

Switzerland

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Legislative framework

1 What is the relevant legislation and who enforces it?

At the international level, Switzerland is a member of the GPA and the 1979 Geneva Protocol on International Customs and Trade Matters. On 21 June 1999, Switzerland and the EU concluded seven bilateral agreements. One of these agreements concerns public procurement (EU-CH BA-PP). The agreement package entered into force on 1 June 2002. Following its EFTA membership, Switzerland also applies the EFTA public procurement rules contained in appendix R to the EFTA Agreement and furthermore EFTA's bilateral free trade agreements (eg, with Bulgaria, Chile, Israel, Mexico and Romania). Their proper transformation and application is monitored by the State Secretariat for Economic Affairs (SECO) and a special commission where the federal government and the cantons are equally represented.

At the national level, the most important pieces of legislation are the Federal Act on Public Procurement (FAPP), the Ordinance on Public Procurement (OPP), and the Ordinance on the Organisation of Public Procurement (OOPP). FAPP and OPP both entered into force on 1 January 1996; the OOPP entered into force on 1 January 2007. Furthermore, general terms and conditions of the federal government, eg, for the procurement of goods, services, construction and IT services, are of practical importance (see www.bbl.admin.ch/bkb/00389/00398/index.html?lang=de).

Goods in general and the services specified in the OOPP are procured by one of the three central federal procurement bodies, ie, the Federal Office for Buildings and Logistics (FOBL), the armasuisse Group, and the Swiss Government Travel Centre (see article 3 OOPP). The FOBL, a branch of the Federal Department of Finance (FDF), undertakes most procurement activities. The central federal procurement bodies may delegate a specific purchasing competence to other authorities (see article 7 OOPP). This is the case, eg, for universities, the Swiss Federal Railways and Swiss Post. Services not specified in the OOPP (namely, consulting services and scientific studies) may also be procured by other federal authorities (see article 11 OOPP). For this purpose, these authorities are supported by special coordination offices (see article 12 OOPP). The FOBL and other procurement bodies are further supported by the Federal Procurement Commission, an inter-departmental body, which exercises mainly a coordinating and advisory function (see articles 16-18 OOPP).

At cantonal level, the most important pieces of legislation are the Intercantonal Agreement on Public Procurement (revised version dated 15 March 2001) and the respective cantonal legislation. Articles 5 and 9 of the 1995 Federal Act on the Internal Market also set out general principles for the tender proceedings.

The Federal Administration's website provides an overview of all 26 cantonal laws (see www.bbl.admin.ch/bkb/00235/00239/00241/00244/index.html?lang=de).

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

The FAPP transforms the GPA, the OPP transforms the EU-CH BA-PP into national law. The EU Procurement Directives, which came into force on 21 June 1999, are contained within the EU-CH BA-PP's acquis. Consequently, the amended EU Directives 2004/17/EC and 2004/18/EC are not included.

3 Are there current proposals to change the legislation?

The federal government intends to overhaul the current legislation, aiming at modernisation, clarification, more flexibility and harmonisation (both between cantonal and federal law and between Swiss and EU/international law). The federal government particularly intends to examine the question of whether the loss of time caused by appeal procedures could be reduced by limiting judicial review to arbitrary actions or by eliminating the possibility of providing remedies with suspensive effect. No draft legislation has been presented so far. The revised law is not likely to enter into force before 2009.

Furthermore, the relevant thresholds are updated periodically (see question 7).

4 What is the relevant legislation for the procurement of military equipment?

The legislation mentioned in question 1 (at international and national level) is also applied by armasuisse, a branch of the Federal Department of Defence, which is in charge of military procurement activities.

Applicability of procurement law

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

The FAPP is applicable to the Federal Administration, the Federal Alcohol Board, the Federal Institutes of Technology and their Research Centres, non-competitive postal and transport services provided by Swiss Post (article 2 paragraph 1 FAPP) and any organisation providing water, energy and transport services which has been specifically subjected to public procurement rules by the federal government (article 2 paragraph 2 FAPP). Those bodies must apply the FAPP if the relevant thresholds (see ques-

tion 7) are met. Below the thresholds, they must apply articles 32-39 OPP.

The OPP implements the FAPP, but it is also applicable to bodies that are not subject to the FAPP but set out in article 2a OPP, ie, organisations controlled by the federal government or organisations constituted by private law providing Swiss-wide services of general interest (telecommunications, railways, electricity) on the basis of exclusive rights. It should be noted that, in contrast to the GPA/FAPP, the EU-CH BA-PP/OPP also imposes public procurement obligations on local entities.

Bodies set out in article 2a OPP, however, may 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 organisations must seek a full or partial exemption from the Federal Department of Environment, Transport, Energy and Communications (FDET). So far, the FDET has granted exemption only to telecommunications services (parts of fixed network and mobile communication, internet access and data communication).

Further exceptions in partial areas concern Swiss Post (article 2 paragraphs 2 and 3 OPP), Swiss Federal Railways (article 2 paragraph 3 and article 2a paragraph 2 lit b OPP) and other providers of railway services under the control of the federal government (article 2 paragraph 3 OPP).

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

For railway freight services, an application to the FDET is currently pending.

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

At the international level, see the GPA and article 3 paragraph 4 EU-CH BA-PP, which contain specific thresholds for telecommunications and railways services.

At federal level, there are four sets of thresholds, one for the application of the FAPP and three for the OPP.

The current FAPP thresholds for 2007 (article 6 paragraph 1 FAPP) are as follows:

- 248,950 Swiss francs (approximately €155,000 for goods and services;
- 9.575 million Swiss francs (approximately €5.947 million) for construction services; and
- 766,000 Swiss francs (approximately €476,000) for tenders concerning goods and services launched by Swiss Post for its public transport sector or by a body meeting the criteria of article 2 paragraph 2 FAPP (see question 5).

Article 2a paragraph 3 OPP sets out the following thresholds:

- 960,000 Swiss francs (approximately €596,000) for the supply of goods and services in the public telecoms sector;
- 640,000 Swiss francs (approximately €398,000) for goods and services in the railways sector;
- 766,000 Swiss francs (approximately €476,000) for goods and services in the electricity sector;
- 8 million Swiss francs (approximately €4.969 million) for construction services in the telecom and railways sector; and
- 9.575 million Swiss francs (approximately €5.947 million) for construction services in the electricity sector.

Below these thresholds, the entity is, in principle, obliged to launch an invitation to participate (article 35 OPP; see question 19). The entity may choose limited tendering (article 36 OPP; see question 19) if the value is below:

- 100,000 Swiss francs (approximately €62,000) for construction services; and
- 50,000 Swiss francs (approximately €31,000) for goods and services.

Particular threshold requirements relate to the 'planning and global solution' procedure (articles 40-57 OPP); see question 21. Furthermore, 'de minimis' clauses are set out in article 7 paragraph 3 FAPP and article 14 OPP.

At cantonal level, current thresholds in the areas that do not fall under the GPA or the EU-CH BA-PP are set out in appendix 2 to the Intercantonal Agreement (see question 1).

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

Yes, if the extension leads to a procedural change due to a pass of thresholds. See also question 9.

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

Yes, in cases as in question 1. The tender may be cancelled and repeated if no satisfactory offer was received, if a change of conditions may lead to a better outcome, or if the project was substantially changed (see article 30 paragraphs 2 and 3 OPP). Changes (extensions and amendments) will normally lead to negotiations (article 26 OPP). Suppliers are not obliged to accept split awards of contracts or to cooperate with other suppliers, provided they have launched one global offer solely (article 27 OPP).

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

No, since the contract is awarded to the best offer only (see articles 21-23 FAPP). Any transfer to another supplier would deprive other suppliers of their right to challenge the award (articles 27-35 FAPP).

11 In which circumstances do privatisations require a procurement procedure?

If an entity subject to FAPP or OPP aims to outsource a service or construction service which it previously provided itself, such as a privatisation, it will require a procurement procedure. An example is local waste management.

12 In which circumstances do public-private partnerships (PPP) require a procurement procedure?

Only the entities that explicitly fall under the provisions of the FAPP or the OPP require a procurement procedure (see question 5).

13 What are the rules and requirements for the award of services concessions?

Rules and requirements are contained within sector-specific regulations, eg, see: article 6 paragraph 1 Federal Telecommunications Act; articles 5 and 9 Federal Railways Act; articles 2-4 Federal Act on Pipelines; article 16 Federal Act on High and

Low Voltage Plants, etc. Cantonal law also contains sector-specific regulation.

14 What are the rules and requirements for the award of an in-house contract without a procurement procedure?

Entities are free to choose between in-house provision and outsourcing of specific services. Only in the latter case is a tender required. Swiss procurement law does not define the term of 'in-house contract', however, and the question when a contract should qualify as 'in-house' is highly controversial. In the case of private-public partnerships and private entities outsourced by state authorities, there seems to be a tendency to apply the public procurement rules when the governmental influence or public financing prevails.

The procurement procedures

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

Yes, see articles 1, 8, 15 paragraph 4, and 20 paragraph 2 FAPP as well as articles 4 and 6 OPP. The provisions explicitly refer to free competition, transparency, non-discrimination between domestic and foreign suppliers, protection of workers, equal treatment of men and women and confidentiality. The contracting authority is entitled to monitor compliance (article 8 paragraph 2 FAPP) and to provide for contractual penalties (article 6 paragraph 5 OPP).

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

Yes, see question 15 above and question 17.

17 How are conflicts of interest dealt with?

To safeguard the principle of equal treatment in the tendering process (article 1 paragraph 2 FAPP), any member of the contracting authority with a personal interest in the outcome of a specific tender is obliged to refrain from working on this matter (article 26 paragraph 1 OPP in connection with article 10 of the Federal Act on Administrative Proceedings (FAAP)). Any supplier may request an involved person to step down, and challenge a refusal to do so (see article 45 FAAP).

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

The issue is not explicitly dealt with in federal legislation (unlike in article 6 paragraph 4 GPA). It derives, however, from the principle of equal treatment and from relevant case law that this bidder is excluded from participating in the ongoing tender procedure. Bidders may, however, follow an invitation to participate regarding an intended procurement; see question 19. On participation in a competitive dialogue, see question 21.

19 What is the prevailing type of procurement procedure used by contracting authorities in your country?

FAPP and OPP provide for open tendering (article 14 FAPP), selective tendering (article 15 FAPP and article 12 OPP), and, under certain conditions, limited tendering (reasoned exception

or below threshold, see articles 13 paragraph 2 and 16 FAPP, and articles 13 and 36 OPP). Article 35 OPP also allows an invitation to participate regarding an intended procurement under certain conditions (certain types of tenders below thresholds; possibly at least three offers). Articles 40-57 OPP provide for a 'planning and global solution competition' (see question 21).

The prevailing type in Switzerland currently is the selective procedure.

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

Yes, see article 20 paragraph 1 FAPP (negotiation indicated in the tender notice; no offer appears to be the most advantageous) and article 26 OPP (negotiations to be conducted on the basis of the selection criteria; negotiations with at least three suppliers). The proceedings must safeguard the principles of confidentiality, written procedure and equal treatment (article 20 paragraph 2 FAPP). Negotiating parties must not be informed of their competitors' offers during the negotiation proceedings (article 26 paragraph 5 OPP).

21 When and how may the competitive dialogue be used?

The current legal framework in Switzerland does not provide for a competitive dialogue as set out in article 28 EU Directive 2004/18/EC. Articles 40-57 OPP, however, provide for a 'planning and global solution competition' for novel and complex projects above the article 6 paragraph 1 FAPP threshold (goods and services) and above 2 million Swiss francs (approximately €1.242 million, whereas €1 ≈ 1.61 Swiss francs) for construction services (article 43 paragraph 1 OPP). This procedure allows a contracting authority to evaluate different alternatives (jointly for planning and realisation) beforehand and to formulate, on this basis, its tender notice and documentation. The described procedure is quite similar to the 'competitive dialogue' under community law.

Additionally, suppliers may present variations together with their principal offer unless this possibility has been excluded in the tender notice (article 22 paragraph 2 OPP).

22 What are the requirements for the conclusion of a framework agreement?

Swiss procurement law contains no explicit reference to framework agreements. According to a common view, framework agreements may only be concluded by entities meeting the criteria of article 2 paragraph 2 FAPP (see question 5) or by Swiss Post for bus transport services (cf article 18 paragraph 2 FAPP). Just like other agreements concluded under public procurement rules, framework agreements are typically governed by private law.

23 May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

This is possible on the basis of article 18 paragraph 2 FAPP (see question 22). No additional procedure is required for the award of contracts within the scope of a framework agreement.

24 Under which conditions can consortium members be changed in the course of a procurement procedure?

Consortia are, in principle, allowed. This possibility may only be excluded or limited in particular, justified cases (article 21 OPP). Suppliers are therefore also free to set up and to re-compose their consortia. The composition of, and any changes within, the consortia, however, must be made transparent, and the changes must be justified. The lead supplier is fully responsible for all consortium members complying with the fundamental principles set out in question 15, and violations may lead to a withdrawal of the award (article 11 FAPP). It should be noted that, in case one consortium member resigns, all remaining members risk losing their legitimization for judicial review (see also question 33 et seq).

25 Are unduly burdensome or risky requirements in tender specifications prohibited?

Unlike article 7 paragraph 2 GPA, the relevant Swiss legislation does not contain an explicit prohibition. Unduly burdensome or risky requirements can, however, be challenged before the Swiss Competition Commission since they may constitute a misuse of market dominance (article 7 of the Act on Cartels).

26 What are the legal limitations on the discretion of contracting authorities in assessing the qualification of tenderers?

Legal limitations for discretion are the fundamental principles of the procurement procedure (see question 15) and include: the self-binding effect of qualification criteria and specific requirements set out in the tender notice (article 9 FAPP and articles 16-18 OPP); applied evaluation systems (article 10 FAPP); the award criteria (article 21 paragraph 1 FAPP) in their ranking order set out in the tender notice (article 21 paragraph 2 FAPP); and limitations to negotiations (article 20 paragraph 2 FAPP, article 26 OPP).

27 What are the requirements for the admissibility of alternative bids?

Suppliers may present, together with their principal offer, alternative bids (variations – article 22 OPP) unless this possibility has been limited or excluded in the tender notice.

28 Must a contracting authority take alternative bids into account?

Yes, within the limits of article 22 OPP (see question 27).

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

Changes and amendments are only possible within the limits of article 22 OPP (alternative bids) and of article 20 paragraph 2 FAPP and article 26 OPP (negotiations – see question 20).

30 What are the award criteria provided for in the relevant legislation?

The contract is awarded on the basis of economic efficiency criteria, ie, the best value-for-money ratio. Relevant aspects for the assessment are punctuality, quality, net price, effectiveness, running costs, customer service, expediency, aesthetics, environmental-friendliness and technical value, etc (article 21 paragraph 1 FAPP). If standardised goods are tendered, the contract may also be awarded on the basis of the lowest price (article 21 paragraph 3 FAPP).

31 What constitutes an 'abnormally low' bid?

Since the relevant Swiss legislation does not contain an explicit provision, the definition set out in article 13 paragraph 4 lit a GPA is likely to be taken into account.

32 What is the required process for dealing with abnormally low tenders?

Again, Swiss legislation does not contain an explicit provision (see question 31). In analogous application of article 13 paragraph 4 lit a GPA, an enquiry with the bidder may be made.

Review proceedings and judicial proceedings

33 Which authorities may rule on review applications?

At federal level, the Federal Administrative Court (FAC) is competent (see article 27 FAPP), which has replaced the former Federal Appeal Body for Public Procurement (FAB) as of 1 January 2007. The FAC is currently situated in Berne and will later relocate its seat to St Gallen. Review applications are only possible for tenders subject to the FAPP, and not if a tender is subject to the OPP only. The FAC's decisions may be appealed to the Federal Supreme Court only if: (i) the estimated contract value reaches the applicable threshold of the FAPP or the EU-CH BAPP (see question 7 above), and (ii) a legal question of fundamental importance arises (articles 82 and 86 in connection with article 83 lit f Federal Supreme Court Act).

For cantonal review proceedings, see the link in question 1.

34 How long does a review proceeding or judicial proceeding for review take?

The length of the review proceedings depends upon the complexity of the case. In average cases, the former FAB proceedings took eight to 12 months.

35 What are the admissibility requirements?

The FAC is competent for tenders subject to articles 2 et seq FAPP. Only decision types mentioned in article 29 FAPP can be challenged, ie, decisions regarding the contract award, the withdrawal of tender proceedings, the choice of suppliers invited to participate in a selective tender, exclusion from the tender process (article 11 FAPP), or the admission or non-admission to an evaluation system (article 10 FAPP). The right to challenge a decision is limited to parties with legitimate interests (article 26 FAPP in connection with article 48 paragraph 1 FAAP – see question 17), which are predominantly unsuccessful bidders. The FAC reviews violations of the law, including misuse of discretion, but not mere inappropriateness (article 31 FAPP).

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

Appeals must be launched within 20 days upon publication or notification of the contract award (article 30 FAPP).

37 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

According to article 28 paragraph 1 FAPP, the application only has a suspensive effect if: the contract has not been concluded yet, and the FAC has ordered a suspensive effect (articles 22 paragraph 1 and 28 paragraph 2 FAPP). Once the contract has been concluded, the FAC may only state a violation of federal law

Update and trends

In September 2006, the Federal Appeal Body for Public Procurement (FAB) approved an appeal of a bidder who had unsuccessfully applied for a contract concerning construction works at the New Transalpine Railway (NTR) base tunnel. The FAB annulled the award of the contract to a competing bidder, remanding the case to the contracting authority for reappraisal. This decision has further delayed the completion of the NTR and raised a political controversy on the practicability of the applicable procurement rules and appeals procedures. The federal government has vowed to examine the question of whether the loss of time caused by appeal procedures could be reduced by limiting judicial

review to arbitrary actions or by eliminating the possibility of providing remedies with suspensive effect. Furthermore, the Competition Commission has issued a recommendation whereby certain alternative bids should be admitted in future NTR tender procedures.

As of 1 January 2007, the central federal procurement bodies for the procurement of goods and certain services were reduced from 42 to three. At the same time, coordination offices were created with the function of supporting government agencies in the procurement of other services.

(article 32 paragraph 2 FAPP). In those cases, the applicant may claim damages (article 34 FAPP).

38 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

No. The contracting authority must notify them only 'immediately' upon request (article 23 paragraph 2 FAPP).

39 Is access to the procurement file granted to an applicant?

Yes, within the limitations of article 26 paragraph 1 FAPP in connection with articles 26-28 FAAP. Since access may be refused to safeguard business secrets or the confidentiality of ongoing proceedings, applicants will normally only gain access to the evaluation of their own offer, but not to documents relating to competitors' offers.

40 Is it customary for disadvantaged bidders to file review applications?

This is not customary. The former FAB published 11 decisions in 2006, and 9 decisions in 2005. Reviews at cantonal level are more frequent.

41 May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

This question has not been decided by the FAC (respectively, the former FAB) so far. Article 32 paragraph 2 FAPP states that, post conclusion, only claims of damages are possible (articles 32 paragraph 2 and 34 FAPP). But a cancellation or termination may be requested on grounds of general civil law rules.

42 Is legal protection available in cases of a de facto award of a contract, ie, an award without any procurement procedure?

On the proviso of a procurement obligation based on the FAPP, such non-procurement can be challenged under article 29 FAPP if one of the cases of this provision is present (see question 35).

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