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December 8, 2004

## **New Legal Regulation of Public Procurement - CZECH REPUBLIC**

by *Pavla Prikrylova*

As of 1 May 2004, the new Act on Public Procurement, No. 40/2004 Coll., took effect, which replaced the previous legislation on public procurement based on the model legislation on the procurement of goods, buildings and services, as adopted by the UN Commission for International Trade Law (UNCITRAL).



Following criticism from the European Commission, the fundamental grounds of the new legislation became its compatibility with EU Law, i.e. the collection of Public Procurement Directives.

In this respect, it should be noted that before the new Act took effect, a new procurement legislative package was approved within the EU and, therefore, the adoption of an amendment to the Act on Public Procurement can soon be expected. This ought to exclude telecommunications entrepreneurs as contractors and rectify certain partial deficiencies in the new Act in order to enhance transparency in the award process. With reference to such an amendment, a motion to provide for a central purchasing body is also discussed.

The new European directives on Public Procurement also allow for the implementation of certain other methods of public procurement, such as the Dynamic purchasing system, electronic auctions or the so-called competitive dialogue. The motion to provide for competitive dialogue under the Act on Public Procurement has already been installed in the proposal of the intended subject matter of the legislation on the partnership between the public and private sector, as elaborated by the Ministry for Regional Development, which is presently undergoing the pre-legislative commentary procedure.

The New Act on Public Procurement provides for:

- (i) a range of legal and natural persons, which are obliged to award their contracts under this Act,
- (ii) a procedure for the contracting entity for the award of public contracts,
- (iii) types of award procedures,
- (iv) public design contest,
- (v) supervision of the award of public procurement.

A public contract is a contract for supplies, services or construction works, whose contractor is a person defined under the Act and whose expected value exceeds CZK 2.000.000.

Regarding the definitions of public contracts, it should be noted that there have been some court decisions relating to the previous Act on Public Procurement, according to which contracts for the rental of non-residential premises and other immovable property, i.e. contracts where a contracting entity is a lessor, should be treated as a public contract and thus awarded under the Act on Public Procurement. However, the Office for the Protection of Competition does not consider such contracts as being public contracts, which should thus be awarded under the new Act.

Consequently, it would be highly welcomed if contracts for the acquisition or rental of immovable property were expressly excluded from the applicability of the new Act, as is the case under the new European Directive (Directive 2004/18/EC).

The basic element for distinguishing public contract from other types of contract is the obligation of the contractor (contracting entity) to follow those procedures as laid down in the Act on Public Procurement. The key characteristic, then, for determining a public contract is thus the nature of the person who is the contracting entity.

The Act defines two basic types of contracting entities:

(i) public contracting entities, i.e. the state, state allowance organizations, regional and local authorities, bodies governed by public law and another legal and natural persons, which are reimbursed by more than 50% by a public contracting entity.

(ii) the so-called network, sector or utilities contracting entities, which are (i) public undertakings, i.e. undertakings over which public authorities may exercise directly or indirectly a dominant influence through ownership or regulation and (ii) entities which have been granted special or exclusive rights in the fields of water, energy, transport and the telecommunications industry. These contracting entities are obliged to award under the Act only contracts which meet the thresholds set out in the Act, i.e. the so-called above the threshold public contracts.

Under the new Act public contracts are divided into below the threshold public contracts and above the threshold public contracts (the provisions of Section 14 provide the financial thresholds for the various types of public contracts; see the table below).

<b>Public Contracts are:</b>		
contracts for services, supplies and construction work awarded by public contracting entities where their estimated value net of VAT is not less than CZK 2.000.000		
contracts for services, supplies and construction work awarded by both types of contracting entities if their estimated value net of VAT is not less than the below mentioned financial thresholds.		
<b>An above the threshold contract is a contract where the estimated value net of VAT is not less than:</b>		
<b>Contracting entities</b>	<b>Financial threshold</b>	
	<b>Contract for supplies and services</b>	<b>Contracts for construction works</b>
Czech Republic and state allowance organizations (in the case of certain goods, also Czech Republic – Ministry of Defence)	EUR 130.000	EUR 5.000.000
Regional and local authorities, bodies governed by public law, i.e. contractors stated in Section 2(1)(a), under Provisions 3 and 4	EUR 200.000	
Contracting entities operating	EUR 400.000	

in the water, energy and transport sectors, where they pursue the activities referred to in ? 3(1)(a)-(e)		
Contracting entities operating in the sector of telecommunications, where they pursue the activity referred to in ? 3(1)(f)	EUR 600.000	

The new Act defines four possible types of awarding procedures as follows:

- (i) an open procedure, wherein all potential suppliers can participate in the tender,
- (ii) a restricted procedure, wherein any potential supplier can apply for participation in the tender. However, only those entities subsequently invited by the contractor can enter the tender,
- (iii) a negotiated procedure (with or without publication), wherein the invited suppliers do not submit a regular offer but directly negotiate the terms of a public contract with the contracting entity.

The basic principles for the awarding of public contracts are the principle of equal treatment, the principle of non-discrimination and the principle of transparency.

The Act therefore provides that not only the open procedure but, also both the restricted procedure and the negotiated procedure with publication, must be announced for the purpose of maximizing the number of applications received. The Act allows the contracting entity to subsequently limit the number of the tenderers, whereof the refused applicants must be informed in writing inclusive of the specification for the reasons of the refusal.

The Act also contains a new institute – a framework agreement, the purpose of which is to establish the terms governing those contracts to be awarded during a given period.

The Act puts more emphasis on establishing the eligibility of the suppliers for a particular public contract. Contracting authorities may therefore demand not only the documents for establishing the legal existence of the tenderer, but also the evidence of its economic and technical capacities to carry out the works, provide the services or supply the products concerned.

A contract award can be based on one of two principles:

- (i) the lowest price
- (ii) the most economically advantageous tender.

For the purpose of determining the most advantageous tender the tender price will always be one of partial criteria and there is a non-exhaustive list of others: operational and running costs, maintenance requirements and technical, quality, ecological or functional characteristics.

The awarding criteria have to be listed either in the tender notice or in the tender documents.

As far as the review and supervision of the awarding procedure is concerned, it should be noted that any supplier in the case of above the threshold public contracts and any tenderer or candidate in the case of below the threshold contracts is entitled to submit reasoned complaints.

In the case that the contractor does not satisfy the complaints, it is not allowed to, within 60 days

of the receipt thereof, execute any contract on the fulfillment of the public contract in question; otherwise, such a contract is rendered invalid. This rule applies even if the supplier does not mention commencing review proceedings at the Office for the Protection of Competition.

However, the submission of complaints to the contracting entity is a condition for initiating review proceedings at the Office for the Protection of Competition.

As has already been mentioned, the new Act on public procurement came into effect on May 1, 2004. However, many contracting entities have utilized the provisions of the new Act according to which the award of public contracts initiated before May 1, 2004, are concluded under the current, i.e. previous, legislation and therefore commenced the awarding procedure during the last days of April, 2004.

Published by [Alan Griffiths](#)

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