

Public Procurement

An overview of regulation
in 40 jurisdictions worldwide

Contributing editor: Hans-Joachim Prieß

2008



Published by
Global Competition Review
in association with:

AB & David Law
Advokatfirmaet Schjødt DA
Aluko & Oyebode
Anderson Mōri & Tomotsune
Arthur Cox
Arzinger & Partners
Attorneys at Law Miro Senica in odvetniki
Barretto Ferreira, Kujawski, Brancher e Gonçalves
Sociedade de Advogados (BKBG)
Beiten Burkhardt
COMAD, SC, Firma de Abogados
Eversheds Saladžius
Freshfields Bruckhaus Deringer
Hamilton Advokatbyrå
Kachwaha & Partners
Kelemenis & Co
Krogerus Attorneys Ltd
Lett Law Firm
Logos Legal Services
Marx Van Ranst Vermeersch & Partners
Mohammed Muigai Advocates
Morales & Besa
Nieto & Chalela Abogados
Ormai és Társai CMS Cameron McKenna LLP
Paul Varul Attorneys-at-Law
Peckar & Abramson, PC
Peterka & Partners
Sabev & Partners Law Firm
Sérvulo & Associados
Vilau & Mitel Attorneys-at-Law
Walder Wyss & Partners
Wierciński Kwiecieński Baehr Sp.k.

Czech Republic

Barbora Hrivnacova

Peterka & Partners

Legislative framework

1 What is the relevant legislation and who enforces it?

Since 1 July 2006, public procurement in the Czech Republic has been regulated by Act No. 137/2006, on public procurements (the PPA), which replaced the former act on public procurements, No. 40/2004. The PPA was amended by Act No. 110/2007, of 1 June 2007, on the transfer of power from the Ministry of Informatics to the Ministry of Internal Affairs, by Act No. 296/2007, of 1 January 2008, on new insolvency regulation and finally by Act No. 76/2008, of 15 March 2008, remedying incompliance with European legislation.

The amendment introduced by Act No. 76/2008, was the most important modification of the PPA as the financial limits applicable to public contracts are not indicated in the PPA itself, but are indicated by Government Regulation, currently Government Regulation No. 77/2008. This modification will ensure the possibility of promptly modifying financial limits in European legislation that will occur every two years.

Concession contracts are regulated by Act No. 139/2006, on Concession Contracts, effective also since 1 July 2006. The supervisory authority for public procurements is the Office for the Protection of Competition (the OPC).

2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

PPP implemented two European directives published in the European Official Journal on 30 April 2004, namely Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and also respects directives that were not directly replaced by the two abovementioned new directives, namely directives 71/304 EEC, 89/665 EEC, 92/13/EEC and 2001/78/EEC. Current Czech procurement legislation is thus fully compatible with European procurement legislation. The Czech Republic, as a member state of the European Union, is also bound by the GPA. The legislation is further supplemented by the opinions of the OPC.

3 Are there proposals to change the legislation?

There are no proposals to change the legislation.

4 What is the relevant legislation for the procurement of military equipment?

The PPA stipulates a general exemption from scope of its application for public contracts the subject of which is production or purchase of:

- military material necessary to ensure the defence and security of the state, in which case a contracting authority is not obliged to award a public contract under the PPA; and
- military material for the armed forces of the Czech Republic, in which case a contracting authority is not obliged to award a below-the-threshold public contract under the PPA.

Lists of military material necessary to ensure the defence and security of the state, and military material for the armed forces of the Czech Republic can be found in the decree of the Czech Ministry of Defence No. 274/2006, effective 1 July 2006.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The PPA stipulates an exhaustive list of entities that fall within the application of the PPA and determines three kinds of contracting entities: public, subsidised and sector contracting authorities.

Public contracting authorities are the Czech Republic, a state allowance organisation, a territorial self-governing unit or an allowance organisation in respect of which a territorial self-governing unit exercises the function of founder, and another legal person, provided that it has been established or set up for the specific purpose of meeting certain needs in the public interest, not having an industrial or commercial character, and it is financed, for the most part, by the state or by another contracting authority, or is subject to the management supervision of the state or another contracting authority, or has an administrative, managerial or supervisory board, more than half of whose members are appointed by the state or another contracting authority.

A subsidised contracting authority is a legal or a natural person that awards a public contract that is reimbursed by more than 50 per cent from the financial means provided by the public contracting authority, even through another person, in respect of either a construction works contract, the estimated value of which equals or is greater than 146 million Czech koruna (approximately €5.9 million) and the subject-matter of the public contract is the execution of further determined construction works (concerning especially health care, sport, leisure time, etc, facilities, schools and buildings for administrative purposes); or a public service contract relating to a public contract on construction works, the estimated value of which is equal to or greater than 5.86 million koruna (€234,000).

A sector contracting entity is a person that pursues on the basis of a special or exclusive right an activity in the gas, heating, electricity, water supply, transport, telecommunications and postal service sectors and activities carried out when exploiting geographically determined areas, on condition that the contracting authority can exert a dominant influence over the entity.

6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

The PPA provides rules that apply if the contracting authority can be considered as more than one type of contracting authority. Should the contracting authority be at the same time a public and subsidised authority, the rules for the public authority apply. Should the contracting authority be at the same time a public and sector authority, then it is necessary to evaluate whether the particular public contract is awarded in relation to performance of the relevant activity of this authority, as in such a case, the authority must comply with the provisions applicable to a sector authority (including statutory exemptions). On the contrary, if this is not the case, the authority shall proceed in compliance with the rules applicable to the public authority. If it cannot be determined with certainty whether the particular public contract is awarded in relation to performance of the relevant activity of the authority, the authority shall proceed according to special rules on defining activities, which are based on the principle of the prevailing purpose of the activities concerned. Should the contracting authority be at the same time a public authority, a subsidised authority and a sector authority, the authority shall proceed in compliance with the rules applicable to a subsidised authority.

7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

The PPA distinguishes three kind of contracts according to value, namely above-the-threshold, below-the-threshold and small-scale public contracts. The applicable thresholds are determined in Government Regulation No. 77/2008.

Above-the-threshold public contracts are contracts with a value of at least 3.78 million koruna (approximately €151,000) (state and state allowance authorities), 5.86 million koruna (€234,000) (territorial self-governing units and other persons) and 11.7 million koruna (€469,000) (sector contracting authorities) for contracts on supplies and services and 146 million koruna (€5.86 million) for contracts on construction works for all types of contract authorities.

Below-the-threshold public contracts are contracts with a value equal to or greater than 2 million koruna (€74,100) in the case of public supply contracts or public service contracts, or equal to or greater than 6 million koruna (€222,000) in the case of construction works contracts that do not exceed the thresholds fixed for above-the-threshold contracts.

Small-scale public contracts are contracts with a value less than 2 million koruna in the case of public supply contracts or public service contracts, or 6 million koruna in the case of construction works contracts.

As regards calculation of value, VAT is excluded from the calculation and the value is calculated as either the estimated amount of the total financial liability of the contracting entity for the duration of the supply contract, where the contract is to be concluded for a definite period; or the estimated total financial liability of the contracting entity for 48 months, where the con-

tract is to be concluded for an indefinite period – or for a period the duration of which is impossible to specify.

8 Does the extension of an existing contract require a new procurement procedure?

Yes, for the extension of an existing contract, a new procurement procedure is required. However, under specific conditions, additional or new supplies, public works or services may be awarded to the same bidder with whom the contract was signed. The conditions consist in general of the requirement that the supplies, public works and services cannot be provided by another bidder to the overly burdensome effect for the contracting authority.

9 Does the amendment of an existing contract require a new procurement procedure?

As the extension of an existing contract requires a new procurement procedure, the PPA does not expressly stipulate the conditions under which the amendment of an existing contract would be permissible. However, it results from the basic principles of the procurement procedure that no modification of the essential provisions of a public contract is permissible, as it would breach the principle of equal treatment.

10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?

The PPA stipulates special rules for a central purchasing authority, which may award public contracts for and on behalf of other contracting authorities and subsequently sell those public contracts to other contracting authorities for the same price for which they were purchased by a central purchasing body. Besides this possibility the PPA does not provide special rules regulating the transfers of public contracts. However, we believe that such a transfer would violate the principle of equal treatment.

11 In which circumstances do privatisations require a procurement procedure?

Privatisations do not fall within the scope of the PPA, unless the privatising entity fulfils the PPA criteria of a contracting authority in which case the services provided within the privatisation process are subject to the PPA. However, pursuant to European Regulation No. 659/1999 of 22 March 1999, privatisations are to be realised through a sale tender.

12 In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

Pursuant to the PPA a contracting authority is any partnership or other joining of contracting authorities, provided that at least one of them is considered a public contracting authority. In the case of PPP the relevant provisions of the PPA shall thus apply.

13 What are the rules and requirements for the award of services concessions?

The regulation of concession contracts is provided by Act No. 139/2006 on Concession Contracts (ACC), effective since 1 July 2006, which implemented European Directive 2004/18/EC. The ACC applies to service concession contracts and supply concession contracts.

14 What are the rules and requirements for the award of an in-house contract without a procurement procedure?

If the contracting authority and the service provider are, or form a part of, the same legal entity, the public procurement procedure is not to be employed.

The procurement procedures

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

The PPA stipulates the basic principles for tender procedures that are to be followed by the contracting authority, namely the principles of transparency, equal treatment and non-discrimination.

16 Does the relevant legislation or case law require the contracting authority to be independent and impartial?

The contracting authority shall appoint an evaluation committee to assess and evaluate the tenders in open procedures, restricted procedures, and competitive dialogue and in simplified below-the-threshold procedures, as well as for the indicative evaluation of tenders in negotiated procedures with publication. Pursuant to the PPA the members of the evaluation committee shall not be biased in relation to the public contract and the bidders, shall not engage in drawing up a tender, shall have no personal interest in the award of the public contract and shall have neither a personal nor occupational nor any other relationship of that kind with the bidders. The same requirement applies to persons representing the contracting authority in the award procedure.

17 How are conflicts of interest dealt with?

Where the grounds for bias of any member of the evaluation committee occur, he or she shall be obliged to report this immediately to the contracting authority. In such a case, the contracting authority shall exclude the member from further participation in the evaluation committee. Where the contracting authority has any doubts in respect of the impartiality of any member of the evaluation committee, it shall proceed by analogy.

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

The participation of a bidder that would be involved in the drafting of tender documents would violate the basic principles of the tender procedure (equal treatment, transparency and competition). The contracting authority thus should exclude such a bidder from the tender procedure, although the PPA does not stipulate any express provision on this matter.

The PPA provides for four groups of criteria that are to be fulfilled by a bidder: general qualification prerequisites, professional prerequisites, financial and economic standing, and technical qualification prerequisites.

19 What is the prevailing type of procurement procedure used by contracting authorities?

According to official statistics, the prevailing types of procurement procedures were in 2006 negotiated procedures without publication, open procedures and restricted procedures.

20 Are there special rules or requirements determining the conduct of a negotiated procedure?

The PPA regulates two types of negotiated procedure: a negotiated procedure with publication and a negotiated procedure without publication.

A negotiated procedure with publication may be used by the contracting authority where only incomplete or inadmissible tenders have been submitted in response to the previous open procedure, restricted procedure or competitive dialogue, insofar as the original tender conditions and terms have not been substantially altered and the negotiated procedure with publication is immediately initiated following the setting aside of the previous award procedure.

Negotiated procedure without publication may be used by the contracting authority if:

- no tenders have been submitted in response to the previous open procedure, restricted procedure or negotiated procedure with publication;
- only unsuitable tenders have been submitted in the previous open procedure, restricted procedure or negotiated procedure with publication; or
- no requests to participate in restricted procedure or negotiated procedure with publication have been submitted.

21 When and how may the competitive dialogue be used?

The contracting authority is entitled to make use of a competitive dialogue for the award of public contracts with a particularly complex subject matter, where the use of open procedures or restricted procedures is impossible in view of the nature of the subject matter of the public contract.

Particularly complex public contracts are understood as public contracts in respect of which the contracting authority is not objectively able to precisely define technical specifications, or the legal or financial requirements applicable to the performance of the public contract.

The contracting authority is obliged to inform an unlimited number of economic operators of its intent to award a public contract in a competitive dialogue, by means of a notice of competitive dialogue. Candidates shall submit their requests to participate in writing and demonstrate the fulfilment of qualifications within a set time limit. The contracting authority, following the assessment of candidates' qualifications, shall invite those candidates (at least three) that have demonstrated the fulfilment of qualifications to participate in competitive dialogue.

22 What are the requirements for the conclusion of a framework agreement?

Under the terms of the PPA, a framework agreement is an agreement in writing concluded for a definite period between a contracting entity and one or more tenderers, which provides for the terms of the individual public supply contracts, public service contracts or public works contracts awarded during the duration of the framework agreement, in particular, with regard to price and quantity.

If the contracting entity intends to conclude the framework agreement with more than one tenderer, the candidates shall be at least three in number. The contracting entity is entitled to indicate in the contract notice or in the announcement of competition the maximum number of candidates with which the framework agreement may be concluded.

The term of a framework agreement concluded by the contracting authority shall not exceed four years, save in exceptional

cases, where a longer term is justified on objective grounds, relating in particular to the subject matter of the framework agreement.

When awarding a public contract based on a framework agreement, the contracting entity is entitled to apply the same evaluation criteria as those applied in awarding the framework agreement. In such a case the tenderer shall be obliged to offer the contracting entity at least such terms and conditions for the performance of the public contract as those under which the framework agreement was concluded with such a tenderer.

23 May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

No, the contracting entity shall conclude only a single framework agreement regardless of whether it is concluded with one or more tenderers.

24 Under what conditions may consortium members be changed in the course of a procurement procedure?

If the number of candidates capable of performing a public contract based on a framework agreement falls below three – during the term of a framework agreement to be concluded with more than three tenderers – the contracting entity is not entitled to award a public contract based on such a framework agreement. This also applies in the case of a framework agreement concluded with two tenderers, if both tenderers are incapable of performing the public contracts based on a framework agreement.

25 Are unduly burdensome or risky requirements in tender specifications prohibited?

There is no explicit prohibition of unduly burdensome or risky requirements in the regulations.

26 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

No economic, financial or technical qualification criteria may be subject to evaluation by the contracting authority. Should a tenderer fail to prove fulfilment of the relevant qualification criteria, the contracting authority must exclude this tenderer from the procurement procedure. The public authority has no discretion in this matter.

27 What are the requirements for the admissibility of alternative bids?

The contracting authority is to determine whether the alternative bids shall be permissible prior to the initiation of an award and should it permit alternative bids, it is to determine the related conditions in the awarding documentation. Alternative bids are admissible if the public contract is awarded on the basis of the basic evaluation criterion of economic advantageousness of the bid.

28 Must a contracting authority take alternative bids into account?

The contracting authority is obliged to take alternative bids into account only if it expressly allowed for the inclusion of alternative bids in advance.

29 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Should a bidder fail to comply with the conditions of the tender, its bid is to be excluded from the award procedure, save for cases where alternative bids are admitted and the specific requirements for these bids determined by the contracting authority are satisfied.

30 What are the award criteria provided for in the relevant legislation?

Bids may be evaluated exclusively on the basis of one of two basic evaluation criteria: the economic advantageousness or the lowest bid price.

The qualification criteria cannot serve as a basis for the award criteria. This applies to all contracting parties without exception.

31 What constitutes an 'abnormally low' bid?

Whether a bid is abnormally low shall be considered in every particular case by the evaluation committee of the contracting authority. Should the evaluating committee consider a bid as abnormally low, it shall proceed as described in question 32.

32 What is the required process for dealing with abnormally low tenders?

Should the evaluating committee consider a bid as abnormally low, it shall request a written justification from the bidder regarding those parts of the bid that are relevant to the level of a bid. The bidder is to reply within three days. The committee may take into account an abnormally low tender price only in cases where it finds that such a tender is justified on objective grounds, in particular: exceptional economic aspects of the construction method or technology, process of manufacture or provided services; originality of technical merit of solutions or exceptionally favourable conditions available to the bidder to carry out works or provide supplies or services; originality of works, supplies or services; compliance with regulations relating to employees' protection and working conditions that are effective in the place where works are performed or supplies or services provided; and the possibility that the bidder would obtain state aid. If the evaluation commission considers that a bid price is abnormally low and the reason for the low bid is that the bidder has received state aid, then the evaluation commission may exclude the bid on these grounds only if it has consulted the bidder and if the bidder is unable to prove that state aid was provided in compliance with EU legal regulations.

33 How can a bidder, that would have to be excluded from a tender procedure because of past irregularities, regain the status of a suitable and reliable bidder? Is 'self-cleansing' an established and recognised way of regaining reliability?

Bidders must submit correct bids to the contracting authority by the deadline, in which they must prove they meet the qualification criteria. If the bidder does not meet the criteria the contracting authority will exclude it from the tender proceedings. Subsequent remedy of this lack of qualification by the bidder cannot put it back in the tender proceedings. Thus, the only way to return to the tender is to successfully appeal against the contracting authority's decision on the exclusion. In this respect, the remedies available to the bidder are objections to the contracting authority and the OPC in the time limits specified in question 37.

If the bidder loses some qualification criteria after submitting

Update and trends

A hot topic in the Czech Republic is preventing manipulation of procurement proceedings, especially the competition and criminal aspects of public procurement.

In February 2007, the OPC levied the highest sanction in the Czech Republic's history after fining nine power equipment manufacturers a total of 979 million koruna (approximately €38.8 million) for their roles in a price-fixing scheme and bid-rigging.

The OPC stated that nine engineering companies had apparently colluded to keep prices artificially high since 1988 and rigged bids for procurement contracts, thus allocating projects to each other and sharing the gas-insulated switchgears market.

Among the victims were state-owned public utilities, municipalities and private companies that all rely on gas-insulated high-tension electric switchgears, which are used to control flow on electricity grids.

The companies are Alstom, Areva, Fuji Electric, Hitachi, Japan AE Power Systems, Mitsubishi Electric, Siemens, Toshiba, and Nuova Magrini Galileo.

Currently a new Criminal Code is being prepared, with new offences relating to public procurement being included, eg arranging an advantage in procurement proceedings, bribery in procurement proceedings, grave infringement of tender rules and bid-rigging.

the bid but before concluding the public contract, it is obliged to notify the contracting authority within seven days of losing the qualification and must simultaneously prove to the contracting authority that it can ensure the requested qualification in another way (typically a sub-contractor through the bidder proves part of the qualification and withdraws from the agreement on cooperation with the bidder and in this case the bidder must find another sub-contractor and submit a new agreement on cooperation with this new sub-contractor to the contracting authority within seven days). If the contracting authority has already decided on concluding the public contract with this bidder, the bidder must do so until concluding the public contract at the latest.

Review proceedings and judicial proceedings

34 Which authorities may rule on review applications?

The authorities that may rule on review applications are the contracting authority itself, the OPC and the European Commission.

35 How long does a review proceeding or judicial proceeding for review take?

The contracting authority must decide on an objection raised by the tenderer within 10 days of its receipt. The OCP must decide within 30 days of the commencement of administrative proceedings according to the general rules of administrative proceedings as set out in Act No. 500/2004 on administrative proceedings.

36 What are the admissibility requirements?

Objections to the contracting authority may be filed by each tenderer that allegedly incurred damage due to the proceedings of the contracting authority in the case of above-the-threshold, below-the-threshold and dynamic purchase systems, within 15 days of the day when the tenderer became aware that damage had been incurred.

The OPC may review the procedure on above-the-threshold and below-the-threshold public contracts (not small-scale contracts) on the basis of objections raised by the tenderer or on its own initiative, when it has reasonable grounds to believe that an infringement of the PPA has occurred.

37 What are the deadlines for a review application and an appeal?

The objections are to be delivered to the contracting authority within 15 days of the day when the tenderer became aware that the proceedings of the contracting authority had caused it damage. A complaint to the OPC is to be delivered to the OPC within 10 days of receiving the decision of the contracting authority. Should the contracting authority not issue a decision on the objection, the tenderer must deliver its complaint to OPC within 25 days of sending its objection to the contracting authority. Potential appeals against a decision of the OPC are not covered by the PPA itself but are subject to the general rules on appeals relating to the decisions of administrative authorities.

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

Should the contracting authority fail to allow the objections within 10 days, the contracting authority cannot conclude a public contract nor cancel the procurement procedure within period for filing a complaint to the OPC and should such a complaint be filed, within 45 days of the delivery of objections to the contracting authority (the blockage period). The same prohibition shall apply should the contracting authority fail to treat the objections within the fixed period (ie, it has not dispatched a written decision on the objections within 10 days). The prohibition ceases to exist and the contracting authority is entitled to conclude a contract or cancel the award procedures should the proceedings on a complaint to the OPC be definitely terminated before lapse of the blockage period.

39 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

Yes. The contracting authority must, within five days of deciding on the most suitable bid, immediately send the decision to all bidders, unless they have been excluded from the award procedures.

40 Is access to the procurement file granted to an applicant?

No. An applicant has access only to the Report on Consideration and Evaluation of Tenders. The contracting authority is obliged to enable all bidders, at their request, to look into the report, unless they have been excluded from the award procedures, and to take an extract or a duplicate of it.

41 Is it customary for disadvantaged bidders to file review applications?

It is customary for bidders to file objections to the contracting authority. However, as regards complaints to the OPC, a considerable fee (1 per cent of the offered price of the contracting authority, at least 50,000 krouna (approximately €1,851), maximum 2 million koruna (approximately €79.4 million)) is to be paid by the tenderer filing the complaint that is returned to the tenderer only if they are successful in review proceedings. Consequently, filing a complaint with the OPC is not as customary as filing objections to the contracting authority.

42 May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

If the OPC ascertains, before the conclusion of a public contract, that the contracting authority did not comply with the procedure stipulated by the PPA for the awarding of public contracts, whereby such action substantially affected or could affect the choice of the most suitable bid, the OPC shall impose a corrective measure on the contracting authority. In particular, unless the contract has been concluded, the OPC may cancel the awarding of the public contract or cancel a single action of the contracting authority; otherwise, it shall stop the procedure.

If the OPC learns of a violation only after the conclusion of a public contract it shall impose fine on the contracting authority. A contract already concluded thus cannot be cancelled by OPC.

However, a public contract concluded as a result of tender proceedings that did not comply with relevant public procurement regulation (ie, PPA) can be considered as null and void under the Civil Code, which declares all legal acts that breach or evade legislation as null. The nullity of the contract cannot be declared by OPC but by the court in civil proceedings. A plaintiff requiring this finding would have to prove urgent legal interest.

43 Is legal protection available in cases of a de facto award of a contract, namely, an award without any procurement procedure?

De facto award contracts would be considered invalid, due to the circumvention or breach of the applicable legislation.

PETERKA 
& PARTNERS

Barbora Hrivnacova

hrivnacova@peterkapartners.cz

Na Prikope 15
110 00 Prague 1
Czech Republic

Tel: +420 246 085 300
Fax: +420 246 085 370
www.peterkapartners.com