

## PUBLIC PROCUREMENT (SLOVAK REPUBLIC)

### Introduction

Public Procurement Law is one of the cornerstones of the single European market. It aims to provide for a level playing field for all operators based in the EU in the area of public contracts where, traditionally, national preferences played (and indirectly still play) a major role.

Public procurement is an important sector of the economy. According to the European Commission's estimates, it represents 16% of EU GDP, i.e. approx. € 1400 billion. The EU rules will be in effect in the Slovak Republic on 1 May 2004 following the adoption of the new act on public procurement (the "Procurement Act").<sup>1</sup> New EU legislation, which has to be transposed into national law by 2006, seeks to further facilitate international procurement.

Accordingly, as of accession, through the application of transparent tender procedures, Slovak companies will have the opportunity to compete on an equal footing for a share of this market. Companies that do business with public authorities are well advised to have a general understanding of the EU public procurement rules in order first to identify the full range of business opportunities open to them and then in order to comply with the rules necessary to ensure smooth contractual procedures.

#### Key Changes

##### Changes on accession

- Contracts with public authorities or "utilities" (public or private water, energy, transport and telecommunications companies) that exceed certain financial thresholds are to the EU tendering procedures.
- Tenders that exceed the EU thresholds must be published in the Official Journal of the EU.

##### Future changes

- Private companies in the telecommunications sector will fall outside of the scope of the EU public procurement rules. Postal services will be included. (Postal services are already governed by the national Slovak public procurement rules.)
- Specific rules on public-private partnerships will be introduced (enhancing legal certainty).
- Procurement via electronic communication will be established.

<sup>1</sup> No. 523/2003 Coll.

Public Procurement Law is a very complex area of the law, involving a very high level of detailed regulation. What renders the public procurement rules particularly intricate is the co-existence of two different legal systems: the EU system which applies when specific EU thresholds are exceeded and national rules which apply to certain contracts below the EU thresholds. Below, we provide a broad overview of the key legal issues that are relevant from a business perspective, first identifying the EU thresholds (Section II.), the specific EU rules applicable to (public and private) utilities (Section III.), and the national Slovak rules that apply below the EU thresholds (Section IV.), before then describing the potential remedies companies have in relation to unlawful tenders in the Slovak Republic (Section V.) and finally, providing an outlook on future EU developments in the field (Section VI.).

## II. EU Public Procurement Law (Contracting Authorities)

### 1. When do the EU rules apply?

As mentioned above, public procurement is governed by both national and EU rules, with the EU rules applying to contracts with values exceeding certain thresholds and national rules applying to those contracts whose values fall below those thresholds.<sup>2</sup> Furthermore, the EU directives provide for a minimum legal standard in the field, and Member States are free to opt for stricter rules. This will continue to be the case post accession.

The EU rules (as transposed into national law by the Procurement Act) apply if (i) the contract is to be awarded by a so-called “Contracting Authority”; (ii) falls into one of the categories of works, services or supply contracts and (iii) the EU thresholds are met. These thresholds are € 5 million for Works contracts and € 200,000 for Supply and Service contracts (save for certain exceptions).

The delineation between the different types of contracts – and, therefore, the applicable threshold - may, in certain instances, be very complicated. In very general terms, it can be said that works contracts include general building and civil engineering work, such as the construction of roads, bridges and railways, demolition work and installation work, for example, plumbing. Supply contracts cover contracts for the purchase or hire of goods, together with their sitting or installation. Service contracts are defined negatively as including all contracts between a service provider and a contracting authority that are not works or supply contracts. Moreover, the Service Directive provides different sets of rules for different types of service contracts. In their entirety, the rules apply only to contracts designated “Annex Ia service contracts” which comprise, for example, maintenance and repair services, computer services and management consultant services. Other contracts – so-called Annex Ib services – are only subject to

<sup>2</sup> Directive 93/37/EEC (the “Work Directive”), Directive 93/36/EEC (the “Supply Directive”), and Directive 92/50/EEC (the “Service Directive”), collectively the “Procurement Directives”.

limited regulation. Annex Ib covers, for example, legal services. In addition, certain service contracts – such as employment contracts – are entirely excluded from the application of the Services Directive.

The Procurement Directives use the term “Contracting Authority” to describe the bodies to which the EU public procurement rules apply. A Contracting Authority is defined broadly as the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.<sup>3</sup> Despite efforts to clearly define the entities that qualify as contracting authorities, there are a number of borderline cases, most notably in the case of the now, common instrument: the public-private-partnership (PPP). In the course of 2004, the Commission intends to issue a so-called Green Paper to trigger a debate on how best to provide a comprehensive legal framework for PPPs (planned for April 2004).

## 2. *What are the relevant procurement procedures?*

The Procurement Directives set forth an exhaustive list of available procurement procedures, namely (i) the open procedure, (ii) the restricted procedure, and (iii) the negotiated procedure.

In all instances, the Contracting Authority has a choice of applying either the open or the restricted procedure. In an open procedure, all interested parties may submit offers. The tender is published in the EU’s Official Journal. In a restricted procedure, only those companies invited by the Contracting Authority may submit tenders. The tender is also published in the Official Journal and interested companies may request that they be permitted to participate in the procedure (the Contracting Authority must assess such requests in a fair and non-discriminatory fashion). In both open and restricted procedures, the terms of the contract must be set out in the tender and all subsequent negotiation between the Contracting Authority and participants on fundamental aspects of the contracts, and in particular on prices, is ruled out. Discussions with participants may be held solely for the purpose of clarifying or supplementing the content of their tenders or the requirements of the Contracting Authorities, provided that this does not involve discrimination.

The so-called negotiated procedure is considered an exception that may be used only in justified cases and if the conditions required for its use as set out in the Procurement Directives are fulfilled. There are two types of negotiated procedure: the negotiated procedure with publication of a notice in the Official Journal and the negotiated procedure without publication of a notice. The negotiated procedure with publication may be used, for instance, when the nature of the services or the risks involved do not permit

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<sup>3</sup> A body governed by public law is defined as any body that (a) is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, (b) which body has legal personality; and (c) is either (i) financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or (ii) is subject to management supervision by those bodies; or (iii) is having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

prior overall pricing. Publication of a notice is intended to permit companies to approach the Contracting Authority to make an offer. Negotiated procedure without publication comes into play where the Contracting Authority can enter into an agreement with the service provider of its choice. The circumstances in which it may be used are even more limited. It may only be used, for instance, if, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, only a particular service provider may provide the services.

### 3. *What are the criteria for awarding a tender?*

Supply, works and service contracts may be awarded on the basis of one of two criteria: either the lowest price or the most economically advantageous tender.

For the purpose of determining the most economically advantageous tender, the Procurement Act gives a non-exhaustive list of criteria that may be applied.<sup>4</sup> The Contracting Authority must state in the contract notice all the criteria it intends to apply to the award, where possible, in descending order of importance.

## III. EU Public Procurement Law (Utilities)

The scope of the "traditional" Directives on supplies, works and services excludes those works, supply and service contracts awarded by "utilities" (i.e. public and private entities operating in the water, energy, transport and telecommunications sectors and, in anticipation of the new EU directive on utilities, postal services). Directive 90/531/EEC, as amended by Directive 93/38 EEC (the "Utilities Directive") established a more flexible legal framework for the utilities sector when compared with other public procurement sectors.<sup>5</sup> Most notably, contracting entities have a free choice between open, restricted and negotiated procedures, which are defined in exactly the same way as in the traditional Directives on supply, works and service contracts, provided that the tender is published in the Official Journal.

Similar to the "traditional" directives, the Utilities Directive covers the supply of products, building or civil engineering works and the provision of services. It applies to contracts whose estimated value is not less than € 400.000 in the case of supply or service contracts awarded by entities in the transport, drinking water or energy sectors; € 600.000 in the case of supply or service contracts awarded by entities in the telecommunications sector; and € 5 million in the case of works contracts in those sectors.

<sup>4</sup> The criteria include price, delivery or completion date, technical merit, quality, aesthetic and functional characteristics, running costs, cost-effectiveness, after-sales service and technical assistance.

<sup>5</sup> The Utilities Directive applies to private entities that have been granted special or exclusive rights of exploitation (e.g. through licenses to operate a transport facility or telecommunications network) in respect of one of the activities covered by the Directives. Such special or exclusive rights may be (a) cases where a service is provided to the public via a technical network whose very existence restricts competition (production, transport or distribution of drinking water, and railway, tramway and bus networks) or (b) cases where an entity exploits a geographical area for a particular purpose subject to a government concession or authorization (e.g. extraction of gas and oil or the provision of airport or port facilities).

## IV. Slovak Public Procurement Law below the EU thresholds

Under the national Slovak procurement rules there are basically three different regimes for both contracting authorities and utilities: for contracts of lower value (the so-called “under threshold method with lower price”),<sup>6</sup> for contracts of higher value (the so-called “under threshold method with higher price”)<sup>7</sup> and for contracts below the EU limit (the so-called “below limit method” ).<sup>8</sup>

The basic difference between the three methods is the level of regulation. In the case of the “below limit method”, the full scope of public procurement rules applies. In the case of contracts that fall under the “under threshold method with higher price”, only the restricted procedure and the negotiated procedure with and without publication of a notice are used. Finally, in the case of the “under threshold method with lower price”, the Contracting Authority or utility only uses the negotiated procedure without publication of a notice.

## V. Legal protection

Legal protection of private parties in relation to the public procurement rules, both below and above the EU thresholds, is basically a question of national law. However, EU law establishes a general remedial framework that sets out a minimum standard of remedies and provides for the possibility of a complaint to the Commission.<sup>9</sup>

In the Slovak Republic, the competent enforcement authority is the Public Procurement Office (PPO). Any interested parties whose rights or rightful interests may be infringed or endangered by a breach of the procurement rules may submit an objection. Moreover, the PPO may initiate proceedings *ex officio*. The PPO may (a) order the cancellation of the selected method of public procurement, (b) order the cancellation of any discriminatory requirements, (c) impose fines, or (d) file a motion in court to declare the relevant contract null and void in cases where the public procurement rules were not followed. Decisions of the PPO concerning objections are subject to review by the courts.

Despite the apparent priority of national dispute resolution mechanisms, the European Commission plays an important, albeit indirect, role in enforcing the public procurement rules. Apart from (or instead of) an

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<sup>6</sup> Applies to supply and services contracts of an amount of SKK 50,000 - 250,000 and to works contracts of an amount of SKK 100,000 - 500,000.

<sup>7</sup> Applies to supply and services contracts of an amount of SKK 250,000 - 500,000 and to works contracts of an amount of SKK 500,000 - 2,000,000.

<sup>8</sup> Applies to contracts the value of which exceeds the “higher value” threshold but is below the EU thresholds.

<sup>9</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

action under national law, private parties are free to lodge a complaint with the European Commission. If the Commission considers that an infringement has been committed prior to a contract being concluded, it will notify the awarding authority and the relevant Member State's government of the alleged infringement. In practice, the awarding authority, through the medium of government, is called upon to justify its conduct and rectify the infringement or suspend the award procedure.

In cases where the Commission is not satisfied with the explanations or actions of the awarding authority or the Member State's government, it may commence formal proceedings against the Member State under Article 226 EC. Such an action may ultimately result in the European Court of Justice issuing a ruling that condemns the Member State in question for failing to fulfil its Community law obligations.

## VI. Outlook

On 29 January 2004, a new Directive on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (replacing the respective Works, Supply and Services Directive) and a new Directive on Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (replacing the Utilities Directive) were adopted. Member States have 21 months to implement the new directives (Directives are not directly applicable but need to be transposed into national law.)

The new directives will not lead to a drastic change in the EU procurement rules but aim to consolidate and modernize the current regime, making it more transparent. Most notably, the new directives introduce a more flexible award procedure, the so-called competitive dialogue, where, prior to making bids, participants may negotiate the contract conditions. Moreover, the directives provide for common rules for electronic procurement. In this context, the Commission intends to present in June 2004 an action plan for a coordinated approach as regards e-procurement within the EU. Furthermore, the new thresholds will change to € 162,000 and € 249,000 for supply and service contracts (depending on the type of service or supply) and € 6,242,000 for works contracts.

As regards utilities, the most important change is that the telecommunications sector will no longer be regulated. Instead, the Utilities Directive now applies to postal services. For utilities, the new thresholds will be € 499,000 for supply and service contracts and € 6,242,000 for works contracts.

In 2004, the Commission also intends to revise the procurement remedies directives. In particular, the Commission plans to suggest that Member States confer onto an existing national surveillance authority the power to bring cases – in the general interest - before a national review body or court, seeking effective remedies. As has been seen from above, the Slovak Republic already has such a mechanism in place.

# EU Accession Series



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## Contact Persons on Public Procurement Law Matters at Squire, Sanders & Dempsey:

<b>Bratislava Office</b> Zochova 5 811 03 Bratislava Slovak Republic Tel. +421.2.5930.3411 Fax +421.2.5930.3415	Kevin T. Connor	+421.2.5930.3473	<a href="mailto:kconnor@ssd.com">kconnor@ssd.com</a>
	Michal Luknar	+421.2.5930.3467	<a href="mailto:mluknar@ssd.com">mluknar@ssd.com</a>
<b>Brussels Office</b> Avenue Louise 165 1050 Brussels Belgium Tel. +322.627.11.11 Fax +322.627.11.00	Brian Hartnett	+322.627.11.01	<a href="mailto:bhartnett@ssd.com">bhartnett@ssd.com</a>
	Rebecca O'Donnell	+322.627.11.36	<a href="mailto:rodonnell@ssd.com">rodonnell@ssd.com</a>
	Oliver Geiss	+322.627.11.12	<a href="mailto:ogeiss@ssd.com">ogeiss@ssd.com</a>
<b>Budapest Office</b> Andrássy út 64. 1062 Budapest Hungary Tel. +36.1.428.7111 Fax +36.1.428.7100	Kevin T. Connor	+36.1.428.7115	<a href="mailto:kconnor@ssd.com">kconnor@ssd.com</a>
	Akos Eros	+36.1.428.7155	<a href="mailto:aeros@ssd.com">aeros@ssd.com</a>
<b>Prague Office</b> Václavské náměstí 57/813 110 00 Prague 1 Czech Republic Tel. +420.2.2166.2111 Fax +420.2.2166.2222	Vladimira N. Papirnik	+420.221.662.292	<a href="mailto:vpapirnik@ssd.com">vpapirnik@ssd.com</a>
	Jeffrey A. McGehee	+420.221.662.282	<a href="mailto:jmcgehee@ssd.com">jmcgehee@ssd.com</a>
	Libor Drabek	+420.221.662.265	<a href="mailto:ldrabek@ssd.com">ldrabek@ssd.com</a>

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