

PUBLIC PROCUREMENT (CZECH 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 Czech Republic on 1 May 2004 following the adoption of the new act no. 40/2004 (the "Procurement Act").¹ 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, Czech 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 public procurement rules in order to first identify the full range of business opportunities open to them and then 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 regulated according 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.
- Specific rules on public-private partnerships will be introduced (enhancing legal certainty).

Public Procurement Law is a very complex area of the law, involving a very high level of detailed

¹ Act No. 40/2004, Coll. of Laws, on public procurement (dated 17 December 2003).

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 Czech rules that apply below the EU thresholds (Section IV.), before then describing the potential remedies companies have in relation to unlawful tenders in the Czech 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 Czech 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.² 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 the contract (i) 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).³

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

² 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”.

³ See Section 14 of the Procurement Act. The Procurement Act reserves the application of the reduced threshold of € 130,000 to supply and service contracts only on condition that either (i) the Contracting Authority is the Czech Republic, or the state contributory organization, or (ii) the Ministry of Defence is contracting for goods that are expressly specified in the law.

management consultant services. Other contracts – so-called Annex Ib services – are only subject to 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.⁴ 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 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.

⁴ The Public Procurement Act defines a Contracting Authority as: (A) public contracting authorities, which are, primarily, the following entities: (1) the Czech Republic, (2) state contributory organization, (3) self-governed regional authorities, city of Prague and other cities recognized by special regulation, including the administration, and contributory organizations established by them, (4) entities such as Czech National Bank, the Czech Consolidation Agency, or a legal entity that is (i) established by or on the basis of the law for serving public interests and (ii) another public Contracting Authority mostly finances such special purpose entity, directs the business of such special purpose entity, or appoints the majority of members of the supervisory, administration and executive bodies, (B) physical or legal person whose construction works, services or supplies are financed by more than 50% by a Contracting Authority; and (C) an entrepreneur who is controlled by public Contracting Authority, or whose conduct of business is conditional upon obtaining a licence that conveys special or exclusive rights in transportation, water distribution and treatment, telecommunications, energy sectors (i.e., utilities).

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 EU 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 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.⁵ 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.⁶ 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

⁵ Pursuant to Section 55 of the Procurement Act, the criteria include price, delivery or completion date, technical merit, quality, maintenance requirements, aesthetic, functional, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance.

⁶ 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).

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.

IV. Czech Public Procurement Law below the EU thresholds

The procedure under the Procurement Act provides, with regard to construction works, services or supply contracts that do not meet the EU thresholds, a similar regime to that which applies in case of EU procurement. It applies to contracts with a value in excess of CZK 2 million (approx. € 62,000).⁷ However, the Procurement Act does not exactly mirror the EU rules and provides for certain exceptions. For instance, it provides for shorter time limits and the negotiated procedure can be used more widely.

Tenders do not have to be published in the EU Official Journal but in the information system administered by the Ministry for Regional Development.

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 European Commission.⁸

In the Czech Republic, a private party may seek (a) the issuance of interim measures, (b) the annulment of the Contracting Authority’s final decision on awarding the public procurement contract, (c) the prohibition of any performance under the contract, or (d) a claim of damages.

Before filing a complaint to the national supervising authority (the “UOHS”, as per its Czech initials), the private party must deliver its objections to the Contracting Authority no later than within 15 days following the Contracting Authority’s decision to award a contract but before signing. Any private party may raise objections. The Contracting Authority must reply to such objections in writing within 10 days. In case it

⁷ For contracts amounting to CZK 2 million and less there is no specific procedure that has to be followed. However, the award must be transparent, non-discriminatory and at market price.

⁸ 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.

overrules the objections, the agreement may not be signed for 60 days following the Contracting Authority's receipt of the objections.

A complaint must be filed with UOHS within 10 days of the complainant's receipt of the Contracting Authority's decision regarding its objections. UOHS will render its final decision within 30 days of the receipt of all information from the Contracting Authority whose actions are being challenged. A complainant may also seek to obtain interim relief requesting, e.g., an order temporarily suspending the procurement procedure or prohibiting the conclusion of a contract. Complainants may challenge the final decision of UOHS before the administrative 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 action under national law, private parties are free to lodge a complaint with the European Commission. If the European Commission considers that an infringement has been committed prior to a contract being concluded, the European Commission 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 European 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 fulfill 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 European 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

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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 European Commission also intends to revise the procurement remedies directives. In particular, the European 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.

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