

# Government Procurement Rules on the Market for Hospitals

## Introduction

The legislation on government procurement is currently being revised. Even under currently applicable law, an increasingly strict case law is starting to prevail which is forcing even non-central government entities to open their procurement contracts to public tender. This is illustrated in the following case from Zurich, in the area of hospitals.

What is at stake: Both public and private hospitals that are listed, in accordance with the Zurich Hospitals Act (SPFG) on the so-called Hospital List, shall in future be treated as government entities for government procurement purposes. Listed hospitals, including private hospitals, must comply with government procurement rules when they purchase goods and services for the purpose of fulfilling their performance mandate. Once certain threshold values are exceeded, the hospitals are required to either list their contracts for public tender or to award them following a tender procedure, whereby at least three quotes must be obtained.

## 1. Points of Contention

In the Zurich case (RRB 758/2015) the issue in dispute was whether the hospitals had to comply with government procurement rules despite the fact that *formally they had been privatised*.

The proceedings were initiated by the Zurich public health authorities. The authorities complained that the hospital at stake which was privately organized but publicly funded by its supporting municipalities, had failed

to comply with government procurement rules.

## 2. Hospital's Perspective

The hospital opposed corresponding instructions and circulars from the public health authorities. In doing so, it claimed that it was not subject to government procurement rules, since it was a privately constituted company limited by shares and was in open competition with other hospitals, for which reason even as an entity under public law, it was not subject to government procurement rules. In 2009, the hospital was converted from the legal form of a municipal public entity into a company limited by shares under private law. The share capital, however, remained 100% in the hands of the supporting municipalities, as did oversight and any liability.

## 3. State Council's Perspective

The State Council initially examined the definition of an *entity under public law*. It found that such an entity was possessed of its own legal personality, was linked to the State, performed duties in the general public interest, and thus did not pursue exclusively commercial activities.

It held that this was precisely the case of the hospital. It was possessed of its own legal personality and its share capital formed part of the municipality's administrative assets. To counter the argument that the hospital was constituted as a company limited by shares under private law and was thus not subject to government procurement rules, the State Council argued that the legal form that an entity chooses to take is of no importance.

The hospital, it found, was rather established by the State, in order to perform specific activities. The State controlled the company limited by shares and exercised an influence on the executive management thereof, for which reason one could assume that it performed duties in the general public interest.

Listed hospitals, according to the State Council, are only subject to a limited degree of competition, since this market is heavily regulated. For this reason, it would be incorrect here to speak of a commercial activity. In addition to this, listed hospitals are to a large degree financed by the public purse, particularly when it comes to their basis insurance requirements. The hospital in is thus subject to the scope of application of government procurement rules.

Finally, a functional approach is also of significance, i.e. it is important that the hospital exude the characteristics of an entity under public law. Otherwise, it would be possible for every municipality to circumvent its government procurement obligations simply by privatizing its public entities.

The forcefulness with which the State Council states its case at the end is worth noting: The hospital is hereby required to comply with government procurement rules, whereby failure to do so will render it liable to sanctions.

The matter has been appealed, but the decision of the State Council is unlikely to be altered.

#### **4. Summary**

Whether or not this case law is comprehensively applicable with regard to privately held listed hospitals that are not publicly owned, is something that remains to be seen. It is nevertheless clear that listed hospitals and other non-central government entities, irrespective of their legal form, will in future be subject to stricter oversight in terms of their compliance with government procurement rules.

Philipp do Canto/Stephanie Gstrein

---

#### **Contact**

**Philipp do Canto**  
philipp.do.canto@ch.pwc.com