

Switzerland

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Lalive

1 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before they took such a step?

Public tenders in Switzerland are regulated by federal, cantonal and municipal laws. Methods are adapted to WTO standards. Relevant information about the legal framework can be found on www.simap.ch. Useful material for foreign bidders can also be found on the website of the Swiss Society of Contractors, including a checklist for tender proceedings: www.baumeister.ch.

For sizeable projects, foreign contractors regularly participate in Swiss public tenders, mainly in joint ventures with local Swiss contractors or engineers. In the largest infrastructure project (the longest railway tunnel in the world – the 57km Gotthard tunnel through the Alps) numerous foreign contractors were awarded contracts.

Public procurement by federal and cantonal (state) authorities is subject to distinct rules. The Federal Law on Public Procurement (RS 172.056.1) governs federal projects exceeding certain value thresholds. It complies with the WTO Government Procurement Agreement of 15 April 1994 that has been incorporated into Swiss law (RS 0.632.231.422). Foreign bidders are admitted provided that they are established in countries that grant reciprocity to Swiss contractors (article 4). As a rule, all bidders must be treated equally. According to article 8 I/a, 'the Federal authority launching the tender ensures the equal treatment of Swiss and foreign bidders throughout the tender process'.

Projects on a cantonal (state) level are subject to a treaty among the cantons: the Intercantonal Treaty on Public Procurement (AIMP). Equal treatment applies. Access to the market is further addressed by the Federal Law on the Domestic Market (RS 943.02) and numerous other regulations.

Bilateral treaties between the EU and Switzerland extend the WTO treatment to procurement by municipalities, to private companies exercising public functions in the areas of water, electricity and gas, as well as to procurement by Swiss state-owned telecoms and railway operators.

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. As major Swiss contractors sometimes have a large real estate portfolio, the acquisition of control in the Swiss contractor may be subject to restrictions.

Foreign contractors wishing to set up a more stable organisation usually establish a limited liability corporation – normally a share company. The rules governing corporations are federal and thus no driving factor for the choice of location within Switzerland. The minimum share capital is 100,000 Swiss francs, at least half of which needs to be paid in at the time of the establishment of the corporation. From 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, section 3 of the 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.

Geographic factors usually play a role in the selection process. Switzerland has three linguistic areas (German, French and Italian). The major cities are Zurich, Geneva, Basel and Bern.

Taxes are levied on federal, cantonal and municipal levels. Some cantons are well known for investor-friendly tax regimes. Tax deals are available in most cantons, though, usually subject to the creation of sustainable employment in the region.

2 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences for working without a licence?

There is no general need for a local licence. However, the adjudication authority will evaluate the professional capacities of the bidders. To this end, the production of the relevant certificates and licences of the bidders' key personnel may be required (annex 3 to the Regulation on Public Procurement, RS 172.056.11).

Local licences may be required for applications for construction permits. For this reason, foreign contractors or design professionals usually tie up with local professionals to liaise with the authorities.

3 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

According to the Federal Law on Public Procurement, all bidders must be treated equally (see question 1).

4 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

Bribery of Swiss and foreign public servants is a criminal offence that will trigger criminal prosecution (article 322ter et seq of the Criminal Code). Contracts that cover the payment of bribes are null and void (article 20 of the CO). Individuals who have accepted bribes can be dismissed immediately. 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 (Supreme Court Decision 129 III 320).

Bribe-givers and bribe-takers are prosecuted and face up to five years' imprisonment or a fine (article 322 ter and quarter of the Criminal Code). Facilitation payments are also criminal offences and both the public official and the contractor face up to three years' imprisonment or a fine (article 322 quinquies and sexties of the Criminal Code).

5 Political contributions

Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

There is no specific law on this issue. At present, Switzerland has no legislation on the financing of political parties, but this could change in the future due to Switzerland having joined in 2006 the Council of Europe's Group of States against Corruption (GRECO). Current legislation on public procurement does not restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties but merely sets out rules that aim to ensure the transparency of procurement procedures and the equality of bidders. As a rule, the making of political contributions is not part of doing business.

6 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

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 saturated, 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.

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.

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 parol evidence. Oral witness evidence is an important feature in contract disputes.

7 Construction contracts

What standard-contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

In Swiss domestic contracts, the construction conditions prepared by the Swiss Society of Engineers and Architects (SIA) are widely used. General conditions only apply if specifically agreed by the parties. As an exception, the Swiss Supreme Court ruled (Decision 4C.261/2005 of 9 December 2005) that two Swiss companies active in the construction business were deemed to have tacitly accepted the SIA standards.

In international construction projects outside Switzerland, the most frequently used conditions of contract are the various sets of conditions issued by FIDIC, often combined with Swiss law. Private parties involved in construction projects in Switzerland can choose whatever law or venue they wish to apply to their contracts and disputes.

Government parties can do so as well, in principle, but they are bound by public procurement rules. Swiss law does not have any specific language requirements for contracts; however, for practical reasons it may be advisable to draft the contract in one of the official languages of Switzerland (German, French or Italian), especially in contracts with public entities.

8 Payment methods

How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Payment is by electronic payment. There is no standard frequency.

9 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

The owner will regularly appoint an engineer. Such engineers are the owner's representative. They do not function as certifier or 'neutral' administrator of the contract; nor do they decide disputes between the contractor and the owner, contrary to some common law jurisdictions. On the contractor's side, large-scale projects usually involve consortia or joint ventures, which may include foreign contractors. Often, the owners choose a general contractor, who retains subcontractors.

10 PPP and PFI

Is there a formal statutory and regulatory framework for PPP and PFI contracts?

Forms of cooperation between public and private entities have become common in many countries, in particular in the UK, but are rare in Switzerland. However, federal authorities and municipalities observe international developments closely and it is expected that PPP and PFI projects may become more frequent in the future.

11 Joint ventures

Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

The relation between consortium members is based on contract and not on statute law. In general, the relationship is that of a simple partnership (article 530 seq of the Code of Obligations (CO)) and the consortium is not a legal entity. Subject to contrary agreement, members of a consortium are jointly and severally liable for obligations to third parties contracted jointly or through representatives (article 544 (3) of the CO). Within the consortium, members may allocate liability and responsibility among them, but unless agreed otherwise with a third party to the consortium, may not avail themselves of this allocation. If the consortium establishes and acts through a corporation, the corporation alone will be liable to third parties. The shareholder's internal liability can be allocated in a shareholders agreement.

12 Tort claims and indemnity

Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

As a rule a party is liable for any damages resulting from non-performance unless it shows that it has no fault at all in the non-performance (article 97 of the CO). Negligence is sufficient to trigger liability. Absence of fault or of negligence of the injured party that is entitled to compensation is not a prerequisite for its entitlement. A concurring fault of the injured party does not limit the non-performing party's liability, but may result in damages not being fully recoverable (for tort claims, see article 44 of the CO).

In its relationship with the owner, the contractor is solely liable for the performance of the contract, and thus for the work of the subcontractors (article 101 of the CO).

Liability for gross negligence and wilful intent cannot be excluded (article 100 of the CO).

If instructions by the owner risk causing delay or defects, or increasing the costs of the work, the contractor is duty-bound to immediately and specifically notify the owner of such risk. Failing such notice, the contractor may be liable for any consequences (article 369 of the CO). The same principle applies in the relationship between contractor and subcontractor, with the subcontractor being obliged to notify the contractor.

13 Liability to third parties

Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

No contract claims against the contractor are possible as no contract exists between the third party and the contractor. The contractor has a contract only with the owner of the building. If the owner sells the building, he or she can assign existing warranty rights to the new owner, who can in turn assert them against the contractor. In the event of third-party damages, if indirect damages are not excluded, the contractor may also face a claim from the owner trying to recoup damages he or she was obliged to pay. If construction defects cause injuries, the contractor might be held liable under criminal law or article 41 of the Code of Obligations, or both.

14 Insurance

To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

All these events can be insured. There is no statutory limit on the amount of the contractor's liability for damages. Contractually, such limitations can be agreed. They do not apply, however, to third parties or in cases of gross negligence or wilful misconduct.

15 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

There is no obligation to employ a certain amount of local labour. For contractors established in Switzerland and hiring locally, the Swiss legislation on foreigners applies. Non-Swiss employees must obtain permits (work and residency) that are subject to regulations. The future employer must show that no Swiss national or national of a state with which Switzerland has treaties guaranteeing the free movement of workers (for example, the EU, with some exceptions for new member states) is available for the position. Further, foreign companies face annual limitations of the number of days (90 or 120) during which they may employ non-Swiss employees in Switzerland without having to acquire a Swiss permit (cross-border delivery of services).

16 Local labour law

If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

The Federal Labour Act (RS 822.11) and the Federal Act on Dispatched Employees (RS 823.20) provide general provisions on working conditions. The Act aims at preventing salary-dumping by

foreign contractors seconding employees to construction projects in Switzerland. Most individual employment contracts in the construction industry are governed by collective contracts of employment jointly elaborated by employers' associations and trade unions. They contain provisions on minimal hours and wages that prevail over the Labour Act if they have been declared applicable to the relevant industry by the federal authorities (for a listing of collective contracts, see the website of the Ministry of Economy: www.seco.admin.ch). The Federal Act on Dispatched Employees also extends the social benefits (contributions to pension funds and to continuous education programmes) in such collective contracts or Swiss employment legislation to dispatched employees. The foreign-based contractor must guarantee the dispatched employees accommodation that is in line with local standards of comfort and hygiene. Before dispatching its employees to Switzerland, the contractor has to notify to the competent Swiss authority of the location and nature of the works and identify the seconded personnel.

Irrespective of their domicile, contractors that use subcontractors are obliged to obtain a contractual undertaking from the subcontractors to the effect that they will comply with the Federal Act on Dispatched Employees. Without such an undertaking, the contractor is jointly and severally liable with the subcontractor for the latter's failure to abide by the Act.

17 Close of operations

If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

Notice periods applicable to employment contracts of terminated employees must be respected. If the contractor is a company with more than 20 employees on its payroll, special provisions governing mass lay-offs apply (article 335d of the CO). If the company is dissolved by means of a voluntary liquidation, statutory rules must be observed (article 739 et seq of the CO). Pension funds legislation may also be relevant. Small severance payments may be due if individual employment contracts that are governed by Swiss law and are not limited in time (by the duration of the project, for instance) are terminated.

18 Payment rights

How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

If the owner does not comply with its obligation to pay the contractor, the contractor may terminate the contracts or insist on payment before continuing the works (article 82 of the CO). Liens can be placed by all contractors (including subcontractors) in accordance with article 839 of the Federal Civil Code for the value of material and works.

19 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

All contract claims against agencies can be pursued in court or, if so agreed, in arbitration. A state agency cannot assert immunity from jurisdiction to escape arbitration (article 177.2 of the Federal Act on Private International Law (PIL Act)). However, it can resist enforcement of an arbitral award or a court judgment based on its immunity from enforcement, if it has such immunity and if the assets against which enforcement is made are covered by it.

20 Insolvency and bankruptcy

Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Under Swiss law, the parties are free to agree in their contracts that insolvency is a ground for termination. In any event, the solvent party is entitled to request security for performance from the insolvent party. According to article 83 of the CO, the solvent party may withdraw from the contract if no such security is provided within a reasonable time.

In any event, the owner may terminate the construction contract for convenience at any time before completion of the works against full payment of works and damages (article 377 of the CO). If the works are delayed, the owner can also avail itself of the remedies of article 366 of the CO. If the contractor does not cure the situation upon request, the owner can withdraw from the contract and have a third party perform the works at the contractor's cost and risk. If the owner chooses to terminate for convenience, without giving the contractor a chance to cure, the owner must compensate the contractor in full.

As a practical matter, owners should ensure that the contractor pays its subcontractors, since the latter have a right to place a lien (article 839 of the CC) on the property for any unpaid work. Payment by the owner to the contractor does not avoid the risk of a lien, even if the funds are earmarked for payment to subcontractors. Unless the payment reaches the subcontractor, a lien can be registered.

21 Force majeure and acts of God

Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

The contractor remains liable for non-performance unless it demonstrates that performance is no longer possible because of reasons that are not its fault (article 97 of the CO). If performance of the works becomes impossible due to circumstances for which the contractor is not responsible, the contractor's obligation to perform is extinguished (article 119 of the CO). If the works are temporarily delayed for reasons within the contractor's sphere of risk (which include force majeure events affecting the contractor's performance), the rules on delayed performance will apply (article 366 of the CO). These mechanisms are not mandatory law, and the parties can agree on different solutions (for instance, by adopting the SIA model contract).

Under article 376 of the CO, the contractor carries the risk for the destruction of the works prior to taking over due to a fortuitous event (which includes but is not limited to force majeure). In such event the contractor will not be reimbursed for its costs.

22 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

The construction industry has established arbitration rules whereby disputes may be referred to specialised tribunals (these can be found on the SIA website: www.sia.ch). There are no state courts specialising in construction disputes. There are state commissions dealing with public procurement disputes.

23 Dispute review boards

Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

Dispute boards are not widely used but were established with success in one of the largest infrastructure projects: the on-going construction of the railway tunnels through the Alps (see question 1).

24 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

There is no federal law on mediation defining the mediation process. Mediation is not commonly used yet, although recently industry associations have adopted mediation and arbitration rules. (For an overview of dispute resolution proceedings in Swiss construction projects, see Dominique Brown-Berset and Matthias Scherer, 'Les modes alternatifs de règlement des différends dans le domaine de la construction', *Journées suisses du droit de la construction JDC*, 2007, pp 265–87.)

25 Confidentiality in mediation

Are statements made in mediation confidential?

There is no statutory federal law on confidentiality in mediation. The parties are free to adopt institutional or ad hoc mediation rules that address confidentiality. For instance, articles 7 and 18 of the ICC ADR Rules and the Mediation Rules of the Swiss Chambers of Commerce provide that statements made in the mediation are confidential at all times, even in subsequent litigation or arbitration.

26 Arbitration of private disputes

What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Under Swiss law, most disputes are arbitrable (article 177 of the PIL Act; article 354 of the Federal Code of Civil Procedure). Compulsory jurisdiction of the courts exists in a few limited areas, such as lease and employment contracts. Commercial contracts are, as a rule, arbitrable. 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 organisation from relying on its own law to contest its capacity to be a party to an arbitration or the arbitrability of the dispute.

27 Governing law and arbitration providers

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

Contracts for domestic construction projects usually provide for the jurisdiction of the local courts, especially if the owner is a public entity. 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 (these can be found on the SIA website: www.sia.ch).

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 Swiss PIL Act.

28 Dispute resolution with government entities

May government agencies participate in private arbitration and be bound by the arbitrators' award?

Yes.

29 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Enforcement of foreign arbitral awards in Switzerland is governed by the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 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.

30 Limitation periods

Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

The general limitation periods of the CO also apply to construction and design works. The normal limitation period is 10 years (article 127 CO). Exceptionally, a five-year time bar applies for works essentially performed by craftsmen (128 CO). The section on works contracts contains special rules for claims regarding defects. Such claims are time-barred after one year for moveable works, and after five years for immovable works and related design services (article 371 CO). The limitation period to bring a claim must be distinguished from contractual or statutory notice requirements that may impose a much shorter time limit on a party that wishes to assert a claim. In particular, under article 370 CO, the owner has to notify hidden defects immediately upon their discovery. The parties can provide for other notice requirements in their contracts.

31 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

The environment is protected by a multitude of laws and regulations, mainly due to the Federal Law on Environmental Protection (RS 814.01). This Law provides for compulsory studies to be prepared to assess the effect on the environment of projects of a certain size. Construction site waste needs to be separated into normal and hazardous or special waste (Regulation SR 814.600).

32 Local environmental responsibility

What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Swiss federal environmental law is very detailed and tailored to protect humans, animals and the environment against all types of pollution. Any construction that may create an environmental hazard is subject to a pre-construction impact study that is then published. The environmental impact of a construction on soil and water is under particular scrutiny. As a rule, the entity causing the pollution or creating an environmental hazard is liable to pay all costs linked with preventing or repairing damages to the environment. On the cantonal level, specific rules may apply taking into account the particular natural environment of the canton.

33 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Switzerland has adhered to the ICSID Convention and has one of the largest bilateral investment protection treaty (BIT) networks, with over a 100 worldwide. There is no publicly available model BIT. Arbitration (mainly under UNCITRAL or ICSID rules) will be available to the investor in most instances. Each treaty will have to be looked at individually to assess whether infrastructure projects qualify as a relevant investment. ICSID precedents show that projects of a certain size and duration regularly qualify. ICSID arbitration is available in the event of a breach of protection granted in a BIT (eg, discrimination against or expropriation of a foreign contractor).

A mere contract violation will only exceptionally qualify as a treaty breach sufficient to establish jurisdiction of the ICSID arbitral tribunal (for instance, by operation of an 'umbrella clause'. For a discussion, see the awards in two ICSID cases based on a Swiss BIT: *SGS v Pakistan* and *SGS v Philippines*).

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34 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Switzerland has concluded numerous income tax treaties to avoid double taxation. These treaties usually provide for reduced withholding rates on dividends, interest and royalties. To benefit from a reduced treaty withholding rate, the foreign recipient must generally apply to the Swiss tax authorities for a refund. Certain treaties may provide a direct reduction at source under certain conditions.

35 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

No, there are no currency controls in Switzerland.

36 Removal of profits and investment

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

Taxes may apply to dividends as indicated in question 34, at rates varying depending on the jurisdiction of residence of the investor deriving a profit from an investment in Switzerland.