

Construction and projects in Switzerland: overview

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OVERVIEW OF THE CONSTRUCTION AND PROJECTS SECTOR

1. What are the main trends in the local construction and projects market? What are the most significant deals?

Main trends

After the Swiss National Bank lifted the minimum Swiss franc-euro exchange rate in January 2015, the general price levels in Switzerland (including labour costs) decreased, which had a dampening effect on the Swiss economy (Swiss franc shock), especially on the export sector.

The direct effects for the Swiss real estate and construction sectors were, however, relatively negligible due to the domestic bias in these sectors. Additionally, the effects were compensated by very low interest rates, which resulted in comparably low financing costs, as well as negative interest rates, which were driving investors into real estate.

The UK vote to exit the European Union in June 2016 (Brexit) has and will further intensify the existing trends in Switzerland, driving investors even deeper into real estate. Directly after the Brexit, the shares of listed real estate companies in Switzerland reached a historically high level. Real estate investments have therefore again proven to be crisis-resistant.

Due to the constant growth of the population and the declining households' sizes, demand on the residential market is still strong. This contrasts with the high-price segment and the market for office space on which, especially in city centres, supply exceeds demand.

Major projects

Major projects include:

- Federal railway projects:
 - NEAT: new railway transalpine axis for freight transport and passenger services (cost: CHF23.5 billion);
 - GOTTHARD: renovation of the existing Gotthard road tunnel (cost: CHF2.8 billion);
 - CEVA: railway connection between Geneva and Annemasse (France) (cost: CHF1.5 billion);
 - HGV: improving Switzerland's accessibility to the European high-speed transportation network (for example, Biel/Bienne-Belfort, Zurich-Munich and Basel-Mulhouse) (cost: CHF1.3 billion).
- Hotel projects: Bürgenstock, a car-free resort above Lake Lucerne with three hotels (400 rooms), 68 residence suites, a golf course, a conference centre as well as several restaurants and bars (cost: CHF500 million).

- Mixed use projects:
 - "The Circle": business centre with offices, a medical centre, hotels, restaurants and congress rooms next to the Zurich airport (cost: CHF1 billion);
 - Greencity: construction of 740 apartments and 3000 workplaces until 2020 in the south of Zurich (2000 Watt Society certificate) (cost: CHF900 million);
 - Genève Pont-Rouge: construction of 600 apartments, offices, hotels and schools. This is a real estate project of the Swiss Federal Railway (cost: CHF670 million);
 - Horw Mitte: construction of 520 apartments, 1700 workplaces, a railway square and a park (cost: CHF600 million).
- Chemical industry projects:
 - Roche Campus: Roche officially inaugurated the highest skyscraper in Switzerland (178 metres) in September 2015. The company plans additional construction projects over the next decade, such as a new research and development centre for about 1,900 employees, new office buildings for 1,700 workers (including a skyscraper of 205 metres) (cost: CHF3 billion);
 - Novartis Campus: the first stage of the campus is completed, but additional construction projects are planned until 2030 (cost: CHF2.5 billion).

PROCUREMENT ARRANGEMENTS

2. Which are the most common procurement arrangements if the main parties are local? Are these arrangements different if some or all of the main parties are international contractors or consultants?

There are several types of procurement arrangements depending on the complexity of the project, regardless of whether the main parties are local or international:

- **Single contractors.** This model is mainly used for smaller projects. The owner or developer enters into several construction agreements with several partial contractors. The project is co-ordinated by the owner or developer. The responsibility of the partial contractors is limited to a specific part of the construction (for example, electricity).
- **General contractors.** This model is used for larger and complex projects. The owner enters into one agreement with the general contractor who is responsible for the execution of the owner's project for a fixed price. The general contractor usually enters into further agreements with subcontractors.
- **Total contractors.** This model is used for very large projects, where the total contractor is commissioned to design a project

and to execute it. The total contractor therefore not only coordinates with architects and other planners but also executes the work performed by a general contractor.

TRANSACTION STRUCTURES

3. What transaction structures and corporate vehicles are most commonly used in both local and international projects?

Local projects

In commercial projects, Swiss investors often incorporate a Swiss real estate company in the legal form of a corporation or a limited liability company, and use it as a special purpose vehicle (SPV) for this specific matter only.

Apart from corporate SPVs, contractual structures are used to organise relationships between contractors as consortiums. It is very common in Switzerland to use consortiums for large projects, due to the joint liability of the members of the consortium for the realisation of the project towards a client.

International projects

Cross-border real estate investors use the same structures as Swiss investors (see above, *Local projects*).

FINANCE

4. How are projects financed? How do arrangements differ for major international projects?

In Switzerland, real estate projects of Swiss and foreign investors are usually financed through equity and debt. Banks and certain life insurance companies grant mortgages against corresponding collaterals of generally 70% to 80% of the market value of the property.

In addition, large real estate companies often issue bonds. More complex financing instruments may be used depending on the complexity, size and type of the project.

The interest rates for mortgages in Swiss francs have been historically low. Based on the current situation on the market, a turnaround of interest rates is not to be expected in the foreseeable future.

SECURITY AND CONTRACTUAL PROTECTIONS

5. What forms of security and contractual protections do funders typically require to protect their investments?

Security

Typically, the funders will request a lien on the real property in the form of a mortgage certificate, which will allow them to foreclose on the property in the event of default.

Other securities that may be required include:

- Global assignment of receivables (for example, the rights to proceeds arising from the lease of the premises).
- Parent guarantee or surety.
- Pledge of shares (if the building owner is a stock company), bank accounts or other assets or intellectual property rights.

Contractual

Lender banks often require that the owner undertakes to hold all of its assets in accounts with them, which allows them to set off any

claims out of the building loan against these assets, whereas they exclude a reciprocal set-off right of the customer.

STANDARD FORMS OF CONTRACTS

6. What standard forms of contracts are used for both local and international projects? Which organisations publish them?

Local projects

The most frequently used standard forms of contracts are those published by the Swiss Society of Engineers and Architects (SIA). They cover a large range of different contractual relationships, including contracts between building owners and contractors, architects and engineers.

In addition, even when the parties do not use standard forms of contracts, they commonly refer to specific SIA norms and include them into their agreements. SIA norms embody the current state-of-the-art for different aspects of planning and construction.

International projects

Although Switzerland is one of the founding members of the International Federation of Consulting Engineers (*Fédération Internationale des Ingénieurs-Conseils*) (FIDIC), which has its offices in Geneva, the FIDIC forms are not used in Switzerland, not even for international projects. For most international projects, the same templates and norms are used as for local projects (see above, *Local projects*).

CONTRACTUAL ISSUES

Contractors' risks

7. What risks are typically allocated to the contractor? How are these risks offset or managed?

Under Swiss statutory law, a contractor usually has the same duties of care as an employee in an employment relationship, that is, the contractor must either:

- Carry out the work in person.
- Have the work carried out under his personal supervision.

The contractor is liable for any defects of the work. If the work is defective to the extent that the customer has no use for it or cannot equitably be expected to accept it, the contractor is at fault and the customer can seek damages.

The risk of destruction of the work before completion or delivery usually lies with the contractor. As a result, the contractor is not entitled to payment for any unfinished work and must, provided that reconstruction is possible, re-do the work at its own cost, unless the reason for the destruction is attributable to the customer.

Where the parties have agreed on a lump sum for the work, the contractor must carry out the work for the fixed price, even in cases where its expenses are higher than contemplated. The only exception to this rule applies in the case of extraordinary circumstances which were unforeseeable or excluded under the contract. In practice however, Swiss courts have the discretion to qualify additional work as extra performance under the agreement, therefore approving the price increase by the contractor.

Since these rules are all non-mandatory, the statutory regime can be contractually modified in favour of the client or the contractor.

Excluding liability

8. How can liability be excluded or restricted under local law?

Under Swiss law, contractual liability can be excluded, restricted or modified at will, except liability for damages caused by wilful intent or gross negligence.

Under statutory law, the contractor can also exclude its liability for acts carried out by its auxiliaries, including its subcontractors.

In any event, excluding liability for physical injury is not possible.

Caps on liability

9. Do the parties usually agree to a cap on liability? If yes, how is this usually fixed? What liabilities, if any, are typically not capped?

Caps on liability can take various forms (for example, caps on the amount of insurance coverage or multiples of the compensation). However, such caps do not apply to cases of liability due to gross negligence or wilful intent.

Force majeure

10. Are force majeure exclusions available and enforceable?

Under Swiss law, a force majeure event can break the causation link between an act/omission and the damage, and therefore exclude the liability of the contractor.

The Swiss Society of Engineers and Architects' Norm 118, which is often included in contracts, provides that the contractor is entitled to equitable compensation if the work is destroyed due to force majeure.

Material delays

11. What contractual provisions are typically negotiated to cover material delays to the project?

Statutory law provides that the customer is entitled to withdraw from the contract before the agreed delivery date if the contractor either:

- Fails to commence the work on time or delays its performance in breach of contract.
- Falls so far behind schedule that there is no longer any prospect of completing the work on time, provided that the customer is not at fault.

As the above provision is vague and incomplete, the parties often agree on contractual penalties applicable in the case of delays. These penalties often consist of a percentage of the price depending on the importance of the delay, based on a clearly defined construction schedule.

Material variations

12. What contractual provisions are typically negotiated to cover variations to the works?

Under statutory law, the customer can refuse acceptance and, if the contractor is at fault, seek damages if the work is so defective or deviates from the contractual terms to such an extent that the customer has no use for it or cannot equitably be expected to accept it (rescission).

In the case of minor defects or minor deviations from the contractual terms, the customer can either:

- Reduce the price in proportion to the decrease in value of the works (reduction).
- Require the contractor to rectify the work at its own expense and to pay damages if it was at fault, provided that such rectification is possible without excessive costs to the contractor (repair).

In the case of works carried out on the customer's land or property which, by its nature, cannot be removed without disproportionate detriment to the contractor, the customer can only request a reduction of the price or repair.

This regime is often contractually modified so that the customer must first seek repair before other options are available.

In any case, the rights of the customer for defects in the work are forfeited if he is at fault for these defects due to having given instructions concerning performance of the work that were contrary to the express warnings of the contractor, or for any other reason.

Other negotiated provisions

13. What other contractual provisions are usually heavily negotiated by the parties?

Provisions relating to price, quality, the definition of additional services and the construction schedule are usually heavily negotiated.

Subject to certain mandatory provisions, the parties are free to agree on all aspects of their contractual relationship.

ARCHITECTS, ENGINEERS AND CONSTRUCTION PROFESSIONALS

14. How are construction professionals usually selected? Following selection, how are they then formally appointed?

For the realisation of a project of a certain size, the developer and/or the land owner, or the construction manager, generally invite several contractors to submit their offer for the works to be performed. Based on the offers received, the developer then selects the most suitable offer and appoints the respective contractor, provided that it does not make a counter-offer which triggers further negotiations. This appointment is not subject to formal requirements, and can be made orally or in writing, or result from conclusive actions

In the private sector, it is not mandatory to conduct a selection process through a tender process, whereas in the public sector the tender proceeding rules must be observed by public entities if certain thresholds for the work to be performed are reached or exceeded.

International treaties provide for such thresholds, which have been implemented in Switzerland on a federal, cantonal and even communal level. These national regulations set out the applicable formal procedure that guarantees equal treatment of the participating contractors and grants the contractor a right to appeal in certain cases.

15. What provisions of construction professionals' appointments are most heavily negotiated? Are liabilities commonly limited or capped in construction professionals' appointments?

Negotiated provisions

See *Question 13*.

Liability

See *Question 8*.

Developers usually seek to exclude liability to the extent possible under mandatory Swiss law. Contractors, who are often in a weaker position, are frequently presented with a "take it or leave it" offer, resulting in the acceptance of very unfavourable liability rules for them.

Certain contractual relationships, such as construction management agreements, are deemed to be agency contracts (*mandate, Auftrag*). Other agreements involve agency contract components, such as mixed agreements containing planning and management obligations. Under Swiss case law, agency contracts can be terminated at any time by both the service provider and the principal. This provision is considered to be mandatory by the Federal Supreme Court and also applies to mixed agreements. However, if the mandate is terminated at an "inappropriate moment", the terminating party must indemnify the other party. This right of termination cannot be circumvented or hindered through contractual provisions (for example, notice periods or contractual penalties).

PAYMENT FOR CONSTRUCTION WORK

16. What are the usual methods of payment for construction work? Are there ways for the contractor and consultants to secure payment or mitigate risks of non-payment under local law?

Methods of payment

According to Swiss statutory law, payment for construction work is due on completion or delivery, unless the work is delivered in parts and payment by instalments has been agreed (in which case the amount due for each stage of the work is payable on delivery).

Parties often agree on monthly advance payments or payments on account in line with the progress of the work.

The SIA Norm 118, which is frequently used in practice, provides for a sophisticated payment regime:

- Management services are invoiced monthly on a time-spent basis.
- Services delivered at fixed unit prices are invoiced monthly per delivered unit.
- Final accounting must be delivered, at the latest, two months after approval of the work; checked by the construction manager within 30 days, and paid within another 30 days.
- If the owner of the building is contractually entitled to retain a percentage of the monthly invoices, this amount is released on:
 - approval of the work;
 - receipt of final accounts and expiration of examination period; or
 - the granting of a joint and several surety or guarantee for the guarantee period (if applicable).

Securing payment

A builder's lien over the property can be registered in the land register by any contractor and subcontractor that has supplied labour and materials (or labour alone) for construction work, demolition work, scaffolding work, work for securing the construction pit or other similar work. A builder's lien can be registered with the land register in Switzerland regardless of whether the debtor is the owner of the property, the general contractor, a tradesman, a tenant or any other person with rights over the property. However, where the debtor is a tenant or another person with rights over the property, the lien can only be registered if the owner has consented to the work.

Builder's liens are by far the most efficient way for contractors to secure payment claims and are widely used in practice, since the provisional registration of a builder's lien can easily be obtained through a summary judicial procedure.

SUBCONTRACTORS

17. How do the parties typically manage their relationships with subcontractors?

Under statutory law, a contractor must carry out the work in person or have the work carried out under its personal supervision, unless the nature of the work does not require its personal involvement.

It is advisable to explicitly agree on the appointment of subcontractors in the construction agreement. The Swiss Society of Engineers and Architects' Norm 118 provides that, as a default rule, the appointment of subcontractors requires the prior consent of the building owner/customer.

The subcontractor is an auxiliary of the contractor and does not have a direct contractual relationship with the building owner/customer. The contractor is responsible for the actions of the subcontractor, unless its liability has been contractually excluded (see *Question 8*).

LICENSING

18. What licences and other consents must contractors and construction professionals have to carry out local construction work? Are there any specific licensing requirements for international contractors and construction professionals?

There are no federal licensing requirements. However, certain cantons (mainly the French and Italian speaking cantons) impose such requirements on engineers and architects:

- In the cantons of Vaud, Fribourg, Geneva, Neuchâtel and Ticino, engineers and architects must be registered or authorised in the canton or at least fulfil certain qualifications in order to carry out certain categories of work. The scope of such works varies, but always includes the planning and/or submission of a building permit application.
- In the canton of Lucerne, engineers and architects must undertake specific professional education and training.

In all other cantons, access to the private and public construction sectors is free, unless tender conditions require certain qualifications. Some cantonal construction laws require that building owners hire local authorised land surveyors.

In the majority of cantons where access to the construction sector is free for Swiss construction professionals, access is also free for international contractors and construction professionals.

In the other cantons, to be registered in the local registries, international professionals from EU and European Free Trade

Association (EFTA) countries can request that their diploma be recognised based on the free movement of persons agreements concluded with the EU and the EFTA. They must submit a formal request to the competent authority, which varies depending on the type of diploma to be recognised.

19. What licences and other consents must a project obtain?

Before

Every construction in Switzerland requires a building permit. The requirements to obtain a permit are set out in the:

- Federal Statute on Zoning and Planning.
- Zoning and construction statutes enacted by the cantons and the communes.

Federal infrastructure projects are governed by specific federal statutes and are subject to a distinct authorisation procedure.

Complex projects require various authorisations in addition to a building permit. The issuance of such authorisations must be coordinated both procedurally and in substance.

During

Once a building permit has been granted, the construction must start within a certain deadline, otherwise the validity of the permit will lapse. A building permit will also lapse in the case of interruptions of the work for lengthy periods.

During the construction work period, the local construction supervisory authorities supervise and inspect the construction site to ensure that the building, the building pit and the scaffolding comply with the building permit and the applicable construction laws.

On completion

On completion, the authorities inspect the building to verify compliance with the building permit and the applicable construction laws. In certain cantons, the authorities deliver a permit to use the building once these verifications are completed.

PROJECTS INSURANCE

20. What types of insurance must be maintained by law? Are other non-compulsory types of insurance maintained under contract?

Compulsory insurance

In most cantons, it is compulsory to take out insurance covering fire and elementary damages during the construction works.

Non-compulsory insurance

The building owner often takes out a civil liability insurance covering damages caused to third parties. In addition, it is common for the owner, contractor and other parties involved to take out insurance covering damages to the building during the construction process.

Contractors often take out, and owners often request, insurance covering claims of the building owner for defects that appear during the warranty period.

EMPLOYMENT LAWS

21. What are the main requirements for hiring local and foreign workers?

Local workers

Apart from the provisions in collective agreements (see *Question 22*) there are no requirements for hiring local workers.

Foreign workers

Switzerland has entered into the Agreement on the Free Movement of Persons with the EU that allows EU citizens to take up residence in Switzerland provided that they have signed an employment agreement with a Swiss employer.

Swiss employers that want to hire third country citizens must show that they were not able to find suitable workforce within Switzerland and the EU. Work permits for these workers are subject to quotas.

Foreign companies based in the EU that want to assign workers to work on projects in Switzerland can do so for a maximum duration of 90 days per calendar year through a simple online registration. However, by registering its employees, a company undertakes to grant them Swiss market standard salaries and working conditions for the duration of the assignment (subject to sanctions in the case of non-compliance). In the construction sector, they must also comply with the applicable collective agreements (see *Question 22*).

Assignments by EU companies exceeding 90 days or assignments by third country companies for any period require regular work permits for the assigned employees. Such permits are only granted if all of the following conditions are met:

- The employees benefit from Swiss market standard salaries and working conditions during the assignment. In the construction sector, these are set out in applicable collective agreements (see *Question 22*).
- Quotas are available.
- The project is in the general interest of the Swiss economy.

The same rules as for EU citizens apply to citizens of European Free Trade Association member states.

22. Which employment laws are relevant to projects?

Most construction workers in Switzerland are bound by collective agreements. The most important agreement is the collective agreement for the construction industry. These agreements contain specific rules that differ from the statutory labour law. For example, collective agreements contain minimum wage provisions, whereas Swiss statutory law does not.

23. Must an employer pay statutory redundancy or other payments at the end of a project? Are all employees eligible?

If employees become redundant at the end of a project, the employer can terminate their employment agreements. Unless the parties have agreed otherwise, the statutory notice period does not exceed three months. Collective agreements in the construction sector provide for notice periods of up to six months.

However, in certain circumstances (depending on the size of the company and the number of employees to be terminated), the employer has a statutory obligation to consult the employees and

to provide a "social plan". The purpose of such a plan is to avoid the termination of employment agreements or reduce the number of terminations, and to mitigate their consequences. A social plan can include redundancy payments. If the parties cannot agree on a social plan, a federal instance or an arbitration court will decide on the plan.

HEALTH AND SAFETY

24. Which health and safety laws apply to projects?

The following health and safety laws apply to projects:

- Ordinance regarding the safety and health of construction workers of 29 June 2005 (Construction Works Ordinance).
- Ordinance regarding the avoidance of accidents of 19 December 1983.
- Ordinance No. 3 to the Labour Act of 18 August 1993.

The Construction Works Ordinance requires contractors to carefully plan construction works with regard to workers' health and safety and contains comprehensive regulations on the necessary measures a contractor must take for this purpose. The Swiss Accident Insurance Fund, a public law insurance institution, has issued an extensive online planning tool allowing contractors to customise their health and safety plan according to the construction works in question.

Under Swiss criminal law, any person engaged in the management or execution of construction or demolition work that wilfully disregards the accepted rules of construction and, as a result, knowingly or by negligence endangers the life and limb of others, is liable to a custodial sentence of up to three years and/or to a monetary penalty.

Depending on the circumstances of the case, the prosecution authorities can press further charges if the violation of health and safety rules causes (among others):

- Injury to a worker.
- The death of a worker.
- A conflagration.
- Flooding.
- The collapse of a building.
- A landslide.
- An explosion.

ENVIRONMENTAL ISSUES

25. Which local laws regulate projects' effects on the environment?

To be authorised, all construction and infrastructure projects must comply with the requirements of the Spatial Planning Law and all relevant environmental regulations. The planning authorities must also integrate the requirements of environmental regulations into their zoning and planning instruments. These requirements are reviewed by the authorities that deliver building permits and are integrated in such permits.

Air

Air pollution is regulated by the Federal Environmental Protection Act (EPA) and the Ordinance on Air Pollution Control of 1985 (OAPC). As a general rule, air emissions must be limited at their respective source using state-of-the-art technology, provided that the costs of doing so are not excessive.

Existing and new facilities must comply with the emissions limitation standards provided under the OAPC and/or the construction and operating permits. If emissions due to combined sources of air pollution exceed exposition thresholds, the competent authorities will order stricter abatement measures.

Water

The Water Protection Act (WPA), supplemented by ordinances, applies to all public and private surface and underground waters. The Federal Fishing Act of 1991 includes further water protection provisions. Activities that may pose a risk to waters are subject to a permit issued by the competent cantonal authorities, for example, constructing and converting buildings and installations in areas that are particularly vulnerable (including operations such as excavations, earthworks and similar works).

Waste

Waste is any movable material disposed of by its holder, or the disposal of which is required in the public interest. Disposal of waste is governed by the EPA, which is complemented by several ordinances and rules, including the:

- Ordinance on Waste of 2015.
- Ordinance on Movement of Waste of 2005.
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

Construction waste, in particular polluted excavated material, must be disposed of according to the specific provisions applicable to hazardous waste.

Environmental impact assessments (EIAs)

Construction or planning projects for facility or transport infrastructure that may substantially impact the environment are subject to an EIA. EIAs are regulated by the EPA and the Federal Ordinance on Environmental Impact Assessment of 1988, which contains a list of projects that are subject to an EIA. The aim of an EIA is to assess the project's compliance with all relevant statutory provisions, as well as cantonal and municipal regulations.

The competent authority must assess the project's environmental impact based on the:

- Environmental report.
- Recommendations and observations of any other relevant cantonal or federal authorities (such as the federal or cantonal office for the environment, or the Federal Office of Energy).
- Observations and oppositions filed by any interested party.

The authority can impose all necessary additional measures or conditions to ensure compliance with the environmental regulations. The EIA is not a licence but is part of the general authorisation to build or a part of the planning procedure. The final decision (that includes the EIA) is published.

Sustainable development

According to the Swiss Federal Office of Energy, about 50% of Switzerland's primary energy consumption is currently attributable to buildings. There is a very large potential for enhancing energy efficiency in the construction sector. Under Article 89 of the Federal Constitution and the Federal Energy Act of 1998, the cantons are responsible for enacting and implementing provisions on the efficient use of energy in the construction sector. They have adopted common energy standards (*Modèle de prescriptions énergétiques des cantons*) (MoPEC 2014), some of which are based on the norms of the Swiss Society of Engineers and Architects and which cover a large range of issues (including building shell, heating system and isolation). The cantons must integrate these standards in their own statutes.

26. Do new buildings need to meet carbon emissions or climate change targets?

Switzerland is a party to the UN Framework on Climate Change and the Kyoto Protocol. Switzerland committed itself to reduce its greenhouse gas emissions by 50% by 2030 as compared with 1990 levels. The legal framework for the implementation of the Kyoto Protocol is set in the Federal Act on the Reduction of CO₂ Emissions of 2011 (CO₂ Act) and the Ordinance for the Reduction of CO₂ Emissions.

By 2020, CO₂ emissions from buildings should be reduced by at least 40% below the 1990 level. The CO₂ Act establishes an interim target for 2015 of a 22% reduction in CO₂ emissions below the 1990 level (*Article 3, CO₂ Act*). In the long term, Switzerland's building stock should be CO₂-free. Since 2010, one-third of the revenue from the CO₂ levy is used for the federal and cantonal buildings programme. This programme promotes the renovation of building shells as well as investment in renewable energies, waste heat recovery and building utilities.

The cantons must define standards for the continuous reduction of CO₂ emissions in new and older buildings (*Article 9, CO₂ Act*). The cantons' common energy standards (*Modèle de prescriptions énergétiques des cantons*) (MoPEC 2014) set out technical standards in this respect that the cantons must implement.

PROHIBITING CORRUPT PRACTICES

27. Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Rules

The rules prohibiting corrupt business practices and bribery are set out in the Swiss Federal Criminal Code (SCC). There are no specific rules targeting the construction sector.

A new provision regarding bribery in the private sector was integrated into the SCC and entered into force on 1 July 2016. The SCC now contains provisions regarding bribery in both the public and private sector.

Under the definition of bribery in the public sector included in the SCC, it is a crime for any person to offer, promise or give an official a bribe, or for an official (whether a Swiss or a foreign official) to accept a bribe. Granting an advantage to an official and the acceptance of such advantage by an official are also crimes under Swiss law.

Bribery in the private sector has a similar definition. The SCC provides that it is a crime for a person to offer, promise or give an employer (a company member, agent or any other auxiliary to a third party) in the private sector an undue advantage, or for an employer (a company member, agent or any other auxiliary to a third party) to accept an undue advantage. Advantages permitted under public employment law or contractually approved by a third party, as well as negligible advantages that are common social practice, do not qualify as undue advantages.

While criminal sanctions are usually aimed at individuals only, companies can also be prosecuted for corruption and held liable if they fail to take all reasonable organisational measures to prevent bribery.

Penalties

In the case of bribery of Swiss or foreign public officials, individuals face a penalty of imprisonment of up to five years or a monetary penalty (depending on the income and wealth of the individual).

In the case of bribery in the private sector, individuals face a penalty of imprisonment of up to three years or to a monetary penalty (depending on the income and wealth of the individual).

A company that failed to take all the reasonable organisational measures that were required to prevent the bribery of officials or private persons is sanctioned by a monetary fine of up to CHF5 million (*Article 102, SCC*).

BANKRUPTCY/INSOLVENCY

28. What rights do the client and funder have on the contractor's bankruptcy or insolvency?

The bankruptcy or insolvency of the contractor does not automatically terminate the contract for work unless the parties have specifically agreed to termination in the contract.

Under the Swiss Debt Enforcement and Bankruptcy Act, on the opening of bankruptcy proceedings, non-monetary claims (such as the performance of construction work) are converted into monetary claims representing the value of the original claim, which can then be produced in the bankruptcy proceedings. However, the receiver of the bankrupt contractor can decide to perform the contract for works. In such a case, the receiver must inform the client that he will perform the contract and the client can request security. The client can withdraw from the contract if, on request, no security is provided for the performance of the contract.

PPPS

29. Are public private partnerships (PPPs) common in local construction projects? If so, which sectors commonly use PPPs?

PPPs are not broadly used in Switzerland but have become more popular in recent years.

PPPs are used for projects in the following sectors:

- Industry.
- Infrastructure (for example, fire station, day-care centre, underground parking lot, long-distance heating station).
- Transport (for example, bus station, bike stations in Zurich).
- Leisure (for example, sports and events centre).
- Defence.

30. What local laws apply to PPPs?

There is no specific legislation on PPPs in Switzerland. However, the federal administration must assess for each project whether a PPP may be appropriate (*Article 52a, Financial Budget Ordinance*).

31. What is the typical procurement/tender process in a PPP transaction? Does the government or another body publish standard forms of PPP project agreement and related contracts?

Due to the lack of specific legislation for PPPs, the general rules on procurement/tender apply. The central issue of whether a PPP project is subject to public procurement law must be carefully examined in each case.

The main stages of the procurement process are as follows:

- Publication of the invitation to tender for a planned contract on www.simap.ch.
- Submissions by suppliers within the deadline.
- Evaluation of the offers submitted and determination of the economically most advantageous offer.
- Potential appeal procedures.

Below certain turnover thresholds, procurements can be awarded through a (less restrictive) invitation procedure or a limited tender procedure, under which the award can be awarded directly to a specific supplier without conducting a tender procedure. There are certain exemptions that also justify the application of the limited tender procedure (for example, if the contract has special technical or artistic features that can only be provided by one specific supplier or in the absence of adequate alternatives).

There are no standard contracts/forms or best practice rules for PPPs.

DISPUTE RESOLUTION

32. Which are the most common formal dispute resolution methods used? Which courts and arbitration organisations deal with construction disputes?

Formal dispute resolution methods

The most commonly used formal dispute resolution methods in domestic matters are regular court litigation and ad hoc or institutional arbitration. Arbitration clauses are regularly used in international projects.

Courts and arbitration organisations

The applicable court litigation proceedings mainly depend on the value at stake. Usually, the regular courts of first instance are competent and a mandatory conciliation procedure must be followed before the actual court litigation.

If a cantonal commercial court is competent, which is usually the case if at least the defendant is a commercial enterprise, no conciliation procedure is required before filing a lawsuit. In litigations with a value exceeding CHF100,000, the parties can agree to submit the case directly to the superior court, which will then act as judge (cantonal) instance.

In arbitration proceedings, the use of arbitration institutions (such as the International Chamber of Commerce (ICC)) and ad hoc arbitration clauses are both frequent. In addition, there are specialised local arbitration tribunals in the construction and real estate sectors, including the:

- Arbitration Tribunal for Construction and Real Estate (*Schiedsgericht Bau + Immobilien*), constituted by several major players in the construction and real estate sectors such as the House Owners Association (*Hauseigentümergeverband*), Geneva Real Estate Chamber (*CGI Conseils*), the Swiss Builders Association (*Baumeisterverband*) and the Swiss Society of Engineers and Architects (SIA) (www.hev-schweiz.ch/home/schiedsgericht).
- Swiss Arbitration Tribunal for Construction Business (*Schweizerisches Schiedsgericht in Bausachen*) (SSIBS), which is an independent arbitration institution (www.ssibs.ch).
- Arbitral Tribunal for the Swiss Real Estate Industry (*Schiedsgericht der Schweizer Immobilienwirtschaft*) of the Swiss Association of Real Estate Trustees (*Schweizer Verband der Immobilienreuhänder*) (SVIT) (www.svit-schiedsgericht.ch).

33. What are the most commonly used alternative dispute resolution (ADR) methods?

Parties commonly agree in their contract that, before initiating court or arbitral proceedings, they must submit their disputes to an institutional or informal conciliation or mediation procedure led by mediators specialised in construction and/or real estate matters.

Under the Swiss Civil Procedure Code, the parties can agree that mediation replaces the conciliation procedure that is usually required before initiating first instance court litigation. Parties can also at any time jointly request the court to suspend the proceedings in order to conduct mediation.

TAX

34. What are the main tax issues arising on projects?

Corporate income tax

Contractors that are tax resident in Switzerland are subject to a combined federal/ cantonal/municipal effective corporate income tax rate of about 12% to 24% depending on the canton, the location of the properties and the inter-cantonal allocation of profits.

Foreign contractors with a permanent establishment in Switzerland are subject to the same provisions. Under many tax treaties, a construction site in Switzerland constitutes a permanent establishment if the site is active for more than 12 months.

Annual capital tax on equity

The statutory/fiscal equity (that is, share capital plus open reserves, taxed hidden reserves and deemed equity under thin capitalisation rules) is subject to an annual capital tax of about 0.2 % (average of cantons) depending on the location of the property.

Value added tax (VAT)

For VAT purposes, services that are closely linked to real estate are deemed to be rendered where the property is located. Therefore, property development services and management services rendered in connection with Swiss real estate are generally subject to Swiss VAT at the standard rate of 8%, even if they are rendered by a foreign services provider. Whether a Swiss property company (special purpose vehicle) (SPV) (*see Question 3*) can claim back input VAT paid on such services depends on whether it has elected to waive the VAT exemption. A waiver of exemption is not possible if the premises are used for private purposes.

Other taxes

Important tax issues for a property holder/SPV include the following:

- Rental income of the SPV is subject to corporate income tax (*see above, Corporate income tax*).
- Dividend distributions by the SPV are subject to Swiss withholding tax (35%) that may be partially or fully reclaimable.
- There is no withholding tax on interest payments. However, interest payments on deemed equity are subject to Swiss withholding tax.
- Source tax is levied on mortgage interest payments secured by Swiss properties and granted by a foreigner. However, under the Swiss tax treaties, no withholding tax will usually be levied.
- Exit/capital gains tax and real estate transfer tax may be payable depending on the cantonal law and the location of the property. Some cantons/municipalities levy a transfer tax that is normally due by the buyer.

- A special tax between 20% and 50% is levied in some cantons on the additional value deriving from re- or up-zoning.

35. Are any methods commonly used to mitigate tax liability on projects? Are there any tax incentives to carry out regeneration projects?

Mitigating tax

The tax mitigation tools available include:

- The use of certain structures (for foreign investors), which may reduce the tax burden on sale (share deal).
- The use of shareholder loans, which may reduce the taxable amount for corporate income tax purposes in accordance with Swiss thin capitalisation rules.
- The use of depreciation on the fiscal book value of the building and/or land to reduce the taxable amount.
- Tax losses can be carried forward for seven business years.

Tax incentives

There are indirect tax incentives, for example:

- To finance a person's principal residence (or to reimburse a mortgage), all or part of such person's pension schemes can be withdrawn or pledged. A withdrawal is subject to reduced income taxation.
- Capital gains realised on the sale of property can be tax-free if they are reinvested.
- Energy-efficient investments for residential properties are tax deductible.

OTHER REQUIREMENTS FOR INTERNATIONAL CONTRACTORS

36. Are there any specific requirements that international contractors or construction professionals must comply with?

There are no additional specific requirements for international contractors.

REFORM

37. Are there any proposals to reform construction and projects law?

Reform proposals

In May 2016, several politicians of the canton of Aargau announced their intention to launch a cantonal initiative with the aim to abolish the taxation of imputed rental value in Switzerland.

Under the current legislation, the rental value of a property is added to the income of each home owner who occupies his property, and is therefore subject to general income tax in Switzerland. The amount of the imputed rental value corresponds to the rent that a house owner could charge a third party tenant if he decided to rent out his property. In return, the owner can deduct all maintenance costs in connection with the property from its general income.

The aim of the reform proposal is to disburden retired people who have to pay tax on the full imputed rental value despite earning considerably lower incomes, and who are no longer in a position to benefit from the deduction of mortgage interest payments, if they already fully repaid their mortgage.

This reform proposal is at a very early stage and it remains to be seen whether and how the federal government will react once the cantonal initiative has been launched.

Trends

The acquisition of residential real estate (and certain types of commercial real estate) by non-Swiss resident foreign nationals has been restricted in Switzerland since the early 1960s (by the Lex Koller legislation). Restrictions apply to:

- Natural non-Swiss/EU/European Free Trade Association persons who do not possess a Swiss residence permit C.
- Legal entities domiciled abroad.
- Foreign-controlled legal entities domiciled in Switzerland.

Since 2005, the acquisition of participation rights in Swiss real estate companies listed on the Swiss stock exchange, and the acquisition of participation rights in real estate funds that are regularly traded, is possible without prior federal approval.

Up and until around 2007, the restrictions for non-Swiss resident foreign nationals had been softened and the Swiss Parliament even discussed abandoning the restrictions altogether.

Since 2007, this trend has been dwindling and current political discussions are pointing to reintroducing the restrictions for the purchase of commercial real estate or the purchase of shares in listed real estate companies. In 2015, the federal government formally announced its intention to revise the current Lex Koller legislation. The consultation process regarding the respective draft legislation is expected to start in August 2016 (at the earliest).

MAIN CONSTRUCTION ORGANISATIONS

Swiss Society of Engineers and Architects (SIA)

Main activities. The SIA is a professional association with 16,000 members. The SIA standard contractual provisions (norms) are essential to the construction sector and widely used by contracting parties.

W www.sia.ch/en/the-sia

Swiss Development (*Entwicklung Schweiz/Développement Suisse*)

Main activities. This association represents 20 general contractors.

W www.entwicklung-schweiz.ch/de/home

ONLINE RESOURCES

Swiss Confederation

W www.admin.ch/gov/en/start/federal-law/classified-compilation.html

Description. The website of the Swiss Confederation contains all federal laws and international conventions. Some of them are translated into English.

Swiss Federal Supreme Court

W www.bger.ch

Description. The entire case law of the Swiss Federal Supreme Court is published on the official website of the Court. The decisions are available in the national language in which they have been issued, that is, in German, French or Italian (and in one case, in Rhaeto-Romanic).

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