If they have provided the contracting authority with false information;
3. If they have not paid taxes or social security contributions;
4. If they fail to meet their obligations under Article 8;<sup>2</sup>
5. If they have entered into arrangements to avoid or substantially prejudice competition; or
6. If they are the subject of insolvency proceedings.

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<sup>5</sup>OPP, Article 19a(1).

<sup>6</sup>OPP, Article 19a(2).

<sup>7</sup>OPP, Article 19(3).

<sup>8</sup>Swiss Federal Administrative Court Decision, 17 July 2008 (B 1982-2008).

#### [Section 40:36]

<sup>1</sup>OPP, Article 18(2).

#### [Section 40:37]

<sup>1</sup>FAPP, Article 11.

<sup>2</sup>Certain principles must be adhered to in the award of public contracts.

**§ 40:38 Tender or proposal security**

Swiss law does not provide for any form of tender or proposal security.

**E. EVALUATION AND COMPARISON OF TENDERS OR PROPOSALS****§ 40:39 Opening of tenders or proposals**

In the open or selective procedure for supplies and services, two representatives of the contracting authority check whether the bids have been presented in a timely manner and then open the submissions (Article 24 (1) OPP).

For open and selective procedures in the field of construction contracts, a specific procedure must be followed (Article 24 (2) OPP). At least two representatives of the contracting authority open the bids presented within the deadlines, together and at a place and time indicated in the notice of procurement. Minutes of the opening of the bids shall be drafted, stating at least the names of persons present, names of tenderers, date of the bids, total price of each bid, and variants in the bids.

**§ 40:40 Requests for clarification of tender**

The contracting authority may change bids from a technical or accountancy standpoint so as to make the bid comparable to others in an objective manner.

The tenderer is contacted in this respect. If the price is abnormally low, the contracting authority may contact the tenderer to ensure there is no exclusion case under Article 11 FAPP.<sup>1</sup>

**§ 40:41 Evaluation criteria**

The evaluation of the bid must be done in a quantifiable manner.<sup>1</sup> The Swiss federal tribunal requires that all criteria be listed in advance and by order of importance in the notice of procurement.<sup>2</sup> This must be done in the most precise manner to avoid any distortions. Even if the concept of the most advantageous proposal is indeterminate, it may follow certain guidelines that must be communicated to the tenderers prior to their bid. Such guidelines must state the re-

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**[Section 40:40]**

<sup>1</sup>OPP, Article 25.

**[Section 40:41]**

<sup>1</sup>Swiss Federal Administrative Court Decision, 11 March 2005 (BRK 2004-014).

<sup>2</sup>ATF 125 I 86.

spective weight of the criteria used to evaluate a bid and the manner in which such an evaluation will be carried out.<sup>3</sup>

The evaluation methods may not change over time during the procedure. Pursuant to Article 21(1) and (3) FAPP,<sup>4</sup> contracts will be awarded for the most commercially advantageous bid. In seeking the most commercially advantageous bid, a number of criteria will be taken into account, particularly deadlines, quality, price, profitability, operating costs, customer service, expediency of the service, aesthetics, environmental sustainability, and technical value. Contracts for broadly standardized goods may be awarded solely on the basis of the lowest price criterion. If similar bids are submitted by Swiss tenderers, the contracting authority takes into account the fact that the tenderers offer training positions (Article 27(3) OPP).

#### § 40:42 Negotiations and discussions with the tenderers

If so stated in the notice of procurement or if no bid appears to be the most commercially advantageous, negotiations may be conducted with the tenderers (Article 20 FAPP). Pursuant to Article 26 OPP, the contracting authority should, when possible, contact three tenderers in writing and invite them to provide a definite bid within a certain timeframe.

Oral negotiations also are possible. In this case, minutes of the meeting are drafted stating the names of those present, the parts of the bid that have been negotiated and the result of the negotiations.<sup>1</sup> These minutes must be signed by all present at the meeting. At no point in time, and until the final award, is the contracting authority allowed to communicate any information whatsoever on the bids of competing tenderers.

In cases of complex services or intellectual services, the contracting authority may set up a discussion forum with the tenderers.<sup>2</sup> The conditions of the discussion are set down in the notice for procurement. Such conditions include: content of the dialogue, payment of participation, deadlines to submit a final bid.

#### § 40:43 Qualifications of supplier or contractor

Federal legislation on public procurement explicitly guarantees the equal treatment of foreign bidders, but foreign contractors will be guided by general market opportunities rather than by legal considerations. As the Swiss market for low-margin work is fairly sat-

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<sup>3</sup>Swiss federal administrative court decision of 03.09.1999 (BRK 1999-006).

<sup>4</sup>OPP, Article 27.

#### [Section 40:42]

<sup>1</sup>Swiss Federal Administrative Court Decision, 26.April 2000 (BRK 2000-001).

<sup>2</sup>OPP, Article 26a.

urated, foreign contractors will usually only bid for large projects with higher margins. Most foreign contractors who regularly bid in Switzerland have acquired local Swiss contractors or entered into joint ventures with local partners.

Additionally, Swiss courts acknowledge that in certain cases due to the geographical proximity of a tenderer with respect to the fulfillment of the projected contract, local bidders may be put at an advantage.<sup>1</sup> As a rule, only those contractors that fulfilled the pre-qualification criteria may be awarded a contract. The contracting authority may not accept a bid from a supplier or contractor that does not fulfill such pre-qualification criteria.

#### **§ 40:44 Confidentiality requirement**

At no point in time, and until the final award, is the contracting authority allowed to communicate any information whatsoever on the bids of competing tenderers.<sup>1</sup>

#### **§ 40:45 Right to reject all tenders or proposals**

The contracting authority may stop the procedure if it does not intend to implement the project. However, the call for tenders may not be withdrawn without a legitimate reason.<sup>1</sup>

The procedure may be interrupted and repeated if no bid fulfils the criteria of the notice of procurement,<sup>2</sup> or it is likely that more advantageous offers may be made following new contractual provisions or changes in conditions of competition. A new procedure may be published if the contracting authority decides to substantially modify the project.

### **F. ACCEPTANCE OF A TENDER OR PROPOSAL, AND ENTRY INTO FORCE OF PROCUREMENT CONTRACT**

#### **§ 40:46 Notice of acceptance of tender or proposal**

The award is published at latest 30 days after the decision made by the contracting authority. Doing so, the contracting authority indicates (Article 28 OPP): The type of procurement procedure used;

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#### **[Section 40:43]**

<sup>1</sup>DC 2/2000, at pp. 58 and 59.

#### **[Section 40:44]**

<sup>1</sup>FAPP, Article 20(2); OPP, Article 26(5).

#### **[Section 40:45]**

<sup>1</sup>Swiss Federal Administrative Court Decision, 16 November 2001 (BRK 2001-005).

<sup>2</sup>Swiss Federal Administrative Court Decision, 6 March 2001 (BRK 2002-013).

the type of services ordered; the name and address of the successful tenderer; the date of the decision; the name and address of the contracting authority; the value of the contract.

#### **§ 40:47 Procurement contract—When is it effective?**

Pursuant to Article 22 FAPP, the contract with the tenderer may be entered into following the award unless the Federal Administrative Court issues, in exceptional cases, an administrative appeal with stay effect under the terms of Article 28 (2) FAPP.

In the event that administrative appeal proceedings are pending against the award, the contracting authority will notify the Federal Administrative Court promptly that the contract has been entered into. As a rule, the contract is executed in writing (Article 29 (1) OPP), subject to the contracting authority's General Conditions. In general, payment of the tenderers invoices will be effective 30 days following their receipt.

#### **§ 40:48 Information of unsuccessful tenderers**

Pursuant to Article 23(2) and (3) FAPP, the contracting authority must, if requested to do so, promptly disclose the following to the unsuccessful tenderers: the award procedure applied; the identity of the successful tenderer; the price of the successful bid or the highest and lowest prices of the bids included in the award procedure; the essential reasons why the bid was not considered; the determining characteristics and advantages of the successful bid.

However the contracting authority need not provide this information if, by doing so it would be committing a breach of Federal law, or the disclosure would not be in the public interest or the justified commercial interests of the tenderers would be adversely affected or fair competition between them would be prejudiced.

### **G. REVIEW PROCEDURES FOR PUBLIC PROCUREMENT CONTRACTS**

#### **§ 40:49 Generally**

Unless the law provides otherwise, legal actions will be conducted in accordance with general legislation governing the administration of justice in Switzerland.<sup>1</sup> As a rule, appeals against decisions issued by a federal contracting authority may be submitted to the Federal Administrative Court. The Federal Administrative Court will notify the contracting authority promptly on receipt of an appeal.<sup>2</sup> A similar mechanism is applied on cantonal level.

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#### **[Section 40:49]**

<sup>1</sup>FAPP, Article 26.

<sup>2</sup>FAPP, Article 27.

**§ 40:50 Right to review**

At the federal level, legal remedies are, in principle, only available if the tender procedure is subject to the FAPP. Only the following types of decisions may be challenged (Article 29 FAPP):

1. The award of contract or discontinuation of the award procedure;
2. The invitation to tender for the contract;
3. The decision on the selection of participants in the selective procedure;
4. The exclusion of a tenderer under the terms of Article 11; and
5. The decision on registration of the tenderer under the terms of Article 10, i.e., the admission of a bidder to a permanent list of qualified suppliers.

Appeals must be filed within 20 days of notification of the ruling (Article 30 FAPP).<sup>1</sup> Standing is limited to parties with a legitimate practical interest in the awarded contract, e.g., in particular, unsuccessful bidders. Recognized grounds for challenges are violations of the law, including the abuse of discretion, or incorrect factual findings; mere inappropriateness cannot be challenged (Article 31 FAPP), i.e., a court will not interfere with the discretion of the contracting authority unless the latter acted arbitrarily.

**§ 40:51 Judicial review**

Contracts for domestic construction projects usually provide for the jurisdiction of the local courts, especially if the owner is a public entity. At the federal level, the Federal Administrative Court has jurisdiction over review applications provided that the tender is subject to the FAPP (Article 27 FAPP). The court's decision may be appealed to the Swiss Federal Tribunal if a legal question of fundamental importance arises.<sup>1</sup> Review applications must be filed with the Federal Administrative Court within 20 days after publication or notification of the decision of the contracting authority (Article 30 FAPP). Upon receipt of an application, the Federal Administrative Court may grant a provisional stay and prohibit the execution of the contract, pending the prima facie decision of the merits of a challenge (Article 28(2) FAPP).<sup>2</sup> An appeal against the review decision of the Federal Administrative Court must be filed with the Swiss Federal Court within 30 days after service of the decision.

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**[Section 40:50]**

<sup>1</sup>IAPP, Article 15(2).

**[Section 40:51]**

<sup>1</sup>Federal Tribunal Act, Article 83(f)(2).

<sup>2</sup>If no stay has been granted, the contract may be signed. Swiss Federal Administrative Court Decision, 2 October 2010 (BRK 2003-019).

During the 20-day period for a complaint to the Federal Administrative Court and during a stay as summarily ordered by the Federal Administrative Court on receipt of a complaint, the contract may not be executed. Once it has been signed, the Federal Administrative Court may only declare the breach of procurement law and award damages, but not annul the award of the contract (Articles 32(2) and 34(1) FAPP). However, if the contract is signed in breach of an ordered stay, it may be considered void or subject to termination by the contracting authority. At the cantonal level, most cantons provide for review by the cantonal administrative court. The cantonal decision may be appealed to the Swiss Federal Tribunal if:

1. The estimated contract value reaches the applicable threshold values of the FAPP or the EU-CH BA-GP;
2. A legal question of fundamental importance arises; and
3. A violation of international or federal law or of the IAPP is at issue (Article 95 FTA).

Additionally, the cantonal decision may be appealed to the Swiss Federal Tribunal on grounds of unconstitutionality.

#### § 40:52 Other methods of dispute resolution

In recent years, arbitration has become more popular, as illustrated by a new set of arbitration and mediation rules adopted by a number of leading industry associations.<sup>1</sup> Foreign contractors should note that arbitration among Swiss entities (which include local project companies of foreign contractors) is subject to domestic Swiss arbitration law, whereas contracts to which at least one foreign contractor is a party, are subject to the PIL Act.<sup>2</sup>

Under Swiss international arbitration law, all disputes that involve a financial interest can be arbitrated (Article 177 PIL Act);<sup>3</sup> in domestic arbitration arbitrability is limited by Article 354 CPC.<sup>4</sup> Compulsory jurisdiction of the courts exists in a few limited areas, such as lease and employment contracts. Commercial contracts can, as a rule, be arbitrated. Outside these cases, government agencies are allowed to commit to arbitration (but rarely do). Once it consents to arbitrate disputes with a foreign contractor, the agency cannot renege on its undertaking. Article 177(2) of the PIL Act prohibits a state or state organization from relying on its own law to contest its capacity to be a party to arbitration or the arbitrability of the dispute. Enforcement of

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#### [Section 40:52]

<sup>1</sup>See <http://shop.sia.ch/collection%20des%20normes/droit/sia%20150/f/F/Product>.

<sup>2</sup>PIL Act, Article 176.

<sup>3</sup>Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP), RS 291.

<sup>4</sup>Code de procédure civile du 19 décembre 2008 (CPC), RS 272.

foreign arbitral awards in Switzerland is governed by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>5</sup> which considerably limits the grounds on which enforcement may be refused. Switzerland has a good track record of abiding by the Convention's terms and spirit.

Contractors from common law countries should be aware that Switzerland is a civil law country and that the rules governing contract interpretation may differ from common law. In the case of a dispute over the proper construction of a contract provision, the courts will establish the real and common intention of the parties. The wording of the contract is the starting point, not the end of the interpretation. Contrary to common law courts, civil courts will look at evidence outside the four corners of the contract to determine the parties' intentions. There is no prohibition on parole evidence. Oral witness evidence is an important feature in contract disputes. Mediation is not commonly used yet, although recently industry associations have adopted mediation and arbitration rules.

#### § 40:53 Contractor remedies

The Federal Government or contracting authorities outside the general Federal Administration will be liable for any loss that they may cause as a consequence of an order which is held to be illegal.

Liability is limited to the amount of costs that are incurred by the tenderer in connection with the award procedure and appeal proceedings. The application for damages must be submitted within a maximum of one year following the declaration of the procedural defect.

### III. IMPLEMENTATION OF PUBLIC PROCUREMENT CONTRACTS

#### § 40:54 Generally

Public procurement contracts are subject to private law, and the provisions of the Swiss Code of obligations are applicable. However, as most provisions of the Code of obligations are not compulsory, the content of the contract relies on the general conditions laid down by the contracting authority. In the following, we will limit our analysis to general contract law and specific provisions for the relevant contracts of supply, services and construction contracts.

The Swiss law of obligations is contained in the Federal Code of Obligations (CO) relating to contracts and torts, adopted 30 March 1911 and entered into force on the 1 January 1912. The Code is divided into two parts: the General Part (Articles 1–183) and the Special Part (Articles 184–551).

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<sup>5</sup>Convention du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères, Rs 0.277.12.

However, some specific principles applicable to obligations also may be found in the Swiss Civil Code (CC). Provisions in the Civil Code include the principles of good faith and of the “misuse of a right” doctrine (Article 2 CC). In the case of public procurement, provisions from both the general part and the special part come into play. In particular, provisions on the sale of goods contract, work contract and mandate can be applicable.

### § 40:55 Types of contracts

#### *Mandate*

The mandate is a contract according to which a party (the “agent”) obliges himself to carry out the business of, or render a service to, another party (the “principal” or here the “contracting authority”).<sup>1</sup> The statutory provisions on mandate apply as default rules to contracts for services that are not subject to a specific statutory type of contract.

The agent has a claim for compensation if remuneration was agreed upon or if a fee is customary in the field in which the service was rendered (Article 394(3) CO). This is, of course, the case of public procurement.

#### *Work Contracts*

The ordinary work contract is an agreement by which a party obliges himself to produce a work for which the other party will pay compensation (Article 363 CO). Contrary to the agent in the mandate, the contractor in a work contract must reach a certain result and not merely tend to it in good faith. Another difference between mandate and work contract is that a work contract is never gratuitous. The main area where work contracts are of daily use is the construction industry.

The general work contract is an agreement according to which a party (the general contractor) obliges himself towards the contracting authority to produce a whole work or part of it without regard to the actual different types of work to be performed. The general contractor promises a specific result, such as a building or a highway. To reach that end, the general contractor may perform part of the work himself, or delegate the entire building performance to subcontractors and limit his action to the coordination of the work to be done. One of the advantages for the contracting authority is that it is only contractually linked with the general contractor and must only instruct the latter.

The work contract is regulated at Articles 363–379 CO, but in the construction industry one also must pay attention to norms provided

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#### [Section 40:55]

<sup>1</sup>CO, Article 394(1).

by the *Société Suisse des ingénieurs et des architectes* (SIA). The most important norm is SIA 118 that represents general conditions on the execution of construction works. To be part of a contract and therefore applicable, such general conditions must be expressly or tacitly integrated into the contract. However, in general, the contracting authority lays down its own general conditions.

The contractor must carry out the work personally, or at least must have the work done under his supervision, except in cases where his personal qualities are not important (Article 364(2) CO). While performing the work, the contractor must follow the contracting authority's instructions.

The contractor who merely performs the work has not yet fully completed his role: he must still deliver the work to the contracting authority. The delivery is operated by the transfer of the work to the contracting authority. As of that moment the profits and risks of the work pass to the principal (Article 376(1) CO).

The contractor owes the contracting authority a general duty of care and fidelity.<sup>2</sup> He must perform his obligations with care and safeguard the contracting authority's interests. Also, there is a duty to notify without delay certain circumstances (Articles 365(3) and 369 CO) to the contracting authority. The notification need not take a specific form, but will preferably be made in writing to serve as evidence in subsequent legal proceedings. The notification must be clear and unequivocal so that the contracting authority can understand its meaning and scope.

#### *Sale of Goods*

The sale of goods is a contract by which the seller agrees to deliver goods to the buyer and to transfer to the latter the ownership of these goods, while the buyer agrees to pay the price (Article 184 CO).

A commercial sale is defined as one where the buyer intends to resell the goods for a profit and is subject to the same statutory provisions than an ordinary sale (with a few exceptions such as Articles 190, 191, and 215 CO). This should not be the case of public procurement.

#### **§ 40:56 Impediments to performance**

The contractor in a work contract must reach a certain result. If he is not in the position to produce the result as promised, he has no claim for the price, even if the failure is not caused by his fault.<sup>1</sup> Under Swiss law, the mere entering into a sales agreement does not transfer title to the goods to the buyer.

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<sup>2</sup>CO, Article 364(1), with cross-references to CO, Article 321a and e.

#### **[Section 40:56]**

<sup>1</sup>CO, Article 119; compare Article 185 CO for the sale of goods.

The transfer of ownership regarding movable goods only operates at the moment of their physical transfer to the buyer. For immovable goods, the passing of title never comes into effect before the time the relevant inscription on the real property register is made. Impediments to performance may result from an impossibility of the supplier to deliver the goods sold or to render the service.<sup>2</sup>

#### § 40:57 Inspection and acceptance

The buyer must promptly inspect the goods upon their reception and, in case he detects a defect, immediately notify the seller of the existence of such a defect (Article 201 CO). If defects are not perceptible in a normal inspection, notice may be given when they have subsequently become apparent.

In construction contracts, the contracting authority has a duty to inspect the site at completion of the contract. The delivery is operated by the transfer of the work to the contracting authority. As of that moment the profits and risks of the work pass to the contracting authority (Article 376(1) CO).

#### § 40:58 Warranty

##### *Warranty in Construction Contracts*

The contractor provides a warranty for defective work or belated work. If the defect already appears during the production of the work, the principal is granted anticipated rights to either withdraw from the contract or have the defect repaired by the contractor or by a third party.<sup>1</sup> If the defect only appears after completion of the work and if the defect was neither created (Article 369 CO) nor accepted by the contracting authority (Article 370(1) CO), the latter may either have the defect repaired, the price reduced, or even rescind the contract if the defect is of great consequence (Article 368 CO).

##### *Warranty for Defective Goods*

The contracting authority must promptly inspect the goods upon their reception and, in case it detects a defect, immediately notify the seller of the existence of such defect (Article 201 CO). If defects are not perceptible in a normal inspection, notice may be given when they have subsequently become apparent. Such warranty is limited to a two-years period for movable goods (five years for immovable goods), unless otherwise contractually extended between the contracting authority and the seller (Article 201(1) CO). The warranty period for movable goods has been extended in 2013 from one year to two years after a revision of the Article 201 CO.

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<sup>2</sup>CO, Article 185.

#### [Section 40:58]

<sup>1</sup>CO, Article 366(1) and (2).

The existence of defects is not legally tantamount to a non-performance of contractual obligations, but a peculiar situation for which the CO provides specific remedies. The contracting authority has the choice between claiming for a reduction of the purchase price or for a rescission of the whole contract of sale the latter being possibly combined with a claim for damages.<sup>2</sup>

Following the line of reasoning according to which the delivery of a defective good does not trigger the general rules of non-performance of obligations, the seller's obligation does not likewise include the direct obligation to transfer good title of the goods to the contracting authority. Only eviction cases (i.e., situations where the contracting authority must surrender the goods bought to a third party with preferable rights on the goods, Articles 192–196 CO) are included in the seller's warranty.

#### § 40:59 Termination rights, including default

In general, a contract may be terminated pursuant to Article 107 CO:

If the obligor is in default in the case of a bilateral contract, the obligee shall be entitled to fix an appropriate time limit for subsequent performance, or to have it fixed by the competent authority. If, at the expiration of this time limit, there is no performance, the obligee may still sue for performance plus damages due to delay. Alternatively, if he so declares without delay, he may waive subsequent performance and ask for compensation for damages arising out of the non-performance or withdraw from the contract.

Article 107 CO operates as follows, whereas the choices are mutually exclusive. In the first option, the creditor can insist on performance and claim damages. In the second option, the creditor can renounce performance and claim compensation for non-performance. In the third option, the creditor can withdraw from the contract. If he withdraws from the contract, the creditor can ask for negative damages (109 CO).

When a party chooses between the three different options under Article 107 CO, he uses a so-called “act transforming rights,”<sup>1</sup> meaning a right to influence a legal relationship by unilateral declaration.<sup>2</sup> In principle, this act cannot be made subject to a condition and, once, exercised, cannot be revoked. The use of such a right is thus deemed to be irrevocable.

In application of Article 108 CO, “The fixing of a time limit for

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<sup>2</sup>CO, Article 205(1).

#### [Section 40:59]

<sup>1</sup>Acte formateur or Gestaltungsrecht.

<sup>2</sup>ATF 123 III 16.

subsequent performance is not required: if the behavior of the obligor indicates that this would be in vain, or if, because of the delay of the obligor, performance has become useless to the obligee, or if the contract indicates that it was the intention of the parties that performance was to be made exactly at a defined time, or prior to the end of an exactly defined time period.”

In principle, a construction contract comes to an end when each party has performed its respective obligations. In limited cases, however, the law provides for premature causes of the contract's extinction: the contractor is late (Article 366(1) CO); the work's defect can be anticipated (Article 366(2) CO); a disproportionate increase of the approximate estimate (Article 375 CO); the destruction of the work before delivery due to a fortuitous event (Article 376 CO); an impossibility of performance imputed to the contracting authority (Article 378 CO).

Besides these five causes that are all related to the performance of the contract, the law provides for two additional causes unrelated to the contract's performance: death or incapacity of the contractor (Article 379 CO); withdrawal of the contracting authority against indemnification (Article 377 CO).

#### § 40:60 Contractual penalties

The law of tort deals with the obligation of a party to repair the damage caused to a third party. Articles 41-61 of the CO deal with the conditions and effects of liability. The aim is to exactly repair the damage suffered, not to leave the aggrieved party in a better position as the one it was in before the damage occurred. Accordingly, Swiss law does not embrace the doctrine of punitive damages.

Interest on arrears is not automatically due in all types of transactions in Switzerland. For instance loans granted by an individual to another individual carry interest only if specifically provided for (Article 313 I CO); and, if only the principle of interest to the exception of its percentage has been provided for, the loan carries a 5% yearly interest (Article 73 I CO).<sup>1</sup>

On the contrary, in business matters, interest is due even absent any agreement to that effect. In case of lack of timely performance by a debtor, a penalty interest is due. In such cases, the yearly interest rate amounts to 5%, unless otherwise agreed (Article 104 I CO), or unless a business transaction is at stake and the bank discount rate at the place of payment is higher (Article 104 III CO). In cases where the penalty interest did not fully pay off the actual damage, further supplementary compensation also may be claimed (Article 106 I CO) in cases where the debtor is guilty.

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#### [Section 40:60]

<sup>1</sup>ATF 126 III 189.

**§ 40:61 Payment issues***Sale of Goods*

In the sale of goods, the payment of the purchase price is the performance due by the buyer in consideration of the delivered goods. Generally, the purchase price is paid upon delivery of the goods, but it may not and other options such as a payment before or after delivery are fairly common.

In case the buyer's payment is late and the payment was to be performed before or at the same time as the delivery, the seller may rescind the sale (Article 214(1) and (2) CO). Where payment was to be made after the delivery, he may only rescind the sale if he had expressly reserved such possibility in the contract (Article 214(3) CO). If such possibility was not reserved, the seller may only claim for performance or damages for non-performance.

As to the calculation of damages, Article 215 CO provides for specific rules applicable to commercial sales.<sup>1</sup> Thus, in commercial sales, when the buyer fails to meet his payment obligations, the seller has the right to claim as damages the difference between the mutually agreed purchase price and the price at which he resold the goods in good faith (concrete calculating method). Where no resale occurred and where the goods have a market price (or are quoted on an exchange), the difference between the mutually agreed price and the market price (or the exchange price at the time of performance) applies (abstract calculating method).

*Construction Contracts*

The contracting authority and the contractor may agree in advance on the price for the work. In such cases, the contractor has no claim for unforeseen activities or expenditures and must complete the work for the agreed sum (Article 373(1) CO). Only in exceptional circumstances will the judge allow for an increase in the price or a rescission of the contract (Article 373(2) CO). The contracting authority must pay the full price in case the completion of the work by the contractor caused him less labor than foreseen.

In work contracts where the price has not been fixed in advance, the price shall be determined pursuant to the value of the labor and the expenses of the contractor, i.e., according to the "effective" price (Article 374 CO). In the construction industry, such method is called timework because the price is determined according to timework applicable rates (each activity is attributed an hourly rate).

In certain handcraft industries, the tradition is to work with an ap-

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<sup>1</sup>CO, Article 215, being a *lex specialis* compared to Article 191(2) and (3) CO being the *lex generalis* applicable to ordinary sales.

proximate estimate (Article 375 CO). Where the contractor anticipates such estimate to be higher than 10% of the initial estimate, court's practice requires the contractor to inform the contracting authority without delay. Often, each party bears the burden of half of the excess of the estimate, but the principal has the right to rescind the contract either before or after the work has been completed.

### § 40:62 Contractor remedies

In general, a breach of contract may lead to specific performance or to damages in case of non-performance (Article 97 CO). In situations where performance is possible at the time of the entering into the contract but subsequently becomes impossible without fault of either party to the contract, the obligation to perform is extinguished (Article 119 CO).

When a contract is null and void or has been terminated and the contracting authority is liable for termination, the other party is entitled to claim negative damages for all the investments made in regard of the conclusion and the execution of the contract.<sup>1</sup> Negative damages put the claimant in the same situation as if a contract had never been entered into.

Seeking the costs of investments is possible when the claimant seeks negative damages on the ground of the termination of the contract. If he seeks positive damages, the claimant must be put in the same situation as if the respondent had performed his obligations under the contract. This situation does not allow the recovery of lost investments.

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#### [Section 40:62]

<sup>1</sup>Commentaire Romand, Thévenoz, ad. Article 97 N. 35.

