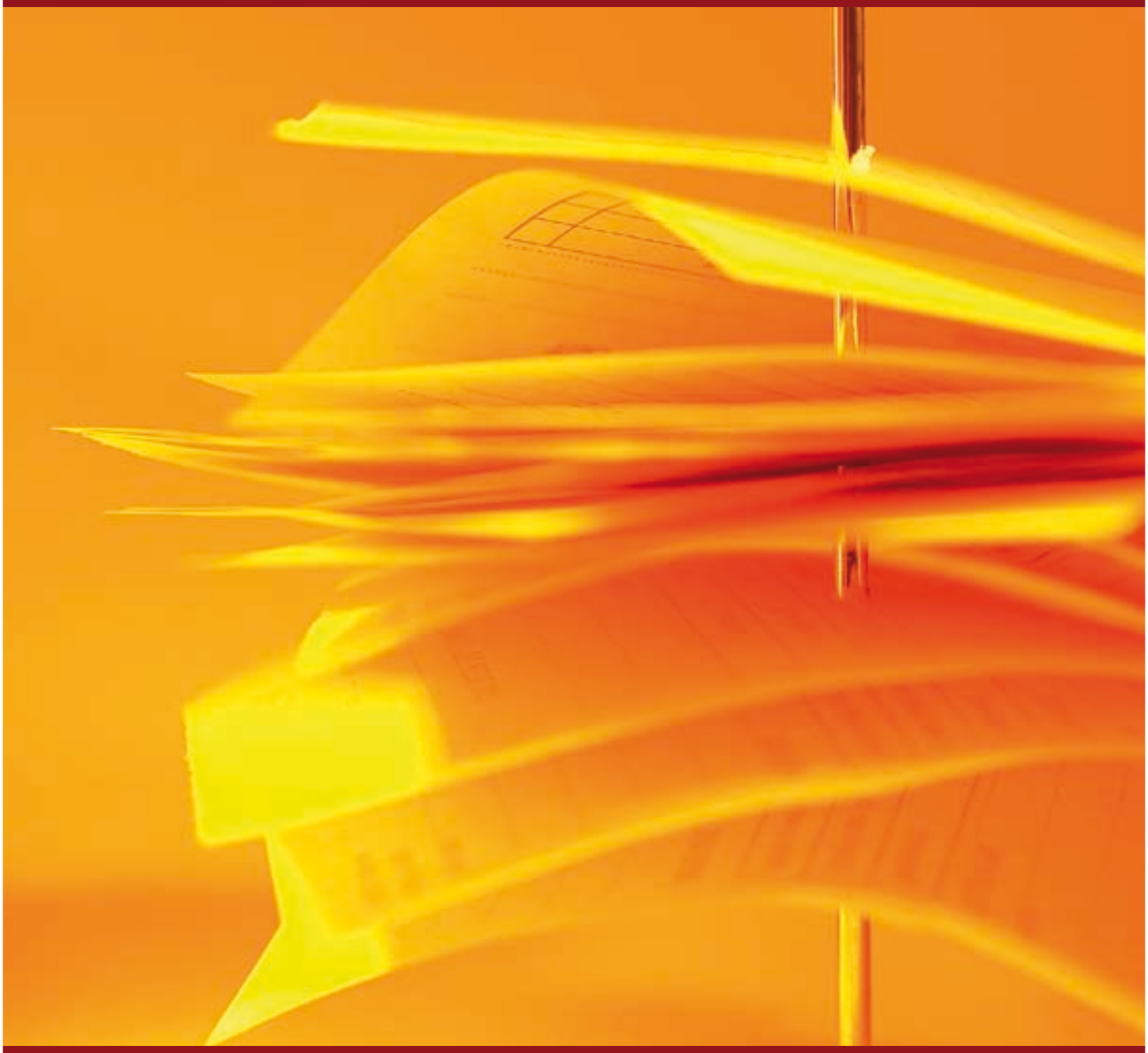
ÚOHS OFFICE FOR THE PROTECTION OF COMPETITION



PUBLIC PROCUREMENT

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CONTENTS

ÚOHS

OFFICE FOR THE PROTECTION OF COMPETITION
tř. Kpt. Jaroše 7, 604 55 Brno

Editorial Board: Kristián Chalupa, Filip Vrána, Martin Švanda, Jana Ištvanová

Phone: +420 542 167 288/243/225
Fax: +420 542 167 112
e-mail: tiskuohs@compet.cz
www.uohs.eu

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INTRODUCTION BY MARTIN PECINA, CHAIRMAN OF THE OFFICE

Martin Pecina
Chairman, Office for the Protection of Competition

The purpose of the activities of the Office for the Protection of Competition (hereinafter "The Office") in the area of the review of awarding public contracts is mainly to ensure that funding, which comes to a large extent from the taxpayer, is spent transparently, so that in the procedure for awarding public contracts no preferential treatment is given to any party. It is simply a matter of everyone having the same opportunity, that tax revenues are used to build as many roads, schools and kindergartens as possible and that these funds secure the maximum in comfort and services for our people. Neither can public finances be allowed to be spent in favour of companies linked to the beneficiary either regionally or in some other way.

In connection with the process of checking the award of public procurement, our Office has decided to organise an international conference on this subject in order to exchange experience with our foreign colleagues in this area and to acquaint the wider public with how checks are maintained on this process both here and abroad. This international conference on public procurement is taking place exactly one year after another one jointly organised by the Office for the Protection of Competition at the Brno Exhibition Grounds. Last year at the end of November together with dozens of leading economic competition experts from the whole of Europe and overseas, we recalled fifteen years' application of competition law and the existence of our Office. That conference entitled "Competition and Competitiveness", was successful. At least that was the opinion expressed by representatives of foreign competition authorities who took part in the 2 day event in the Rotunda of Pavilion A. Last year's event was also positively received by participating Czech lawyers, economists and students. I would like on this occasion to express the hope that this year's international conference addressing the award of public procurement will meet with the same level of interest and success.

ON THE APPLICATION OF ACT No. 137/2006 Coll., ON PUBLIC PROCUREMENT

Jindřiška Koblihová
Vice-chair, Office for the Protection of Competition

On 1st July 2006 a new Act on Public Procurement, No. 137/2006 Coll., came into force, replacing Act No. 40/2004 Coll. This is now the third set of legal regulations governing the award of public contracts to be enacted in the Czech Republic. Although there were several immediate reasons for the amendment, the most important was the transposition of European procurement directive 2004/17/EC coordinating the procurement procedures of sector entities and 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Further reasons for the amendment were the strengthening of the fundamental directive principles, namely the principle of transparency, equal treatment and a prohibition on discrimination in the awarding of public procurement, the working up of experience with the application of the current law, the rectification of inadequacies in the current law and the introduction of new institutions in the area of public procurement.

The new amendment shows the effort to retain the content, structure and terminology of the previous legislation. Nevertheless there is still quite a number of new items and changes. For example in the case of minor contracts, the option of fully electronic award procedures, central awarding, new proceedings – competitive dialogue and simplified below-the-threshold procedures, exceptions to the application of the law, and so on.

Six implementing regulations for the new law have already been issued, for example a notice on the attestation procedures for electronic instruments, a notice on public notifications for the awarding of public contracts, a notice on the requirements for electronic media and instruments and a notice on setting the procedural costs for reviewing a purchaser's transactions.

As with every new set of amendments the Office for the Protection of Competition has met with and continues to meet the issue of the interpretation of some provisions within the law, either when handling specific cases or when answering enquiries. Some ambiguities in the law have already been resolved through the Office's explanatory positions in its final decisions. Nevertheless we continue to come up against a lack of consistency within individual provisions of the law or against their logical incorrectness. In its supervising work the Office gathers knowledge and experience which will be the basis for a major revision of the Act, on which it will be working with the Ministry for Regional Development, which is the administrator of legislation in the area of public procurement. We wish for example to focus on the ambiguities concerning the submission of an offer by a supplier who may not be at the same time a sub-contractor to another supplier, the formalist provision of Section 71, para. 8, letter b) concerning the linking of the content of an offer etc. A major part of the amendment will be the inclusion of the new European Directive on increasing the activity of review procedures in awarding public contracts, which is currently being debated by the European Parliament. At present the Czech parliament is debating a "technical amendment" to the Act which proposes to make the financial limits applicable for public procurement the subject of special legal treatment so that it will not be necessary to undertake a new amendment to the Act every time that these limits change. The financial limits are therefore to be set by a government order issued on the basis of the powers included in the Act. In addition a clear error in the Act will be corrected concerning the repealing provisions, in Article 111, para. 2, where there is an incorrect reference to Article 113, para. 3 instead of para. 2.

A difficult area is that of concessions which are covered by Act No. 139/2006 Coll. where there is no clear definition of concessions or of the relationship of that Act to the Act on Public Procurement.

In of the deficiencies mentioned here, which will in all probability be the subject of a further amendment in the foreseeable future, Act No. 137/2006 Coll. is a reliable piece of legislation which secures the economical and transparent commitment of public funds. The Office for the Protection of Competition will continue to endeavour to have all knowledge gained from its work incorporated into legislation.

REVIEW PROCEDURES – A DEMANDING AND VERY IMPORTANT PART OF PUBLIC PROCUREMENT

SUPERVISION OVER PUBLIC PROCUREMENT IN THE SLOVAK REPUBLIC

Béla Angyal
Chairman of the Office for Public Procurement of the Slovak Republic

The basic objective of public procurement is to ensure that public funds are used in a manner that ensures that all goods, services and works are obtained for a reasonable price at the required level of quality and by the set time, in which all eligible subjects are invited to participate in the public procurement procedure in accordance with the principle of equal access and with adherence to the principles of public procurement.

The Office for Public Procurement was established on 1 January 2000 as a central government body with responsibility for public procurement and procurement based on concession agreements defined in the new Act 263/1999 on public procurement. Subsequent acts regulating the activity of the office were: Act 557/2001, Act 523/2003 and the act currently in force, Act 25/2006. These acts were transposed into the law of the Slovak Republic from European Community directives on public procurement but they also take into consideration previous experience and developments in the Slovak legal system.

Review procedures play an important role in public procurement. These allow eligible persons to request investigation of the procedures of contracting parties.

Review procedures serve mainly for the correction – amendment of incorrect or illegal actions and penalties for procedures that violate the law through fines for administrative conduct in cases specified by law. In addition, review leads to prevention – it deters further breaches of the law through penalties

The most important change in the current form of the law on protest proceedings compared to the previous law is that claimants must pay a deposit to the office's account. If the office upholds the protests in its decision it will return the deposit to the account of the claimant. If protests are rejected, the deposit becomes income to the state budget.

The character of the violations of the law that the office identifies in protest proceedings has not changed significantly in comparison with the previous period. There continues to be frequent suspicion of supervised persons relating to, for example, failure to evaluate conditions for participation in accordance with the contract notice and the tender conditions and discrepancies between the conditions for participation given in the contract notice and in the tender conditions. In complaint proceedings the office often identifies incorrectly set criteria for the evaluation of tenders, the use of discriminatory tender conditions, the evaluation of compliance with conditions for a group of contractors in a manner that violates the law, restrictions of the means used to prove technical capacity or qualifications, evaluation of the criterion of lowest price taking into consideration only part of the price of the subject matter of the order, no record of the evaluation of tenders and failure to observe statutory deadlines. In public procurement bidders continue to be excluded for purely formal deficiencies in their tenders that do not relate to the quality of the bidder or the tender. Serious deficiencies were also found with regard to supervised persons requiring additional documents not mentioned in the contract notice and tender conditions during clarification of a bidder's tender or failing to specify the rules for the evaluation of individual sub-criteria or failing to set a single method for the composition of the bid price. A frequent deficiency is unclear specifications of the documentation to be submitted in order to prove satisfaction of the conditions for participation, which are open to various interpretations and which can lead interested parties into error. A recurrent deficiency was requiring a higher bond than that required by law, which is 5% of the estimated contract value.

In contrast to protest proceedings, which take place only before the conclusion of a contract with the successful bidder, the office carries out audits of contract award procedures both before and after conclusion of a contract. Audit before conclusion of a contract is carried out only on the initiative of the office. As in protest proceedings, audits after conclusion of an agreement study the whole procurement procedure from the preparation stage to the conclusion of the agreement. The act gives a precise definition of the value of the fine, 5% of the value of the contract, if the contracting authority fails to comply with the duty to conclude a contract in accordance with the law on public procurement or if it concludes a contract by negotiated procedure with publication or negotiated procedure without publication without satisfaction of the conditions for their use, 5% of the value of the contract if the published criteria for the evaluation of tenders are not adhered to and also 5% of the total value of contracts if the contracting authority and contracting authority has divided the subject matter of the tender in order to avoid the use of the procedure for above-the-threshold contracts and for below-the-threshold contracts. Another fixed rate is a fine of SKK 500,000 if the contracting authority and contracting authority does not publish a contract notice and SKK 500,000 if it concludes

a framework contract by negotiated procedure without publication. Other violations of the act are placed in a category where it is possible to take into consideration the gravity of the charge, in which case the fine is set in a range from SKK 10,000–500,000.

One of the two highest fines in the history of the Office for Public Procurement, amounting to SKK 12,096,644, was imposed on the Ministry of Interior in 2005 for the use of a negotiated procedure without publication in contravention of the conditions for its use when purchasing: "fire engine – tanker fire engine equipped as a special goods carrier for the fire service of type 1B including special equipment". The second serious case was a fine of SKK 9,819,792 imposed on the Trenčín region local authority for violation of the conditions for the use of negotiated procedure without publication for "Repair of second and third class roads in the Trenčín region".

The public have various reactions to the fines. Initially it was thought that the imposition of a fine is only a transfer of funds within the state budget. We were able to convince the public through the media that it is not so clear. The contracting authority must pay the fine from the budget allocated to it, which means from its own budget. This fine is then paid back into the state budget and can be used for other purposes. In the final result, it means that the budget of the given state institution is reduced by the value of the fine. Furthermore, the employees will be liable for damages to their employer. We have explained to the public a number of times that it is not just a transfer of money from one pocket to another but that a fine is a real punishment for an organisation. In addition, another serious "punishment" is the fact that some contracting authorities are shown to have broken the law, which is the reason for the imposition of a fine.

WILL WE BE NOTIFYING PUBLIC PROCUREMENT IN BRUSSELS?

Kamil Rudolecký
Vice-Chairman, Office for the Protection of Competition

In this article I would like to outline the current issue of the link between public procurement and state aid. The fundamental question will be whether we should also assess the process of awarding public contracts from the point of view of state aid.

At first glance it may appear that these two areas of the law are independent of each other, each going its own way. If, however, we consider the different sets of regulations more closely, we can uncover many aspects that are common to both. First of all one should realize that both areas concern to a greater or lesser extent the protection of competition. That is to say, the maintenance of equal conditions for undertakings in the market. For public procurement the emphasis is on the efficient use of public funds and the selection of those options which are the most advantageous from an economic standpoint. State aid is aimed at equal treatment to competitors, attempting to eliminate inappropriate individual preferential treatment, that is, giving something without receiving something equivalent in return. Both areas are therefore complementary.

Particularly in evidence is the penetration of public procurement regulation into the process for assessing the existence of state aid. For state aid to be demonstrated, there must be favourable treatment of certain undertakings from state resources which distorts or threatens to distort competition and affects trade between EU member states. There is a threat of a significant risk of providing state aid when selling public property or awarding a contract to a specific party determined in advance. What then is the situation when conducting competitive tendering? Community rules presume that when there is a correctly conducted competitive tender based on broad openness, transparency and unconditionality, no state aid takes place. This principle has also been and is still widely applied in Czech privatisation proceedings.

Of major importance is the question of approach. From the point of view of formal approach we might say that the approach of itself fully excludes the existence of state aid in the sense of the Act on Public Procurement. This characteristic of non-discriminatory selection (open, transparent,

unconditional) is in my opinion reflected in Act no. 137/2006 on Public Procurement, which transposes European directives into Czech legislation and secures delivery of the principles of equality and transparency. The selection of bids by individual applicants in accordance with the Act on Public Procurement is done on the basis of assessment criteria, either of economic benefit or lowest bidding price. Qualifying criteria are also established; these are focused on securing equality of opportunity without an element of discrimination and the exclusion of applicants who do not fully demonstrate the required financial, economic or technical qualifications. The qualification criteria are also primarily aimed at selecting the most suitable applicant. The approach based on the Act should therefore lead to the most qualified applicant to satisfy the order. Individual applicants will go through a tendering procedure, during which they are obliged as a result of competitive pressure to submit a competitive bid. The party which successfully passes through the screen of legal condition is thus not arbitrarily given preferential treatment compared with other applicants and does not become the recipient of state aid. Therefore on the basis of the fair application of a national standard it should be possible to exclude the existence of state aid and to avoid the process of its approval in Brussels.

However, the situation can be more complicated. From the standpoint of material approach it is necessary to assess whether the investment of public funds is actually done on the basis of market conditions. That is, whether it corresponds to the so-called principle of a private investor, i.e. a party acting on a fully commercial basis. This principle is also applied, as I can confirm based on my own personal experience, by the European Commission in its current work. The Commission states that even if the conditions of a tender are met, it is sometimes not possible to exclude the existence of state aid. It is therefore necessary to specifically assess the market nature of the conditions, e.g. by comparing them with similar cases already completed.

In my opinion it is difficult to question the fact that the price arising from a duly implemented tender will not be a market price. The tendering process is generally regarded as being a very reliable method for determining the market price when compared for example with an expert opinion, which is based on the subjective methods of a particular expert. One should however be aware that the assessment process within a tendering process can also be influenced by a range of subjective approaches.

One interesting case where state aid can end up being given as part of a tendering process is the application of qualifying or assessment criteria which go beyond the limits of national and community rules for awarding public contracts. This is the case, for example, with requirements to reduce unemployment, with regional development or other social aspects. In these cases the state is involved not as a market player, but as politically motivated agent. By means of such criteria the price of a contract can be artificially increased, leading to the provision of state aid.

A claimant (unsuccessful tenderer for a public procurement) typically objects that as a result of a preference given to a bid which price is higher than the competing price, state aid has been provided to the value of the difference between the prices. One should however be aware that a whole series of other assessment factors such as quality, technical support, delivery terms, warranty conditions etc, enter into the equation. Therefore, the price need not to be the only criterion in the assessment of bids and it is not always true that the bid with the lowest price is the best and most economical. So, one cannot automatically infer that if an offer not containing the lowest price has been chosen, state aid has been provided.

The European Commission does not say that each public procurement must be assessed from the standpoint of state aid; it deals solely with complaints that have been submitted. However, as a result of wider legal awareness of state aid cases, the number of complaints of the existence of state aid in tendering procedures is growing. This trend is confirmed by the European Commission itself.

In conclusion we may summarise that based on the approach of European officials the rules for state aid can become a relatively strong weapon for unsuccessful tenderers for public procurement. Even through the use of a tendering procedure in order to eliminate illegal state aid, the existence of state aid is not a priori excluded. We can expect to see a situation where each more significant public procurement makes it way to Brussels for assessment by the European Commission on the grounds of the existence of prohibited state aid.

THE SIGNIFICANCE OF FINES IMPOSED BY THE OFFICE FOR THE PROTECTION OF COMPETITION FOR BREACH OF LAW

Martin Pecina
Chairman, Office for the Protection of Competition

In the event that a breach of law is discovered, the Office for the Protection of Competition, as the supervising body, may impose sanctions on the contracting authority or call for remedial measures. If a contract has not yet been fulfilled and for example the unfairly excluded applicant can be reinstated, or the situation corrected by the cancellation of the public procurement, then the Office for the Protection of Competition will choose one of these ways to remedy the situation. If the works contract has already been signed or should the Office determine that the law has been breached, say, several months after the contract has been fulfilled, the only possible form of sanction is the imposition of a financial penalty. Its value is derived from the size of the contract and also from the nature of the breach of law. Current legislation at the same time allows the Office to impose fines of up to five per cent of the value of the contract or up to CZK 10 million if the contract price is not given. This tariff can be increased up to twofold in the event that the contracting authority repeats the breach.

Although enabled by the above mentioned Act, the Office does not impose penalties of CZK millions, but generally in tens of thousands. The main reason for this is the fact that the aim of the penalties imposed is not to transfer millions or hundreds of thousands from one public account to another. Its aim rather is to agree remedial action. A penalty imposed at the lower possible limit gives the contracting authority a greater chance of demanding recompense for the damage from the employee or expert company responsible for implementing the tendering process.

Even if most penalties are not "painful" in terms of the amount imposed, the overall total of penalties imposed by the Office in the area of public procurement since 1995 has been approximately CZK 20 million. During this period more than 400 different contracting authorities have been penalized, including towns, cities, ministries, autonomous organisations, state bodies and companies which are defined as contracting authorities by the law. In this regard it is therefore interesting to look at the question of how different contracting authorities react to the imposition of fines, particularly in cases where, on the basis of a decision of the Office or later findings by the courts, they are forced to admit their fault, which can lead to not insignificant complications for them (returning state subsidies). The Office has already analyzed this question once and continues to work on it, using statements made by contracting authorities' representatives in the media.

According to replies received to a questionnaire in 2006, contracting authorities regularly analyze their own mistakes and also attempt to make their employees or retained expert companies responsible for them. The city of Prague went so far as to have an external auditor analyze 133 public contracts awarded from 1998 to 2002. In addition to approving a new procedural basis, it also undertook an investigation to determine the responsibility of individual employees. Department heads responsible for the fulfilment of certain contracts were removed from office. In seven cases termination of employment was proposed. Less serious breaches of employee responsibilities was resolved by the withdrawal or reduction of personal bonuses. Some other contracting authorities also dealt with breaches of law by reducing employee salaries. In some cases termination of employment was the result (for example in the Brno-center city quarter). In one case the Ministry of Defence dismissed the people responsible on the basis of "other facts related to public procurement, when the Czech Police were given grounds for initiating criminal proceedings. After the charges were brought the court stopped criminal proceedings, since the subjective side of their fault had not been fully demonstrated". However the Ministry of Defence did note in 2006 that "a specific individual was responsible for the damage caused", and was to make joint contributions to reparations.

Of interest are those cases where the contracting authorities who, in spite of having used an external company, were unsuccessful in review proceedings before the Office. One example is the State Agriculture Intervention Fund

(SZIF) which in the end sued its own mandated representative for damages to the value of CZK 70 thousand (the value of the fine imposed by the Office). According to the SZIF the representative "failed to perform his duties as a professional, neglecting his duty to obtain the relevant required documents from the successful tenderer", etc. The city of Česká Lípa has also applied penalties in respect of an external company, same as has the town of Nový Hrozenkov, as recently reported in the media. The Ministry of Foreign Affairs has also stated that it has restricted the use of the services of expert companies to a minimum. The reason is that "these were not provided at the required level of expertise and our experience has been on the whole negative". Overall it can be stated that expert legal companies are used by contracting authorities mostly for large and more complex tenders.

From the information given it is clear that public procurement area is subject to some scrutiny and that in most cases authorities try to learn from their mistakes. Correctly prepared tender, open to the maximum number of applicants, brings clear benefits represented by larger volume of competitive bids and also to the lower final price of the contract. This fact was also understood by the Ministry of Defence which has recently tried to increase the number of public contracts awarded under the Act on Public Procurement and not to unnecessarily invoke the exception provided by the law. As Minister Vlasta Parkanová said in August 2007 in the weekly Ekonom: "In 2006 a total of 209 contracts to a value of CZK 2.26 billion were awarded by the Ministry of Defence using some of the exceptions provided by the law. This represents 36% of the contracts awarded during that year. 343 contracts were awarded through competitive tender, i.e. 43% of the total number. The remainder was arranged by approaching directly one or more parties interested in the contract. In order for the Ministry's management to be transparent and efficient the share of tenders must be increased and the number of exceptions reduced accordingly".

It is clear that it is often up to the contracting authority which approach it chooses, and this does not concern only penalties. There are also towns and cities which make it clear in their responses that they have no desire to learn from the Office's findings. In cases like these the Office for the Protection of Competition will take decisive steps within the limits of the law.

IN THE FIELD OF PUBLIC PROCUREMENT PERSONAL ACCOUNTABILITY IS AT STAKE

Michal Petr
Director, Legal Department,
Office for the Protection of
Competition

Based on the Act on Public Procurement (hereinafter "the Act")[1] the Office for the Protection of Competition ("the Office") may only assess whether the law has been observed (Article 112 para. 1 of the Act); breach of the law is then an administrative offence for which the contracting authority[2] can be fined (Article 120 of the Act) and if a contract has not yet been signed against the background of an illegal tendering procedure, the Office can, subject to certain further conditions, cancel the award procedure or a particular transaction of the contracting authority (Article 118 of the Act).

A breach of the law on public procurement can, however, also be significant for other branches of the law; this is particularly true of competition law, supervision of compliance with competition law also falls within the competence of the Office, but it is also true of criminal, civil and in the end even labour law.

1. COMPETITION LAW

Competition law, both Czech[3] and European community[4] law, forbids the kind of coordination between companies which could lead to a distortion of competition in a particular market. Among these so-called *prohibited agreements* are also agreements to influence bidding (so-called *bid rigging*), defined as "*prohibited agreements between competitors made in connection with public trade tenders or public procurement, to influence competitors' bids in such a way as to ensure that there will be one particular successful party or to otherwise eliminate competition between the bidders*[5]", considered to be one of the most serious forms of breach of competition law. If conclusion of such an agreement can be proven, the Office is authorised to fine the participating undertakings up to 10% of their annual turnover.[6]

1 Act No. 137/2006 Coll., on Public Procurement, in its current version.
2 And not therefore the specific individual who may have made the mistake.
3 Provision § 3 of Act No. 143/2001 Coll, on the Protection of Competition and on the change of certain laws (Act on the Protection of Competition), as later amended (hereinafter the Act).
4 Provision of Art. 81 of the Treaty Establishing the European Community.
5 Mikulecký, D. On the issue of cartel agreements in public contracts. Právní rozhledy, 2007, no. 15, p. 544.
6 Prov. § 22 para. 2 of the Act.

In its history to date the Office has been able to prove the existence of such an agreement only once. This was the case of a cartel of large multi-national engineering companies which coordinated their activities on orders for so-called gas-insulated switchgear. Companies such as, for example, Siemens, Toshiba, Fuji, Hitachi and others had to pay almost CZK 1 billion for this behaviour.

Just as in the case of a breach of the Act on Public Procurement, here also the fines were imposed on the company as such, and not on specific employees.

2. CRIMINAL LAW

By way of contrast, breach of the Act on Public Procurement can have criminal consequences for specific individuals. The Criminal Code[7] defines a criminal act of *intriguing during a public tender* (Article 128a and 128b of the Criminal Code), which in simple terms, is committed by someone who during a tender creates favourable conditions for a given tenderer or arranges for a tenderer not to take part in a tender. This criminal act affects public tenders in general, and not only public procurement proceedings.

The new Criminal Code in preparation at the Ministry of Justice (the draft Criminal Code) is working on embedding several newly formulated factual bases of criminal acts related to public procurement. In addition to *agreeing an advantage in awarding public procurement* (Article 228 of the Draft Criminal Code) and *intriguing in public tenders* (Article 229 of the draft Criminal Code), *serious breach of the rules of award procedure* (Article 220 para 2 of the draft Criminal Code) should also become a criminal offence; criminal accountability would also be associated with *bid-rigging* (Article 228 para. 1 letter d) of the Draft Criminal Code).

3. LABOUR LAW

For individuals responsible for a breach of the Act on Public Procurement, the definition of responsibility under the Labour Code (the Labour Code)[8] can be of major significance, since an employee is responsible for damage caused to his employer through breach of his duties when executing his job (Article 250 of the Labour Code); these damages may be not only a fine which may be imposed on the contracting authority, but also those costs linked to the preparation of a new tender and so on. If the employee has caused damage "only" by negligence, he is responsible up to four and a half times his average monthly earnings; if however the breach was deliberate, his full accountability remains unaffected (Article 257 of the Labour Code).

4. CIVIL LAW

Nor can one overlook the fact that a contract concluded on the basis of a tendering procedure not conducted in line with the Act on Public Procurement could be considered to be invalid in view of the Civil Code[9] which establishes the absolute invalidity of all legal steps which contradict the law or circumvent it (Article 39 of the Civil Code).

Of course the Office may not rule on the validity of a contract, which must be stated by the court which would rule on it based on a suit under civil proceedings.

7 Act No. 140/1961 Coll., the Criminal Code, as later amended.

8 Act No. 262/2006 Coll., the Labour Code, as later amended.

9 Act No. 40/1964 Coll., the Civil Code, as later amended.

DEVELOPMENTS IN LEGISLATION IN THE AREA OF PUBLIC PROCUREMENT

Until 1994 the Czech Republic had no legal framework for the awarding public procurements. For this reason in 1993 the government passed rulings assigning the Ministry of the Economy the task of preparing the principles of a law which were subsequently approved not only by the government, but also by the budgetary and economic committees of the Czech Parliament. The aim of the law according to the explanatory report was mainly "to apply a market mechanism to the management of public funds by implementing a system of public tendering when awarding public procurements". The law was to be valid "for an extended period without the need for amendment" (it has of course been amended more than ten times) and it should be "easier to respect its provisions than to find ways to circumvent them". This at least is how government officials wished to see things in their explanatory report to the Act, which was passed under no. 199/1994 Coll. in September 1994 and came into force at the beginning of 1995. After numerous amendments the Act's validity terminated with the accession of the Czech Republic to the European Union, i.e. on 1st May 2004, when it was replaced by Act no. 40/2004 on Public Procurement.

The idea of the law followed on conceptually from the system which had functioned in Czechoslovakia from the beginning of the 1920's. On 17th December 1920 the then Czechoslovak government issued a decree (no. 667/1920 Coll.) on the awarding of state supplies and works, which was in force until the 1950's. The decree in question was valid for supplies and works awarded by state offices and institutes and funds managed by them. The decree recognized the following forms of awarding contracts: public competitions, limited competitions ("excluding the public" – military, specialised contracts and contracts up to the value of 80 thousand crowns, but where at least 3 bidders must be called to submit bids, and "free issue", i.e. excluding competition (e.g. supplementary orders, urgent orders, monopoly and special items, supplies up to 20 thousand crowns and works contracts up to 50 thousand crowns).

It is interesting that the government decree from the 1920's, just like the first "post-revolutionary" law on the issuing of public procurements from 1994, paid attention to domestic companies and employees. Article 34 of the decree indeed talks about the duty to employ domestic workers and public employees. It was even possible for a supplier or businessman to be given the obligation to employ "disabled ex-servicemen".

It is logical that the application of this regulation ended with the introduction of central planning. Whereas with the transfer to a market economy after 1989 there arose the need to set out new regulations for state administration. For these reasons the awarding of so-called "state contracts" was amended as early as 1989 to 1991 in the form of an amendment to the Commercial Code, in provisions of Article 356a et seq. A further regulation was the Awarding Procedures for Buildings from 1991, issued by the Federal Ministry of the Economy, the Ministry of Industry of the Czech Republic and the Ministry of Construction and Works of the Slovak Republic as the recommended approach for concluding contracts for the preparation and completion of construction works. The Awarding Procedures for Buildings described competition conditions, the subject of contract, delivery terms, suitability of applicants as well as the course of the competition itself.

It cannot therefore be said that the Act on the awarding of public procurement "came out of nowhere". Preparatory work on it started as early as 1992. A significant model for the work of the legislators was the Model Law on Procurement prepared by the United Nations Commission for International Trade Law (UNCITRAL). The Act was ready and was passed into law in 1994. It gave preference to awarding public procurements on the basis of public tender. In a public commercial tender, which could take place over two rounds, the contracting authority proceeded in accordance with the Commercial Code. Other forms for awarding public contracts were described in Article 49 (invitation to multiple interested parties to submit bids, contracts of up to 5 million crowns for real estate, or 1 million in other cases) and Article 50 (invitation to a single party to submit a bid). A public procurement was *"purchase, rental, preparation, installation, maintenance, repair or adjustment to moveable property or real estate or the performance of other activities (e.g. transport services in the region, removal and disposal of solid domestic waste, road cleaning, project work), if awarded by:*

1. a ministry, other administrative body, local autonomous unit and other established budgetary and contributory organisations, the Supreme Audit Office, courts, state representative offices and state funds, as well as legal entities which, in accordance with budgetary rules, handle funds from the state budget, state funds, the budgets of county offices or the budgets of local autonomous units, or

2. an individual or legal entity which, when paid for a contract involving the preparation, installation, adjustment or repair or purchase of real estate or a set of machinery and equipment forming an independent functioning unit, makes use of money from the state budget, state funds, local government budgets or the budgets for local autonomous units, and the value of the financial commitment for the relevant contract, before VAT, exceeds 500,000 Czech crowns in the case of real estate (excluding rentals) or a set of machinery and equipment forming an independent functioning unit, or 100,000 Czech crowns in all other cases.

Supervision over compliance with the law was assigned to the then Ministry for Economic Competition. This was materially connected to its main activity, that of promoting the principles of competition in all areas of economic activity. For the first time also for public procurement, where there is the risk of cartel agreements between suppliers prohibited under competition law. The combination of both of these activities is most advantageous for the Office, permitting it to arrange close cooperation between experts of the Office's relevant sections, as well as the exchange of information on matters of a suspicious nature. Investigation of a particular approach by a contracting authority from the point of view of the Act on Public Procurement can thus lead, for example, to suspicions being developed about coordinated behaviour on the part of suppliers. In the reverse case, an investigation undertaken on the basis of competition law can help to demonstrate the existence of an agreement between a contracting authority and a supplier which might later be penalised under the Act on Public Procurement. Of some significance is also the fact that the Office for the Protection of Competition may, on the basis of the Act on the Protection of Competition, undertake investigations in buildings, rooms and other premises belonging to undertakings and thus more easily

uncover cartel agreements between those competing for public procurements (so-called bid-rigging).

The Ministry for Economic Competition thus became the body supervising the award of public procurements, in spite of the fact that first to be considered for this was the Ministry of Economy which was subsequently abolished. It was also at this Ministry where the supervisory body took its first experts, who had shared in the preparation of the legislation. It was the Prague Division of the Ministry for Economic Competition that dealt with public procurement, although the headquarters of this Ministry was in Brno. Originally there were some ten specialists under the direction of one of the originators of the legislation, Václav Šedivý. The establishment of a supervisory body was of particular significance for those competing for contracts. These gained the option of appealing when they were not satisfied with a contracting authority's approach and felt themselves disadvantaged. This supervisory body then decided in a timescale shorter than was normal for the courts, whether to reverse the contracting authority's decision and make a new tender, or to instruct the contracting authority to declare a new tender. The then Ministry for Economic Competition also gained the option of imposing on contracting authorities fines, which were originally 0.5% of the contract value, subject to a minimum of CZK10 thousand. This option was not however much exploited at first. Among the first to be fined in this way were the towns of Mašovice and Praha-Zbraslav at the end of 1995.

It is interesting that political leaders of the time expected in particular the introduction of self-contained legal regulations in the area in question, greater economy and transparency of the prescribed rules and, not least, a reduction in corruption. The Act, however, also contained certain "protectionist measures" favourable to domestic companies. These could be given preference over foreign competition up to 10 percent over the lowest price bid from a foreign competitor.

THE FIRST REVISION

The Act came into force on 1 January 1995. After only a few months it became clear that it would require amending. In particular there was discussion on raising the financial limits which a contract must reach before it must be the subject to a public tender (the limit was originally CZK 5 million for real estate building and CZK 1 million for others). There were also problems with supervision over the approach of contracting authorities, objections via the supervisory body were in fact only allowed in public commercial tenders. Even here of course there were a series of mistakes in practice. Up to the middle of May 1995 the supervisory body had issued over 150 decisions cancelling tenders which had not been announced in the correct manner. In the second half of 1995 the Minister for Economic Competition Stanislav Bělehrádek therefore proposed more than 70 changes to the law. There were comments mainly on the low financial limits for commercial tenders. Any state purchase order was once more to be a public contract, even for 1 crown. There was discussion on the threshold for minor contracts under a simplified regime. Bělehrádek proposed CZK 50 thousand, and in the approved amendment from 1996 the value is twice that. From mid-1996 the Act speaks of the so-called simplified regime for contracts over CZK 100 thousand, but under CZK 2.5 million. In such cases bids must be sought from a minimum of three bidders. For public procurement where the value of a future contractual monetary commitment before VAT was to exceed CZK 2,500,000, in the case of real estate, with the exception of rental, or a set of machinery and equipment forming an independent functioning unit, and CZK 500,000 in other cases, the contracting authority could sign a contract on the basis of a written invitation to bid sent to a minimum of 5 bidders. Public commercial tenders have remained in place for the largest contracts over CZK 20,000,000 (real estate and sets of machinery and equipment), over CZK 5,000,000 (all other cases). There were, however, further changes to be made to the Act. The Minister proposed that contracts might also be awarded by the individual city quarters of major cities, and not just by city halls (this was indeed introduced precisely in this form in the amended Act). From the framework of the Act the following were withdrawn: purchases of works of art at auction or purchases of library collections, the provision of targeted financial aid for scientific activity, contracts making use of authorial copyright, contracts for the Czech Republic's diplomatic offices abroad, and some others. The competence of the supervisory body (now the Office for the

Protection of Competition, formerly the Ministry) was further extended. This review also began to relate to awarding contracts in the case of invitations to bid to multiple tenderers in accordance with Article 49. Among other reasons, above all for that of the increased possibility of submitting comments and complaints the supervisory body proposed including in the Act a surety for complaints, a proposal which was not, however, approved by the government in 1996. In addition, a contracting authority was not allowed to invite bids repeatedly from the same group of interested parties. It was for this particular breach of the Act that the city of Brno´s quarter of Žabovřesky was later fined.

DIFFERENCES OF THE ACT FROM EU DIRECTIVES

In spite of these changes, which markedly improved the transparency of the issue of public procurement, the Act continued to be the subject of analysis. In 1996 the Office for the Protection of Competition prepared an analysis which stated that the Act on Public Contracts was "mostly compatible with the European Community (hereinafter "EC") law". To secure full compatibility certain differences were to be removed. The Act for example did not contain certain sectors in which there exist so-called administrative monopolies (e.g. water, energy…). Further, it did not embody the requirement to publish the public tender in the Official Journal of the European Union and neither the awarding procedures were harmonised with the relevant EU Directives. In section 11 domestic applicants were still given preferential treatment, contrary to European Union legislation, but still permitted by the so-called Association Agreement. Discussion also began on reincorporating procurement whose subject enjoyed the protection of laws dealing with industrial and intellectual property into the scope of the Act.

For this reason the Office in the next few years submitted to the government in 1998 a draft for a further amendment, in which some of the aforementioned issues would be resolved. The government passed the draft in February 1999, with Parliament following just under a year later. Amendment no 28/2000 Coll. came into force on 1 June 2000. The most significant change was the transposition of Directive coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors. In this way a whole series of sector monopolies and dominant players became contracting entities (and also the operators of airports and ports, companies extracting oil, gas, coal and other fuels, health insurance firms and then in 2001 Czech Television and Czech Radio). These contracting entities were levelled with the contracting entities of public contracts, which caused them to react negatively, since they had to award their contracts within the scope of the Act (today the Act relates to them only in respect of precisely defined and relatively high limits). There were however certain further changes. For example the limit for small contracts to be decided by the contracting authority was raised from CZK 100,000 to CZK 500,000. In article 50, invitation to a single tenderer to bid, the provision allowing the Czech government to award contracts directly without a tendering process turned out to be very questionable (this provision was not withdrawn until mid-2002). The Office was again given the option of increasing its fines, this time up to 1 per cent of contract value. Also the time limit for the Office for the Protection of Competition to impose a fine doubled, up to 1 year from the day on which the Office learned of the breach of the Act. In addition, in accordance with the Act, information on public procurement began to be made public on a central Internet address. Generally speaking the "amendment" affected practically the whole wording of the Act. The changes affected the definition of its scope, the definitions of key concepts, the qualification requirements of applicants; the course of public commercial tender and other forms of contracting was further specified.

While it is clear from the foregoing that a step had been taken towards harmonisation of the Act with EU law, several further steps remained to be taken. For example, the possibility still existed of preferential treatment for domestic, as opposed to foreign, applicants, although foreign companies with branches or representative offices in the Czech Republic counted as domestic applicants. This preferential treatment of up to ten percent was to end with the Czech Republic's accession to the EU. To achieve full compatibility, however, a whole new Act was to be elaborated, which would consistently harmonise contract awarding procedures with EU Directives and at the same time set up the requirement to publish tender notices in the Official Journal.

The Ministry for Regional Development was entrusted with the preparation of the new Act and the Office for the Protection of Competition prepared the supervisory part. The Parliament however returned the Ministry's draft for refinishing. The Office in individual consultations particularly recommended the maximum implementation of competition principles and the limitation of various exceptions.

In the meantime however a further, now the fifth, amendment of the current Act came into force, which once more "shuffled" the number of contracting entities. Telecommunication companies and companies extracting oil, gas, coal and other fuels were removed from the Act. All this about one year after the sectors in question had been included among contracting entities. Amendment No. 142/2001 Coll.

also increased the limits of monetary liabilities for the different forms of contracting.

The contracting authority was thus obliged from 26 April 2001 to open a public commercial tender if the value of a future contractual monetary commitment without VAT in the case of real estate, with the exception of rental, or a group of machines and equipment forming an independent functioning unit, exceeded CZK 30 million or CZK 7.5 million in other cases. For sector contracting entities this limit was higher, i.e. CZK 50 million and CZK 12 million, respectively. For invitations to tender to multiple candidates (minimum of 5), the limits were raised from CZK 2.5 million to CZK 5 million (real estate) and from CZK 1 to 2.5 million (others). The simplified contract awarding process with bids from at least three interested parties could be used from a value of CZK 2 million (originally CZK 500,000). A new limit was also set for small scale contracts, which was later settled at CZK 2 million. These limits did not change until the implementation of the new Act on Public Procurement and the accession of the Czech Republic to the EU on 1 May 2004 The scope for not declaring new tenders on additional deliveries was also reduced. If additional or repeated public procurement exceeded 20 % of the original contract (previously 50 %) then such a contract could not be the subject of invitation to tender to only one applicant.

The process of awarding public contracts became more and more complicated. In 2002 alone 6 amendments were passed reacting to the dissolution of district entities, to floods and other separate developments. In the meantime preparations for the new Act continued, together with consultations with the European Commission. The drafts were submitted in mid-2003 to the Chamber of Deputies of the Czech Parliament and were passed on 30 October 2003, and then to the Senate, which passed them on 17 December 2003. Following signature by the President, the Act was published under No. 40/2004 Coll. The new Act transposed the European Directives on contracting. The original legislation, even after numerous amendments, did not remove some ambiguities in the interpretation of concepts, which led when applying the Act to legal uncertainty, and thereby to an excessive number of requests for review. The whole process had thus become disproportionately extended. The new Act was to eliminate these shortcomings. Changes were put in place in the provisions for an evaluating committee, on assessment and valuation of bids; these were worked up in more detail in connection with the implementing legal regulation. The new Act also removed discrimination against foreign bidders. The Office was to gain the option of penalising contract awards by up to 30 % of the contract value. However, a value of only 5 % fine was put into the Act. Mainly, however, the new Act significantly changed the number of contracting entities. Now certain public bodies were to be included among these. But in many cases it was not easy to clearly identify this status. Arguments thus took place over whether a particular company (for example Lesy České republiky – Forests of the Czech Republic) is or is not a contracting authority by course of law. Also other firms,

which received state-owned subsidies of more than 50 % of the contract value, had to proceed pursuant to law. On the other hand as elsewhere in the EU military contracts were withdrawn from the scope of the Act. The Act similarly did not apply to all contracts under CZK 2 million. Above this limit new types of contracting were defined so that in an open procedure all interested suppliers could submit a bid. In a closed procedure only those bidders could bid who were selected by the contracting authority from applicants to participate. In a negotiating procedure with publication bids could be submitted only by selected bidders who were then invited by the contracting authority to negotiate and finally in a negotiating process without publication, subject to certain given conditions, the contracting authority could invite one or more suppliers directly.

The various types of contract (services, construction or delivery of goods) also had their price limits in Euros, which varied according to the type of contracting authority. For example the financial limits for open tenders were set as follows: EURO 130,000 for state and allowance organizations, EURO 200,000 for territorial units and other public bodies, EURO 400,000 for contracting entities in water management, power engineering and transport, EURO 600,000 for contracting entities in telecommunications. For construction work the limit is the same for all, at EURO 5 million. The Act also contains a number of innovations in the supervisory part.

If an applicant did not agree with the approach taken by the contracting authority in the contracting proceedings and submitted a proposal for review to the Office, then it had to pay a deposit to the value of one percent of the bid price, up to a maximum of CZK 1 million. In the event that the submission was not justified and the Office subsequently refused their proposal in administrative proceeding, the deposit fell to the state. The paradoxical situation began to occur, when the Office started in the area of public procurement to collect higher sums as deposits than as fines (e.g. in 2006 CZK 22 million was collected in sureties, of which more than CZK 10 million fell to the state, while contracting entities paid CZK 3.4 million in fines). In connection with the new Act the Office began to a much greater extent to make use of interim measures in an attempt to prevent the contracting entities from concluding contracts for completion before the Office's decision in the matter.

IN PLACE OF A NEW ACT, AGAIN A "NEW ACT"

No sooner had Act No. 40/2004 Coll. come into force than serious discussion began about changes to it. The transposed EU Awarding Directives on contracting ceased to be up-to-date, the new Directives No. 17 and 18 had been put into force in 2004. So preparations for a new Act began again. The EU Directives had in fact changed significantly. Due to their liberalisation, telecommunications were withdrawn, changes were approved for the individual financial limits and the directives also introduced new ways of awarding contracts or a new option for the use of so-called framework agreements. The Office for the Protection of Competition also proposed a series of changes to the Act. These concerned for example the excessively high deposits, the long 60-day period during which the contracting authority could not conclude a contract for work, even when there was no proposal for a review of the contracting entity's decision, and other changes. The result of this was a draft of a new Act which came into force as No. 137/2006 in mid-2006.

The Act brought in a number of innovations. New institutes included: dynamic purchasing systems, electronic auctions, framework agreements and central purchasing body. A dynamic purchasing system is a fully electronic system for organising ordinary public procurement, which is time-limited and open for its period of operation to all suppliers who meet the entry criteria. An electronic auction is an electronic system for assessing bids, which allows the submission of new bids and drawing up and up-to-date order of bids using automatic assessment methods. Framework agreements permit the conclusion of a contract with one or three or more suppliers for a fixed period, covering the conditions for individual performances. Finally the central purchasing body is newly defined as an organization which places public procurement at the expense of other contracting entities, or organises deliveries, services or construction work directly for them. This should be advantageous in particular for municipalities. But one can also imagine aggregate contract awarding for state administrative purposes (for example, office equipment for all ministries). A larger contract volume should after all lead logically to savings. A contracting authority can arrange to be represented by a private specialised firm, but is nevertheless in the end always itself accountable for the course of the proceedings. An innovation of interest is a design contest, which permits the assessment for example of projects from the standpoint of their quality (and not just price). But it remains necessary to establish an independent expert commission, only anonymous proposals are assessed. On the other hand, contracting entities need no longer invite bids separately for the design and subsequently for the construction phase, and may combine these two stages.

Each expense (and not sales) again becomes a public procurement. Values up to CZK 2 million and CZK 6 million for construction work are regarded as small scale contracts, which need not be placed pursuant to law. The contracting authority must nevertheless act in a transparent manner and without discrimination in respect to the applicants. The Act retains the separation between the below-the-threshold and over-the-threshold contracts. Below-the-threshold contracts are those which are of higher value than small scale contracts, but do not achieve the value of over-the-threshold contracts. Over-the-threshold contracts are: construction work over CZK 165.288 million, goods and services over CZK 4.29 million when awarded by the state, over CZK 6.607 million when awarded by an autonomous territorial unit or institution receiving contributions from the State Budget, or other so-called "legal entity" and over CZK 13.215 million when awarded by a specified sector contracting authority.

The set of contracting entities has partially changed too: telecommunications firms were withdrawn, and on the contrary the operator of reserved postal services is now the contracting entity. Further changes can nevertheless take place, as permitted under § 20 of the Act. In some countries certain "problematic" sectors (e.g. postal services) have been fully liberalised and a competitive market already exists. There is no longer any reason why these sector contracting entities should place contracts in line with the Act. The state in question must naturally have an exemption granted by the European Commission for the particular area. The Czech Ministry for Regional Development may apply for such an exemption, or the respective sector contracting entity. In the Czech Republic in this connection discussions started on the exemption from the Act for companies in the mining area. It is however important to comment that under law even these sector contracting entities need not place all the orders, but only the largest ones of more than CZK 165.288

million (construction work) and CZK 13.215 million (in supplies and services). The concept of a subsidised contracting entity has also partially changed. This is anyone who obtains a state subsidy and uses it to pay for more than half of the value of a contract. But this now applies only to the largest construction contracts with a value of more than CZK 165 million. This represents a major conciliatory step in favour of private companies. Companies will thus proceed in accordance with the Act only occasionally. Suppliers receive the opportunity to show that they have met part of the qualification by means of an extract from the list of qualified suppliers and now also by means of a certificate issued as part of the certified suppliers scheme intended generally for individual industries (construction and so on). The list of qualified suppliers is kept by the Czech Ministry for Regional Development. As far as supervisory activity is concerned, the deposit remains in place at 1 percent of the bid price, subject to a minimum of CZK 50,000 and a maximum of CZK 2,000,000. Where a bidder's bid price cannot be established, the deposit is CZK 100,000.

In addition to the Act six implementation regulations were issued, which clarify it in many respects. For example Government regulation No. 304/2006 Coll. informs on the conversion rates for financial values given in the Act on Public Procurement in Euro into Czech currency and on the definition of goods purchased by the Ministry of Defence of the Czech Republic, to which the financial limit given in the Act on Public Procurement applies. These conversion rates will be regularly updated in the future. There are in addition decrees, one of which establishes what is and is not military equipment, a further example clarifies attestation procedures for electronic instruments. Of some importance is decree No. 328/2006 Coll., which sets the flat rate of CZK 30,000 for the cost of proceedings at the Office, payable by the contracting entity in the event of a breach of the Act. Of equal importance is decree No. 330/2006 Coll., on the publication of announcements for the purposes of the Act on Public Procurement.

By contrast the last cited Act No. 137/2006 Coll. annulled the implementation regulations for Act No. 40/2004 Coll., i.e. Decree No. 239/2004 Coll., which specifies the detailed content and scope of construction documentation and Decree No. 240/2004 Coll., on the information system for the awarding of public procurement and on the methods for assessing bids based on their economic benefits.

In addition to the problems of public procurement the Office also reviews cases of concessions; these however make up only a small part of the administrative load. The Office has been dealing with concessions in a limited way since February 2005, when concessions for construction work and services were defined in the Act on Public Procurement. One of the first cases to be reviewed was the proceedings conducted with the city district Prague 1 concerning the use of the so-called Werich villa. The proceedings were halted in December 2005 because the contracting entity terminated the tender. These proceedings were conducted under the then valid Act No. 40/2004 on Public

Procurement. Later, in view of the complexity of the issue of cooperation between public and private sector bodies (Public Private Partnership – PPP), a special legal framework was prepared, i.e. since mid-2006 the Act No. 139/2006, Act on Concessions. The reason for this is that concessions differ in a certain manner from classical public procurement. Concessionary contracts have a long-term nature. The fundamental difference from a public procurement is the fact that the consideration consists of the right of the supplier to operate the object of the concessionary contracts (e.g. motorway construction, or a service - toll collection) for a set period of time. The business risk for this operation is also transferred to him. This Act should, in the same way as other legislation in the area of public procurement, lead to greater transparency in this area, so closely connected with the expenditure of public funds.

AMBITIONS FOR THE FUTURE

What to say for conclusion? From the foregoing it is absolutely clear that the question of public procurement is a very complicated area. At the present time the Act in force is about one-third larger than earlier legislation, which to a certain extent makes it more difficult for smaller towns to award contracts. So for these contracting entities we can only wish in the future that the legislation in the area of public procurement remain as clear as possible and that it does not undergo so many amendments and changes as we have seen so far.

Miroslav Šumbera
Public Procurement Section,
Office for the Protection of Competition
Filip Vrána
External Relations Department,
Office for the Protection of Competition

IMPORTANT CASES

HIGHEST SANCTIONS IMPOSED IN THE AREA OF PUBLIC PROCUREMENT IN A SINGLE ADMINISTRATIVE PROCEEDING

Contracting entity	Year	Proceedings No.	Sanction in CZK	In force
Moravské naftové doly, s.p.	2007	S195/07	5,000,000	YES
Statutory City Zlín	2007	S 395/06	3,000,000	YES
Statutory City Prague	2002	S 155/02	715,000	YES
Statutory City Hradec Králové	2005	S 249/05	700,000	YES
Dopravní společnost Zlín-Otrokovice	2005	S 048/05	500,000	YES
Statutory City Karlovy Vary	2007	S 169/07	500,000	NO
Ministry of Labour and Social Affairs	2006	S 213/06	500,000	YES
Statutory City Brno	2002	S 114/02	480,284	YES
České dráhy	1997	S 097/97	300,000	YES
Dolní Třebonín	2004	S 106/04	300,000	YES
Vítkovice Aréna a.s.	2007	S 196/07	300,000	NO

Moravské naftové doly s.p. – CZK 5,000,000

A five million CZK fine was imposed, in September 2007, on Moravské naftové doly (Moravian Oil Wells) state enterprise in liquidation. The company awarded public procurement for the cleaning up of environmental damage – removal of gas-oil drilling rigs and probes in proceedings without publication, i.e. without open tendering. The total value of the contract was in excess of CZK 4 billion.

The infringement was made by the former liquidator of the state company, who was removed from office in mid-July 2007. The newly appointed liquidator in his statement as part of the administration proceedings admitted that in this case the legal requirements for the proceedings public had not been met. Commenting on the contracting entity's approach in the investigated case the Office said that the purpose of the Act is to secure a framework for the efficient expenditure of funds of the contracting entity, which can only be achieved in a transparently conducted contracting procedure, i.e. by an approach securing the maximum level of competition, which is the basis for gaining the most favourable conditions for the contracting entity. In announcing an open, close or negotiated proceeding with publication the contracting entity announces to an unlimited number of suppliers his intention to place a public contract in this contracting procedure. In view of the fact that the contracting entity used for awarding a public procurement a negotiated proceeding without publication, in which the intention of the contracting entity to award a public procurement was not subject to the requirement for publication, he caused the contract issuing proceedings to be used by only the three suppliers who had been addressed (of which 1 refused to take part in the proceedings).

Statutory City Zlín – CZK 3,000,000

In late August 2007 the Chairman of the Office for the Protection of Competition (the Office) Martin Pecina confirmed a fine amounting to CZK 3 million on statutory city Zlín. This penalty was imposed in proceedings concerning a total of thirteen contracts to a total value in excess of CZK 420 million. These included for example contracts for the reconstruction of elementary schools, underground services for the Zlín Congress Centre, redevelopment of blocks of flats, a tropical Amazonia for the Lešná Zoo and others.

In all thirteen cases the contracting entity had committed administrative offences, since the selection of candidates was not transparent due to the limited number involved. The contracting entity in the notice for the contract issue proceedings announced that with a limited number of applications the suppliers would be selected by ballot. The ballot took place in the presence of the members of commission named by the contracting entity without the involvement of any other person. Such a method for limiting the number of interested parties is not quite transparent (non-transparent). There are well-grounded assumptions that the authorised representatives will act in the interests of the contracting entity, which substantially reduces the objectivity of the ballot, in which the element of public supervision over its course is quite absent. When using methods of random selection of interested parties it is essential to ensure impartiality (e.g. the presence of all applicants or a notary), so that the possibility of the outcome of the ballot being influenced can be ruled out. This did not however occur in the contract award proceedings in question. The approach taken by the contracting entity could have significantly affected the assessment of the bids. By non-observance of the principle of transparency the key phase, in which those who are to be

invited to bid are chosen from the qualified applicants, was influenced.

In setting the fine, account was taken particularly of the degree of seriousness of the administrative offence. The maximum value of the penalty could in this case be as much as CZK 21 million. Administrative proceedings were launched on the basis of an audit undertaken in the middle of 2006.

A complaint against the decision was lodged at the Regional Court in Brno.

Statutory City Prague – CZK 715,000

During June 2002 the competition entity undertook an audit of contracts awarded by the City of Prague. The Office investigated a total of 66 contracts, in the case of 47 of which proceedings were begun. In most of these cases there was found to have been a breach of the law and penalties were imposed in a total amount of CZK 715,000 (the largest penalty were 2 cases of CZK 50,000 each, for breach of law on contracts "Construction 0130 Tylova čtvrť – Hotel premises" and "Public procurement No of construction 0079 ŠPEJCHAR – PELC, Tyrolka – exploration gallery"). The contracting entity paid the fines and did not appeal against any of the Office's decisions. The serious breaches of the law determined on the part of the contracting entity were based particularly on the fact that the qualifications of the applicant for the contract were not shown before signing the contract, in 39 cases the contracting entity made mistakes when assessing the bids.

Statutory City Hradec Králové – CZK 700,000

In April 2007, the Chairman of the Office for the Protection of Competition Martin Pecina confirmed a repeated first-instance decision imposing one of the highest fines for breach of the Act on Public Procurement on the city of Hradec Králové. The mistakes for which the penalty of CZK 700,000 was imposed concerned a contract for the disposal of communal waste. In view to the volume of the public procurement in question the resulting penalty could have been as much as CZK 10 million.

The contracting entity breached the law when he failed to limit the information required on the qualifications of the suppliers to that immediately required for the public procurement in question. This faulty approach could have influenced the ranking of bids. It follows from the Act that the contracting entity's requirements for qualifications must be directly related to the contract activity. The setting of excessive requirements for the suitability of applicants limits the number of suppliers. The contracting entity demanded a minimum of 70 waste disposal vehicles, 5 waste disposal machines, and 5 other waste handling machines. However he did not specify the capacity of the equipment, even though he had the capacity to do so.

Compared with the original first-instance decision which was annulled by the Chairman of the Office and returned for consideration, the fine was reduced by CZK 50,000, because the exclusion of applicant AVE was not considered as a separate reason for imposing the fine. The company was however excluded by the contracting entity for not meeting the requirement, which was set contrary to the law. A legal action was brought against the decision at the Regional Court in Brno.

Statutory City Karlovy Vary –CZK 500,000

In a first-instance decision dated 26 September 2007, which has not taken effect yet, the Office imposed a fine of CZK 500,000 on Karlovy Vary. The reason was a serious error in the public procurement for an "Exhibition, Sports, Cultural and Congress Centre" the value of which is more than CZK 1 billion. The contracting entity breached the Act on Public Procurement when it did not conduct in a transparent manner the reduction in the number of candidates for the final selection round.

The contracting entity in this case proceeded as follows. It delegated the awarding of the contract in question to the company STORMEN Ltd., which without good reason itself delegated the ballot to the company Stone Block a.s. The contracting entity thus lost direct control of the course of the ballot and its correct transparent operation.

In its proceedings it also dealt in detail with a video recording of the ballot, which is publicly available. From this it is clear that the person conducting the ballot tampered with the ballots in the box. A ballot in which the balloting person tampers with the ballots, for whatever reason, cannot be considered transparent. The balloting of the first three companies took considerably less time than of the last two. The final drawn company was the later contract

supplier, the SYNER-BAU-STAV-METROSTAV syndicate. The difference in the length of drawing the lots was explained as being due to the ballots "sticking together". The Office did not consider this explanation as credible in its proceedings, among other reasons because when the remaining ballot slips were tipped out of the box they were all separate without any sign of sticking together. A check on the slips themselves was not possible because the contracting entity did not submit them to the proceedings and said that they were not available.

From the foregoing it is clear that the approach of the contracting entities can considerably influence the assessment of bids, since the reduction in the number of candidates for the final selection round is a key phase, in which are chosen those who will be invited to submit bids.

Dopravní společnost Zlín-Otrokovice – CZK 500,000

Martin Pecina, Chairman of the Office for the Protection of Competition, in a second-instance decision issued in January 2006, imposed a fine of half a million crowns on the Dopravní společnost Zlín-Otrokovice (Transport Company Zlín-Otrokovice). In 2004 the contracting entity decided to add to the rolling stock 6 low-floor trolleybuses in negotiations without making it public. With the aim of unifying its rolling stock the contract was given directly to the Karosa firm, from whom they had previously taken buses. In this case however this was the purchase of goods of a differing type and therefore the delivery of these trolleybuses could not be described as an "additional" order to the original bus deliveries in the sense of the Act.

The procedure of the contracting entity was not sufficiently transparent and did not provide the backup for a public procurement tender. It did not demonstrate in a full and legal manner (i.e. by declaring an open tender) that there is no other supplier on the market, which would offer a lower price for the buses to be delivered than the selected Karosa company and that such a lower price would not compensate the contracting entity also for the additional costs arising from the servicing of vehicles of two different makes.

In the case under investigation the total price of the public procurement was CZK 77.8 million. The highest sanction at a 5 % tariff could then have been less than CZK 4 million. On the basis of a first-instance decision the Office imposed on the contracting entity to date the highest sanction, as yet not in force, in the area of public procurement in the amount of CZK 1 million; after an appeal was lodged the Chairman reduced the sanction by a half. Later on the Regional Court in Brno confirmed the correctness of the decision, however a cassation complaint was submitted against this judgment.

Ministry of Labour and Social Affairs – CZK 500,000

In October 2006 the Office for the Protection of Competition imposed a sanction in the amount of CZK 500,000 on the Ministry of Labour and Social Affairs (MPSV) for breaching the Act on Public Procurement. This is the highest sanction so far imposed in a single case on a Ministry. The contracting entity did not lodge an appeal against the first-instance decision.

In January 2006 the Ministry made the mistake when concluding a contract for the operation of its communications system in 2006–2008 with the ANECT Company. In this case it is a contract in the amount of more than half a billion CZK.

During the administrative proceedings the Ministry argued that the public procurement could be implemented by reason of protection of rights and industrial or other intellectual property only by the firm they had addressed. Against this argument is the fact that the contracting entity had originally put the contract out to open tender and had obtained 2 bids, which met the defined contract criteria. The contracting entity then cancelled this open tender on the basis of objections submitted by the second company on the list, the CZECH TELECOM. Subsequently the Ministry, at variance with the Act, concluded a contract directly with ANECT, when it used procedural proceedings without publication and argued that it was necessary to place the order for pressing reasons. However the chosen proceedings can be used, among others, only in acute cases due to an emergency situation.

OTHER SIGNIFICANT CASES

Tolls

This is the largest public procurement to have been reviewed in the Office's history. The Office for the Protection of Competition has handed this case intermittently since December 2005. At that time it was encouraged to investigate the procedure of the Ministry of Transport. The Office began to handle the case on the basis of a proposal from two unsuccessful applicants, the Mytia syndicate and the Autostrade Company. In the Ministry of Transport's contract award certain mistakes were found, but these did not have any influence on establishing the order of the bids. In first instance decisions made in January 2006 the Office stated that the exclusion of the Mytia syndicate, as well as the Autostrade Company, was justified for several reasons. Both excluded applicants later lodged an objection against these decisions to the

Chairman of the Office. He however confirmed the original decision in the case of the syndicate Mytia, and in the case of the Autostrade Company made a minor change to the decision. The correctness of the Office's decision was subsequently confirmed by the Regional Court in Brno and then by the Supreme Administrative Court. In its investigations the European Commission, which Autostrade had approached with a complaint, also came to the conclusion that the tender process had not breached the *acquis communitaire* for public procurement. The Office began to concern itself with the toll contract again at the end of 2006, when it started to review an appendix from the Ministry signed with the winning company Kapsch. The Ministry of Transport had in fact signed Appendix No. 1 to the contract in June 2006 and the Office began to investigate the contracting entities approach to the concluding of this Appendix.

Administrative proceedings regarding this matter began at the end of 2006. The Office subsequently stated that the signing of this Appendix was not in accordance with the Act on Public Procurement. The contracting entity erred because Appendix No. 1 signed with KAPSCH on 8 June 2006 contains changes to the original contracts which are in conflict with the awarded contract and the selected bid. The Appendix for example extended the time limit for completion of Stage II to 30 June 2007; for the first quarter of 2007 the minimum required efficiency of the system was reduced for to 85 %; the commercial conditions for the pricing of new work in the case of extension of the system were changed. The second breach of the law concerns the so-called alternate solution, i.e. particularly the powering of the technological equipment at the toll-gates using diesel generator sets. In the Office's opinion such a performance requires a new public procurement, because it was not included in the original contract and the contracting entity undertook payment. This order should therefore have been placed in the entry proceedings. The Office did not impose a fine on the contracting entity because the changes in Appendix 1 did not significantly affect the order of the bids and the actual performance on conclusion of the second Appendix the Ministry transferred the related costs to KAPSCH. In the middle of 2007 the Office rendered the Czech Ministry of Transport its standpoint on the third Appendix in the matter of tolls and gave its opinion on a number of partial issues associated, among others, with Stage 3 of the launching of the electronic toll system.

Functional division of public procurement

This form of breach of the law was committed for example by the town Březová nad Svitavou in the construction of 26 houses in the Špitálská pole locality. This urban development was awarded for construction to one company within one budget year. The contracting entity awarded the contract in a simplified form of invitation to multiple candidates to submit bids, although considering the bulk of the performance and according to the Act it had no right so to do. The contracting entity appealed against the Office's decision. The Regional Court in Brno and subsequently the Supreme Administrative Court however dismissed the complaints. Similarly in 2003 the Office dealt with the purposeful division of the contract for the reconstruction of the 5th floor of the administration building of the Ministry of Informatics, which concluded 9 separate contracts with its contractors. A CZK 33,000 fine was imposed on the contracting entity.

A fine for the Senate

In 1997 the Office reviewed a public procurement for the procurement of complete engineering, investment and design activities and delivery of all required structures including computer technology for the Senate of the Czech Parliament. The contract was awarded in a simplified form of invitation to multiple candidates to submit bids; whereas the subject of the performance was vague and the option of variant solutions did not stimulate the suppliers of all the structures to optimise the constructional and technological process, especially since the price for the completion of the construction work and deliveries was based on the bid prices of selected sub-contractors and the contracting entity had not reserved the right to be in control of this selection. A fine of CZK 200,000 was imposed on the contracting entity, the highest sanction so far imposed.

Army contract

During the year the Office for the Protection of Competition suspended administrative proceedings with the Ministry of Defence regarding a contract to re-arm the armed

forces of the Czech Republic with armoured personnel carriers (APC). Under the law administrative proceedings were launched on the basis of a proposal from an unsuccessful applicant, the Finnish company Patria, which objected namely to inadequacies in the formulation of the award conditions and the approach of the assessment commission. The Office suspended the proceedings because the Act on Public Procurement does not apply to the awarding of contracts whose subject-matter is the manufacture, purchase or repair of weapons, weapon systems, ammunition or the provision of other military material for defence purposes or state security. However since April 2005 the bidder had known about the fact that the tender in question should not proceed according to the said Act, but had no objections. The Office came to the conclusion that withdrawing the contract for the APC's from the scope of the Act on Public Procurement was entirely justified and for this reason suspended

the administrative proceedings. Subsequently the Finnish company brought an action against the Office, which was unsuccessful.

STATISTICS

PUBLIC PROCUREMENT REVIEWED BY THE OFFICE IN THE PERIOD 1995–2007

Year	Proposals and initiatives	Proceedings initiated	Proceedings appealed	No. of fines imposed	Total amount of imposed fines in force (in CZK)
1995	529	–	–	–	–
1996	601	535	–	8	110,000
1997	502	324	–	34	1,050,000
1998	574	428	–	27	627,000
1999	818	581	117	57	822,000
2000	826	508	106	68	1,396,500
2001	758	446	110	84	2,094,000
2002	700	379	97	65	2,809,000
2003	583	334	79	90	943,000
2004	636	340	119	29	1,470,000
2005	539	334	102	64	2,349,000
2006	566	293	159	77	3,467,000
2007*	316	174	139	40	5,141,500

*Statistics for 2007 include the period up to 1 October 2007

PUBLIC PROCUREMENT STATISTICS ACCORDING TO THE CONTRACTING AUTHORITY IN THE PERIOD 2005–2007

Year	Total proceedings	of which communities:	of which ministries:	of which regions:
2005	334	124	42	0
2006	293	115	52	7
2007*	174	50	21	3

*Statistics for 2007 include the period up to 1 October 2007

COMMUNITIES AND MINISTRIES AGAINST WHOM MOST OF THE ADMINISTRATIVE PROCEEDINGS WERE CONDUCTED

Towns and other communities 2005

1.	Zlín	6
2.–3.	Brno	4
	Orlová	4

Towns and other communities 2006

1.	Zlín	19
2.	Litvínov	11
3.	Žatec	5

Ministries 2005

1.–2.	Ministry of Defence of the Czech Republic	10
	Ministry of Agriculture of the Czech Republic	10
3.–4.	Ministry of the Interior of the Czech Republic	5
	Ministry of Informatics of the Czech Republic	5

Ministries 2006

1.	Ministry of Defence of the Czech Republic	17
2.	Ministry of the Interior of the Czech Republic	12
3.	Ministry of Agriculture of the Czech Republic	6

STATISTICS FOR COURT REVIEW OF DECISIONS REGARDING PUBLIC PROCUREMENT (1996–2007)

* Situation as at 1 October 2007