

PRÁVNÍ ÚPRAVA A ŘEŠENÉ PŘÍPADY VEŘEJNÝCH ZAKÁZEK

REGULATIONS AND CASE LAW OF PUBLIC PROCUREMENT

Karel Marek

Abstrakt: *Transponování směrnice Evropského parlamentu a Rady 2004/18/ES ze dne 31. března 2004, o koordinaci postupů při zadávání veřejných zakázek na stavební práce, dodávky a služby, a směrnice Evropského parlamentu a Rady 2004/17 /ES ze dne 31. března 2004, o koordinaci postupů při zadávání zakázek postupů působících v odvětví vodního hospodářství, energetiky, dopravy a poštovních služeb (sektorové zakázky) bylo zajištěno. Směrnice sice bylo možno provést novelizací zákona č. 40/2004 Sb. V tomto zákonu nebyly jen vhodné legislativní konstrukce, ale i řešení problémová. Bylo tedy vhodnější vydat předpis nový, tj. zákon č. 137/2006 Sb., i když řada právních ustanovení nedoznala změny.*

Klíčová slova: *obchodní právo; veřejné zakázky; nadlimitní veřejné zakázky; podlimitní veřejné zakázky; veřejné zakázky malého rozsahu; PPP projekty, smlouva, obchodní smlouva*

Abstract: *Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (sectoral contracts) were thus transposed. The Directives could have been transposed by amending Act No. 40/2004 Coll.; however, the Act included not only suitable legislative schemes, but also certain problematic aspects. It was therefore more appropriate to issue a new regulation, i.e. Act No. 137/2006 Coll., although a number of provisions remained unchanged.*

Keywords: *business law, public procurement; above-the-threshold public contracts; below-the-threshold public contracts, PPP projects, contract, commercial contract*

JEL Classification: K12

1 INTRODUCTION

The aim of the legislation on public procurement is to facilitate the creation of equal conditions for participating in a competition of contractors (candidates, bidders) for a public contract.¹

The date of accession of the Czech Republic to the EU was also the effective date of Act No. 40/2004 Coll., on public procurement, which transposed the relevant EC/EU directives to the Czech laws. These included particularly Directives 92/50/EEC, 93/36/EEC, 93/38/EEC, 97/52/EC, 98/4/EC and 2001/78/EC.

The fact that the European procurement procedures were consistently reflected in the said Act created preconditions for the unification of terminology, use of individual types of procurement procedures and suitable evaluation of the qualifications of the candidates and bidders and of their bids. Indeed, the previous legislation (Act No. 199/1994 Coll.) was not based on European regulations.

However, new directives concerned with utilities contracts and the award procedure – Directives 2004/17/EC and 2004/18/EC – were issued in the meantime. These directives were to be transposed by the individual Member States to their national laws not later than by 31 January 2006. The Czech Republic then adopted the relevant legislation, i.e. new Act No. 137/2006

¹ For further details we must refer to the relevant commentaries, Cf., e.g., RAUS, D., NERUDA, R. *Zákon o veřejných zakázkách, Komentář* (Public Procurement Act, Commentary). Praha: Linde, 2007.; ŠEBESTA, M., PODEŠVA, V., OLÍK, M., MACHUREK, T. *Zákon o veřejných zakázkách s komentářem* (Public Procurement Act with Commentary). Praha: ASPI, 2006.; JURČÍK, R.: *Zákon o veřejných zakázkách, Komentář* (Public Procurement Act, Commentary). 2nd edition. Praha: C.H.Beck, 2011.; PODEŠVA, V., OLÍK, M., JANOUŠEK, M., STRÁNSKÝ, J. *Zákon o veřejných zakázkách, Komentář* (Public Procurement Act, Commentary). 2nd edition. Praha: Wolters Kluwer, 2011.; KRČ, R., MAREK, K., PETR, M. *Zákon o veřejných zakázkách a koncesní zákon s komentářem* (Public Procurement Act and Concessions Act with Commentary). 2nd edition. Praha: Linde, 2008.

Coll., with effect as of 1 July 2006. Overall, the obligation imposed on the Czech Republic was fulfilled at a later date, but to the full extent.

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (utilities) were thus transposed. We shall refer to these directives in an abbreviated form, specifically to Directive 2004/17/EC as the “Utilities Directive” and to Directive 2004/18/EC as the “Contract Award Directive”.

The Directives could have been transposed by amending Act No. 40/2004 Coll.; however, the Act included not only suitable legislative schemes, but also certain problematic aspects. This would require substantial changes that would exceed the scope of what could be considered as amendment. It was therefore more appropriate to issue a new regulation, i.e. Act No. 137/2006 Coll., although a number of its provisions remained unchanged (the Act has later been modified by a number of various amendments).

Two directly applicable regulations of the European Union also must be taken into consideration in implementation and application of Act No. 137/2006 Coll., in the consolidated version. This includes primarily Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council. The Annex to the Regulation provides a uniform set of updated forms for the publication of notices on selected contracts. These include the following: prior information notice; contract notice; contract award notice; periodic indicative notice – utilities; contract notice – utilities; contract award notice – utilities; qualification system – utilities; simplified contract notice on a dynamic purchasing system; public works concession (concessions are regulated by Act No. 139/2006 Coll.); contract notice - contracts to be awarded by a concessionaire who is not a contracting authority; and design contest notice. Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) is also directly implemented and applied.

Directives 2004/17/EC and 2004/18/EC (modified by Directive 2005/75/EC) represent “public procurement directives”, providing for the award of public contracts. However, they do not stipulate all the aspects of this subject and, in respect of issues that are not regulated by the directives, they leave it to the discretion of each Member State whether it will regulate them by a national law or leave them without regulation.

Other European regulations provide particularly for the aspects of the review procedure, coordination of review procedures, co-ordination of rules and co-ordination of procedures in general. European regulations mostly only establish the relevant framework for the specific regulations and procedures.

The European legislation also regulates, relatively in detail, “above-the-threshold contracts”, i.e. contracts with an anticipated value attaining at least the thresholds stipulated by EC regulations. These thresholds are specified in Art. 1.7 of the Contract Award Directive and in Article 16 of the Utilities Directive. The Czech legislation adheres to these limits and entrusts the setting of their applicable amount in CZK to a Government regulation.

Act No. 137/2006 Coll. also provides for below-the-threshold contracts and minor contracts.

The principles of awarding public contracts are set out in Article 2 of the Contract Award Directive. The contents of this Article are then reflected in Section 6 of Act No. 137/2006 Coll.

It must be borne in mind in this respect that interpretation of Act No. 137/2006 Coll., on public procurement, cannot rely solely on its provisions, but also needs to respect the Euro-conforming interpretation in compliance with the case-law of the ECJ. Indeed, this case-law is also respected by decisions of the Office for the Protection of Competition and Czech case-law.

In the following text, we shall discuss the regulation embodied in Act No. 137/2006 Coll., and particularly those parts of the Act that transpose the EC/EU legislation and aspects of the structure of the given legal regulation.

Certain ensuing aspects are contained in various parts of the Act. In this paper, we shall attempt to provide a well-arranged explanation and describe the relevant activities in their chronological order.

On the basis of public contracts, contractors are given the opportunity to implement extensive supplies. A major part of funds available to society are spent in this process. “Relatively stable business relationships with secured financing are established on the basis of public contracts. The entrepreneur who is awarded a contract faces a minimum risk of not being paid the agreed consideration for the provided performance”.² Indeed, the EC directives and the ensuing Czech legislation³ were adopted with a view to ensuring transparency, non-discrimination and equal position of all contractors (candidates, bidders) in awarding these contracts.

The Act transposes the applicable legal regulations of the European Union⁴ and provides for

² PLÍVA, S. *Obchodní závazkové vztahy (Commercial Contractual Relationships)*. 1st edition. Praha: ASPI Praha, 2006. p. 49.

³ A new Public Procurement Act was also issued in the Slovak Republic under No. 25/2006 Coll. – Cf. MORAVČÍKOVÁ, A.: *Nový zákon o verejnom obstarávaní č. 25/2006 Zz (New Public Procurement Act No. 25/2006 Coll.)*. In: MORAVČÍKOVÁ, A. *Zodpovednosť a riziko pri vedení firmy (Responsibility and Risk in Company Management)*. Bratislava: Verlag Dashofer, 2005. On public procurement in the Slovak Republic, cf. also HUSÁR, J. *Právna regulácia ingerencie verejnej moci do podnikania (Legal Regulation of Interference of Public Authority with Business)*. EQUILIBRIA Košice 2007, pp. 198-207. Unlike the Czech legislation, which grants the supervisory authority to the Office for the Protection of Competition, which actually has competence exceeding supervision of public contracts, e.g., in Slovakia, the supervisory authority deals only with public contracts. This competence is entrusted to the Public Procurement Office. The situation in Hungary is similar to that in the Slovak Republic. Otherwise, the Slovak legislation is identical with the Czech laws in fundamental aspects.

⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

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 Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the

- the procedures in awarding public contracts,
- a design contest (concerned with a design, project or plan),⁵
- supervision over compliance with the Act,
- the conditions for keeping the list of qualified contractors and a system of certified contractors and their functions.

The Act is divided into nine parts and three annexes.

Part One, entitled General Provisions, is concerned with the Subject of the Act, Contracting Entity, Central Contracting Authority, Relevant Activities, Concurrence of Activities, Principles of the Contracting Entity's Procedure, Public Contract (public works contracts, public supply contracts and public service contracts) and Definitions; it also provides for exemptions and competition related to the performance of the relevant activities.

Part Two provides for the Award Procedure, its types and conditions for use of certain procedures, including the aspects of a competitive dialogue and simplified below-the-threshold procedure.

Part Three regulates special procedures in the award procedure.

Part Four deals with design contest.

Provisions on the protection against incorrect procedure of the contracting entity are contained in Part Five.

application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC

Commission Directive 2005/51/EC of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement

⁵ Act No. 137/2006 Coll. contains special provisions on a design contest.

The subsequent parts include provisions on the list of qualified contractors, system of certified contractors, foreign list of contractors and joint provisions (particularly on publication and on communication between the contracting entity and the contractor).

This is followed by Transitory and Final Provisions.

Part Nine contains provisions on the effect of the Act.

Annexes Nos. 1 and 2 provide a list of services subject to publication in the Official Journal of the European Union (Annex No. 1) and a list of services not subject to publication (Annex No. 2). Annex No. 3 is entitled “Construction Works pursuant to Section 9 (1) (a) of the Act”. Section 9 (1) (a) stipulates that, if a construction work set out in Annex No. 3 is involved, the public contract is a public works contract.

The scope of the Act is defined by the set circle of persons.

2 CONTRACTING ENTITIES

Act No. 137/2006 Coll. distinguishes the following categories of contracting entities: contracting authorities, sectoral contracting entities, subsidised contracting entities and central contracting authorities. In this respect, contracting entities are entities that intend to obtain supplies, services and works for consideration and, according to the law, they are not allowed to enter into the relevant contract directly, without adhering to the procedure pursuant to the Public Procurement Act.

The following are contracting authorities:

- a. the Czech Republic;⁶
- b. State contributory organizations;
- c. territorial self-governing units (local governments) and contributory organisations where the function of the founder is performed by a territorial self-governing unit;
- d. other legal entities if

⁶ Cf. Act No. 219/2000 Coll., on the property of the Czech Republic and acts thereof in legal relations, as amended.

1. the entity was established or founded for the purpose of meeting needs in the general interest, not having an industrial or commercial character, and
2. is financed, for the most part, by the State or some other contracting authority or is subject to management by the State or some other contracting authority or the State or some other contracting authority appoints or elects more than half of the members of its statutory, administrative, supervisory or control body.

This definition of a contracting authority corresponds to Art. 1.9 of the Contract Award Directive. The definition of “other legal entities” was further specified compared to the previous legal regulation and currently corresponds to the wording of Art. 1 (9) (c) of the Directive.

We recommend *de lege ferenda* that the definition of contracting authority also include specifically city wards and city districts of statutory cities and faculties of public institutes of higher learning so as to clarify that they award contracts insofar as they act independently according to the statute of the city or institute or higher learning. This could contribute to resolving of the current disputable issues.

A subsidised contracting entity is defined, in conformity with Art. 8 of the Contract Award Directive, as a legal or natural person who awards a public contract subsidised by 50 % by contracting authorities.

Case 1.: CASE-LAW OF THE ECJ ON THE GIVEN SUBJECT

All judgments are provided particularly pursuant to the websites at www.compet.cz and www.portal-vz.cz and according to Krč, R. in Krč, R.; Marek, K.; Petr, M: Zákon o veřejných zakázkách a koncesní zákon s komentářem (Public Procurement Act and Concessions Act with Commentary), 2nd substantially reworked and supplemented edition, Linde Prague, 2008, 700 p. The following judgments relate to the wording of Art. 1.9 of the Contract Award Directive.

- Judgment of the European Court of Justice C-31/87 of 20 August 1988

Gebroeders Beentjes BV v State of the Netherlands

The objective of the Directive is to coordinate national procedures for the award of public works contracts concluded in Member States on behalf of the State, regional or local authorities or other legal persons governed by public law and, therefore, this term must be interpreted in functional terms. The aim of the directive would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works

contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration. A body whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it is its task to award must be regarded as falling within the notion of the “State” for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms.

- Judgment of the European Court of Justice C-44/96 of 15 January 1998

Mannesmann Anlagebau Austria AG v Strohal Rotationsdruck GesmbH

A body governed by public law (other legal entity) is a body

1. established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
2. having legal personality, and
3. financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or 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.

The European Court of Justice found these conditions to be cumulative.

Another legal entity that was established with a view to fulfilling public needs in public interest not having an industrial or commercial character may also be entrusted with fulfilling other needs - determination of whether the body in question is “another legal entity” on the basis of the relative proportion of its activities pursued for the purpose of meeting these needs would be contrary to the principle of legal certainty. However, an undertaking which carries on commercial activities and in which a contracting authority has a majority shareholding is not to be regarded as “another legal entity” **on the sole ground** that that undertaking was established by the contracting authority or that the contracting authority transferred to it funds which it has earned from activities pursued in order to meet needs in the general interest, not having an industrial or commercial character.

A contract which falls within the definition of a public contract cannot cease to be a public contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority.

- Judgment of the European Court of Justice C-237/99 of 1 February 2001

Commission v French Republic

Construction corporations which meet needs in the general interest, not having an industrial or commercial character, which have legal personality and whose management is subject to supervision by the public authorities which allows the latter to influence their decisions in relation to public contracts, are “other legal entities”.

For subcontracting purposes, a contractor to whom the contracting authority has awarded the public contract is not considered to be a subsidised contracting entity.

In awarding a public contract, a subsidised contracting entity proceeds according to the regulation applicable to a contracting authority. However, a subsidised contracting entity is not subject to the provisions of the Act in respect of awarding a public contract in the area of defence or security.

In our opinion, the legal regulation applicable to subsidised contracting entities could also be extended to cover above-the-threshold “supplies” and “services” (services in general). However, such extension would go beyond the scope of the Contract Award Directive.

A sectoral contracting entity is an entity performing one of the relevant activities (Section 4 of Act No. 137/2006 Coll. stipulates the specific relevant activities in the individual sectors, i.e. in gas industry; heating industry; generation of electricity; water management; activities related to water management; activities related to the operation of transport networks; activities related to the provision of reserved postal services and other postal services; other listed services and listed activities carried out in the utilisation of a geographically delimited area), provided that

- a. it performs the relevant activity on the basis of a special or exclusive right; or
- b. a contracting authority can directly or indirectly exercise a dominant influence over this person; a contracting authority exercises a dominant influence if
 1. it has available a majority of voting rights, either itself or on the basis of an agreement with another person, or
 2. it appoints or elects more than half of the members of its statutory, administrative, supervisory or control body.

This specification of sectoral contracting entities (also called network or utility contracting entities) is based on Art. 2 of the Utilities Directive and activities set out in Act No. 137/2006 Coll. correspond to the definition of activities in Art. 3 to 7 of the Utilities Directive.

Sectoral contracting entities award only above-the-threshold contracts.

A central contracting authority is a contracting authority that performs centralised purchasing, which consists in the fact that

- a. it procures, for other contracting entities, supplies or services that are the subject of public contracts, which it then sells to other contracting entities for a price not exceeding the price for which the supplies or services were acquired; or
- b. organises award procedures and awards public contracts for supplies, services or construction work on account of other contracting entities.

Prior to commencement of a centralised award procedure, the contracting entities and the central contracting authority must execute a written agreement in which they provide for their mutual rights and obligations related to centralised procurement (Section 3 (1)).

Centralised procurement can be employed at all levels, e.g. for regional or local governments (regions, municipalities and city wards, etc.). Two basic types of centralised procurement are laid down. Within the first type, the central contracting authority procures supplies or services within the award procedure and subsequently provides these supplies or services to the contracting entities without any increase in the price. This procedure cannot be applied for public works contracts.

In the second case, the central contracting authority organises an award procedure on account of the contracting entities. This means that the contracting entities authorise the central contracting authority, e.g. to organise the award procedure. In this case, the central contracting authority may procure goods, services and construction works for the contracting entities.

Those contracting entities that acquire goods, services or construction works through a central contracting authority do not organise the award procedures themselves, but the latter are rather organised by the central contracting authority in their stead. The responsibility for the proper course of the entire award procedure is thus borne by central contracting authority.

Before the commencement of centralised procurement, the contracting entities enter into an agreement with the central contracting authority in which they stipulate the terms related to centralised procurement. This scheme is highly appropriate, because certain contracting entities lack sufficient personnel for organising procurement procedures.

Definition of the central contracting authority and central procurement is embodied in the Czech legislation; however, it is in no way at variance with European regulations. In contrast, the Contract Award Directive permits centralisation in its Art. 23.

Concurrence of activities means that the subject of a given public contract relates to the performance of the relevant activity as well as to the performance of some other activity of the contracting entity.

Concurrence was not regulated in the previous legislation and interpretation of the Act varied in respect of such concurrence of activities. This legal regulation is thus welcome.

It is based on Art. 9 of the Utilities Directive, which provides for contracts covering several activities. The previous Czech legal regulation did not deal with concurrence of activities and, consequently, these cases had to be interpreted as requiring application of the legal regulation that was stricter for the contracting entity (e.g. where a sectoral contracting entity was simultaneously a contracting authority, the provisions on contracting authority were applicable).

Currently, the issue of concurrence is resolved for the benefit of the contracting entity and the solution more beneficial for the contracting entity is preferred.

In concurrence of activities:

- a. a contracting authority shall proceed pursuant to the provisions applicable to a sectoral contracting entity only if the subject of the public contract is related primarily to a relevant activity performed by the contracting authority; otherwise, or if it is not possible to objectively determine whether the subject of the contract is related predominantly to the performance of a relevant activity, the contracting authority shall proceed pursuant to the provisions applicable to contracting authorities;
- b. a sectoral contracting entity shall not proceed pursuant to these provisions if the subject of the public contract is related primarily to activities of this entity other than the performance of a relevant activity; otherwise, or if it is not possible to objectively determine

whether the subject of the contract is related predominantly to the performance of other activities, the sectoral contracting entity shall proceed pursuant to the provisions applicable to sectoral contracting entities.

Case 2.: CASE-LAW OF THE ECJ ON THE GIVEN SUBJECT –
corresponding to Art. 9 of the Utilities Directive

- **STRABAG AG and Kostmann GmbH v Österreichische Bundesbahnen** – judgment of the European court of Justice in cases C-462/03 (Strabag AG) and C-463/03 (Kostmann GmbH) of 16 July 2005 celex 62003J0462

The European Court of Justice found that, if the activities of a contracting entity correspond to the definition of a sectoral contracting entity, in the award contracts within that activity, the contracting entity is governed by Utilities Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

3 MINOR CONTRACTS, BELOW-THE-THRESHOLD AND ABOVE-THE-THRESHOLD CONTRACTS

A minor public contract means a public contract with an anticipated value not attaining CZK 1,000,000 excluding value added tax for a public supply contract or a public service contract or CZK 3,000,000 excluding value added tax for a public works contract.

A below-the-threshold public contract means a public contract with an anticipated value attaining at least CZK 1,000,000 excluding value added tax for a public supply contract or a public service contract or at least CZK 3,000,000 excluding value added tax for a public works contract and not attaining the set financial threshold.

An above-the-threshold public contract means a contract exceeding the set thresholds or at least attaining these thresholds.

If the domestic legislation stipulates the duty to publish a notice, this means that

- for below-the-threshold public contracts, a notice is to be published in the national information system;

- for above-the-threshold public contracts, a notice is to be published in the national information system and in the Official Journal of the European Union.

The mentioned thresholds are specified by the European regulations (see above) in EUR. The current Czech law authorised the Government to issue regulations specifying these amounts in CZK. These Government regulations are issued from time to time and the thresholds specified for this country in CZK are adjusted in view of the currency development.

However, the thresholds specified in the directives are always complied with. At the time of preparation of this text, the threshold of CZK 3,236,000 (all figures are excluding VAT) applies to supply contracts awarded by the Czech Republic and State contributory organisations and the threshold of CZK 4,997,000 applies to “other legal entities”. These thresholds are stipulated by Government Regulation No. 77/2008 Coll., as amended by Government Regulation No. 474/2009 Coll., which also stipulates the thresholds for services and construction works, also for sectoral contracting entities.

Tab. 1: The limit values for above-the-threshold public contracts

Contracting entities	Supplies and services	Construction works
The Czech Republic, State contributory organisations; for the Czech Republic – the Ministry of Defence – this threshold applies only to goods pursuant to an implementing regulation	CZK 3,236,000 for services subject to an exemption stipulated by the Act	CZK 125,451,000
Territorial self-governing units (regional and local governments) or contributory organisations were such self-governing units perform the function of the founder, and “other legal entities”; for the Czech Republic – the Ministry of Defence – for goods not specified in an implementing regulation	CZK 4,997,000 more detailed specification of services is provided in the Act	CZK 125,451,000
Sectoral contracting entity	CZK 10,020,000	CZK 125,451,000

Source: Government Regulation No. 77/2008 Coll., as amended by Government Regulation No. 474/2009 Coll.

Similar to the Czech Republic, a number of other countries also provide, in addition to above-the-threshold contracts, for other categories which are denoted in the Czech legislation as minor and below-the-threshold contracts. These two latter categories are also mutually distinguished on the basis of the financial volume.

Tab. 2: A comparison of the regulations stipulating the financial volume of the lower threshold for below-the-threshold contracts in certain countries⁷

Country	Supplies and services		Construction works	
	EUR	CZK	EUR	CZK
Denmark	66 792	1 665 792	-	-
France	4 000	99 760	4 000	99 760
Poland	14 000	349 160	14 000	349 160
Slovakia	30 000	748 200	120 000	2 992 800
Slovenia	10 000	249 400	20 000	498 800
Czech Republic	80 192	2 000 000	240 577	6 000 000

Source: Vršecký, R.: Protisoutěžní rozhodnutí zadavatele veřejných zakázek (Anti-competition Decisions of Contracting Entities), disertační práce (dissertation thesis), VŠE Praha (University of Economics in Prague), 2011 and cited literature.

4 CONTRACTOR, CANDIDATE, BIDDER (TENDERER)

The legal regulation uses the terms contractor, candidate and bidder (tenderer). The individual provisions are then correspondingly addressed to the respective entities. We therefore need to know the contents of these terms. They terms are defined in Art. 1.8 of the Utilities Directive. The Czech law is compatible with the definitions contained in the Directive.

A contractor is a natural or legal person who:

- a. supplies goods;
- b. provides services; or

⁷ The table according to the average EUR exchange rate (CZK 24.94) was used for the conversion of currencies; in fact, the average exchange rate is not decisive as the table does not provide an exact conversion, but rather a comparison.

- c. performs construction work provided that (s)he/it has the registered office, place of business or place of residence in the territory of the Czech Republic; or
- d. is a foreign contractor.

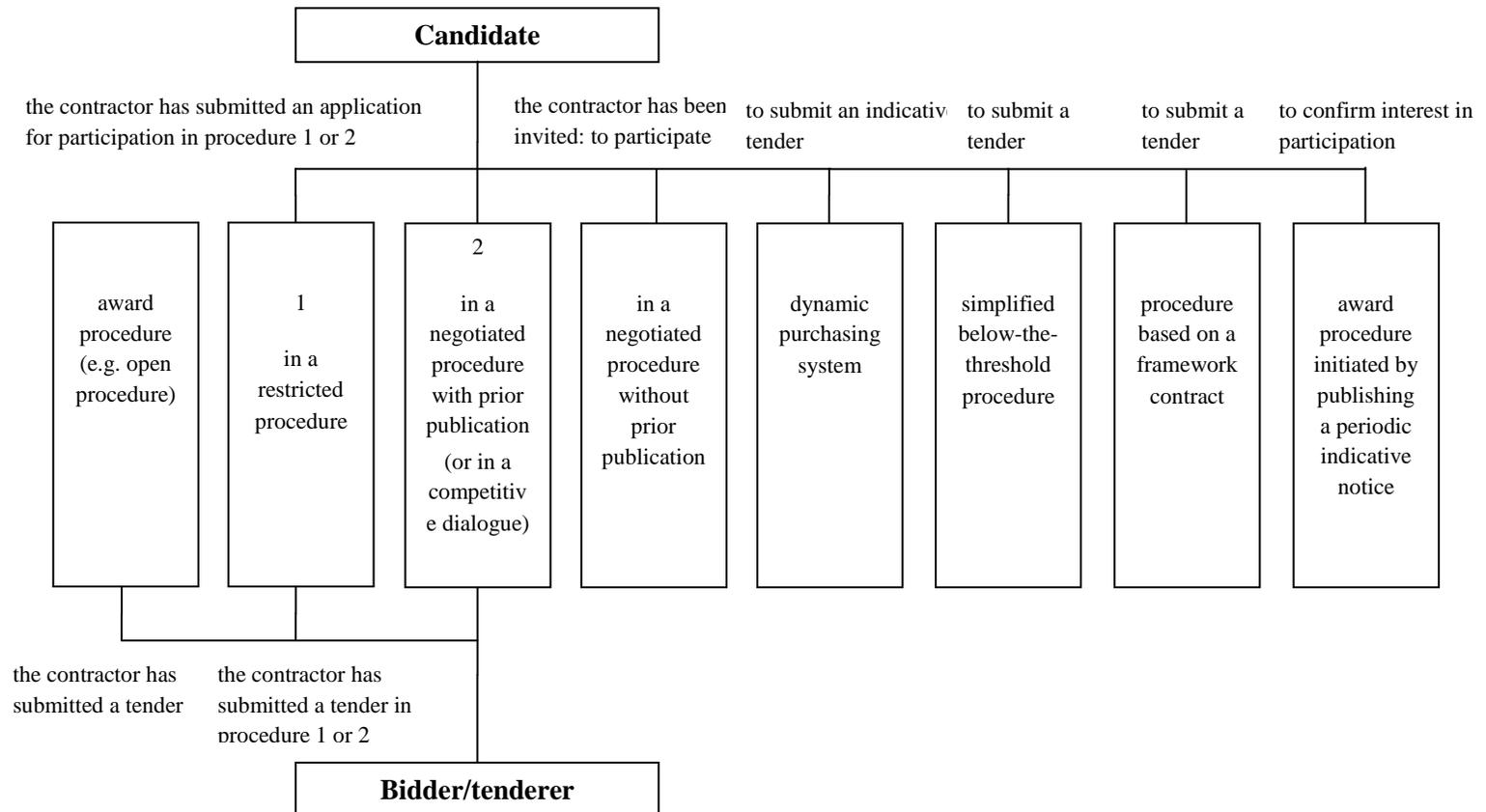
A bidder (tenderer) is a contractor who has submitted a bid (tender) in an award procedure (tender procedure).

A candidate is a contractor who has sought within the set deadline an invitation to

- a. a restricted procedure;
- b. a negotiated procedure with prior publication; or
- c. a competitive dialogue;
- d. or a contractor who has been invited by the contracting entity
- e. to negotiations in a negotiated procedure without prior publication;
- f. to submit an indicative tender in a dynamic purchasing system;
- g. to submit a tender in a simplified below-the-threshold procedure;
- h. to submit a tender in a procedure based on a framework contract; or
- i. to confirm interest in participation in an award procedure initiated by publishing a periodic indicative notice.

The Act stipulates the duties and rights for candidates and bidders (tenderers); however, the addressees of the Act who apply for contracts are often unable to determine at which point they are in the position of candidate and in the position of bidder (tenderer) in respect of individual types of procurement. We attempted to resolve this issue by means of a simple chart that can substantially assist the users who need not “seek” these facts in the law. The following chart shows when a certain person is a candidate and when a bidder (tenderer).

Pic. 1: On the terms “candidate” and “bidder/tenderer”



Source: MAREK, K. Smluvní obchodní právo, Kontrakty. 4th edition. Brno: MU Brno, 2008.

Section 18 of the Act stipulates general exemptions for public contracts. Where an exemption is applicable, the contracting entity is not obliged to award public contracts or need not comply with all the provisions of the Act, or a simplified procedure is available. Section 18 lists approximately 30 exemptions. Within amendment to the Act, the exemptions were extended particularly in the area of defence and security.

Exemptions from the scope of the Act applicable to sectoral contracting entities are specified in Section 19 of the Act.

5 SUPPLIES, SERVICES, CONSTRUCTION WORKS

As in the previous legal regulation and in conformity with Art. 1.2 of the Contract Award Directive, contracts are divided to:

- Supplies
- Services
- (construction) works

Case 3.: CASE-LAW OF THE ECJ ON THE GIVEN SUBJECT – in conformity with Art. 1.2 of the Contract Award Directive

- Judgment of the European Court of Justice C-16/98 of 5 October 2000

Commission v French Republic

It is clear from the definition of work that the existence of a work must be assessed in the light of the economic and technical function of the result of the works concerned. The definition of the term work does not make the existence of a work dependent on matters such as the number of contracting entities or whether the whole of the works can be carried out by a single undertaking.

Pursuant to the Act and also pursuant to Art. 1 (2) (a) of the Contract Award Directive, a public contract that the contracting entity is obliged to award must be performed on the basis of a contract made in writing and for consideration (pecuniary interest).

Consequently, a contract is performed on the basis of a written contract for consideration entered into between the contracting entity and a contractor or contractors. The Act thus requires a written form for these contracts, although this duty does not otherwise follow from the general legal regulations.

While commercial contracts are generally subject to Section 272 of the Commercial Code, it can be inferred in respect of regulation of public

procurement not only that contracts must be concluded in writing, but that their changes also require a written form.

The contracts must be made for consideration; the legal regulation thus does not apply to contracts that are not for consideration, e.g. donation contracts.

A public contract is involved only if the contracting entity is the party to the contract that expends certain funds for the provided supplies, services or works.

While public contracts for supplies and works are defined in the Act by means of a positive list, this approach cannot be employed for public services contract. Any public contract that cannot be subsumed under the definition of a public supply contract or public works contract is thus considered to be a public services contract. It is thus secured that the said three types of public contracts cover all potential performances. For the purposes of the Act, a service is thus deemed to include performances that would generally not be considered a service.

The domestic regulation also stipulates exemptions from the legal regulation pursuant to Art. 18 of the Contract Award Directive and in conformity with the European case-law, which has already determined whether or not an exemption is applicable in a given case.

Case 4.: CASE-LAW OF THE ECJ ON THE GIVEN SUBJECT – in conformity with Art. 18 of the Contract Award Directive

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- Cf. the judgment of the European Court of Justice of 18 November 1999 in C-107/98, **Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia**
Where a contracting entity exercises control over another entity similar to that exercised over its own departments and, at the same time, the person carries out the essential part of its activities together with the controlling contracting entity (entities), a public contract is not involved.
 - Cf. the judgment of the European Court of Justice of 11 January 2005 in C-26/03, **Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREU Leuna**
An “in-house” exemption is not applicable if even a minority interest in the company controlled by a contracting authority is held by private capital.
 - Cf. the judgment of the European Court of Justice of 13 October 2005 in C-458/03, **Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG**

Articles 43 EC and 49 EC, and the principles of equal treatment, non-discrimination and transparency, preclude a public authority from awarding, without putting it out to competition, a public service concession to a company limited by shares resulting from the conversion of a special undertaking of that public authority, a company whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

6 AWARD PROCEDURE AND NEGOTIATED PROCEDURE

The following award procedures are regulated:

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

Only a contracting authority may organise the award procedures under letters e) and f) above.

The procedures set out in letters a) to e) correspond to the provisions of Art. 28, 29, 30 and 31 of the Contract Award Directive. The procedure set out under letter f), which was supplemented by the Czech Republic to its legislation, is not at variance with the wording of the Directive and facilitates the award of below-the-threshold contracts. Five contractors are invited to submit a tender in this procedure. It can be generally used for all below-the-threshold contracts.

Together with a restricted procedure, an open procedure – identically with the previous regulation – is a general method of awarding contracts. It is announced generally; it thus allows for participation by an unlimited number of contractors. The tenderers then submit their tenders and, at the same time, prove their qualifications.

A restricted procedure is a procedure where the contracting entity also addresses the notice to an unlimited number of contractors. However, these contractors, in the position of candidates, first submit their application for participation in the procedure and prove their qualifications, and only if they

are selected, do they submit their tenders and become tenderers. If the contracting entity has restricted the number of candidates who will be invited to submit their tenders, the contracting entity should select the addressed candidates based on previously determined objective criteria. At least five candidates must be invited if the notice is published by a contracting authority, or three for a sectoral contracting entity.

Contracting entities may adopt measures to restrict the number of candidates to an appropriate level provided that they do so in a transparent and non-discriminatory manner. To this end, they may apply, for example, objective factors, such as experience gained by the candidates in the given sector, size and infrastructure of their undertaking, their technical and professional qualifications and other factors. They may even opt for drawing a lot, either as a separate, single selection criterion, or in combination with other criteria. In any case, the number of candidates included in the narrower selection must be such as to secure appropriate competition. Various shortcomings are found in practice in reducing the number of candidates. However, it is necessary to respect the legal regulation and not to permit any discriminatory procedures. This is true particularly of drawing a lot.

The Member States must also ensure that decisions taken by the contracting entity are subject to a review. The relevant legislation, i.e. Act No. 137/2006 Coll., provides for this duty in conformity with Art. 81 of the Contract Award Directive and Art. 72 of the Utilities Directive.

Case 5.: CASE-LAW OF THE ECJ ON THE GIVEN SUBJECT – in respect of Art. 81 of the Contract Award Directive and Art. 72 of the Utilities Directive

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- Judgment of the European Court of Justice of 28 October 1999 in C-81/98, **Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr**
The Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.
 - Judgment of the Court of First Instance of 27 September 2002 in T-211/02, **Tideland Signal Ltd. v Commission**

The Commission (meaning the Commission as the contracting authority) enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract.

Review by the Community Courts is therefore limited to checking compliance with the applicable procedural rules and the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers.

- Judgment of the European Court of Justice of 18 June 2002 in C-92/00, **Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien**

The decision of the contracting authority to cancel a contract must be open to a review procedure, and to be capable of being annulled where appropriate, on the ground that it has infringed Community law on public contracts or national rules implementing that law.

- Judgment of the European Court of Justice of 12 December 2002 in C-470/99, **Universale-Bau A G, Biertergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH**

Directive 89/665 does not preclude national legislation which provides that an application for review of a contracting authority's decision must be submitted within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.

Compliance with the set procedure in awarding public contracts should lead (in spite of the related expenditures) to rationalisation of the funds expended for the contracts.

7 ON FINDINGS FROM PRACTICE AND CURRENT SUGGESTIONS *DE LEGE FERENDA*

The subject of public contracts is currently topical on both central and regional levels. One of the issues related to public procurement lies in the frequent changes in the legal regulation of this process, responding both to the extensive EU legislation in this area and to the negative phenomena occurring in implementation of the regulation. Another reason for changes in the legislation lies in the effort to further clarify the relevant terminology and to specify the individual public procurement procedures in detail.

A major part of contracts awarded in the Czech Republic (as well as in the Slovak Republic and other EU countries) is subject to the public procurement

regime. Of course, the underlying European legislation is uniform, the national laws of the individual countries are mutually very similar and the European case-law is binding on all the stakeholders. Indeed, it is likely that the scope of public contracts will be further extended, although simplification of the award process for the currently defined public contracts would be appreciated.

Another major amendment to the Public Procurement Act has recently been adopted. The aim is to reduce the percentage of funds lost by the Czech Republic in the currently applicable public procurement processes.

Suggestions have also been made to extend the scope of minor contracts. Indeed, minor contracts are to be limited by the amount of CZK 1 million. This should be achieved gradually. However, it will probably require substantive and personnel strengthening of the supervisory authority, i.e. of the Office for the Protection of Competition.

It should also be determined that a contracting entity is obliged to use an electronic auction in awarding contracts defined by an implementing regulation. At the same time, a duty is to be introduced to publish the prices actually paid for a public contract in the profile of the contracting entity; fines for administrative offences are also supposed to be increased.

In our opinion, a very important factor related public contracts consists in the selection of the relevant entities active within the award process. The existing problems could be resolved in this respect. However, the opinion currently prevails that positive changes can be achieved by further amendments to the Act, which we consider far from sufficient.

If the situation in awarding public contracts is to improve, this can be attained by adhering to the existing procedures; the main obstacle in this respect does not lie in the Czech legislation which is in full conformity with the European regulation.

As regards the question as to whether the Czech legislation is in conformity with European law, we can answer this question in the positive. Indeed, this clearly follows from this paper. EU has raised no fundamental objections against the Czech laws in this respect. However, critical opinions have been

expressed – particularly by non-governmental organisations – in terms of the practice in awarding certain contracts.

The Czech legal regulation embodied in Act No. 137/2006 Coll. thus applies only to public contracts and does not deal with concessions and concession agreements related to PPP projects. The latter subject is regulated by Act No. 139/2006 Coll., which, however, refers to Act No. 137/2006 Coll. in a number of aspects. Indeed, a joint regulation was possible, similar to, e.g., the Slovak Republic.

Approximately 10 PPP projects have taken place in the Czech Republic so far and were not evaluated in positive terms. The Government currently contemplates not continuing these projects. However, this cannot be considered a suitable solution. In contrast, this method allows for implementation of projects that would otherwise not be realised. As known, very good experience has been gained in the United Kingdom. The country utilises, for example, the Wider Markets model, where a private partner uses public property, and the Private Finance Initiative – a public-private partnership.

The entire process of awarding contracts and concessions culminates by execution of the given contract. In this respect, the national regulations are still autonomous. It remains typical of European civil law that it provides only for individual issues, without creating a comprehensive system. There exists no “European Civil Code” that could approximate the laws of the Member States, although considerations have been made on its possible preparation. However, a “common reference framework” has been established to deal with aspects of private law and aspects of contractual relationships, which fact must be appreciated. Although the common reference framework was drawn up only as an independent (methodical) instrument, it provides an important basis for national legislatures.

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Autor:

prof. JUDr. Karel Marek, CSc., Katedra účetnictví a daní, AKADEMIE STING, o.p.s., Stromovka 1, 637 00 Brno, Česká republika, e-mail: marek@post.sting.cz

Author:

prof. JUDr. Karel Marek, CSc., Department of Accounting and Taxes, STING ACADEMY, Stromovka 1, 637 00 Brno, Czech Republic, e-mail: marek@post.sting.cz