

COLLABORATIVE DEFENCE PROCUREMENT IN THE EUROPEAN UNION AND IN THE CZECH REPUBLIC – BUSINESS PRINCIPLE LEADING MORE EFFECTIVENESS OF PUBLIC EXPENDITURE IN THE FIELD OF DEFENCE

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Abstract

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This article deals with collaborative defence procurement, including critically analyses subjects (agencies) performing defence procurement. In relation to defence procurement author analyses the political, economic and legal context of collaborative defence procurement in the EU and the applicability of EU law (procurement rules) and Czech procurement rule, focussing on opportunities for firms (enterprises). Further, author analyses international organisations and agencies in the field of defence procurement, like OCCAR, NAMSO and EDA. It means the Joint Organisation for Armaments Cooperation, the NATO Maintenance and Supply Organisation (NAMSO) and the European Defence Agency. There is topical theme relating some army controversial tenders in the Czech Republic. Recommendations towards to improve the applicable law are including also.

public administration, efficient of public expenditures, collaborative defence procurement, European Union, Joint Organisation for Armaments Cooperation (OCCAR), NATO Maintenance and Supply Organisation (NAMSO), European Defence Agency (EDA), NATO, economic competition

European defence procurement refers to the collective armaments purchasing policies of European nations. Traditionally European countries have either developed their own weapon systems or bought off the shelf systems usually by NATO. There are defence public procurement contracts. In the modern era, reduced defence budgets and increasing complexity make it difficult for most countries to develop their own weapon systems (ARROWSMITH, 2005). There is necessary to find the most effectiveness ways how to spend public money in the field of military. First, the military public contracts were given under scope of “Defence and Security” Directives No. 2009/81/EC and Czech procurement law (IDEA: increasing economic competition will lead to saving public expenditure),

second, increasing ‘pooling and sharing’ of European military capabilities by international organisation (IDEA: cooperation and unique standard will led to saving public expenditure).

Defence procurement in the Czech Republic and in the European Union

Defence procurement accounts for a large share of public procurement in the European Union. Member States combined defence budgets are worth about €170 billion, which includes more than €80 billion for procurement (KOLÍN, 2010). Most of this expenditure is split into relatively small and closed national markets: Europe’s defence sector remains fragmented at national level, with 27 different

customers and 27 different regulatory frameworks¹. This fragmentation is a major obstacle to both intra-European cooperation and competition (JURČÍK, 2007). It creates extra costs and inefficiencies and thus has a negative impact on the competitiveness of Europe's Defence Industrial and Technological. Defence and military procurement is not under scope of EC Treaty.² The current Public Procurement (PP) Directive, even in its revised version (2004/18/EC), is considered ill-suited to many defence contracts, since it does not take into account some special features of those contracts. As a result, many Member States are reluctant to use the PP Directive for defence equipment, even if the conditions for the application of Article 296 are not met.³ The Directive No. 2009/81/EC, 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, sets EU rules for the procurement of arms, munitions and war material (plus related works and services) for defence purposes, but also for the procurement of sensitive supplies, works and services for security purposes. It is tailored to the specificities of defence and security equipment and markets. This Directive was implemented into Czech Procurement Law –

act No. 137/2006 Coll. on Public Contracts (APC) by amendment of No. 258/2011 Coll.

Public Contract in the Fields of Defence and Security

Public contract in the fields of defence and security shall be a public contract having as its subject-matter⁴ (see Tab. I).

The contracting entity shall act under the provisions of Act on Public Contracts applicable to awarding public contracts in the fields of defence and security even in the case when the subject-matter of a public contract falls within the scope of this field pursuant § 10a APC only partly and there simultaneously exist objective reasons for the award of only a single public contract. The contracting entity shall not be obligated to act in the case when the subject-matter of a public contract falls within the fields of defence and security pursuant only partly, with the other part of such a public contract for which the exemption from the scope of application pursuant to § 18 or § 19 is applicable, and there simultaneously exist objective reasons for the award of only a single public contract. The exception is also given in case of procuring by international organisation (there were named above). Awarding procedures using in the field of Defence and Security see in Tab. II.

I: Military equipment

The supply of military material, including any parts, components and subassemblies thereof	'military material' shall be understood as the arms, munitions and other products specifically designed or adapted for military purposes; the list of military material shall be set forth by implementing legal regulation
the supply of sensitive material, including any parts, components and subassemblies thereof	
works, supplies and services directly related to the supplies referred to in previous points for any and all elements of its life cycle	sensitive material, sensitive public works and sensitive services' shall be understood as the material, public works and services for security purposes, involving, requiring and/or containing classified information
works and services for specifically military purposes, or sensitive works or sensitive services	

Source: Public Procurement Law

II: Award procedures in the field of Defence and Security

Types of award procedures	The possibilities of using award procedures for public contracts in the field of Defence and Security
Open procedures	We do not use
Restricted procedures	The general procedure with possible selection of suppliers
Negotiation procedures with advertisement	The general procedure – they should be two bids for evaluation, otherwise it is necessary to cancel of award procedure
Negotiation procedures without advertisement	We can use only if there are fulfil conditions contains in § 23
Competitive dialogue	We can use only if the subject is very difficult to define
Simplified under-threshold procedure	We can use only on under-threshold contracts

Source: own work

¹ There is number of EC member states.

² See article 296 EC Treaty, which allows Member States to derogate from Internal Market rules when their essential security interests are at stake.

³ See more discussion on conference Public procurement (Jurčík, 2012).

⁴ See § 10a APC.

III: *Public contacts in the field of Defence and Security in the CR.*

Years	2007	2008	2009
Expenses (mld. CZK)	55	50	52

Source: Ministry of Defence

IV: *Total EU defence expenditures for 2011*

Total expenditure, typology	Personnel Expenditures	Operations and Maintenance	Equipment Procurement	Research & Development	Infrastructure & Other Expenditures
200 billion, division in %	51%	23%	17%	4%	5%

Source: European Union, EDA

When we compare the financial amount of public contracts in the field of Defence and Security in the CR with global amount of all public contracts – 500–600 mld. CZK yearly (see Tab. III), it is clear that portion of these special public contracts is not high. There are some contracting entities that they are awarding public contracts in the field of Defence and Security (e.g. Ministry of Defence, Ministry of Interior).

Defence Procurement provided by international organisation

As many European countries introduce their biggest defence budget cuts in years, they have been exploring ways to limit the impact on their armed forces. There has been much talk within the EU and NATO of increasing “pooling and sharing” of European military capabilities by using of international organisation. But many governments are struggling to commit to specific initiatives because they are worrying about unemployment in the field of production military materials and equipment. The most famous and important international organisations (WHITE, 2005) are following.

The European Defence Agency is “the place to go for European defence cooperation” (European Defence Agency, 2005). The Agency supports the Council and the Member States in their effort to improve the European Union's defence capabilities – a critical task in these challenging times. It works on the basis of a new approach that draws together the whole defence spectrum, tailoring its work to the military needs of tomorrow, providing different and often innovative solutions. Since its foundation in 2004, the EDA and its participating Member States have launched important projects, boosting helicopter availability, forming the European Air Transport Fleet and working to insert Unmanned Aircraft Systems into normal airspace, to name but a few. EDA is pragmatic, cost effective and results oriented. It offers multinational solutions for capability improvement in a time where defence budget constraints foster the need for cooperation. The European Defence Agency (EDA) was created by the CFSP (see Joint Action 2004/551/CFSP). In 2011, it will be seven years since the establishment of the European Defence Agency (EDA), which seeks to improve defence capabilities of the Member States

of the European Union (EU) in crisis management to sustain Common Security and Defence Policy (CSDP).

Some other international initiatives were taken at the intergovernmental level. Four major EU Member States (France, Germany, Italy and the United Kingdom, later joined by Belgium and Spain) founded in 1998 the Joint Organisation for Armaments Cooperation (OCCAR) to manage more efficiently collaborative armaments programmes and to strengthen the competitiveness of the European defence technological and industrial base.

Further, a number of specialised procurement and management organisations or agencies have been created within the ambit of the North Atlantic Treaty Organisation (NATO) and operate in Europe, for instance: the NATO Maintenance and Supply Organisation (NAMSO) or the NATO Helicopter Management Organisation (NAHEMO), just to name a few.

Total amount of Collaborative Defence Procurement through International Organisations in the EU is about 21% (41 billion) were used for the procurement of defence equipment and Research and Development (R&D), and about 23% (44 billion) for operations and maintenance (see Tab. IV), 2 a large part of which also find their source in procurement activities (HEUNINCKX, 2011).

Support for NATO organisation

NATO called for public bodies of its member states to work together much more effectively than they currently do to maximise savings from procurement activities. This thesis is clear, the ways how to achieve this aim is less clear. The one way is cooperation between EC countries and unifications of weapons systems. This way support European weapons business but disadvantage can be low support of national weapons suppliers and producers. The possibly problems in unemployment solves Palát (PALÁT, M., 2013). International cooperation should discriminate small and medium size enterprises (TABAS, J., BERANOVÁ, M., VAVŘINA, J., 2011).

The NATO Maintenance and Supply Organisation (NAMSO), as NATO's premier logistics Agency, provides cooperative logistics services to its customers – the NATO nations and other NATO bodies – underpinned by three basic principles:

consolidation, centralization and competition. The best advantage of this NAMSA procurement ways are following:

Consolidation. NAMSA consolidates identical or similar logistics requirements expressed by two or more of its customers. The consolidation of requirements means larger quantities can be ordered, resulting in lower prices.

Centralization. By placing their requirements with NAMSA, customers have the added advantage of addressing a single entity rather than having to deal with a multitude of suppliers.

Competition. NAMSA's international competitive bidding allows a widest market to be scoured to obtain the best quality at the lowest prices (Ochrana, F., 2010),

Standard harmonization. International cooperation needs to be unique standards (OTRUSINOVÁ, M., HÝBLOVÁ, E., 2013).

As an international organisation, NAMSA is exempt from value added tax (VAT) and customs duties. In addition, thanks to an agreement with the US Government, the surcharge levied on Foreign Military Sales (FMS) is waived in most of such transactions handled by NAMSA.

Support for Partnership for Peace (PfP) States

After a Memorandum of Understanding has been signed between a PfP State and NAMSA, that State can participate in existing Weapon System Partnerships as an Associate State. In this way, NAMSA is authorised by the NAMSO Board of Directors to provide its whole range of logistic services to member states.⁵

Domestic law and EU law will, in general terms, apply to an international organisation or agency in the EU, but this has to be confirmed on the basis of the legal provisions concerned and of relevant international law. More over, international agreement concluded by EU can be applicable by national states. It is likely that most international organisations or agencies would not have power to invoke exemptions from compliance with EU law. The reasons are different. There is not politically correct to lay down domestic production, if there is exists. Domestic public procurement law seems to be universally not applied for the procurement activities of international organisations or agencies, some countries prefer to have independent weapons producers. This is one of barrier of common market in the field of security and defence.

CONCLUSIONS

The directive, legal regulation of military contracts and using of international organisation on European level leads to:

- **fair and transparent rules** to help companies access defence and security markets in other EU countries
- **flexibility for contracting authorities** to negotiate in detail all features of complex contracts
- the option for contracting authorities to require **safeguards** (from suppliers) to ensure the **protection of classified information** against unauthorised access
- **security of supply** so that armed forces receive deliveries in time, particularly in times of crisis or armed conflict.

In short, the fact that military and security public contracts are under scope of the Czech Act on Public Contracts, will lead to effectiveness in these contracts because of necessary to respect transparency duties under Public Procurement Act. The effectiveness competition in the field of military contracts should bring savings 10–15% of contract price. Public Procurement Law is not necessary to use in case of procuring military contracts by international organisations. For example EDA or NAMSO should be pragmatic, cost effective and results oriented. But many member states are struggling to commit to specific initiatives. They fear that their national defence companies will be deprived of vital contracts. That the international procuring will increase local unemployment (social factor see DUNDELOVÁ, 2011). This case happens in the Czech Republic. The Czech Ministry of Defence was procuring munitions and guns by the NAMSO and national producers of these equipment was forced to end of production and about 100 employee lost their work in region Vsetín (ŠVARCOVÁ, J., GABRHEL, V., 2012).

The tendencies and trends how to remove of mentioned barrier is to establish common European enterprises who would able to have influence on unique NATO weapons standard and will able to compete with United States weapons producers. These European enterprises should producing military equipment across the all member states.

Finally, we will see how effectiveness will be open public contracts in the field of security and defence. It should be way how to cut down corruption in this field of public contracts what was one of the main problems in the previous Czech military contracts (e.g. purchases transport aircrafts CASA, cars TATRA).

5 The NAMSO Member Countries: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and the United States.

SUMMARY

Defence Public procurement is the purchase of goods or services by some public bodies and providing of works. This Practice note considers the European Union obligations imposed on purchasing authorities to award contracts on an open, competitive and non-discriminatory basis. The options available to a supplier of goods or services where a purchaser does not comply with EU procurement rules are also explored. For the purposes of this Directive, military equipment should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council in its Decision 255/58 of 15 April 1958, and Member States may limit themselves to this list only when transposing this Directive. This list includes only equipment which is designed, developed and produced for specifically military purposes. However, the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment, for instance on the basis of the Common Military List of the Union. For the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material. The conditions under which the Member States may derogate from European Union legislation in connection with their defence and their armed forces repeatedly give rise to legal disputes. See, for example, the case-law on access for women to posts in the Member States' armed forces (Case C-273/97 *Sirdar* [1999] ECR I-7403, and Case C-285/98 *Kreil* [2000] ECR I-69), on compulsory military service for men (Case C-186/01 *Dory* [2003] ECR I-2479), on VAT liability for armaments (Case C-414/97 *Commission v Spain* [1999] ECR I-5585), and on customs handling of military equipment (Case C-284/05 *Commission v Finland* [2009] ECR I-11705; Case C-294/05 *Commission v Sweden* [2009] ECR I-11777; Case C-372/05 *Commission v Germany* [2009] ECR I-11801; Case C-387/05 *Commission v Italy* [2009] ECR I-11831; Case C-409/05 *Commission v Greece* [2009] ECR I-11859; Case C-461/05 *Commission v Denmark* [2009] ECR I-11887; Case C-239/06 *Commission v Italy* [2009] ECR I-11913; and Case C-38/06 *Commission v Portugal* [2010] ECR I-1569).

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