A TENDER OF WORKS AT THE GOTTHARD: OBSERVATIONS ON A COMPLEX PROCEDURE AND ITS CONSEQUENCES

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New railway tunnels are being built in the Swiss Gotthard region. The tender of these works was subject to public procurement. The corresponding proceedings did not always go smoothly. One particular case is the subject of my detailed appraisal here. By way of introduction, I should like to make two preliminary observations on the legal situation: First, Switzerland has implemented the WTO Government Procurement Agreement separately at the federal and cantonal levels. As a result, Switzerland has 27 procurement laws. The tender to be discussed here was subject to federal law. Secondly, it must be noted that the award of work does not entail the formation of a contract in the Swiss legal system. Rather, it is an administrative order that may be subsequently appealed. The conclusion of the contract in Switzerland thus does not occur with the award, as is partly the case in other jurisdictions.

I. NEW TUNNELS FOR SWITZERLAND

The north-south route over the Swiss Gotthard pass has played an important role in European history for centuries. Yet today its major importance as a corridor for the conveyance of persons and goods is at the forefront. The massive increase of traffic volume in recent times has led Switzerland to transfer as far as possible the transalpine flow of freight, as well as a significant portion of the passenger traffic, from the road to the rail system. In order to achieve this strategic goal, it was decided to build new higher-capacity railway tunnels. This undertaking has been designated as the ''NEAT'' (''Neue Eisenbahn-Alpentransversale'' or New Transalpine Rail Links). This mammoth project involved the modernisation of the Swiss railway infrastructure. However, the major engagement was to embark on the construction of new railway tunnels under the Lötschberg, under the Monte Ceneri and through the Gotthard massif. The construction of the

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Lötschberg tunnel went according to plan. Regular rail traffic will be taken up there during the course of this year. The Monte Ceneri project, on the other hand, has hardly proceeded beyond a preparatory stage. There are substantial problems with the Gotthard project, where a 57 kilometre base tunnel has to be driven through mountains with difficult geological conditions. The owner of the Gotthard tunnel project is the AlpTransit Gotthard AG (ATG), a subsidiary of the Swiss Federal Railways (SBB) founded specially for this purpose. The costs are exploding and work is delayed. According to current estimates, this branch of the NEAT will be in operation only by 2016. It would not surprise anyone if this prognosis is once more pushed further back.

The NEAT is thus in difficulties at the Gotthard. This is exemplified by the current appeal proceedings concerning the award of railway installation work. The outcome of this tender, which involves a gigantic construction sum of 1.7 billion Swiss francs, is still completely open. However, another case has been closed, which I wish to discuss here, namely, the NEAT Lot No 151, involving the construction of a tunnel near Erstfeld and a construction sum between 420 to 430m. Swiss francs. Several consortia contended for these works, which went in an initial award to the ANG consortium (Strabag).

One of the competitors, the Marti consortium (Marti), was not prepared to accept this outcome and appealed the award to the competent administrative court, the Federal Board of Appeals for Public Procurement. These court proceedings made waves in Switzerland and were also the subject of a podium discussion at the Swiss Construction Law Conference of 2007 in Fribourg. The reason for the uproar was first the economic importance of the tendered tunnel construction work. The fact that a foreign-dominated concern had prevailed over a Swiss enterprise possibly also played a role. However, the circumstance that Marti's appeal prevented work on the Erstfeld section for a longer period of time was of prime significance. For the court granted the appeal suspensive effect, so that the construction contract could not be concluded.

The owner ATG itself estimated its resulting additional costs to be in the amount of 100,000 Swiss francs per day. Marti, on the other hand, claimed at the beginning of the appeal proceedings that it would have to lay off 100 employees, if it did not obtain the award. It is certain that the primary relief in the form granted here resulted in massive delays and correspondingly high cost overruns. However, the issue whether this extreme case is sufficient cause for Parliament to restrict the courts' power to grant suspensive injunctions is the subject of controversy in Switzerland.

In Part II I shall first describe this seemingly endless dispute. Subsequently, in Part III, I shall consider individual issues that were particularly significant factors in the lawsuit.

II. STRIFE AT THE GOTTHARD

1. How it all started

On 21 May 2004, ATG made a public call for tenders, under the project name ''Lot 151, Tunnel Erstfeld'', for tunnel work. The works included preparation of the construction site and its surroundings, as well as civil engineering work. ATG's tender documents provided for unit prices, but variants were permissible.

2. Tenders and reductions

Various tenders were submitted to ATG. These included the tenders of Strabag and Marti. Both tenders included a variant. However, Strabag's variant was limited to offering a lump sum instead of ATG's specified unit prices. ATG held several discussions with the contractors, which also concerned redimensioning a part of the project. The corresponding reduction of the bid prices was similar for all tenders, namely, approximately 20m. Swiss francs.[1] Some time later, Strabag revised its price on its own initiative, indicating to ATG that the reduction of the lump sum would not be 20m., but almost 31m. francs. While ATG rejected this advance, it simultaneously initiated a new round of tenders, in which also the other tenderers could participate. In the end, Strabag's lump-sum bid was 2.6m. francs lower than Marti's unit prices, a difference of some 0.6%.

3. What then happened

This round of negotiations was followed by notable proceedings that lasted almost a year and a half, involving a total of three judgments and three award orders.

First award

On 11 August 2005, ATG awarded Strabag the works and notified Marti that its tender could not be accepted.

First appeal

On 13 September 2005, Marti filed its first appeal, petitioning the court to annul the award and furthermore to award it the disputed works. In addition, Marti petitioned the court to grant its appeal suspensive effect.

[1] The following detail is of note: in Strabag's tender, which contained a lump-sum tender (as a variant) in addition to the official version, the reduction of the lump sum was 20.7m. francs for the lump-sum variant, whereas for the tender according to the official version it was only 5.6m. francs.

First interlocutory decision (BRK 2005-016)

On 13 September 2005, the Board of Appeals granted the appeal suspensive effect. With this injunction, ATG was enjoined from concluding a construction contract with Strabag during the term of the proceedings.[2] Although the owner had submitted that the award was very urgent, and that for this reason suspensive effect was to be denied, the court merely noted that a construction period of $6\frac{1}{2}$ years was to be expected for the tunnelling work at issue. It held that the length of the appeal proceedings was not material for a project of such length.

First judgment on the merits (BRK 2005-016)

Marti wins its appeal! The Board of Appeals struck down the award order of 11 August 2005 with its decision of 13 February 2006 (VPB 70.51). The judgment's main criticism was that ATG did not examine in sufficient detail the risks inherent in Strabag's lump-sum tender that had been submitted as a variant. The Board also found that lump-sum prices for underground works were rare in Switzerland, and that there was little experience with such tenders. For this reason also, ATG was obligated to undertake an in-depth examination. As the evaluation procedure had been inadequate, the Board of Appeals ordered ATG to re-evaluate the tenders.

Second award

On 4 May 2006, ATG once more awarded the contract to Strabag and Marti again appealed. On 29 May 2006, the Board of Appeals granted the appeal suspensive effect by means of an *ex-parte*[3] restraining order. Somewhat surprising was ATG's argument that prices as tendered and not the ultimate recalculated prices are decisive in comparing the tenders. If this were really so, the frequently applied sensitivity analyses would *a priori* be superfluous. The purpose of such an analysis is, namely, to determine how offers react under a change of parameters during the contract's execution. The goal is nothing less than approximating the ultimate price as accurately as possible, which in the end determines whether the procurement is economical.

Second judgment on the merits (BRK 2006-008)

Marti once again wins its appeal! The Board of Appeals struck down the award order in its decision of 11 September 2006 and remanded the matter

[2] Pending this initial decision concerning suspensive effect, ATG was required to comply with the standstill rule. Although the federal statute does not contain this standstill rule, it was adopted early on by the Federal Board of Appeals.

[3] In *ex-parte* proceedings the opposing party is not heard. This procedure corresponded to the Board of Appeals' constant precedents and served to enforce the standstill rule, which at a federal level was of its own invention.

for renewed consideration to ATG. It held that ATG had complied with the first judgment only in a minimalistic fashion. *Inter alia*, the necessary sensitivity analysis had only been carried out in an incomplete manner. Marti's allegation, that it had been the victim of systematic prejudice, was considered to be at least plausible.

Third award

On 9 February 2007, Strabag was awarded the works for the third time. Before issuing the award order, ATG obtained an expert opinion on its award procedure. The external experts came to the conclusion that the procedure had been carried out in a proper manner. The newly formed Federal Administrative Court, which had replaced the Board of Appeals from 1 January 2007, would have had jurisdiction to hear any further appeal. Moreover, under certain circumstances, the judgment of the newly created Federal Administrative Court could also have been appealed to the Swiss Supreme Court, a further novelty that had come into force on 1 January 2007.

Contract at last!

However, no appeal was filed against the third award order. The construction contract with Strabag could thus finally be signed in March 2007. At the time of writing, the tunnelling machinery is scheduled for installation, in order to commence drilling in the first half of 2008.

III. SELECTED ISSUES

1. The remedies and their efficacy

The Board of Appeals granted suspensive effect to Marti's first appeal and did not subsequently reconsider this. The construction contract therefore could not be concluded. This was a medium-sized catastrophe for ATG, but an important intermediate victory for Marti, as its chances of an award remained intact as a consequence. Disappointed tenderers always initially attempt to obtain such an interlocutory injunction. If this is denied, their interest in pursuing the case usually quickly fades. For, in such a situation, even a successful appeal is hardly ever of practical value. However, such an interlocutory injunction is a thorn in the flesh for many owners, as it leads to unpleasant delays. This corresponds to common experience in Switzerland, and underlines the importance of this stage of the proceedings.

The Board of Appeals' precedents on this issue were always fairly generous. With this practice, it wished to ensure that the appeal proceedings offered effective protection (*cf.* Article XX, paragraphs 2 and 7 of the WTO Government Procurement Agreement). The majority of requests for

interlocutory injunctions were granted. The Board of Appeals always applied a two-stage approach in considering such petitions. It first examined whether the appeal was ''manifestly unfounded'' on the basis of the filings. If this was affirmed, the petition was denied. However, if the complaint was not *a priori* without merit,[4] the Board of Appeals weighed the contradictory interests of the owner and the tenderer. It is of note that the Board even undertook this weighing of interests when doubts existed with regard to the appeal's chances of success.

In the present case ATG pleaded a prevailing public interest, citing enormous additional costs as well as substantial delays. This did not impress the Board of Appeals, which ruled that procurement processes, including tendering procedures and possible appeals, were to be planned as far as feasible in a long-term manner so that no urgency can arise. Of course this strict view often reaches its limits, as planning cannot always be ensured even with honest efforts. However, the essence of the Board of Appeals' position is certainly to be followed in this point.

Efforts at reforming the existing procurement legislation are presently being made in Switzerland. How the suspensive effect of award appeals should be regulated in future is also a matter for consideration in this context. The precedents resolve the evident conflict of interests by first examining the appeal's chances of success. If it is not without merit on a *prima facie* examination, the private and public interests at stake are weighed against each other. It would not have been a surprise if the Board of Appeals had denied suspensive effect, in view of the public interest that the Erstfeld lot should not unduly hinder the overall project. For it must be noted that, *pursuant to the legislation in force*, it would have been able to hand down such a ruling! However, it held otherwise, resulting in the well-known massive economic liabilities.

Should Parliament therefore now intervene, for instance by imposing a measure of restraint on the courts when granting future interlocutory injunctions in procurement projects of national and international importance? Does Switzerland need a *Lex Erstfeld?* While personally I am critical of the Board of Appeals' decision to grant Marti's appeal suspensive effect, it is also my opinion that Parliament should decline to intervene. The *Erstfeld* case is a rare situation due to the type of works involved and their economic importance. It is thus a proverbial ''bad case'' that can hardly justify a generalised limitation of the courts' discretionary powers. Effective legal protection must be accorded particularly to large projects that are subject to international procurement, already in view of applicable treaty obligations (see Article XX, paragraph. 7, [?]lit. a GPA[?]). It is feared that a legislative amendment directed against suspensive measures would endanger compliance with this requirement.

[4] These precedents thus did not require that the appeal had clear chances of success. It already sufficed that it was not doomed to failure from the outset.

One should nevertheless also consider the issue of the losses for which a tenderer may claim damages under certain circumstances. In any major procurement, the mere submission of a tender already results in significant costs. A tenderer is to be indemnified for these outlays if its rights are violated during the procurement proceedings. However, such cases are hardly known in Switzerland. The question therefore arises to my mind whether damages limited to the recovery of tendering and procedural costs are an adequate remedy, or whether the attraction of such a remedy is insufficient.

The attraction of this secondary remedy depends upon its ancillary purpose. This purpose consists of initiating a judicial review of state procurement activity in situations where the primary remedy (overturning the award order) does not take hold.[5] The secondary remedy is thus attractive if the tenderer does not abandon an appeal due to the mere fact that the attacked award order can no longer be struck down. As previously mentioned, such proceedings can hardly be found. What is to be done? If one assumes that there is an evident interest in the judicial review of state procurement activity, one will attempt to create stronger inducements for tenderers to at least insist on the secondary remedy (i.e., damages). Swiss law, at the federal level, restricts such claims to the recovery of expenditures that the tenderer incurs in the context of the procurement and appeal proceedings. This has on occasion been criticised as a somewhat petty solution, *inter alios*, by this author.

If one is in favour of a more generous solution, one option would be to grant the appellant a fixed percentage of the procurement price by way of indemnity. This approach should not be rejected out of hand—after all contractual penalties function in a similar manner in Swiss law.[6] However, doubts arise as to the propriety of this method if one is not prepared to completely abandon the foundations of the law of damages. For, it is to be admitted, in the light of the present rules of Swiss law, that the generally criticised exclusion of lost profits is almost completely compensated by various legal advantages. Worthy of mention are the right to inspect the procurement files, the inquisitorial procedure (investigation by the court), lower standards for causation (''real chance'' suffices) and the no-fault nature of the appellant's claim. This has to be acknowledged at least when compared with the risks and costs of regular civil proceedings that would otherwise have to be commenced.

Moreover, the extension of procurement law remedies to include loss of profits is not easily justified. At least if one allows the real chance to be a sufficient foundation for such a claim, the danger exists that those unsuccessful tenderers who would in no event have obtained the award are

[5] Either because an interlocutory injunction is not granted, or because the appellant did not assert the primary remedy.

[6] Contrary to Anglo-American jurisdictions, contractual penalties are permissible in Swiss law, whereas liquidated damages are less common.

always favoured, too, even if the proceedings were free from error. Thus, in my view, it appears today that the current Swiss law, subject to all reservations, is at least more effective than a solution that relies exclusively upon civil law. Nonetheless, I only hold this opinion with the concurrent assumption that the protection offered by procurement law does not pre-empt, but rather complements, civil law. This, however, is a subject of dispute in Switzerland. Some authorities are of the opinion that procurement law remedies exclude civil remedies. As mentioned, I do not concur with this view.

2. The "guillotine" method: innovative or unlawful?

Procurement law can at times be quite draconian. Thus the term ''killer criteria'' is sometimes used to describe qualification criteria in Switzerland that exclude non-complying tenderers at the outset. However, I do not wish to deal with this issue here, but rather to discuss an evaluation method also referred to as the ''guillotine'' system. This method, developed by ATG, is divided into two phases. In the first phase, the tenders are rated in the light of the published evaluation criteria. A minimum number of points must be achieved in this stage. Tenders that remain below this minimum number are excluded from further evaluation. Those tenders that achieve the benchmark are judged solely on the basis of price in the second evaluation phase. Here the other award criteria no longer play a role. This specifically prevents a higher tendered price from being balanced, for instance, by more quality or shorter construction periods.[7]

The tenders of both Strabag and Marti achieved the required minimum points, for which reason only their tendered prices were to be compared pursuant to the procedure described above. Strabag won (with its lump-sum tender). Marti failed (with its unit price tender) and subsequently alleged that the ''guillotine'' method was unlawful. The Board of Appeals, however, declined to hear this complaint. The reasoning for this was simply that ATG had already given notice of this evaluation method in the public invitation to tender. The consequences were thus evident for potential tenderers. Marti should have previously filed a complaint against the notice of tender. At this stage it was too late. This corresponds to the established Swiss precedents, which are formalistic in this regard. For it is obvious that a tenderer rarely is inclined to commence a dispute with a public owner at the stage when tenders are invited.

The evaluation method applied to date by ATG is controversial in Switzerland. It is certainly quite demanding to achieve the necessary transparency with this method. However, I find the basic principle tempting. For with this method, the owner can effectively avoid paying for an

[7] A description of this method can also be found for example in Trepte, *Regulation [?of] Procurement, Understanding the Ends and Means of Public Procurement Regulation* (Oxford, 2004), p. 95.

unwanted high quality standard, if lower-quality performance satisfies its needs. The question nonetheless arises whether this method can be considered compatible with the rule of Swiss procurement law, under which an award based solely on price is only permissible for ''largely standardised goods''. As a rejoinder, the fact that offers are not evaluated exclusively according to the criterion of lowest price may brought in favour of the ''guillotine'' method, so that in all probability no pure price award exists.

3. The pricing variants and the issue of their admissibility

Strabag submitted, *inter alia*, a tender in which it offered a lump-sum price instead of the unit prices contemplated by ATG. This tender was allowed as a permissible variant by ATG, who subsequently awarded the work to Strabag. Some authorities in Switzerland affirm the admissibility of such pricing variants. The Board of Appeals adopted this view and held ATG's direct comparison of Strabag's lump-sum offer with Marti's unit price tender to be permissible.

Personally, I do not wish to dispute that a final accounting with a lump-sum price may be more favourable to the owner than the ultimate cost calculated on a unit price basis after remeasurement. This depends on how the final quantities compare with the scheduled quantities. The owner bears the risk of differing quantities in unit price contracts, whereas the contractor accepts this risk in a lump-sum agreement. In my view, it is doubtful whether a lump sum may be considered a permissible variant without any closer examination. The Board of Appeals, on the other hand, held that a variant may not only consist of deviations from technical specifications contained in the tender documents, but may also entail a bid which differs from the promulgated compensation mode. Pursuant to this authority, both cases constitute variants that, in principle, are to be included in the evaluation.

The Board of Appeals further held that comparability may be difficult not only in respect of varying pricing methods, but also with regard to technical variants, for which reason such a difficulty is not an argument for inadmissibility. I cannot follow this reasoning. Rather, it is correct to examine on a case-by-case basis whether or not the tenders are still comparable. If comparability can no longer be affirmed, there is no variant pursuant to procurement law, but rather a non-compliant offer that is to be excluded from further evaluation. The issue whether a lump sum offer can be compared to a unit price bid is thus also to be decided in the light of the concrete circumstances, and cannot be settled in a general manner.

If one reads the Board of Appeal's decision carefully, one can ascertain that possibly this court also did not intend *a priori* to accept the view that affirms, without any restriction, the comparability of lump-sum and unit prices. On the contrary, the court ordered the owner to examine in more depth the issue whether comparability could be assured. Under such an

interpretation of the ruling, a tender that deviates from the published project may be considered a valid variant only if it can be compared to the conforming tenders. At least as far as complex underground works are at issue, I am sceptical whether pricing variants are comparable, as such projects usually do not run an accurately foreseeable course. Much depends materially upon prognoses which, moreover, are susceptible to manipulation. Apart from this, it must be stated that nothing is gained by merely employing the term ''variant'' to describe deviations from the official promulgations. Otherwise a road pass option submitted by a contractor could also be considered a variant of the tunnel for which the owner is inviting tenders. On the contrary, comparability is decisive. This determines whether a deviation from the invitation to tender is admissible as a valid variant.

A postscript: the Board of Appeals' judgment (with one reservation) corresponds to German precedents that refer to commercial variants. The noted reservation lies in the circumstance that German jurisprudence requires the tender documents to contain minimum requirements. This results from the provision in EU law that ''the minimum requirements to be met'' must be stipulated (Article 24 of Directive 2004/18/EC).[8] While such provisions increase transparency, one may well ask whether such a rule is really meaningful. For the value of variants lies precisely in the fact that, on occasion, they present solutions that no one on the owner's side has thought of, for which reason stipulated ''minimum requirements'' are not necessarily appropriate.

IV. CREDO

Some day trains will be able to race through the Gotthard base tunnel. However, this is not yet the case. The rock is difficult. There are massive delays. The additional costs are enormous. The political uncertainties are on the rise. Yet there is no way back in spite of all this. Nonetheless, we must certainly be prepared for further distractions in view of the project's complexity. The award of the major works will be completed in due course. But it must be remembered that conflicts can also arise during the realisation of public projects; particularly in underground works in the guise of claims for additional costs in lump-sum contracts.

[8] The provision reads: ''Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation'' (para. 3).