Country Reports

Switzerland

Developments in October 2016 – September 2017

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I. New Developments in Switzerland: October 2016 – September 2017

PPP-projects have remained a rarity in Switzerland. The administrative center Neumatt (Burgdorf) remains the only PPP-project which truly meets international standards. In order to implement the revised GPA, Swiss laws on public procurement have been revised at federal and cantonal level for a considerable time.¹ On 15 February 2017, the Federal Council finally adopted its dispatch on the Federal Act concerning the total revision to the procurement law.² To the surprise of observers, the Federal Council proposed to preclude access to documents concerning public procurements. The EDÖB (Swiss Federal Data Protection and Information Commissioner) has already protested against this restriction to public access to official records.³ With regard to new court de-

cisions, a recent ruling by the Swiss Federal Supreme Court regarding an abnormally low price in a tender of the University of Zurich also grabbed much attention in the media.

II. PPPs – New Projects

1. Reka holiday village in the Canton of Thurgau/Bodensee

In order to build and operate a holiday village, the Canton of Thurgau and the village of Kreuzlingen entered into a partnership with the UMB *Untere Mühle Bottighofen AG* – the landholder who builds and leases the shell construction – and the *Reka Schweizer Reisekasse Genossenschaft* – who is the tenant and responsible party for the construction and the operation. The total investment volume will reach CHF 25 million.⁴

2. Campo Marzio Nord in Lugano

In January 2017, the community of Lugano announced the construction of a tourism and conference center on the Campo Marzio Nord. The Cantonal Parliament approved a loan of CHF 1 million in July 2017 in order to construct the center utilising a PPP-model. While the public partner is the city of Lugano, a private partner has not been determined yet. The announcement is scheduled for August 2018.⁵

3. Grande Traversée du Lac in Geneva

The feasibility of building the 'Grande Traversée du Lac' in Geneva via a PPP-model was confirmed by an asset management company.⁶ However, the required

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1 Peter Hettich and Louisa Galbraith, 'Country Report Switzerland' (2014) EPPPL 3 221, 225; see also Peter Hettich and Jannick Koller, 'Country Report Switzerland' (2015) EPPPL 4 320, 320.

2 Jan Flückiger, 'Der Bundesrat schwächt die Transparenz' *Neue Zürcher Zeitung* (Bern, 16 February 2017); See also, 'Botschaft zur Totalrevision des Bundesgesetzes über das öffentliche Beschaffungswesen' (February 2017) available at: <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte/AffairId=20170019>> accessed 1 December 2017.

3 Jan Flückiger (n 2).

4 PPP, 'Reka-Ferendorf Thurgau-Bodensee (Kreuzlingen)' (July 2017) available at: <<http://www.ppp-schweiz.ch/italiano/ppp-che-cose/progetti-di-ppp-in-svizzera/articles/reka-ferendorf-thurgau-bodensee-kreuzlingen-1633/>> accessed 1 December 2017.

5 PPP, 'Campo Marzio Nord - Polo turistico congressuale Lugano' (July 2017) available at: <<http://www.ppp-schweiz.ch/de/ppp-wissen/ppp-projekte-in-der-schweiz/articles/campo-marzio-nord-polo-turistico-congressuale-lugano/>> accessed 1 December 2017.

6 See, Peter Hettich and Jannick Koller (n 1).

funds of CHF 3.5 billion exceed the capacity of the Swiss capital market. A procurement of funds in Euros will result in exchange rate risks.⁷

4. Bicycle Hiring 'Velo Züri' in Zürich

The construction of a bicycle hiring system (a PPP⁸), which was initiated in October 2014, has been delayed because of a legal dispute concerning the award procedure. However, the system is expected to become operational in May 2018.⁹ In the meantime, the city of Berne announced that they are also planning to construct a system for bicycle hiring.¹⁰

5. Underground Parking in Yverdon-les-Bains

The authorities of Yverdon-les-Bains concluded a tender procedure for a public car park in form of a PPP.¹¹ The planning, construction, and operation of the car park remains with the constructor for a period of seven years. The car park is expected to open in 2021.¹²

III. PPPs and Public Procurements – New decisions

1. Online content of the Swiss public broadcasting service: Appeal against the award decision of the Federal Administrative Court (Ruling of 22 May 2017 of the Swiss Federal Supreme Court)

On 28 January 2015, the Office of Communications (OFCOM) requested tenders of an analysis regarding the online content of the Swiss public broadcasting service (SRG SRF). The University of Zurich and Company A submitted an offer. OFCOM awarded the contract to the University of Zurich. Company A filed a complaint with the Federal Administrative Court, claiming that the offer of the University of Zurich is abnormally low due to cross-subsidies. The Federal Administrative Court overruled the award.¹³ Consequently, OFCOM lodged a complaint with the Federal Supreme Court in May 2016.

The Supreme Court argued that the offer of the University of Zurich might be cross-subsidized by its state funding, therefore distorting competition. However, as a public enterprise, the University of Zurich is required to deal with the private sector at arm's length. Offering its services below cost therefore constitutes a reason to exclude the University from the tender procedure (Art. 11 BöB). Since the case record did not allow the court to decide on the matter, the award was annulled and remanded to the lower court for a new decision.¹⁴

2. Gotthard Tunnel: Appeal against the award decision by SBB Ltd. (Ruling of 17 November 2016 of the Federal Administrative Court)

In April 2016, SBB Ltd. launched a tender invitation procedure for cleaning works in the Gotthard Tunnel. The contract was awarded in July 2016. One unsuccessful tenderer filed an appeal against the decision, asking for an exclusion of the successful tenderer from the procurement procedure, because the firm has never cleaned a tunnel before. The court agreed that the successful tenderer failed to demonstrate that it is able to clean a tunnel. In addition, the court specified that the cleaning work of the successful tenderer done during the court procedure may not be

7 PPP, 'Treffen Parlamentarische Gruppe PPP zum Projekt "grande Traversée du Lac"' (December 2015) available at: <<http://www.ppp-schweiz.ch/de/ppp-news/aktuelles/view/items/treffen-parlamentarische-gruppe-ppp-zum-projekt-grande-traversee-du-lac/>> accessed 1 December 2017.

8 See Peter Hettich and Louisa Galbraith, 'Country Report Switzerland' (2015) EPPPL 4, 320.

9 Helene Arnet, 'Das Züri-Velo kommt ins Rollen' *Tages-Anzeiger* (Zürich, 21 June 2017).

10 Simon Gsteiger, 'O-Bike sorgt für Streit um Veloverleih' *Der Bund* (Bern, 20 August 2017).

11 For a detailed overview see (n 8).

12 PPP, 'Parking souterrain sous la place d'Armes, Yverdon-les-Bains' (February 2017) available at: <<http://www.ppp-schweiz.ch/de/ppp-wissen/ppp-projekte-in-der-schweiz/articles/parking-souterrain-sous-la-place-darmes-yverdon-les-bains-1223/>> accessed 1 December 2017; Yverdon-les-Bains, 'Place d'Armes: adjudication du parking souterrain' (9 March 2017) available at: <http://www.yverdon-les-bains.ch/fileadmin/templates/place-armes/_pdf/comm-place-armes-mars2017.pdf> accessed 1 December 2017.

13 For a detailed overview of the decision by the Federal Administrative Court see, Peter Hettich and Jannick Koller, 'Country Report Switzerland' (2017) EPPPL 2 201, 204.

14 BGER 2C_582/2016, May 22, 2017.

taken into account for the tender procedure at hand.¹⁵

3. Furka Tunnel: Appeal against the award decision by Matterhorn Gotthard Infrastruktur Ltd. (Ruling of 6 October 2016 of the Federal Administrative Court regarding suspensive effect)

Matterhorn Gotthard Infrastruktur Ltd. awarded a construction contract. An unsuccessful tenderer filed an appeal against this decision with the Federal Administrative Court, arguing that the successful tenderer does not fulfil the eligibility criteria set out in the procurement documents. Dealing first with a procedural question, the court ruled on whether the appeal should be granted suspensive effect. The court argued that the authority might have deviated from its own eligibility criteria, thereby possibly violating procurement law. Also, the authority failed to demonstrate any urgency in concluding the contract. Consequently, the award was granted suspensive effect.¹⁶ When arguing the matter, the court held that, indeed, the specified eligibility criteria are not identical with the criteria used by the authority. The contracting authority is not free in determining additional criteria as the one laid down in the tender documents. Consequently, the court annulled the decision of the contracting authority.¹⁷

15 BVGer B-4637/2016, October 19, 2016; Martin Beyeler, B-4637/2016: 'Wer kann's, wenn noch niemand es getan hat?', BR 04/2017, 227 et seq.

16 BVGer B-8115/2015, February 3, 2016.

17 BVGer B-8115/2015, October 6 2017. The Supreme Court denied certiorari; BGer 2C_1063/2016, July 20, 2017.