

CONSEQUENCES OF THE PUBLIC CONTRACT LAW FOR PURCHASE OF SCIENTIFIC APPLIANCES IN THE CZECH REPUBLIC

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Abstract

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This article essentially covers in more detail the consequences of the present wording of the Public Contract Law for purchase of scientific appliances in the Czech Republic. The beginning of the article deals with increasing public expenses in research; then, the problem is defined concerning unsuitable wording of certain provisions of the Public Contract Law; while subsequently, the solution for the problem is searched together with the final comments. Investing of public funds into science and research is probably the most efficient in a long-term horizon. However, the flow of funds for acquisition of scientific and research equipment should be supported by appropriate legislation with such wording and form not to prevent purchases of that equipment.

Availability of public funds for something which in fact cannot be, due to wrongly set legislation, acquired by a contracting authority is the problem which must be eliminated through timely implementation of the above proposed changes in the Public Contract Law.

Keywords: public contract, research, development, Public Contract Law, public procurement regulation

INTRODUCTION

Public contracts create an important part of public expenses in the whole European Union, approx. 18% of GDP (European Commission, 2011). In the Czech Republic, according to the annual report of the Ministry of Local Development on the balance of public contracts in 2012 they range between 13–16% of GDP (Ministry for Regional Development, 2012). Comparison of the proportion of public contracts in GDP of the Czech Republic with the average of the European Union is provided in the table below.

I: Development of proportion of public contracts in expenses in the EU (in % GDP)

Year	2007	2008	2009	2010	2011
CR	12.9	13.9	15.6	15.7	13.0
EU27	6.9	17.3	17.9	18.5	17.7

Source: European Commission, own calculation

In relation with the Government effort to increase, with assistance from the European Union, the support and importance of science and research, simultaneously the importance and amount of public finance spent on support of science and research increases. This includes in particular financial support of research institutions, research institutes, universities and research and scientific projects. Data of the Czech statistic office show that the amount of funds spent on research and development has almost doubled from 2005 to 2011 from 17.9 billion CZK to almost 32.3 billion CZK (Czech Statistic Office, 2011). A rather important part of the expenses on science and research includes purchase of scientific appliances and equipments.

Within support of research and science, public funds are allocated into various chapters related for example with financial support of scientists, reconstruction or construction of new research or

II: *Expenses on research and development in the Czech Republic (in million CZK)*

Year	2007	2008	2009	2010	2011
CR (budget)	22 362	22 342	24 301	23 539	26 179
Foreign (namely EU)	925	964	1 305	2 216	6 093
Total	23 287	23 306	25 606	25 755	32 272

Source: Czech Statistic Office

scientific facilities and complexes, while support of scientists together with facilitation of their functionality and the very purpose of scientific and research facilities includes as its integral part purchase of scientific and research equipment serving scientists and research staff as a tool for their work and for achieving their research objectives.

Spending of public funds in the Czech Republic is subject to Act No. 137/2006 Coll., on Public contracts, as amended (Public Contract Law) which should be the tool for efficient, purposeful and transparent spending of public funds.

This article focuses on whether the present wording of the Public Contract Law in the Czech Republic provides the necessary support for procurement of many a time unique research and scientific appliances and equipment where there is a very limited circuit of suppliers on the market.

Problem Formulation

The Public Contract Law in the Czech Republic provides the rules for spending of public funds on construction works, supplies and services. Each of the above mentioned types of expenses has different rules in some aspects requiring utilisation of different modes of the law. Acquisition of scientific and research equipment (appliances) falls, according to the Public Contract Law, into the category of supplies.¹ For the purpose of this article, we will understand acquisition of scientific and research appliances as a supply within the meaning of the Public Contract Law.

Sources of the Public Contract Law, Methodology

The Public Contract Law in the Czech Republic is now based on the directives of the European Parliament and the European Council and their amendments. The quality of the mentioned directives is the subject of, for example, an article by Y. Allain, 2006. The Czech Republic and other member states are obliged to transfer the wording of those directives into their public procurement legislation. In relation with the treated matter, however, the directives do not provide reasons for cancellation of tenders; it is therefore an exclusive competence of member states to set the rules for

cancellation of tenders independently. At the same time, the directives do not provide any special exceptions for purchase of research equipment and it is therefore again up to the member states to provide the rules for such purchases.

The methodology of this article is derived directly from the very formulation of the public contract law, while the main method of the whole work is an analysis of the specific part of the law whose wording strongly impacts contracting authorities in tenders for purchase of scientific and research equipment. The method of the article therefore is to define the starting points of the problem; the problem is identified, specified and described, its impacts assessed and finally, proposals formulated for solution of the problematic situation.

In the article, also practical experience was utilised of various contracting authorities inquiring scientific and research appliances through interviews and correspondence.

Basic Characteristic of Supplies Under the Czech Public Contract Law

The term a public contract for supplies is defined in Section 8 of the Public Contract Law which provides it as acquisition of goods through purchase, hire purchase, rent or leasing, this including performance of necessary construction adjustments for possible installation of the subject of the supply.

One of the most important criteria crucial as to in which mode of the law the public contract for supplies will be implemented is its expected value. Public contracts not subject to the Public Contract Law include contracts for supplies with the expected value lower than 1 mil. CZK². Public contracts for supplies with the expected value higher than 1 mil. CZK are subject to a certain mode of the Public Contract Law. The basic division of public contracts into supplies subject to any of the modes of the Public Contract Law is classification into above-limit and under-limit contracts and supplies while the limit for specification as above-limit and under-limit is set by the Government decree³. The specific rules for setting of the anticipated value of public contracts for supplies are provided in Section 14 of the Public Contract Law.

1 Section 8 of the Public Contract Law

2 Section 12 of the Public Contract Law

3 At present, the applicable decree is the Government Decree No 447 of 14. 12. 2011

Regarding the Contracting Authority's Right to Cancel a Tender

Because purchase of scientific appliances largely depends on an obligation of the contracting authority to cancel a tender in certain cases, it will be appropriate to deal in the following section in more detail with the possibilities of the contracting authority to cancel a tender. The possibilities to cancel a tender by the contracting authority are defined in Section 84 of the Public Contract Law. We can classify the possibilities as obligatory reasons (clearly defined) and facultative reasons (i.e. reasons not exactly clearly defined). Among the not clearly defined reasons for cancellation of a tender, there is in particular so called "reason with special consideration", while this reason is most frequently misused by contracting authorities.

Videlicet, discretionary cancellation of tenders by contracting authorities may be, to a great extent, discriminating for suppliers. The authority in the Czech Republic dealing with illegal reasons for cancellation of tenders by contracting authorities within its review competence is the Office for the Protection of Competition (UOHS) which provides through its decisions interpretative positions on the possibilities of contracting authorities to cancel a tender. When appealed, the review competence of the Office is further subject to control by the Regional and the Supreme Administrative Court in Brno.

Generally, contracting authorities most frequently misuse (as mentioned above) so called "reasons with special consideration"⁴, while large range of case law decisions exists at present (for example: Decision of the Office for the Protection of Competition UOHS-S235/2012/VZ-20045/2012/560/MSc of 24. 10. 2012 or for example: Judgement of the Supreme Administrative Court NSS 2 Afs 64/2009 of 27. 1. 2010, etc.). In the mentioned decision, resp. NSS verdict, the control authorities identified a breach of the law by contracting authorities which misused interpretation of unpredictability. Certain guidelines for possibilities of contracting authorities to cancel a tender can be found, among other things, also in case law decisions of the European Court of Justice (for example Judgement C-92/00 Hospital Ingenieure Krankenhaus-technik Plan ungs-Gesellschaft mbH (HI) against Stadt Wien). Generally spoken, unfounded cancellation of a tender is often one of the most frequent misconducts of contracting authorities. Purchase of scientific appliances is problematic in the aspect that they fall, in their prevailing majority, under the category of obligatory requirements of the Public Contract Law when

the contracting authority is obliged to cancel the tender without its own intention to do so.

The Issue of Purchase of Scientific Appliances

In relation with an increasing amount of funds spent on science and research, logically the importance increases of purchase of new scientific and research appliances replacing old or obsolete ones or designed for fitting of new scientific and research facilities. As to purchase of scientific appliances, this is often unique equipment and only a very limited circuit of specific suppliers is able to deliver it.

It is not unusual that there is only a single worldwide supplier of a specific scientific device. Which is, however, exactly the fact which causes certain complications to contracting authorities of tenders for such scientific equipment when the involved purchase must be implemented according to the Public Contract Law.

Procedure of a Contracting Authority when only one Bid is Received or Remains

The law provides in one of the conditions for cancellation of a tender that when only one bid has been submitted in the tender, resp. only one bid has remained for assessment, the contracting authority must cancel the tender without delay and must call a new tender⁵.

Besides, when it is an above-limit or under-limit contract procured in an open tender (in purchase of unique scientific appliances, this procedure is followed in prevailing majority) the contracting authority has no other choice but to call the tender again which results in an obligation to publish the tender repeatedly in the Public Tenders Journal⁶, while it must then provide a new deadline for submission of bids of up to 52 days.

In this way, the tender for purchase of the scientific device is unreasonably and irrelevantly extended on order of several months. Besides, if there is really only one supplier of the specific device this can result in the situation that the tender for purchase of the scientific device may be repeated to infinity. At present, the Public Contract Law does not include any instrument capable to consider and resolve such a situation (Jurčík, R., 2014a, 2014b).

Procedure of a Contracting Authority when it Does Not Receive any Bids

Besides, a contracting authority can cancel the tender if no bid has been submitted⁷. Regarding tenders for purchase of scientific appliances it means that if the contracting authority cancels the tender for this reason it is entitled to use

4 Section 84 (2 c) of the Public Contract Law

5 Section 84 (1 e) of the Public Contract Law

6 The official portal for publishing of public contracts in the CR

7 Section 84 (1 a) of the Public Contract Law

a simplified procedure in the form of so called proceedings without publishing⁸ when it can invite one or a limited circuit of potential suppliers to negotiate about the possibility to order the subject of the public contract. This procedure provides the contracting authority with the possibility to use for selection of the supplier a simplified, less formal and faster mode of the Public Contract Law while the contract can be granted, in that case, within several days or weeks. Therefore, when no bid is submitted to the tender, the Law is much more “benevolent”.

Paradox in the Public Contract Law

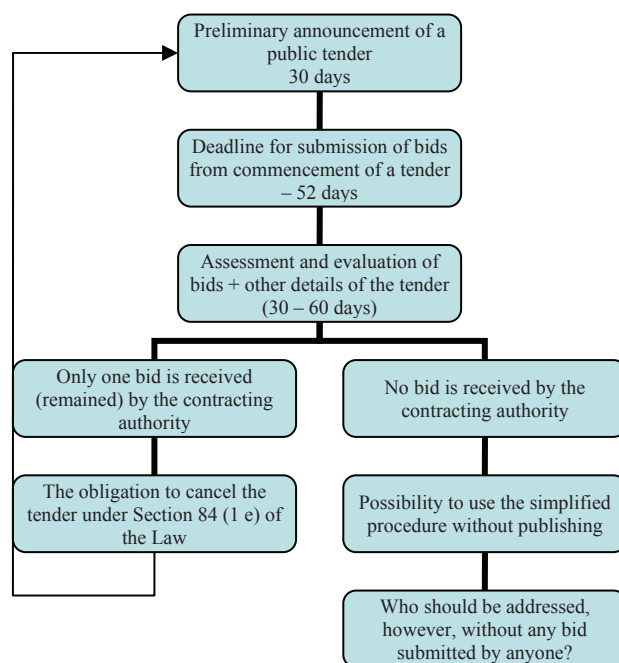
In relation with the above mentioned facts provided in the two previous chapters, a paradox situation results when the contracting authority if knows at least one supplier (if it has not excluded other suppliers for formal defects in their bids) of the scientific device able to deliver the subject of the public contract, must cancel the tender and repeat it again in the same way with new deadlines; however when the contracting authority does not receive any bid (again if all bids have not been excluded from the tender due to formal defects) it can use proceedings without publishing, it means to invite a specific supplier or a limited circuit of suppliers to negotiate about their bids.

What is the paradox of such situation is that when the contracting authority knows there is at least

one potential supplier able to deliver the subject of the public contract (it means to deliver the scientific device) and the contracting authority could invite him within a simplified tender and implement the contract without larger delays through selection of the supplier who has submitted a bid and has proven his ability to perform, while at the moment when such a bidder is not known because no entity has submitted its bid, the contracting authority has a choice to use the simplified procedure of proceedings without publishing and to address the supplier who, however, is not known to the contracting authority from the results of the original tender proceedings.

Due to the maximal transparency of tender proceedings, most purchases of scientific appliances (namely those implemented under operational programmes of the European Union) are implemented through open above-limit proceedings, i.e. in the most open possible way for potential suppliers.

Also some authors see the issue of public procurement with much criticism. Criticizing analysis of the practice of public procurement in the European Union can be seen for example from Christopher Bovis who considers the European method for public procurement as unreasonably complicated with the resulting inefficiency of spending of public funds (Bovis, C., 2006). This inefficiency of spent funds is closely related with



1: Scheme of tender process when one or none bid is received (or remained) for above-limit contracts for purchase of scientific equipment called in an open tender

Source: The author

⁸ The conditions for utilisation of proceedings without publishing are provided in Section 23 of the Public Contract Law, and the procedure itself of proceedings without publishing in Section 34 of the Law

the method in which the Public Contract Law is formulated, at least from the point of view of contracting authorities acquiring specific equipment. The following scheme shows graphically the issue of the covered paradox in the Law.

Studies of the amendment to the Public Contract Law point out also macro- and micro-economic consequences of its implementation where the above mentioned situation of a single bid received (or remained) is provided as the most important and “most strict” reason for cancellation of a tender.

Resulting Paradox in the Public Contract Law

The obligation of the contracting authority to cancel a tender if only one bid is submitted or if only one bid remains for assessment was included into the Public Contract Law in relation with so called big anticorruption amendment of the Law, applicable since 1. 4. 2012. The former wording of the Law granted to contracting authorities only the possibility to cancel a tender, however not the obligation to do so, if only one bid is assessed. It was this former wording of the Law which provided contracting authorities acquiring scientific appliances with the possibility to perform a purchase also in case of a single bid received from a single bidder in the tender.

Consequences for Contracting Authorities

At present, the proportion of subsidies from the European Union through structural funds into research and development increases (since accession of the CR to the EU in 2004 to June 2013, projects have been approved within the Operational Programme Research and Development for Innovations in the total amount exceeding 57.2 billion CZK) (Ministry for Regional Development, 2013). Provision of an EU subsidy, however, is linked with a deadline; it means the subsidy must be “consumed” within a certain predefined period of the specific scientific project duration. If the time schedule for subsidies drawing is not complied with there is a danger for the contracting authority that the subsidy will not be paid out (Jurčík, R., 2006). This is what is in conflict with delayed tenders for purchase of scientific appliances.

If a specific item of the budget (in this case a scientific device) is not contracted based on a tender in time the contracting authority will not receive subsidy for the item and in the extreme fails to acquire the device or must finance it from its own budget which, of course, causes further complications. Therefore, the main risk for contracting authorities acquiring unique scientific appliances is the risk of not granted subsidy by the subsidising body due to possible failure to comply with the time schedule of the subsidy drawing.

Consequences for Suppliers

If a tender for purchase of equipment must be cancelled on repeated basis due to submission of a single bid the supplier gets into the position when he regularly submits his bid into one tender while processing of that repeated bid results in repeated overheads for its completion. The supplier, although he knows that he is obviously the single supplier callable to deliver the specific subject of the tender, cannot get through to the contract due to unsuitable wording of legislation. This fact causes a certain aversion of foreign suppliers, many times the only producers and simultaneously distributors of a specific scientific device, against further participation in tenders in the Czech Republic.

Publications

The issue of the possibility to cancel a tender for reasons specified by the law is commented on namely by annotated publications about the law. For example Kruták and Krutáková in their comment on the Public Contract Law, however, think that in case of repeated submission of only one bid, it will not be necessary to cancel and call the tender again and again but this situation can serve as grounds for using the simplified procedure of proceedings without publishing (Kruták, T., Krutáková, L., 2013).

Present specialised Czech and foreign publications including specialised articles do not deal much with this specifically defined issue of purchases of scientific equipment through tenders. This is probably caused by the fact that the legislation concerning public contracts differs within the world and in different countries. Member states of the European Union have basic rules for public procurement defined by the mentioned directives of the European Parliament and the Council. It is therefore possible to search for common aspects in legislations of individual member states of the European Union as they are based on the mentioned directives. The area most similar to purchase of scientific equipment can be seen in purchase of medical equipment.

For example Kastanioti C., Kontodimopoulos N., Stasinopoulos D., Kapetaneas N., Polyzos N. deal in their article with improved efficiency of purchase of medical technology in Greece in relation with the economic crisis with the use of electronic auctions in the Greek legislation concerning public procurement (Kastanioti, C., Kontodimopoulos, N., Stasinopoulos, D. *et al.*, 2012). Sorenson C., Kanavos P., 2009 deal in their article with international comparison of methods for purchase of medical technology at the European level.

Problem Solution

With regards to the above mentioned facts, it is necessary to search a solution through an adjustment of the wording of the present Public Contract Law which should reflect in certain aspects

the needs of some contracting authorities as to the conditions for tenders.

In the treated case, the contracting authority is a scientific institution, university or a research facility the objective of which is to satisfy its need in the form of purchase of scientific and research equipment which cannot be met pursuant to the Public Contract Law in case of acquisition of unique appliances, this namely due to delays caused by its wording in Section 84 (1 e). The amendment to the Public Contract Law applicable since 1. 4. 2012 changed the wording of this provision of the Law from facultative reasons to obligatory reasons, it means from the meaning "the contracting authority can" to the meaning "the contracting authority must". The solution to this problem is to return the wording of this provision to the wording before the mentioned amendment. There, it was left up to the decision of the contracting authority whether to cancel the tender or to call it again or whether to select the bidder whose bid, as the only one, has met all requirements of the contracting authority, resp. if the contracting authority has received a single bid.

The solution to the problem of purchase of unique scientific appliances and the present wording of the Public Contract Law could be extension of the possibility of utilisation of the simplified tender through so called proceedings without publishing (Section 23 of the Public Contract Law) while if the contracting authority knows in advance that there is a single worldwide supplier of the inquired equipment it could use directly the proceedings without publishing as the fastest possible method for selection of the supplier. Of course, there is a risk of misuse of such "competence" by contracting authorities. The risk can be mitigated by introduction of the contracting authority's obligation to consult in that case its

decision with an expert body which would confirm the unique nature of the equipment and provide the contracting authority with a certain form of "expertise" for that case based on input documents submitted by the contracting authority checked by the expert body.

The expert body could cooperate with the contracting authority on utilisation of the proceedings without publishing if the contracting authority has not received any single bid in the previous tender when it, in fact, does not know who should be addressed within the proceedings without publishing. The advisory body would provide the contracting authority with certain cooperation and professional assistance in searching and selection of the potential supplier who will be able to perform the inquired subject of performance in the form of unique scientific equipment. Based on mutual cooperation between the contracting authority and the expert body, the potential supplier of the inquired equipment could be selected (Jurčík, R., 2013b).

The highest possible number of tenders for purchase of specific scientific equipment should continue to be published in so called Official Journal of the European Union so that potential suppliers from the whole European Union have access to these tenders to extend their circuit as much as possible.

Contracting authorities must further pay close attention to appropriate formulation of so called CPV⁹ codes which are in fact a common vocabulary for denomination of services, supplies or construction works within the European Union. However, for purchase of specific equipment, the suitable specification of CPV code is rather difficult because in many cases, exact denomination with CPV code for the equipment is not available.

CONCLUSION

Investing of public funds into science and research is probably the most efficient in a long-term horizon. However, the flow of funds for acquisition of scientific and research equipment should be supported by appropriate legislation with such wording and form not to prevent purchases of that equipment.

Availability of public funds for something which in fact cannot be, due to wrongly set legislation, acquired by a contracting authority is the problem which must be eliminated through timely implementation of the above proposed changes in the Public Contract Law (Jurčík, R., 2013b). It is therefore up to the lawmakers to implement the changes in the Public Contract Law as soon as possible; the changes will make easier for contracting authorities operating in the field of scientific and research sphere to acquire equipment for their work and in consequence to facilitate sufficient conditions for their scientific work.

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9 Common procurement vocabulary

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