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# Government Procurement

Switzerland and the United States have both signed the World Trade Organization (WTO) Government Procurement Agreement (GPA). Hence, one might think that a Swiss-US FTA would not open as many procurement opportunities as the US-Australia FTA, since Australia did not sign the GPA. However, Switzerland reserved its application of the GPA to US firms in important sectors, arguing that the United States had not given equivalent access to Swiss firms. The GPA does not cover all federal procurement. Finally, multiple restrictions persist at the subfederal level, in both Switzerland and the United States. Opening government procurement markets in both countries could thus deliver considerable benefits, and taxpayer dollars will be saved when states and cantons invite a larger number of bidders. As the largest public procurement body in the world, the US federal government too would benefit from Swiss bids, even in select market niches.

This chapter includes three sections. The first two sections review the regulatory environment and recent developments in the United States and Switzerland respectively. The third section outlines our recommendations for liberalizing government procurement in the context of a prospective Swiss-US FTA.

## Government Procurement: United States

In 1996, the United States signed the WTO GPA along with 28 other nations. At the federal level, public procurement takes place through various departments supervised by the Office of Management and Budget (OMB) and two acquisition regulatory councils, the Defense Acquisition Regulations Coun-

cil and the Civilian Agency Acquisition Council (WTO 2004b). The Federal Acquisition Regulation (FAR) furnishes umbrella regulation for all federal entities but permits them to follow their own internal guidelines (WTO 2004b).<sup>1</sup> Under the FAR, federal entities are obligated to publish their procurement requirements on a Web site known as FedBizOpps when the procurement exceeds \$25,000.<sup>2</sup> The proposed contract must be published at least 15 days before bids begin; thereafter, prospective bidders must be given at least 30 days to place their bids (WTO 2004b).

At the subfederal level, state and local governments regulate procurement contracts. Contracts are subject to threshold values and other provisions specific to each state. Some states grant preferences to local suppliers and impose local-content requirements. However, 37 states have implemented the GPA provisions,<sup>3</sup> and are obligated to publish tender invitations on FedBizOpps for GPA-covered sectors.

## The Buy America Act

The Buy America Act (BAA) of 1933 (as amended) is the core document governing US procurement of goods at the federal level. The act establishes discriminatory measures, also known as Buy America restrictions, for government-funded purchases, including supply and construction contracts (European Commission 2004a). These restrictive measures can take several forms, prohibiting government entities from purchasing foreign goods and services, requiring a certain amount of local content, and preferring domestic suppliers when evaluating bid prices.

The United States maintains a number of Buy America restrictions for procurement that are not covered by the GPA, the North American Free Trade Agreement (NAFTA), the WTO plurilateral Agreement on Trade in Civil Aircraft, or bilateral procurement agreements with Chile, Singapore, Australia, and Israel (WTO 2004c). Where in force, Buy America requirements apply to goods, not services. They require federal entities to procure only US-mined or US-produced unprocessed goods. In addition, only manufactured articles with at least 50 percent local content can be procured (European Commission 2004a).

Executive Order 10582 of 1954 goes beyond the scope of the BAA by carving out special status for procurement contracts with small businesses

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1. The FAR was amended in 2001 to change aspects of electronic procurement and preferential access for small businesses, improve transparency of procedures, and alter bidding process and thresholds. Part 25 of the FAR deals with policies and procedures to acquire foreign supplies, services, and construction materials (WTO 2004b).

2. Exceptions are made for purchases of perishable supplies when delayed publication could be damaging (WTO 2004b).

3. The 37 states are listed in Annex 2 of the US GPA schedule (WTO 2002e).

and firms in areas with labor surpluses. The order also allows government entities to reject bids placed by foreign firms for national interest and security reasons (European Commission 2004a).

## The Balance of Payments Program

The balance of payments program is a nonstatutory program that potentially restricts both purchases of supplies by government entities and contracts for construction, alteration, or repair of any public building outside the United States (WTO 2004c). Since 2001, this program no longer applies to civilian agency acquisitions, but it still applies to the Department of Defense for purchases of end products that are used abroad and exceed \$100,000 in cost (WTO 2004c).

## The Trade Agreements Act of 1979

The Trade Agreements Act of 1979 implemented the GATT Government Procurement Code agreed to in the Tokyo Round. Essentially, it overrides the BAA and kindred legislation by ensuring national treatment to signatories of the Code with respect to scheduled entities and above-threshold contracts (USITC 2004a). Thus, the act gives up BAA preferences regarding civil aircraft and related articles<sup>4</sup> as well as other end products for designated parties.<sup>5</sup>

## Exemptions and Waivers

Exemptions and waivers to the BAA and balance of payments program are granted if it can be shown that domestic preferences are inconsistent with national interests, and if the supply of a particular material is either unavailable or too expensive in the United States (WTO 2004c).<sup>6</sup> BAA restrictions have been waived in acquiring defense equipment originating

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4. Related articles are articles that “meet the substantial transformation test of the Act and originate in countries that are parties to the WTO Agreement on Trade in Civil Aircraft” (WTO 2004c).

5. Similar preferences are extended unilaterally to eligible countries through the GPA, NAFTA, other bilateral procurement agreements, and to less developed countries (WTO 2004c). For example, end products that are granted duty-free entry under the Caribbean Basin Economic Recovery Act (CBERA) are eligible for government contracts.

6. A domestic offer is judged too expensive if the foreign product is priced “below the lowest domestic offer when this offer is from a large business concern” (including import duty and a 6 percent added margin) (WTO 2004c). If the offer is from a small business, the added margin would be 12 percent, and for defense-related purchases, the price difference has to be a minimum of 50 percent.

**Table 6.1 Threshold values in the WTO GPA and US bilateral FTAs (dollars)**

	<b>Supplies</b>	<b>Services</b>	<b>Construction</b>
WTO	169,000	169,000	6,481,000
Canada	25,000	56,190	7,304,733
Mexico	56,190	56,190	7,304,733
Chile	56,190	56,190	6,481,000
Singapore	56,190	56,190	6,481,000

*Source:* WTO (2004c).

from countries with which the United States has a reciprocal procurement agreement, such as Switzerland.<sup>7</sup>

The goods listed in Subchapters VIII and X of Chapter 98 of the Buy America Act are not subject to custom duties when they are purchased for use in government contracts. Other supplies may also be eligible for duty-free entry if the contract price is reduced by the amount of duty that would prevail if the supplies did not enter duty free (WTO 2004c). Finally, excepting equipment, supplies aimed at government-operated vessels or aircraft are eligible for entering the United States duty free (WTO 2004c).

## The WTO GPA and US Bilateral Agreements

As of 2004, the threshold values of procurement contracts covered under the GPA have been maintained at their 1996 levels (WTO 2004c). Table 6.1 shows the threshold values set by the United States in the WTO GPA Schedule, NAFTA, and its FTAs with Singapore and Chile. Table 6.2 shows the list of services that the United States has chosen to exclude from the GPA and in selected FTAs.

The US-Chile and US-Singapore FTAs opened additional state and federal agencies to foreign bids (Schott 2004b). However, under the US-Singapore FTA, state obligations do not expand beyond the sector obligations already committed under the GPA. Local procurement is not covered under either the GPA or the two FTAs. Under the US-Chile FTA, the 37 US states that have agreed to GPA provisions will treat Chilean suppliers in essentially the same manner (USTR 2003e). Finally, the US-Chile and US-Singapore FTAs specify high threshold values and exclude state set-aside programs for small and minority businesses (Salazar-Xirinachs and Granados 2004).

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7. However, the secretary of defense retains the right to restrict or reject an offer from a qualifying country for national defense reasons.

**Table 6.2 Services covered by the United States in the GPA and bilateral FTAs**

Service	WTO	NAFTA/Chile	Singapore	Australia/ Morocco
Purchase of military services overseas	Excl.	Excl.	Excl.	Excl.
Automatic data processing, telecommunications and transmission	Excl.	Excl.	Incl.	Incl.
Telecom networks, automated news services, data services	Excl.	Excl.	Incl.	Incl.
Basic telecommunications network services	Incl.	Incl.	Excl.	Excl.
Dredging	Excl.	Excl.	Excl.	Excl.
Federally funded research and development centers	Excl.	Incl.	Excl.	Incl.
Department of defense, energy, aeronautics/ space facilities	Incl.	Excl.	Incl.	Excl.
Research and development	Excl.	Excl.	Excl.	Excl.
Transportation services	Excl.	Excl.	Excl.	Excl.
Utility services	Excl.	Excl.	Excl.	Excl.
Maintenance, repair, rebuilding, installation of equipment	Incl.	Excl.	Incl.	Excl.
Related to ships, including nonnuclear ship repair	Incl.	Excl.	Incl.	Excl.

Excl. = excluded

Incl. = included

Source: Acqnet (2005).

As with other FTAs, the procurement chapter (chapter 15) in the US-Australia FTA sets out specific rules and standards to achieve the objective of nondiscrimination.<sup>8</sup> The agreement requires the Australian government to eliminate industry development programs and limits selective tendering. These provisions will level the playing field for US firms that bid on public contracts. Australia will also become a designated country under the US Trade Agreements Act, meaning that Australian firms no longer have to establish operations in the United States or a designated country, or estab-

8. For example, the FTA requires each country to enact laws that make bribery of procurement officials a criminal or administrative offense.

lish partnering arrangements with US firms, to sell to the US government. Chapter 15 is complemented by eight annexes that determine the government entities covered and the types of procurements excluded by each party. A side letter deals with government procurement of blood plasma.

Government procurement was a source of concern in the debate over the Central American–Dominican Republic Free Trade Agreement (CAFTA-DR). Congressman Benjamin Cardin (D-MD) attempted to withdraw Maryland from the list of states subject to government procurement rules in the FTA package, but ultimately relented.<sup>9</sup>

## Effect of Restrictions

In 2002, US government expenditures amounted to \$1.98 trillion, or 19 percent of GDP. Defense-related expenditures were the largest component, at some \$400 billion. Most government expenditures, however, represent salaries and transfer payments. In 1999, the United States reported 56,598 procurement contracts, totaling \$205 billion (WTO 2004c), though the EU Commission has estimated that BAA restrictions each year affect approximately \$25 billion of those contracts—most noticeably in mass transport and airport improvements (European Commission 2004a).<sup>10</sup>

US public procurement restrictions take place in three different ways: federal restrictions on procurement by federal entities, state restrictions on state and local procurement contracts, and federal restrictions on how federal grant money can be used by state and local governments (USITC 2004a). At the federal level, major restrictions are placed on defense procurement contracts and small and minority-owned business contracts. At the state level, federal regulations—mostly BAA restrictions—prohibit using federal grant money in transportation and food assistance projects (USITC 2004a).

### *Public Transportation*

The Department of Transportation (DOT) distributes federal aid to state and local governments under the Highway Administration Act, the Urban Mass Transit Act, and the Airports Improvements Act. The federal government may fund 40 to 80 percent of a project, leaving the state to fund the rest. All

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9. Cardin dropped his demand after Deputy US Trade Representative Peter Allgeier gave him assurances that “if USTR found it acceptable, it would consult with DR-CAFTA parties in a way that would not delay congressional consideration of the free trade package.” Subsequently, however, Allgeier informed Cardin that Maryland “will have to remain on the list of states subject to government procurement rules” in CAFTA-DR. See “Maryland to Remain on Government Procurement Annex for CAFTA,” *Inside US Trade*, July 1, 2005, 5.

10. This figure is expected to increase to \$35 billion in 2005 (European Commission 2004a).

projects are subject to local content requirements of 60 percent, or face a penalty of up to 25 percent of the price (European Commission 2004a).

### ***Highway Construction***

Federally assisted highway projects amounted to \$46 billion in 2002, while federal grants to state and local governments totaled \$26 billion (USITC 2004a). Under the BAA, highways must be constructed with domestically produced iron and steel. A waiver is possible but rarely granted.

### ***Airport Construction***

The Federal Aviation Administration (FAA) monitors BAA restrictions on state and local public procurement for airport construction projects. Some 80 to 90 percent of airport construction spending comes from the federal government. Airport construction projects are obligated to use steel and manufactured goods that are domestically produced, unless a waiver is invoked.

### ***Food Assistance***

The US Department of Agriculture and other federal entities (e.g., the Department of Health and Human Services) monitor a wide array of food assistance procurement programs. Those programs, such as the National School Lunch Program and the Child and Adult Care food program, give preference to local food suppliers. Even donated commodities must be of domestic origin. Some programs require that school food authorities buy domestic commodities to the maximum extent (USITC 2004a). Under NAFTA and the Uruguay Round agreements, the United States retained the right to exempt the “procurement of agricultural goods made in furtherance of agricultural support programs or human feeding programs” from its obligations (USITC 2004a).

### ***Small-Business Set-Asides***

The Small Business Act (SBA) of 1958 (as amended) governs federal grants and subcontracts for goods and services awarded to small business firms. Under the act, 23 percent of prime contracts must be awarded to small businesses; 5 percent of prime and subcontracts to minority-owned businesses; 5 percent to women-owned businesses; 3 percent to service-disabled veteran-owned businesses; and prime contracts for Historically Underutilized Business Zone firms (HUBZone) are phased in from 1 percent in fiscal year 1999, to 2.5 percent in fiscal year 2002, to 3 percent in fiscal year 2003 (USITC 2004a). All owners of small businesses must be US citizens to qualify for these preferential procurement programs. Because SBA regulations require that receipts of all domestic and foreign affiliates of the business be counted to qualify as a “small size business,” most US affiliates of foreign-owned

corporations cannot obtain small business status. Most federal purchases under the SBA programs face BAA restrictions, although a general waiver may be granted to federal purchases below \$2,500 (USITC 2004a).

### ***Defense Procurement***

The BAA governs domestic sourcing requirements for defense procurement. In addition, the Defense Federal Acquisition Regulations System (DFARS) regulates defense-related procurement of specific products, such as food, clothing, fibers, vessel acquisition, and anchor chains (USITC 2004a). The DFARS regulations are intended to ensure that government procurement contracts comply with the memorandum of understanding (MoU) between Department of Defense (DOD) and SBA regarding the small-business goals mentioned above (USITC 2004a). North Atlantic Treaty Organization (NATO) countries that have ratified the MoU can obtain a waiver from DOD's domestic preferences (USITC 2004a).

### ***State and Local Government Procurement***

States impose procurement restrictions over and above the restrictions imposed by federal rules. So far, all negotiated US trade agreements have given states the choice to retain their state procurement rules or accede to the agreement. In response, some of the 50 states have chosen to relinquish state preferences. For a US FTA partner, the benefits of state accession are enhanced by the large number and diverse nature of state programs (USITC 2004a), though as of 2005, Ohio, Indiana, Virginia, Georgia, and New Jersey, among others, are still holding out.

### ***Subfederal Selective Purchasing Laws***

Selective purchasing laws at the subfederal level often impede foreign firms with links to "offensive" third countries, such as Burma. Such laws have been adopted by Massachusetts and 20 other cities and local authorities (European Commission 2004a). The Supreme Court ruled that the Massachusetts law was unconstitutional (US Supreme Court 2000), but the ruling was relatively narrow. Hence, municipal selective purchases on foreign policy grounds can still be a problem. In 2001, New York attempted to apply selective purchasing legislation based on the so-called MacBride principles (European Commission 2004a). While the proposal was dropped, it flagged a continuing concern.

### ***Services***

While the BAA is not supposed to apply to service procurement, the off-shore outsourcing debate has inspired new legislative forays, mainly at state level. New Jersey in 2002, followed by Michigan in 2004, enacted leg-

islation stating that “only citizens of the United States and persons authorized to work in the United States pursuant to federal law may be employed in the performance of services [funded by the states]” (European Commission 2004a). Connecticut, Florida, Maryland, Missouri, and Wisconsin have announced the implementation of similar provisions (European Commission 2004a). The target of this legislation is to discourage “call centers” and data-processing abroad (European Commission 2004a).

## Recent Developments

Recent initiatives have attempted to make federal government procurement more efficient. The E-Government Act of 2002 led to the creation of an Internet portal for government procurement known as the Integrated Acquisition Environment (IAE) initiative. The General Services Administration (GSA) has promoted two new programs. GSA Global Supply (GGS) identifies an array of goods and services that conform to government acquisition policies and socioeconomic regulations (WTO 2004c). GSA Advantage is an Internet program that allows interested parties to communicate with authorized contractors online. Under this program, 5,298 contracting foreign firms registered online in 2004 (WTO 2004c).

## Government Procurement: Switzerland

Switzerland ratified the WTO GPA in 1994. The 1994 Federal Law on Government Procurement, however, deals only with federal procurement, not cantonal procurement. The federal law “specifies the procurement regime; it also provides for, *inter alia*, periodic adjustments of definitions and threshold values to the relevant GPA provisions” (WTO 2004b). Some 42 entities have been designated for the purchase of goods. As for relevant services—road and air transport, financial services, and certain professional services, such as advertising, counseling, and publishing—these can be purchased by each of the 42 designated federal entities (WTO 2004b). A 1995 ordinance subsequent to the 1994 federal law covers remaining areas, such as procurements below the relevant WTO thresholds or purchases by entities not included in Switzerland’s commitment under the GPA (WTO 2004b).

The Swiss cantons passed the 1994 Inter-Cantonal Concordat, which altered “previous cantonal arrangements that provided scope for buy-local, buy-regional and buy-national preferences” (WTO 1996). The concordat covers contracts for construction projects in excess of 9.6 million Swiss francs; contracts for goods and services in excess of 0.38 million Swiss francs; and contracts for goods and services purchased by public water, energy, and transport companies in excess of 0.77 million Swiss francs (WTO 2004b). In 1995, the Swiss Parliament passed the Internal Market Law

(LMI), which explicitly created nondiscriminatory access to public procurement in cantons and municipalities.

Competition for public procurement contracts was enhanced in recent years, after Switzerland concluded a bilateral agreement with the European Union extending GPA coverage to the liberalization level of the EU internal market at EU thresholds. As a result, in March 2001, the Inter-Cantonal Agreement on Public Procurement (AIMP) was further revised, as was the federal ordinance in July 2002.<sup>11</sup> The AIMP was revised to harmonize thresholds and procedures of those contracts not governed by international treaties (OECD 2004a). The revised ordinance established a surveillance mechanism, the Commission des Marchés publics Confédération/Cantons (CCMC), which aims to enforce Switzerland's international commitments regarding public procurement contracts. To this effect, thresholds much lower than the WTO levels were established at the cantonal and communal levels, thereby seriously opening local procurement markets. These lower thresholds apply to Swiss-established bidders, while foreign bidders may bid on contracts that meet GATT/WTO thresholds.

Presently, the Swiss government is thoroughly revising the Swiss Federal Law on Public Procurement. The initiatives aim to simplify and harmonize public tender procedures (US Department of State 2005)<sup>12</sup> and attempt to improve the application of procurement procedures by federal purchasing entities (OECD 2004a).<sup>13</sup>

## Swiss Reservations under the WTO GPA

Switzerland took reservations to the GPA for participants that do not provide similar and effective access for Swiss firms. Box 6.1 indicates that Switzerland's reservations apply mostly to the United States and Canada. Indeed, Switzerland made important reservations for US firms regarding communal entities—that is, public authorities that operate at the communal or district level—water, local transport, and airport authorities; service subsectors; and challenge procedures.<sup>14</sup>

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11. The revised text of the AIMP was in force in 21 cantons at the end of June 2005.

12. Under the rules of the WTO Government Procurement Agreement, each canton was allowed to implement the agreement independently, leading to disparities across cantons (US Department of State 2005).

13. For example, the Swiss federal government created a database to track trends in procurement contracts and assess reforms (OECD 2004a).

14. Challenge procedures result from difficulties in honoring the recommendation in the WTO dispute settlement procedure that calls for “retrospective” remedies. The provisions on challenge procedures can be found in Article 20 of the WTO GPA. This article requires the parties to the GPA “to set up a domestic bid challenge system for the purpose of giving suppliers, who believe that procurement has been executed inconsistently with the requirements of the GPA, a right of recourse to an independent domestic tribunal” (WTO 2003).

### Box 6.1 Swiss reservations to the Government Procurement Agreement

Country	Entities
United States	Communal bodies, water, electricity, local transports, airports, and ports Service subsectors Challenge procedures
Canada	Regional bodies, water, electricity, local transports, airports, and ports Service subsectors Challenge procedures
Japan	Communal bodies, electricity, and local transports Challenge procedures
South Korea	Communal bodies, local transports, and airports Challenge procedures
Israel	Communal bodies and local transports Service subsectors Challenge procedures
Singapore	Communal bodies, water, and electricity

Source: WTO (2003b).

## Bilateral Agreements

Switzerland has signed bilateral procurement agreements with the United States (1996), the European Union (2002), Mexico (2001, as part of the EFTA-Mexico FTA), and Chile (2004, as part of the EFTA-Chile FTA). These agreements expand access to government procurement opportunities, including at the subfederal level.

The 1996 Swiss-US procurement agreement was incorporated into the WTO GPA; the Swiss-EU agreement draws and expands on WTO provisions. The GPA guarantees that the Swiss federal state and the cantons, as well as public companies in the water, urban transport, and energy sectors, will tender and award contracts for goods, services, and construction projects when they exceed certain threshold values (e.g., 250,000 Swiss francs, or about \$211,000). The Swiss-EU agreement opens the public procurement market to tender in the rail transport sector, and allows contract awards to

private companies that are working on the basis of exclusive rights, such as private utility companies (Switzerland Integration Office 2005b).

The Mexican procurement agreement, part of the Mexico-European Free Trade Association (EFTA) bloc FTA (including Switzerland), was ratified in July 2001. The agreement guarantees that Mexico will grant EFTA suppliers the same access it provides to US, European, and Canadian suppliers (WTO 2004b). For their part, EFTA member countries will give Mexico access similar to their GPA commitments, except at the subfederal level (WTO 2004b).

In the EFTA-Chile FTA, both parties agreed to mutual nondiscriminatory access to their government procurement markets for goods, services, and public works at both the federal and subfederal government levels, as well as for certain utilities (WTO 2004b).

## Effect of Restrictions

Despite the GPA and FTA agreements, the Organization for Economic Cooperation and Development (OECD) reports that competition for government procurement contracts is weak in Switzerland (OECD 2005). In 2000, total public spending on goods, services, and construction amounted to more than 30 billion Swiss francs, representing 25 percent of total government spending and 8 percent of GDP (WTO 2004b).<sup>15</sup> Cantons and municipalities play the major role in public procurement, which engenders a bias in favor of local firms (OECD 2005).<sup>16</sup>

This bias at the expense of foreign firms can be explained by three factors. First, most contracts for open public tenders are valued below the financial thresholds for international competition (OECD 2004a); they are, however, open to Swiss bidders. Second, the legislation on procurement contracting differs across cantons, and between the Swiss federation and the cantons.<sup>17</sup> These differences should, however, not be overstated, as they refer mainly to procedures and secondary issues: Each canton has its own remedy tribunal, and the decisions of the various tribunals may not be consistent across cantons or with federal remedies.<sup>18</sup> Third, when international thresholds are not

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15. Swiss public procurement as a share of GDP is somewhat lower than it is in other industrial countries. The OECD reports that government procurement in the EU zone varies between 14 percent and 15 percent (OECD 2002).

16. More than 80 percent of the contracts are granted by cantons and municipalities (OECD 2004a).

17. The complexity of the legislation renders its application for both bidders and contracting authorities difficult. The incorporation of international agreements in domestic legislation is not harmonized between the Confederation and the cantons. For example, the OECD remarks, "Under federal law, negotiations with bidders are allowed during the procedure, which is not the case for the cantons" (OECD 2004a).

18. Similar differences exist in other federal countries.

reached, “the lower thresholds above which competition applies at national level have appreciably differed across cantons” (OECD 2004a), which hampers competition and transparency. However, with the revised AIMP, a uniform threshold has been set for the different procedures at the national level to harmonize procedures across Switzerland.

## Recent Developments

The level of competition has improved thanks to recent initiatives. The cantons of Geneva and Vaud initiated a government procurement Web site to pool tenders at both the federal and cantonal levels, and unify the bidding system (OECD 2004a).<sup>19</sup> A new system is planned to go into effect in April 2006 under SIMAP II (Système d’information sur les marches publics) with the federal state and no less than 14 cantons. As the OECD argues, “The system should encourage scale economies on standard procurement contracts and a reduction in the management costs of tendering, which should lead to lower threshold values” (OECD 2004a).<sup>20</sup>

Some evidence indicates that the Internet portal, along with the AIMP revision and the Ordinance mentioned earlier, have created a more competitive environment. The OECD reports that, when comparing identical tenders in the Swiss federation between 2000 and 2002, figures show that prices have decreased by 25 percent on average (OECD 2004a).

## Recommendations for Government Procurement

While the United States and Switzerland have different national competition policies, both countries permit state and cantonal regulations that impair competition. In the United States, the “state action doctrine” immunizes state and local governments from antitrust liability. Stemming from a US Supreme Court decision that allowed a state to sponsor a Depression-era cartel, US states can pursue anticompetitive regulation of transportation, hospitals, healthcare, and electric-power sectors (OECD 2004d). Likewise, despite Swiss federal efforts to gradually liberalize the electricity market, local and regional firms still continue as monopoly owners of the national

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19. The site has 5,500 public contractors, over 98 percent of whom operate at the cantonal and communal level.

20. The OECD reports that “the maximum amount for contracts negotiable by mutual agreement was [recently] raised from 50,000 [Swiss francs] to 150,000 for a service or construction supply contract and to 300,000 [Swiss francs] for a contract on the shell of a building” (OECD 2004a). Higher thresholds are justified by the transactions costs incurred in public tendering, and these costs should be reduced by the new system.

electricity network, known as Swissgrid. To liberalize government procurement at the subfederal level, we offer the following recommendations for the United States and Switzerland.

## For the United States

- The FTA should grant Swiss firms the best terms enjoyed under the GPA and by NAFTA partners, Chile, Singapore, Australia, and future US bilateral FTAs (an unconditional most favored nation [MFN] provision). The MFN provision should apply to both federal and state procurement.
- The United States should extend its procurement coverage to at least three additional sectors that were excluded from the WTO GPA: research and development (R&D), transportation services, and utility services. R&D contracts are likely to be of commercial interest to leading Swiss firms. Both US and Swiss firms may be interested in transportation and utility contracts in the other country.
- The United States Trade Representative (USTR) should seek to cover two or three holdout states in addition to states that have previously agreed to GPA or FTA procurement provisions. Likely candidates might be Atlantic Coast states New Jersey, Virginia, and Georgia.
- Additionally, the USTR should seek to cover a few metropolitan areas. Again, Atlantic Coast metropolitan areas seem most plausible because of their greater familiarity and proximity to Switzerland. Boston, New York, Washington, Charlotte, Savannah, and Miami come to mind.

## For Switzerland

- Reciprocally with the recommended US provision, the FTA should grant US firms the best terms enjoyed under the GPA, and by EFTA partners and future Swiss bilateral FTAs (an unconditional MFN provision). The MFN provision should apply to both federal and cantonal procurement. This provision would eliminate most of Switzerland's GPA reservations with respect to the United States (communal bodies would still be excepted), and thus open both federal and cantonal procurement markets to US firms.

Subfederal practices that impede competition cannot be abolished overnight. Nevertheless, in the realm of public procurement, the Swiss-US FTA should be ambitious and forward-looking. For budget reasons alone, public authorities in both countries should welcome the precedent of greater competition. Our discussion now turns to investment—the final piece of the liberalization puzzle.