

REGULATIONS AND CASE LAW OF PUBLIC PROCUREMENT

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В статті проаналізовано процедуру адаптації Директиви Європейського парламенту та Ради ЄС № 2004/18/ЄС від 31.03.2004 р. про координацію процедур визначення державних закупівель будівельних робіт, постачання та послуг та Директиви Європейського парламенту та Ради ЄС № 2004/17/ЄС від 31.03.2004 р. про координацію процедур при визначенні державних закупівель у сфері водного господарства, енергетики, транспорту та поштових послуг (секторальні державні закупівлі). Проведений аналіз нормотворчої діяльності та судової практики в цій сфері на рівні ЄС та однієї держави-члена ЄС – Чеської Республіки.

Ключові слова: підприємницьке право, державні закупівлі, державні замовлення, договір, підприємницький договір.

В статье проанализированы процедуру адаптации Директивы Европейского парламента и Совета ЕС № 2004/18/ЕС от 31.03.2004 г. о координации процедур определения государственных закупок строительных работ, поставок и услуг Директивы Европейского парламента и Совета ЕС № 2004/17/ЕС от 31.03.2004 г. о координации процедур при определении государственных закупок в сфере водного хозяйства, энергетики, транспорта и почтовых услуг (секторальные государственные закупки). Проведенный анализ нормотворческой деятельности и судебной практики в этой сфере на уровне ЕС и одного государства-члена ЕС - Чешской Республики.

Ключевые слова: предпринимательское право, государственные закупки, государственные заказы, договор, предпринимательский договор.

The paper analyzes the adaptation of European Parliament and Council of 31.03.2004 № 2004/18/EC on the coordination of procedures for determining procurement of construction works, supplies and services and Directive of the European Parliament and of the Council 2004/17/EC of the number 31.3.2004 on the coordination of procedures for determining public procurement in the water, energy, transport and postal services (sector public Procurement). The analysis of legislative activity and judicial practice in this area at EU level and one of the Member States - the Czech Republic.

Keywords: business law, public procurement, public order, contract, entrepreneurial contract.

The aim of the legislation on public procurement is to facilitate the creation of equal conditions for participating in a competition of contractors (candidates, bidders) for a public contract.

The date of accession of the Czech Republic to the EU was also the effective date of Act No. 40/2004 Coll., on public procurement, which transposed the relevant EC/EU directives to the Czech laws. These included particularly Directives 92/50/EEC, 93/36/EEC, 93/38/EEC, 97/52/EC, 98/4/EC and 2001/78/EC.

The fact that the European procurement procedures were consistently reflected in the said Act created preconditions for the unification of terminology, use of individual types of procurement procedures and suitable evaluation of the qualifications of the candidates and bidders and of their bids. Indeed, the previous legislation (Act No. 199/1994 Coll.) was not based on European regulations.

However, new directives concerned with utilities contracts and the award procedure – Directives 2004/17/EC and 2004/18/EC – were issued in the meantime. These directives were to be transposed by the individual Member States to their national laws not later than by 31 January 2006. The Czech Republic then adopted the relevant legislation, i.e. new Act No. 137/2006 Coll., with effect as of 1 July 2006. Overall, the obligation imposed on the Czech Republic was fulfilled at a later date, but to the full extent.

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (utilities) were thus transposed. We shall refer to these directives in an abbreviated form, specifically to Directive 2004/17/EC as the “Utilities Directive” and to Directive 2004/18/EC as the “Contract Award Directive”.

The Directives could have been transposed by amending Act No. 40/2004 Coll.; however, the Act included not only suitable legislative schemes, but also certain problematic aspects. This would require substantial changes that would exceed the scope of what could be considered as amendment. It was therefore more appropriate to issue a new regulation, i.e. Act No. 137/2006 Coll., although a number of its provisions remained unchanged (the Act has later been modified by a number of various amendments).

Two directly applicable regulations of the European Union also must be taken into consideration in

implementation and application of Act No. 137/2006 Coll., in the consolidated version. This includes primarily Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council. The Annex to the Regulation provides a uniform set of updated forms for the publication of notices on selected contracts. These include the following: prior information notice; contract notice; contract award notice; periodic indicative notice – utilities; contract notice – utilities; contract award notice – utilities; qualification system – utilities; simplified contract notice on a dynamic purchasing system; public works concession (concessions are regulated by Act No. 139/2006 Coll.); contract notice - contracts to be awarded by a concessionaire who is not a contracting authority; and design contest notice. Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) is also directly implemented and applied.

Directives 2004/17/EC and 2004/18/EC (modified by Directive 2005/75/EC) represent “public procurement directives”, providing for the award of public contracts. However, they do not stipulate all the aspects of this subject and, in respect of issues that are not regulated by the directives, they leave it to the discretion of each Member State whether it will regulate them by a national law or leave them without regulation.

Other European regulations provide particularly for the aspects of the review procedure, coordination of review procedures, co-ordination of rules and co-ordination of procedures in general. European regulations mostly only establish the relevant framework for the specific regulations and procedures.

The European legislation also regulates, relatively in detail, “above-the-threshold contracts”, i.e. contracts with an anticipated value attaining at least the thresholds stipulated by EC regulations. These thresholds are specified in Art. 1.7 of the Contract Award Directive and in Article 16 of the Utilities Directive. The Czech legislation adheres to these limits and entrusts the setting of their applicable amount in CZK to a Government regulation.

Act No. 137/2006 Coll. also provides for below-the-threshold contracts and minor contracts.

The principles of awarding public contracts are set out in Article 2 of the Contract Award Directive. The contents of this Article are then reflected in Section 6 of Act No. 137/2006 Coll.

It must be borne in mind in this respect that interpretation of Act No. 137/2006 Coll., on public procurement, cannot rely solely on its provisions, but also needs to respect the Euro-conforming interpretation in compliance with the case-law of the ECJ. Indeed, this case-law is also respected by decisions of the Office for the Protection of Competition and Czech case-law.

In the following text, we shall discuss the regulation embodied in Act No. 137/2006 Coll., and particularly those parts of the Act that transpose the EC/EU legislation and aspects of the structure of the given legal regulation.

Certain ensuing aspects are contained in various parts of the Act. In this paper, we shall attempt to provide a well-arranged explanation and describe the relevant activities in their chronological order.

On the basis of public contracts, contractors are given the opportunity to implement extensive supplies. A major part of funds available to society are spent in this process. "Relatively stable business relationships with secured financing are established on the basis of public contracts. The entrepreneur who is awarded a contract faces a minimum risk of not being paid the agreed consideration for the provided performance". Indeed, the EC directives and the ensuing Czech legislation were adopted with a view to ensuring transparency, non-discrimination and equal position of all contractors (candidates, bidders) in awarding these contracts.

The Act transposes the applicable legal regulations of the European Union and provides for

- the procedures in awarding public contracts,
- a design contest (concerned with a design, project or plan),
- supervision over compliance with the Act,
- the conditions for keeping the list of qualified contractors and a system of certified contractors and their functions.

The Act is divided into nine parts and three annexes.

Part One, entitled General Provisions, is concerned with the Subject of the Act, Contracting Entity, Central Contracting Authority, Relevant Activities, Concurrence of Activities, Principles of the Contracting Entity's Procedure, Public Contract (public works contracts, public supply contracts and public service contracts) and Definitions; it also provides for exemptions and competition related to the performance of the relevant activities.

Part Two provides for the Award Procedure, its types and conditions for use of certain procedures, including the aspects of a competitive dialogue and simplified below-the-threshold procedure.

Part Three regulates special procedures in the award procedure.

Part Four deals with design contest.

Provisions on the protection against incorrect procedure of the contracting entity are contained in Part Five.

The subsequent parts include provisions on the list of qualified contractors, system of certified contractors, foreign list of contractors and joint provisions (particularly on publication and on communication between the contracting entity and the contractor).

This is followed by Transitory and Final Provisions.

Part Nine contains provisions on the effect of the Act.

Annexes Nos. 1 and 2 provide a list of services subject to publication in the Official Journal of the European Union (Annex No. 1) and a list of services not subject to publication (Annex No. 2). Annex No. 3 is entitled "Construction Works pursuant to Section 9 (1) (a) of the Act". Section 9 (1) (a) stipulates that, if a construction work set out in Annex No. 3 is involved, the public contract is a public works contract.

The scope of the Act is defined by the set circle of persons.

CONTRACTING ENTITIES

Act No. 137/2006 Coll. distinguishes the following categories of contracting entities: contracting authorities, sectoral contracting entities, subsidised contracting entities and central contracting authorities. In this respect, contracting entities are entities that intend to obtain supplies, services and works for consideration and, according to the law, they are not allowed to enter into the relevant contract directly, without adhering to the procedure pursuant to the Public Procurement Act.

The following are contracting authorities:

- a. the Czech Republic;
- b. State contributory organizations;
- c. territorial self-governing units (local governments) and contributory organisations where the function of the founder is performed by a territorial self-governing unit;
- d. other legal entities if
 - 1) the entity was established or founded for the purpose of meeting needs in the general interest, not having an industrial or commercial character, and
 - 2) is financed, for the most part, by the State or some other contracting authority or is subject to management by the State or some other contracting authority or the State or some other contracting authority appoints or elects more than half of the members of its statutory, administrative, supervisory or control body.

This definition of a contracting authority corresponds to Art. 1.9 of the Contract Award Directive. The definition of "other legal entities" was further specified compared to the previous legal regulation and currently corresponds to the wording of Art. 1 (9) (c) of the Directive.

We recommend *de lege ferenda* that the definition of contracting authority also include specifically city wards and city districts of statutory cities and faculties of public institutes of higher learning so as to clarify that they award contracts insofar as they act independently according to the statute of the city or institute or higher learning. This could contribute to resolving of the current disputable issues.

A subsidised contracting entity is defined, in conformity with Art. 8 of the Contract Award Directive, as a legal or natural person who awards a public contract subsidised by 50 % by contracting authorities.

MINOR CONTRACTS, BELOW-THE-THRESHOLD AND ABOVE-THE-THRESHOLD CONTRACTS

A minor public contract means a public contract with an anticipated value not attaining CZK 1,000,000 excluding value added tax for a public supply contract or a public service contract or CZK 3,000,000 excluding value added tax for a public works contract.

A below-the-threshold public contract means a public contract with an anticipated value attaining at least CZK 1,000,000 excluding value added tax for a public supply contract or a public service contract or at least CZK 3,000,000 excluding value added tax for a public works contract and not attaining the set financial threshold.

An above-the-threshold public contract means a contract exceeding the set thresholds or at least attaining these thresholds.

If the domestic legislation stipulates the duty to publish a notice, this means that

for below-the-threshold public contracts, a notice is to be published in the national information system;

for above-the-threshold public contracts, a notice is to be published in the national information system and in the Official Journal of the European Union.

The mentioned thresholds are specified by the European

regulations (see above) in EUR. The current Czech law authorised the Government to issue regulations specifying these amounts in CZK. These Government regulations are issued from time to time and the thresholds specified for this country in CZK are adjusted in view of the currency development.

However, the thresholds specified in the directives are always complied with. At the time of preparation of this text, the threshold of CZK 3,236,000 (all figures are ex-

cluding VAT) applies to supply contracts awarded by the Czech Republic and State contributory organisations and the threshold of CZK 4,997,000 applies to “other legal entities”. These thresholds are stipulated by Government Regulation No. 77/2008 Coll., as amended by Government Regulation No. 474/2009 Coll., which also stipulates the thresholds for services and construction works, also for sectoral contracting entities.

Tab. 1: The limit values for above-the-threshold public contracts

Contracting entities	Supplies and services	Construction works
The Czech Republic, State contributory organisations; for the Czech Republic – the Ministry of Defence – this threshold applies only to goods pursuant to an implementing regulation	CZK 3,236,000 for services subject to an exemption stipulated by the Act	CZK 125,451,000
Territorial self-governing units (regional and local governments) or contributory organisations were such self-governing units perform the function of the founder, and “other legal entities”; for the Czech Republic – the Ministry of Defence – for goods not specified in an implementing regulation	CZK 4,997,000 more detailed specification of services is provided in the Act	CZK 125,451,000
Sectoral contracting entity	CZK 10,020,000	CZK 125,451,000

Source: Government Regulation No. 77/2008 Coll., as amended by Government Regulation No. 474/2009 Coll.

Similar to the Czech Republic, a number of other countries also provide, in addition to above-the-threshold contracts, for other categories which are denoted in the Czech legislation as minor and below-the-threshold contracts. These two latter categories are also mutually distinguished on the basis of the financial volume.

Tab. 2: A comparison of the regulations stipulating the financial volume of the lower threshold for below-the-threshold contracts in certain countries

Country	Supplies and services		Construction works	
	EUR	CZK	EUR	CZK
Denmark	66 792	1 665 792	-	-
France	4 000	99 760	4 000	99 760
Poland	14 000	349 160	14 000	349 160
Slovakia	30 000	748 200	120 000	2 992 800
Slovenia	10 000	249 400	20 000	498 800
Czech Republic	80 192	2 000 000	240 577	6 000 000

Source: Vrščeký, R.: Protisoutěžní rozhodnutí zadavatele veřejných zakázek (Anti-competition Decisions of Contracting Entities), disertační práce (dissertation thesis), VŠE Praha (University of Economics in Prague), 2011 and cited literature.

CONTRACTOR, CANDIDATE, BIDDER (TENDERER)

The legal regulation uses the terms contractor, candidate and bidder (tenderer). The individual provisions are then correspondingly addressed to the respective entities. We therefore need to know the contents of these terms. They terms are defined in Art. 1.8 of the Utilities Directive. The Czech law is compatible with the definitions contained in the Directive.

A contractor is a natural or legal person who:

- a) supplies goods;
- b) provides services; or
- c) performs construction work provided that (s)he/it has the registered office, place of business or place of residence in the territory of the Czech Republic; or

d) is a foreign contractor.

A bidder (tenderer) is a contractor who has submitted a bid (tender) in an award procedure (tender procedure).

A candidate is a contractor who has sought within the set deadline an invitation to

- a) a restricted procedure;
- b) a negotiated procedure with prior publication; or
- c) a competitive dialogue;
- d) or a contractor who has been invited by the contracting entity
- e) to negotiations in a negotiated procedure without prior publication;
- f) to submit an indicative tender in a dynamic purchasing system;
- g) to submit a tender in a simplified below-the-threshold procedure;
- h) to submit a tender in a procedure based on a framework contract; or
- i) to confirm interest in participation in an award

procedure initiated by publishing a periodic indicative notice.

The Act stipulates the duties and rights for candidates and bidders (tenderers); however, the addressees of the Act who apply for contracts are often unable to determine at which point they are in the position of candidate and in the position of bidder (tenderer) in respect of individual types of procurement. We attempted to resolve this issue by means of a simple chart that can substantially assist the users who need not “seek” these facts in the law. The following chart shows when a certain person is a candidate and when a bidder (tenderer).

Section 18 of the Act stipulates general exemptions for public contracts. Where an exemption is applicable, the contracting entity is not obliged to award public contracts or need not comply with all the provisions of the Act, or a simplified procedure is available. Section 18 lists approximately 30 exemptions. Within amendment to the Act, the exemptions were extended particularly in the area of defence and security.

Exemptions from the scope of the Act applicable to sectoral contracting entities are specified in Section 19 of the Act.

SUPPLIES, SERVICES, CONSTRUCTION WORKS

As in the previous legal regulation and in conformity with Art. 1.2 of the Contract Award Directive, contracts are divided to:

- supplies
- services
- (construction) works

AWARD PROCEDURE AND NEGOTIATED PROCEDURE

The following award procedures are regulated:

- a) open procedure;
- b) restricted procedure;
- c) negotiated procedure with prior publication;
- d) negotiated procedure without publication;
- e) competitive dialogue;
- f) simplified below-the-threshold procedure.

Only a contracting authority may organise the award procedures under letters e) and f) above.

The procedures set out in letters a) to e) correspond to the provisions of Art. 28, 29, 30 and 31 of the Contract Award Directive. The procedure set out under letter f), which was supplemented by the Czech Republic to its legislation, is not at variance with the wording of the Directive and facilitates the award of below-the-threshold contracts. Five contractors are invited to submit a tender in this procedure. It can be generally used for all below-the-threshold contracts.

Together with a restricted procedure, an open procedure – identically with the previous regulation – is a general method of awarding contracts. It is announced generally; it thus allows for participation by an unlimited number of contractors. The tenderers then submit their tenders and, at the same time, prove their qualifications.

A restricted procedure is a procedure where the contracting entity also addresses the notice to an unlimited number of contractors. However, these contractors, in the position of candidates, first submit their application for participation in the procedure and prove their qualifications, and only if they are selected, do they submit their tenders and become tenderers. If the contracting entity has restricted the number of candidates who will be invited to submit their tenders, the contracting entity should select the addressed candidates based on previously determined objective criteria. At least five candidates must be invited if the notice is

published by a contracting authority, or three for a sectoral contracting entity.

Contracting entities may adopt measures to restrict the number of candidates to an appropriate level provided that they do so in a transparent and non-discriminatory manner. To this end, they may apply, for example, objective factors, such as experience gained by the candidates in the given sector, size and infrastructure of their undertaking, their technical and professional qualifications and other factors. They may even opt for drawing a lot, either as a separate, single selection criterion, or in combination with other criteria. In any case, the number of candidates included in the narrower selection must be such as to secure appropriate competition. Various shortcomings are found in practice in reducing the number of candidates. However, it is necessary to respect the legal regulation and not to permit any discriminatory procedures. This is true particularly of drawing a lot.

The Member States must also ensure that decisions taken by the contracting entity are subject to a review. The relevant legislation, i.e. Act No. 137/2006 Coll., provides for this duty in conformity with Art. 81 of the Contract Award Directive and Art. 72 of the Utilities Directive.

Compliance with the set procedure in awarding public contracts should lead (in spite of the related expenditures) to rationalisation of the funds expended for the contracts.

ON FINDINGS FROM PRACTICE AND CURRENT SUGGESTIONS DE LEGE FERENDA

The subject of public contracts is currently topical on both central and regional levels. One of the issues related to public procurement lies in the frequent changes in the legal regulation of this process, responding both to the extensive EU legislation in this area and to the negative phenomena occurring in implementation of the regulation. Another reason for changes in the legislation lies in the effort to further clarify the relevant terminology and to specify the individual public procurement procedures in detail.

A major part of contracts awarded in the Czech Republic (as well as in the Slovak Republic and other EU countries) is subject to the public procurement regime. Of course, the underlying European legislation is uniform, the national laws of the individual countries are mutually very similar and the European case-law is binding on all the stakeholders. Indeed, it is likely that the scope of public contracts will be further extended, although simplification of the award process for the currently defined public contracts would be appreciated.

Another major amendment to the Public Procurement Act has recently been adopted. The aim is to reduce the percentage of funds lost by the Czech Republic in the currently applicable public procurement processes.

Suggestions have also been made to extend the scope of minor contracts. Indeed, minor contracts are to be limited by the amount of CZK 1 million. This should be achieved gradually. However, it will probably require substantive and personnel strengthening of the supervisory authority, i.e. of the Office for the Protection of Competition.

It should also be determined that a contracting entity is obliged to use an electronic auction in awarding contracts defined by an implementing regulation. At the same time, a duty is to be introduced to publish the prices actually paid for a public contract in the profile of the contracting entity; fines for administrative offences are also supposed to be increased.

In our opinion, a very important factor related public contracts consists in the selection of the relevant entities active within the award process. The existing problems could be resolved in this respect. However, the opinion currently prevails that positive changes can be achieved by further amendments to the Act, which we consider far from suf-

ficient.

If the situation in awarding public contracts is to improve, this can be attained by adhering to the existing procedures; the main obstacle in this respect does not lie in the Czech legislation which is in full conformity with the European regulation.

As regards the question as to whether the Czech legislation is in conformity with European law, we can answer this question in the positive. Indeed, this clearly follows from this paper. EU has raised no fundamental objections against the Czech laws in this respect. However, critical opinions have been expressed – particularly by non-governmental organisations – in terms of the practice in awarding certain contracts.

The Czech legal regulation embodied in Act No. 137/2006 Coll. thus applies only to public contracts and does not deal with concessions and concession agreements related to PPP projects. The latter subject is regulated by Act No. 139/2006 Coll., which, however, refers to Act No. 137/2006 Coll. in a number of aspects. Indeed, a joint regulation was possible, similar to, e.g., the Slovak Republic.

Approximately 10 PPP projects have taken place in the Czech Republic so far and were not evaluated in positive

terms. The Government currently contemplates not continuing these projects. However, this cannot be considered a suitable solution. In contrast, this method allows for implementation of projects that would otherwise not be realised. As known, very good experience has been gained in the United Kingdom. The country utilises, for example, the Wider Markets model, where a private partner uses public property, and the Private Finance Initiative – a public-private partnership.

The entire process of awarding contracts and concessions culminates by execution of the given contract. In this respect, the national regulations are still autonomous. It remains typical of European civil law that it provides only for individual issues, without creating a comprehensive system. There exists no “European Civil Code” that could approximate the laws of the Member States, although considerations have been made on its possible preparation. However, a “common reference framework” has been established to deal with aspects of private law and aspects of contractual relationships, which fact must be appreciated. Although the common reference framework was drawn up only as an independent (methodical) instrument, it provides an important basis for national legislatures.

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