

The International Comparative Legal Guide to:

# Public Procurement 2009

A practical insight to cross-border Public Procurement



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## General Chapters:

1	<b>EC Public Procurement Rules</b> - Matthew Hall, Ashurst LLP	1
2	<b>Canadian PFI/PPP's</b> - Ian MacIntosh & Judy Wilson, Blake, Cassels & Graydon LLP	—

## Country Question and Answer Chapters:

3	<b>Albania</b>	Boga & Associates: Sabina Lalaj & Besa Tauzi	—
4	<b>Argentina</b>	M. & M. Bomchil: María Inés Corrá & Ignacio J. Minorini Lima	—
5	<b>Australia</b>	Middletons: Roger Perrins & Tom McAvaney	—
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11	<b>Czech Republic</b>	Peterka & Partners: Barbora Hrivnacova	—
12	<b>Denmark</b>	Plesner: Gitte Holtsø & Christian Karhula Lauridsen	—
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37	<b>Spain</b>	Gómez-Acebo & Pombo: Carlos Rueda	—
38	<b>Sweden</b>	Mannheimer Swartling Advokatbyrå AB: Louise Widén & Niklas Sjöblom	—
39	<b>Switzerland</b>	Walder Wyss & Partners Ltd.: Hans Rudolf Trüeb & Micha Bühler	—
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# Czech Republic



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## 1 Relevant Legislation

### 1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Public procurement in the Czech Republic is regulated by Act No. 137/2006 Coll., on public procurements (PPA), which replaced the former act on public procurements, No. 40/2004 Coll., on 1 July 2006.

Since its introduction, the PPA has been amended several times, most importantly by Act No. 76/2008 Coll., with effect from 15 March 2008, remedying non-compliance with European legislation. Now, the financial limits applicable to public contracts are not indicated in the PPA itself but by Government Regulation, currently Government Regulation No. 77/2008 Coll. This modification will ensure the possibility to react promptly to modifications of financial limits in European legislation which are supposed to occur every two years.

Concession contracts are regulated by Act No. 139/2006 Coll., on Concession Contracts, effective also since 1 July 2006.

### 1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

The Czech Republic, as a Member State of the European Union, has implemented, in the Acts mentioned in question 1.1, two European directives published in the European Official Journal on 30 April 2004. These are 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. The country also respects directives which were not directly replaced by these two 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 supervisory authority, the Office for the Protection of Competition ("OPC").

### 1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

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

### 1.4 Are there special rules in relation to military equipment?

The PPA stipulates a general exemption from 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 Coll., effective since 1 July 2006.

## 2 Application of the Law to Entities and Contracts

### 2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

The PPA gives an exhaustive list of entities which fall within its scope 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, does not have an industrial or commercial character, and 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.

The PPA provides rules which 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 a subsidised authority, the rules for the public authority apply.

Should the contracting authority be at the same time a public and a 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 must 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 must 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 must proceed in compliance with the rules applicable to a subsidised authority.

## 2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

A subsidised contracting authority is a legal or a natural person that awards a public contract which is reimbursed by more than 50 percent 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 CZK 146,447,000 (€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, 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 CZK 5,857,000 (€234,000).

A sector contracting entity is a person who pursues on the basis of a special or exclusive right 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.

For resolving cases of uncertainty about the type of contracting authority see question 2.1.

## 2.3 Which types of contracts are covered?

Contracts with one of the contracting authorities which reach the fixed thresholds (see question 2.4).

## 2.4 Are there threshold values for determining individual contract coverage?

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

Above-the-threshold public contracts are contracts with a value of at least CZK 3,782,000 (€151,280) (state and state allowance authorities), CZK 5,857,000 (€234,280) (territorial self-governing units and other persons) and CZK 11,715,000 (€468,600) (sector contracting authorities) for contracts on supplies and services and CZK 146,447,000 (€5,857,880) 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 CZK 2 million (€74,074) in the case of public supply contracts or public service contracts, or equal to or greater than CZK 6 million (€222,222) in the case of construction works contracts and which do not exceed the thresholds fixed for above-the-threshold contracts.

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

When calculating value, VAT is excluded 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 contract is to be concluded for an indefinite period, or for a period the duration of which is impossible to specify precisely.

## 2.5 Are there aggregation and/or anti-avoidance rules?

Should the evaluating committee consider a bid as abnormally low, it must 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 the 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 regulations.

## 2.6 Are there special rules for concession contracts?

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

## 3 Procedures

### 3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

The PPA provides for the following types of award procedures:

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

The open procedure may be used by all contracting authorities for all tender proceedings. The other types of procedures are bound to several conditions.

In the open procedure the contracting entity makes known its intention to award a public contract to an unlimited number of economic operators by means of a notice of open procedure; the notice of open procedure is an invitation to economic operators to submit tenders and to demonstrate the fulfilment of qualifications.

In the restricted procedure the contracting entity makes known its intention to award a public contract by restricted procedure to an unlimited number of economic operators by means of a notice of restricted procedure; the notice of restricted procedure is an invitation to submit requests to participate in a restricted procedure and to demonstrate the fulfilment of qualifications. Candidates submit requests to participate and demonstrate the fulfilment of qualifications within a fixed time limit. The contracting entity, following an assessment of the candidates' qualifications, invites the candidates that have demonstrated the fulfilment of qualifications to submit tenders.

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: (i) no tenders have been submitted in response to the previous open procedure, restricted procedure or negotiated procedure with publication; (ii) only unsuitable tenders have been submitted in the previous open procedure, restricted procedure or negotiated procedure with publication; or (iii) no requests to participate in restricted procedure or negotiated procedure with publication have been submitted.

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: (i) technical specifications; or (ii) 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 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, invites those candidates (at least three) that have demonstrated the fulfilment of qualifications to participate in competitive dialogue.

In simplified below-the-threshold procedure the contracting authority invites no less than five candidates to submit tenders and

to demonstrate the fulfilment of qualifications by means of an invitation in writing.

The contracting authority is entitled to make use of a simplified below-the-threshold procedure for the award of (i) a below-the-threshold public supply contract or below-the-threshold public service contract, or (ii) a below-the-threshold public works contract where the estimated value is equal to or less than CZK 20,000,000 net of VAT.

### 3.2 What are the rules on specifications?

The PPA provides 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.

### 3.3 What are the rules on excluding tenderers?

Bidders must submit correct bids to the contracting authority by the deadline, in which they must prove fulfilment of qualification criteria. If the bidder does not fulfill the criteria the contracting authority must exclude it from the tender proceedings and subsequent remedying of the 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 object successfully to the decision of the contracting authority on its exclusion. In this respect, the remedies available to the bidder are objections to the contracting authority and to OPC.

If the bidder loses some qualification criteria after submitting the bid but after concluding a public contract, it is obliged to announce it to the contracting authority within seven days of losing the qualification and must simultaneously prove to the contracting authority that it is ensuring the required qualification in another way (typically a sub-contractor through the bidder proves part of the qualification but then withdraws from the agreement on cooperation with the bidder; 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 a public contract with such a bidder, the bidder must do so until concluding the public contract at the latest.

The bidder may also be excluded in cases of abnormally low bids (see question 2.5).

### 3.4 What are the rules on short-listing tenderers?

The bidders are selected within the procedures on the basis of fulfilling qualification criteria. If the contracting authority intends to limit the number of bidders that pass to the next level this condition of the procedure must be stipulated from the beginning in the conditions of procedure.

### 3.5 What are the rules on awarding the contract?

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

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

### 3.6 What methods are available for joint procurements?

Czech law allows a joint tender as well as a joint bid. For the purposes of a joint tender two or more people (one must be a contracting authority under the PPA) may cooperate.

The joint bid may be filed by bidders on condition that these bidders will conclude an agreement on the basis of which they will be jointly and severally liable for performing the contract.

### 3.7 What are the rules on alternative bids?

The contracting authority determines whether alternative bids are permissible before granting an award. If it permits alternative bids, it must determine the related conditions in the awarding documents. Alternative bids are admissible if the public contract is awarded on the basis of the basic evaluation criterion of the economic advantageousness of the bid.

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

## 4 Exclusions and Exemptions (including in-house arrangements)

### 4.1 What are the principal exclusions/exemptions and who determines their application?

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

### 4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

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

## 5 Remedies and Enforcement

### 5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to locus standi?

The remedies available to tenderers under the PPA are (i) objections to the contracting authorities and (ii) a complaint to the OPC if the objections were not successful. 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.

### 5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

Remedies may be sought by complaint to the European Commission.

### 5.3 Before which body or bodies can remedies/enforcement be sought?

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

### 5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

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 it within ten 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.

### 5.5 What remedies are available after contract signature?

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

However, a public contract concluded as a result of tender proceedings that did not comply with relevant public procurement regulation, namely the PPA, can be considered as null and void under the Civil Code, which nullifies all legal acts breaching or evading the law. The OPC cannot nullify the contract, only the courts in civil proceedings can do so. A plaintiff requiring such a finding would have to prove urgent legal interest on this determination.

### 5.6 What is the likely timescale if an application for remedies/enforcement is made?

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

### 5.7 Is there a culture of enforcement either by public or private bodies?

The enforcement of tender rules is under the authority of the OPC.

### 5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

A hot topic in the Czech Republic is preventing the 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 CZK 979.2 million (\$45 million) for their roles in a price-fixing scheme and bid-rigging.

The OPC held 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 market of gas-insulated switchgears.

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.

## 6 Changes During a Procedure and After a Procedure

**6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?**

If extending 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 overly burdening effect for the contracting authority.

Following the basic principles of the procurement procedure no modification of the essential provisions of a public contract is permissible, as this would breach the principle of equal treatment.

The PPA stipulates special rules for a central purchasing authority, which may (i) award public contracts for and on behalf of other contracting authorities and (ii) 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.

**6.2 In practice, how do purchasers and providers deal with these issues?**

The rules on changes of contract conditions may not be circumvented. To do so would be in breach of law.

Currently the new Criminal Code is being prepared, and new offences relating to public procurement will be included, for example, arranging an advantage in procurement proceedings, bribery in procurement proceedings, grave infringement of tender rules and bid-rigging.

## 7 Privatisations and PPPs

**7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?**

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, under European Regulation No. 659/1999 of 22 March 1999, privatisations are to be realised through a sale tender.

**7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?**

Under 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. For PPP the relevant provisions of the PPA apply.

## 8 Other Relevant Rules of Law

**8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?**

The most important source of legal opinions is the decision practice and opinions of the OPC.

## 9 The Future

**9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?**

There are no proposals to change the procurement legislation. However, the new Criminal Code is being prepared, and will contain new offences relating to public procurement, for example, arranging an advantage in procurement proceedings, bribery in procurement proceedings, grave infringement of tender rules and bid-rigging.

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