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REVIEW

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Editor
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WOLF THEISS

PREFACE

Welcome to the 11th edition of *The Government Procurement Review!*

This year we have contributions from a diverse range of jurisdictions, ranging from the Dominican Republic to Australia and from the United States to a number of European jurisdictions along with a separate chapter on EU law.

I feel self-conscious, as an English lawyer, focusing year on year in this preface on the UK position, but the UK procurement bill continues its progress through the legislative process and is likely to become law in the autumn of 2023, with implementation in the spring of 2024. Although it represents an evolution rather than a revolution compared to the EU law position, and underpinned as it is by the WTO Agreement on Government Procurement (GPA), a large amount of concentrated effort from contracting authorities and their advisers, and indeed within private sector bidding organisations, will be required to assimilate the changes. There will also be the inevitable, but confusing, period of dual running as the old rules continue to apply to processes in flight.

Swiss law has also seen major changes aimed at the implementation of the GPA and harmonisation of national and cantonal procurement rules. Interestingly, bidding rounds aimed solely at price reduction are prohibited.

Portugal has legislated for digital signatures in bidding documents, after the submission of a bid on an electronic platform.

The Dominican Republic is also proposing a broad range of other modernisations to its procurement laws from anti-corruption measures to the introduction of e-procurement and frameworks, to new sanctions for breach of procurement law.

Geopolitical issues are affecting procurement law and policy across the globe. This goes well beyond the continuing sanctions against Russia and Russian businesses in consequence of the invasion of Ukraine, most notable in the recent significant German legislative measures on defence procurement, and Maltese provisions allowing contractors, who are affected by price increases concerning works and supply contracts, to seek a price increase.

Broader-ranging developments in the United States include:

- a* an increased focus on domestic preferences with recent legislation expanding Buy America requirements that apply to federally funded infrastructure projects, and regulations amending the Buy American Act applicable to federal procurement creating a framework to impose 'super price preferences' for critical products and components; and
- b* the National Defense Authorization Act, which prohibits the procurement of electronic parts, products and services that include covered semiconductor parts or services from certain Chinese entities.

Developments in Canada include:

- a* the adoption of the Contract Security Program, which focuses on security screening activities for participants in the procurement process, including bid solicitation. In response to espionage concerns, these updates mandate that a foreign ownership, control or influence evaluation must be completed in all situations in which a third-party individual, firm or government is assumed to possess dominance of, or authority over, a Canadian facility to such a degree that it may gain unauthorised access to extremely sensitive assets or information; and
- b* mandates have been introduced for public bodies to ensure that provincial businesses are favoured where the province's goods and services are the subject of a procurement process.

The European Union has now adopted the following:

- a* the long-threatened International Procurement Instrument, which is intended to open access to public procurement markets around the world, and to address the imbalance between EU procurement markets and restrictions or discriminatory treatment applied by some countries on EU businesses bidding for contracts in their territories;
- b* the Foreign Subsidies Regulation, which introduces a new set of rules for addressing distortions caused by foreign subsidies in the single market. It involves mandatory notification of foreign subsidies, and the possibility either of exclusion of non-EU tenders or (oddly) the possibility for mandatory scoring adjustments to tenders from affected bidders. It also includes a right for the European Commission to start investigations on its own initiative if it suspects that distortive foreign subsidies may be involved; and
- c* raising the spectre of retaliatory action in the context of EU Procurement against non-EU states (including, now, the United Kingdom), which do not grant access for EU supplies or where state subsidies create distortions.

These issues are nuanced and concern is understandable where defence or security issues are in play; however, it feels counter-intuitive for states that are GPA signatories to be encouraging national preference or establishing such barriers to trade rather than using the mechanisms offered by the WTO to resolve matters such as distortive state subsidies.

The fallout from covid-19 is also apparent, with a series of high-profile court cases embarrassing to government in the United Kingdom, and new cases reported in the United States involving allegations of fraud related to the Paycheck Protection Program.

There are echoes of the issues in play in the EU decision in *Wall* in the US decision regarding availability of key personnel in *Golden IT, LLC v. United States*.

It is also interesting to note that EU case law has included the bringing in to play of the Charter of Fundamental Rights for review procedures under public procurement law (the *EPIC* case).

In Australia, there have been amendments to the Commonwealth Procurement Rules, including measures aimed at ensuring that small and medium enterprises (SMEs) get more opportunities to participate in covered procurements and even a right to effect direct awards of smaller contracts to SMEs. New anti-corruption legislation has also been adopted, including the ability to investigate serious or systemic corrupt conduct relating to procurement or contract management processes.

Similar rules favouring local family businesses in the context of agricultural produce have been introduced in the Dominican Republic.

Environmental, social and governance issues will become an increasingly more significant facet of procurement law in the next few years, and clearly emission reductions are unlikely to be achieved unless public procurement, accounting as it does for such a significant share of global procurement, is greened.

A good example is Canada, where procurement processes are being modernised to focus more on indigenous procurement, social procurement and green procurement, including:

- a* mandatory targets for contract awards to indigenous businesses;
- b* requirement that, before the tendering process for a contract, public bodies in Quebec must conduct an evaluation of their procurement requirements to further the pursuit of sustainable development;
- c* green procurement provisions relating to carbon in construction and disclosure of greenhouse gas emissions and the setting of reduction targets;
- d* measures to strengthen federal procurement policies to integrate human rights, environment, social and corporate governance principles and supply chain transparency principles; and
- e* an innovative coaching service, which aims to support bidders from diverse socio-economic backgrounds who have had difficulties in successfully bidding on federal procurement opportunities and to address the bidding challenges that they have previously encountered.

The Dominican Republic has introduced new laws regarding ethics and due diligence in procurement procedures, and has proposed the broadening of its procurement laws to add inclusion, sustainability and due process.

In Germany, new supply chain legislation imposes due diligence obligations on larger businesses that bid for public contracts on human rights and environmental protection throughout their supply chains, including establishing risk management procedures and implementing preventive and remedial measures for possible human rights or environmental infringements. Violations of the due diligence obligations may lead to a noncompliant bidder being excluded from public procurement procedures for up to three years.

Finally, in Malta, the case of *Vivian Corporation v. Central Procurement and Supplies Unit* is an interesting analysis of the interaction between competition law (in that case, market dominance) and procurement law.

All in all, 2022 has been a very active year for courts, legislators and procurement practitioners worldwide. The pace of change is unlikely to slow.

Jonathan Davey

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SWITZERLAND

Astrid Waser and Benoît Merkt¹

I INTRODUCTION

Public procurement in Switzerland is regulated by international treaties, and federal, cantonal and intercantonal law. The international treaties set out standard principles, constitute the basic legal framework of rights and obligations, and are binding on authorities. These include international framework agreements such as the Government Procurement Agreement of 15 April 1994 (GPA) (which was replaced in Switzerland by the revised World Trade Organization Agreement on Government Procurement (GPA 2012) on 1 January 2021), the Bilateral Agreement between the European Community and Switzerland on certain aspects of public procurement of 21 June 1999 (EU–CH AAGP) and the convention establishing the European Free Trade Association of 4 January 1960 as amended (the EFTA Agreement). As Switzerland is not a Member State of the European Union, EU law on public procurement is not applicable.

At state level, public procurement is governed by federal law. The principal legislative acts regulating federal public procurement in Switzerland are the Federal Act on Public Procurement of 21 June 2019 (FAPP), the corresponding Federal Ordinance on Public Procurement of 12 February 2020 (OPP) and the Ordinance on the Organisation of Public Procurement of the Federal Administration of 24 October 2012 (OOPP). The FAPP sets out general procurement principles and also contains more detailed provisions. The OPP contains specific provisions for the implementation of the FAPP.

Every canton in Switzerland has its own procurement law governing cantonal administration procurement. The main legislative act for regional and local authority procurements is the revised Intercantonal Agreement on Public Procurement of 15 November 2019 (IAPP 2019), which harmonises the legal framework within the cantons and the cantonal public procurement regulations of each canton.

The purpose of the FAPP is to make efficient use of public funds by enabling competition between tenderers. The FAPP stipulates that the contract must be awarded to the tenderer with the most advantageous offer. Furthermore, transparency as an important tool to facilitate competition is a fundamental principle of the procurement procedure and stated as a purpose of the FAAP. The principles of equal treatment and non-discrimination are also key to the FAAP. Additionally, the FAAP states that tenderers must guarantee compliance with health and safety regulations, employment regulations – including equal treatment of men and women – and environmental regulations.

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In principle, exemptions from the general regime of applicable procurement laws derive directly from the relevant procurement acts. The FAPP, for example, contains a list of procurements to which the FAPP does not apply. For instance, if a procurement is deemed necessary for the protection and maintenance of external or internal security or public order, the FAPP itself stipulates the non-applicability of the FAPP.

This chapter focuses primarily on federal law, as the considerable number of different cantonal, and even municipal, regulations in Switzerland still in force at this point in time are beyond the scope of this chapter.

II YEAR IN REVIEW

During the past few years, the entire legislative framework has undergone revision to implement the GPA 2012. In addition to the implementation of the GPA 2012 in the FAPP, one of the main objectives of the revision was to harmonise the federal and cantonal procurement regulations. At federal level, the revised FAPP and OPP entered into force on 1 January 2021. At an extraordinary plenary meeting on 15 November 2019, the cantons also unanimously adopted the IAPP 2019, which largely contains the same rules as the revised FAPP and leaves the cantons little room for their own regulations. The IAPP 2019 entered into force on 1 July 2021 after being ratified by two cantons (Appenzell Innerrhoden and Argovia). Furthermore, the IAPP 2019 must be enacted into cantonal law by cantonal governments, which is still in progress in slightly more than half the cantons.

The key changes to the laws are as follows.

- a* Contracts are to be awarded to the ‘most advantageous’ offer and no longer to the ‘most economically favourable’ one. The numerous new awarding criteria contained in the new laws are to be given more weight in relation to the price. These criteria particularly include suitability, deadlines, technical value, cost-effectiveness, life cycle costs, aesthetics, sustainability, plausibility of the offer, the different price levels in the countries in which the service is provided, price reliability, creativity, customer service, delivery conditions, infrastructure, innovative content, functionality, service readiness, professional competence and efficiency of the methodology. The overall aim is to place greater emphasis on quality competition rather than price competition.
- b* Bidding rounds (i.e., negotiations with the sole purpose of reducing the price offer) are now prohibited by law at the federal level, as was already the case at cantonal level. However, price adjustments will remain possible in the context of a bid adjustment or special procedures such as the dialogue, where minor modifications may result in a corresponding adjustment of the price offer. In addition, price adjustments may be made within the framework of an electronic auction or during the negotiation of an offer in an invitation procedure.
- c* Flexible and modern procurement instruments were introduced in the revised federal law, such as the possibility of concluding framework agreements or study contracts, as well as competitions. With regard to modern technologies, the law provides for electronic auctions and the electronic processing of award procedures.
- d* Legal protection on procurement proceedings will be harmonised across the federal and cantonal levels (e.g., the appeal period for awards will be 20 days at both federal and cantonal level).

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The FAPP provides a list of the public authorities that are subject to the law. The list contains entities both with and without legal personality as well as also entities such as courts, federal prosecutors and parliamentary services. Appendix 1, Annex 1 of the GPA 2012 contains a list of awarding authorities; however, this list is not exhaustive and entities founded after the contract signing may also be subject to public procurement law. Contracting authorities in the water, energy, transport and telecommunications sectors are explicitly regulated. However, entities active in these sectors may be granted individual exemptions by the federal department.

Private entities are – under specific circumstances and for certain actions, especially when providing public services in the area of production, transport or distribution of electrical power – subject to public procurement law. They must meet the same legal requirements, in particular, if they act in place of contracting authorities for procurements.

ii Regulated contracts

The FAPP provides an explicit definition of ‘public contracts’ as transactions by which a contracting authority subject to the law procures against payment products or services for the fulfilment of its (public) tasks. Accordingly, the public contract is characterised by its remuneration and the exchange of goods or services in return. It is not necessary for the consideration to consist of money; monetary benefits that are only indirectly exchanged are also covered.

Under Swiss law, the following contracts are generally subject to public procurement rules:

- a* supply contracts (i.e., contracts for the supply of movable goods, in particular by purchase, lease, rent or hire);
- b* service contracts (i.e., contracts for the rendering of services); and
- c* works contracts (i.e., contracts for building and civil engineering work).

In addition, the FAPP provides a list of contracts not covered by the law. If, for example, a public authority acquires, rents or leases real estate, or enters into contracts regarding financial services, the FAPP does not apply. In addition, contracts to be concluded in certain sectors are excluded from the FAPP. Furthermore, the FAPP lays down thresholds (without value added tax) for contracts that can be awarded directly and without invitation to tender, which are as follows:

- a* 150,000 Swiss francs for supply and service contracts; and
- b* 300,000 Swiss francs for works contracts.

Pursuant to the FAPP, the Federal Council will periodically adjust these thresholds in accordance with international obligations.

With regard to the award of concessions, the FAPP stipulates that these are subject to procurement law if the tenderer thereby acquires exclusive or special rights that it exercises in the public interest and for which it receives remuneration or compensation directly or indirectly in return. However, specific legal provisions (e.g., under the Waters Protection Act, the Electricity Supply Act or in telecommunications and broadcasting legislation) take precedence over this regulation.

If the contracting parties wish to vary a contract, in general, Swiss public procurement law assumes that the project described in the invitation to tender materially remains the same during the entire procurement process. No new procurement procedure is therefore necessary unless the amendment materially changes the scope of the contract or the amendments exceed the applicable threshold values. However, if the contracting parties wish to transfer the contract to a different supplier, a new procurement procedure is required (i.e., the contract cannot be transferred to a different entity without conducting a new procurement procedure).

Follow-on procurements (i.e., procurements to replace, complement or expand already provided services) can be awarded directly and without invitation to tender under certain conditions; for example, in cases where a change of the supplier would result in substantial additional costs.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements that do not aim at conclusively determining a certain volume of services to be put out to public procurement, but rather at determining the terms for the goods, work and services to be procured over a given period, are explicitly regulated by the FAPP.

In general, framework agreements are permissible provided that they are not used with the intention or effect of impeding or eliminating competition. However, the FAPP provides that, apart from exceptional circumstances, framework agreements may be contracted for a maximum duration of five years and may not be automatically renewed.

ii Joint ventures

Swiss public procurement legislation does not contain a clear definition of public–public joint ventures. The FAPP provides, however, for specific rules in situations where a service is to be procured from an entity that is part of the procuring authority or controlled by the procuring authority, or that is itself subject to public procurement law.

If the contracting authority and the supplier belong to the same legal entity (i.e., if the service is procured from a dependent organisational unit of the contracting authority and is thus procured in-house), the FAPP does not apply. In addition, the FAPP is not applicable if the contracting authority procures a service from an entity over which it exercises control. However, this exemption only applies if the controlled entity essentially provides its services for the contracting authority, which can be assumed if the entity provides at least 80 per cent of the services in a given market for the procuring authority. Finally, the FAPP does not apply to contracts where the contracting authority intends to procure a service from a legally independent entity that is also subject to procurement law and does not provide its services in competition with private third parties. This exception also requires that no private third party holds shares in the entity.

Swiss public procurement legislation also does not provide special rules for public–private partnerships (PPPs). There is no clear definition of a PPP in Swiss procurement legislation. Generally, procurement procedures apply, as PPPs are viewed as ordinary procurements of supplies, services or works. However, the applicability of procurement laws to PPP projects must be examined case by case, depending on the specific characteristics of the procured service. According to case law, once a PPP partner has been selected by the contracting authority in accordance with the FAPP, it is no longer subject to procurement

laws when subcontracting. Despite the recognition of this one-time procurement principle, the contracting authority must ensure that the selected partner obligates its subcontractors to comply with the compulsory regulations.

V THE BIDDING PROCESS

i Notice

As far as regulated procurement contracts at the federal level are concerned, all calls for tender, as well as the awards of the contract, are published on Simap,² the government's public procurement information system platform.

ii Procedures

Swiss public procurement law provides four main methods of procurement. The contracting authority may award a regulated contract by means of an open procedure, a selective procedure, an invitation procedure or a negotiated procedure. The applicability of these procedures depends on the contracting authority, the type of contract and the threshold values set out in the FAPP.

Under the open procedure, all interested bidders may submit a tender. In the selective procedure, all interested bidders may submit an application to participate, but the contracting authority identifies bidders who may submit a tender based on their suitability. In the invitation procedure, the contracting authority determines at least three suppliers, if possible, who will be invited to submit a tender. As far as the procurement of weapons, ammunition or military materiel is concerned, the invitation procedure may always be used. Under the negotiated procedure, the contracting authority negotiates a contract directly with a supplier of its choice without issuing any invitation to submit a tender. In general, the applicability of the negotiated procedure depends on the thresholds set out in Section III.ii. However, under certain conditions specified in the FAPP, the contracting authority may apply the negotiated procedure even though the procurement exceeds the corresponding threshold value.

As far as electronic procurements are concerned, regulated procurement contracts at the federal level are advertised on the Simap electronic platform. Electronic submissions are standard practice within federal administration.

The FAPP also provides for electronic auctions and the electronic processing of award procedures. Flexible procurement instruments such as the dialogue (competitive dialogue) are likely to be increasingly important in the future, especially in the awarding of intellectual services. Practical experience will show the extent to which these new instruments will be used and whether further need for modification of the provisions will result.

iii Amending bids

Modification to tender documents is limited and amendments are possible in the event that formal negotiations take place. However, bidders may submit alternative tenders in addition to their main offer, provided that such alternatives have not been excluded in the tender documents.

See also Section III.ii regarding options for the contracting parties to vary a contract or transfer the contract to a different supplier.

² Available at www.simap.ch.

VI ELIGIBILITY

i Qualification to bid

The FAPP contains an exhaustive list of situations in which a bidder might be excluded from a specific tender or from future public contracts, in general for a period of up to five years; for instance, if it has violated anti-corruption provisions or has been found guilty of a felony in a legally enforceable judgment. Details of excluded bidders, as well as the reasons for and the length of their exclusions, are kept on non-public lists.

As mentioned in Section V.ii, the qualification to bid may also depend on the procurement procedure applicable to the tender. Only the selective procedure provides for a selection or shortlisting of the bidders that fulfil the qualification criteria established by the contracting authority. These criteria may concern the bidders' financial, economic and technical capacity. To meet the principle of transparency, the criteria are published in the invitation to tender or tender documents. The contracting authority can reduce the number of tenderers if the tender could not otherwise be processed in an efficient way. However, even when limiting the number of participants, the contracting authority must guarantee an effective competition between the bidders.

In addition, in certain cases, the contracting authority may restrict or exclude the option for consortia to participate in the invitation to tender.

ii Conflicts of interest

The FAPP provides that the contracting authority must take measures to prevent conflicts of interest. It further provides a list of situations in which an individual acting on the contracting authority's behalf must recuse himself or herself.

The OPP stipulates that the employees of a contracting authority (as well as third parties commissioned by the contracting authority who are involved in an award procedure) are obliged to disclose any secondary employment, contractual relationships and vested interests that could lead to a conflict of interest in the award procedure, and to sign a declaration of impartiality. Moreover, the contracting authority must regularly instruct its employees who participate in award procedures on how to effectively prevent conflicts of interest and corruption. General principles of constitutional and administrative law, according to which members of the administration must recuse themselves if they have a personal interest or could be regarded as lacking impartiality, also apply to public procurements. The IAPP provides for persons concerned to recuse themselves if certain conditions are met but does not specify these conditions. The IAPP 2019, which entered into force on 1 July 2021, contains dispositions almost identical to those in the FAPP.

iii Foreign suppliers

Foreign suppliers coming from countries to which Switzerland has undertaken to grant market access on a contractual basis can participate in Swiss public procurement, provided that the countries concerned have given the same commitment to Switzerland. Even in the case of public contracts outside the scope of international treaties (listed in an annex to the FAPP), pursuant to the FAPP, foreign suppliers can participate in Swiss public procurement procedures if their countries of origin grant reciprocal rights or if the contracting authority allows it. The Federal Council must update its list of countries that grant reciprocal rights.

Although Switzerland is not an EU Member State, it has concluded a set of bilateral agreements with the European Union (and the European Free Trade Association (EFTA)), notably the EU–CH AAGP. EU or EFTA companies have the right to participate in tenders in Switzerland and to second the necessary personnel to Switzerland.

Foreign companies must, however, apply for work permits for their seconded personnel in accordance with the applicable Swiss legislation. They must therefore comply with the requirements on social and working conditions applicable to the location of the awarded contract.

VII AWARD

i Evaluating tenders

The FAPP provides that the contract must be awarded to the most advantageous offer. Tenders must therefore be evaluated using performance-related award criteria, such as the price and quality, appropriateness, time frames, technical value, economic efficiency, life cycle costs, aesthetics, sustainable development, plausibility of the tender, the different price levels in the countries where the supply is provided, reliability of the price, creativity, customer service, delivery conditions, infrastructure, innovation content, functionality, service readiness, and the expertise or efficiency of the methodology. The extent to which the tenderer provides apprenticeship places, jobs for older employees or jobs to reintegrate long-term unemployed people may additionally be taken into account outside the scope of international agreements.

The contracting authority must indicate the award criteria and their weighting in the invitation to tender or in the tender documentation. The weighting may be omitted if the procurement concerns solutions, possible solutions or procedures. Contracts for standard services may also be awarded solely based on the lowest price, provided that the technical specifications for the goods, work or services guarantee high sustainability standards in social, environmental and economic terms.

The FAPP provides an obligation for the contracting authority to request further information from bidders that file an abnormally low tender and enables the contracting authority to exclude such bidders if they cannot respond adequately to the authority's request.

ii National interest and public policy considerations

The GPA 2012 lays down the principle that authorities are required to act in a non-discriminatory manner. National legislation shall not limit the market (i.e., encourage national or local companies, or discriminate against foreign bidders).

The procurement may take into account social or environmental criteria, but these must have a relevance to the market in which the contract is awarded. Thus, to avoid discriminating against foreign companies, one must always ensure that such criteria are objectively necessary for the underlying market.

Furthermore, there are sectors that may be granted individual exemptions from tender procedures. These exemptions are exhaustively listed in the FAPP.

VIII INFORMATION FLOW

Invitations to tender must be published on the government's Simap platform. Tender documents containing all information relevant for a company to decide whether to participate in the tender procedure and to prepare its bid must also be available.

The contracting authority may set a date in the tender documents after which no questions will be answered by the contracting authority with respect to the tender documents. Awards must be published on Simap. Furthermore, the contracting authority must communicate its decision to the bidders and include a reasoned summary of its decision. The contracting authority may conduct a debriefing with an unsuccessful bidder upon request.

In addition, an unsuccessful bidder has the right to request the contracting authority to provide the following information on the award procedure:

- a* the type of tendering procedure used;
- b* the name of the successful tenderer;
- c* the value of the successful tender or the value of the highest and lowest tender taken into account in the tendering procedure;
- d* the main reasons for the rejection of their tender; and
- e* the characteristics and decisive advantages of the successful tender.

However, the awarding authority must not provide this information to unsuccessful bidders if disclosing such information would result in a violation of federal law, be against public interest, prejudice the legitimate commercial interests of the bidders or interfere with fair competition among bidders.

The contracting authority may provide this information in a written statement or invite the unsuccessful bidders for an oral debriefing, which is often the case in practice. Furthermore, other decisions listed in Article 48 of the FAPP – such as the interruption of an award procedure, the choice of participants in the selective procedure or the exclusion of a bidder – must also be communicated to the bidders with summary reasons or be published. During an appeal procedure, the appellant may, on request, consult the documents relating to the evaluation of the appellant's offer and the other documents of the procedure that are relevant to the decision, unless there is an overriding public or private interest that precludes this.

IX CHALLENGING AWARDS

i Procedures

Under the FAPP, an appeal against a decision of the contracting authority is possible if the following conditions are met:

- a* in the case of supplies of goods or services, when the contract value exceeds the applicable threshold for the invitation procedure;
- b* in the case of construction work, when the contract value exceeds the applicable threshold for the open or selective procedure; and
- c* when the decision relates to bids that are not covered by international treaties on public procurement and violate federal law.

Furthermore, the FAPP defines several (final and interim) decisions that can be independently contested by way of appeal. This non-exhaustive list includes:

- a* the award of contract or discontinuation of the award procedure;
- b* the invitation to tender for the contract;
- c* the decision on the selection of participants in the selective procedure; and
- d* exclusions from the tender.

Appeals against these decisions must be brought forward immediately. Their unlawfulness cannot be pleaded at a later point in the procedure.

Appeals against decisions issued by a contracting authority subject to the FAPP may be submitted to the Federal Administrative Court if filed within 20 days of the notification of the decision. If the decision is published on the Simap platform before the tenderers are personally informed about the outcome of the procedure, the date of publication thereon will be relevant for the limitation period.

In addition, in the federal public procurement procedure, suspensive effect must be requested by the appellant. If suspensive effect is not granted or not requested by the appellant, the contracting authority can conclude the contract with the successful bidder.

Appeals against decisions of cantonal or local procurement authorities may generally be submitted to the cantonal public law court within 10 days of the date of publication of the decision. The cantonal decision can then be appealed to the Federal Supreme Court within 30 days, although the Federal Supreme Court's power to review may be very restricted, depending on whether the thresholds are reached.

At cantonal level, there exists a standstill clause under which the contract may not be concluded before the expiry of the time limit for appeals against the award decision. Furthermore, the IAPP 2019 stipulates that, under the revised cantonal procurement laws, appeals against decisions of cantonal or local procurement authorities may generally be submitted to the cantonal public law court within 20 days of the date of publication of the decision.

Decisions of the Federal Administrative Court or the cantonal public court can in general be appealed to the Federal Supreme Court within 30 days of the notification of the judgment of the Federal Administrative Court or the cantonal public court, although the Federal Supreme Court's power to review a decision may be very restricted, depending on whether the thresholds are reached.

ii Grounds for challenge

The appellant may plead any violation of substantive or procedural law, including excess or abuse of discretionary power. The appeal court will review the legality of contested decisions but not their appropriateness. The contracting authority has a great deal of discretion when making decisions and the judge may only review the contracting authority's evaluation of the tenderer's bid in light of the awarding criteria. The grounds may also relate to an incorrect factual situation. In practice, the judge's control in cases of this kind is limited to making a finding of arbitrariness.

An ordinary appeal to the Federal Supreme Court is limited to the ground of federal law violation and manifestly wrong factual assessment established in violation of the law. In the particular case of a subsidiary constitutional appeal, only those constitutional rights of which the unsuccessful bidder is the holder may be invoked.

Furthermore, according to the Federal Act on Administrative Procedure of 20 December 1968, an appeal against other separately notified interim orders is permitted if they may cause a non-redressable prejudice or granting the appeal would immediately bring a final decision and would therefore obviate significant expenditure in time or money in prolonged evidentiary proceedings.

iii Remedies

A distinction ought to be made between the situation in which the unsuccessful tenderer appeals after the award but before the contract is signed with the successful tenderer and the situation in which the unsuccessful tenderer appeals after the contract has been concluded.

In the first case, the possibility to request suspensive effect to prevent the conclusion of the contract remains and, if granted, the unlawful award can be annulled or reformed by the appeal court.

In the second case, the appeal court can only determine the extent to which the contested procurement is in breach of federal (or cantonal) law. Under the FAPP, the appeal court may award damages, within the contested procurement procedure, in connection with expenses incurred by the bidder in preparing the procurement and the appeal procedures for the appellant.

Regarding remedies outside the legislation, the doctrine is divided on whether the remedies provided by the FAPP are conclusive or whether civil claims based on *culpa in contrahendo* are possible. As an informal remedy, a complaint to the supervisory authority of the contracting authority can be made.

X OUTLOOK

Following the revision of the GPA, the GPA 2012 improved transparency and market access, and was ratified by the Federal Assembly on 21 June 2019.

The revised FAPP and OPP entered into force on 1 January 2021. At an extraordinary plenary meeting on 15 November 2019, the cantons also unanimously adopted the IAPP 2019, which largely contains the same rules as the revised FAPP and leaves the cantons little room for their own regulations. The IAPP 2019 was ratified by two cantons, Appenzell Innerrhoden and Argovia, and therefore came into force on 1 July 2021. As of 1 January 2023, the IAPP 2019 has been enacted into cantonal law in 11 cantons (Appenzell Innerrhoden, Argovia, Bern, Fribourg, Graubünden, Lucerne, Solothurn, Thurgau, Schaffhausen, Schwyz and Vaud). Eleven other cantons are currently in the process of ratifying the IAPP 2019 (Basel-Land, Basel-Stadt, Glarus, Jura, Neuchâtel, Nidwalden, Sankt Gallen, Uri, Valais, Zug and Zurich). For the 15 cantons in which the IAPP 2019 did not come into force, the old IAPP 1994/2001 still applies.

Following the latest revisions, procurement legislation has undergone important changes, and therefore further changes are not to be expected in the near future.