

CASE C-454/06, PRESSETEXT NACHRICHTENAGENTUR V AUSTRIA – LEGAL AND ECONOMIC ASPECTS. SOLUTIONS FOR PUBLIC ADMINISTRATION?

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Received: April 28, 2013

Abstract

JURČÍK RADEK: *Case C-454/06, Presstext Nachrichtenagentur v Austria – legal and economic aspects. Solutions for public administration?* Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis, 2013, LXI, No. 4, pp. 967–971

The overall question of when amendments to an existing agreement are to be regarded as constituting a new award of a public contract has not come before the ECJ. The Presstext case and decision's practice in the Czech Republic has solved this question: In order to ensure transparency of procedures and equal treatment of tenderers, amendments to provisions of a public contract during the currency of the contract constitute a new award of a contract when they are materially different in character from the original contract and, therefore, are such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. We can say that for this purpose an amendment to a public contract may be regarded as 'material' when: it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted, or would have allowed for the acceptance of a tender other than the one initially accepted, it extends the scope of the contract considerably to encompass services not initially covered and it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

public procurement procedures, court of justice of the European Union, public procurement, contract amendment, changes of public contracts, variation clauses

The process of entering into an agreement for the subject of fulfilment of a public contract assigned pursuant Act No. 137/2006 Coll., on public contracts, as amended (hereinafter the "Act on Public Contracts") is subject upon assigning of a below-limit or above-limit public contract to a binding legal framework.¹ If this legal framework related to the rules is breached, it will also result in a breach of the Act on Public Contracts. In the article, the author analyses the resulting option of the contracting parties to amend the agreement entered into based on a binding approach pursuant to the Act on Public Contracts. Based on the above

analysis of the legal definition, decision practice and the nature of contractual amendments, the author draws his own conclusions regarding the resulting option of entering into *lege artis* amendments to the specified agreements.

Changes of public contracts

In relation to the above objective, the following provisions of the Act on Public Contracts are standard. Pursuant to Section 82 paragraph 2 of the Act on Public Contracts, the tenderer shall enter into an agreement in accordance with the draft agreement contained in the selected applicant's

¹ The Czech Act on Public Contracts which is based on European procurement directives considers assignment to be a public decision by the tenderer to select the best offer and to enter into an agreement with the applicant selected in the tender (see Section 17 letter k/ of Act No. 137/2006 Coll., as amended).

offer.² This provision does not address the situation involving amendment of the particular agreement. In this particular case, it is necessary to point out that European Community directives governing tenders and the Act on Public Contracts do not regulate the situations following the assignment of a contract and do not include explicit rules regarding the admissibility of such changes.³ Nonetheless, it cannot be stated that the tenderer would have a free hand during modification of agreements or entering into contractual amendments, since each contractual change of the subject of the public contract pursuant to the Act on Public Contracts that is not arranged in a manner that complies with that Act amounts to a breach of the basic principles outlined in Section 6 of the Act on Public Contracts and Section 82 paragraph 2 of the Act on Public Contracts. Pursuant to the cited provisions of Section 82 paragraph 2 of the Act on Public Contracts, the tenderer shall enter into an agreement in accordance with the draft agreement contained in the selected applicant's offer. The respective provisions and their interpretation are the aim of this article. First it is necessary to state the relevant conclusions reached based on expertise and decision practice. According to the literal (grammatical) interpretation, the draft agreement should not be amended in any way, nor should the agreement be amended subsequently in a manner that is not in accordance with the

procedures defined by the Act on Public Contracts. In practice, however, contractual amendments become necessary in a varying extent, and the issue arises of to what extent the agreement can be amended in a manner that is not in accordance with the Act, meaning when from a legal point of view the particular agreement is considered an agreement entered into in accordance with the conditions of assignment of a public contract and when it is an agreement following an adjustment that does not comply with the original conditions for assignment of the public contract.⁴

Expertise and decision experience (cited further) supports the opinion that the tenderer is not authorised to resort to entering into an agreement, if this could lead to the types of changes to the agreement that would cause it to have an effect on previous tenders, categories of suppliers and a type of change to the winning applicant's offer that would cause its offer to no longer necessarily be the most advantageous one after the changes to the agreement (Hartlev, K., Liljenbol, M. W., 2013). In other words, the contracting parties may enter into an amendment to an agreement on realisation of a public contract, if such changes do not change the conditions of the tender, especially if such changes would be to the detriment of the tenderer (price increases are particularly unacceptable).⁵

2 Directive 2004/18 of March 31, 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not contain any direct provision concerning change contracts after awarding. Several Member States have pointed out this "uncertainty of the law" to the Commission. See more in Green Paper on the modernisation of EU public procurement policy. For an in-depth analysis of the proposal for a new common procurement directive (Treumer, 2011).

3 See also the presentation by Feurstein, 2008: Contractual amendments in EC law regarding public contracts. Scientific conference "Public contracts and PPP projects" held at Mendel University in May 2008. This presentation is not online available.

4 *During application of an exclusively grammatical interpretation, it would be possible to reach the conclusion that an agreement, which was entered into in full (literal) accordance with the draft agreement of the selected applicant, needs to be considered invalid from the very beginning. Contrary to that, there is a teleological interpretation of Section 82 paragraph 2 of the Act, according to which certain essential modifications are acceptable, and such amended agreement would be considered valid, meaning entered into in accordance with the law. In our opinion, in the particular place it would make sense to select an interpretation that does not establish any doubts about the validity of the agreement, i.e. teleological interpretation of the cited provisions of the Act (Mareš, D., Šebesta, M., Dvořák, D., 2009).*

5 In the specified respect, the view of the Office for Protection of Economic Competition (OPEC) regarding the particular issue is also important. For example, in the legally effective decision by the chairman of the OPEC in matter R087/2007/02-14942/2007/310-Hr, the Office stated that it perceives amendments to the agreement in accordance with general legal theory as a sufficient bilateral arrangement between the contracting parties, which changes the original contractual relationship, and that relationship needs to continue to be interpreted only in the wording of the particular amendment. Therefore, if an amendment changes the contents of an original agreement, it is necessary until the moment of its signing to take into consideration its effect in the future, as if it had been agreed upon from the beginning in the wording modified by the amendment. By entering into an amendment, the process of realising a public contract returns to the moment before entry into the agreement for fulfilment of the subject of the public contract. The OPEC also emphasised that the provisions of Section 66 paragraph 2 of the Act cannot be considered only from the point of view of the time correlation of the tenderer's individual steps, meaning that the tenderer is bound by these provisions only at the moment of entering into the agreement for fulfilment of a public contract, which directly corresponds to the entire tender and concludes it. The tenderer's obligation to enter into an agreement in accordance with the assignment and the selected offer (authors' note: in accordance with the draft agreement contained in the selected applicant's offer) needs to be understood functionally, meaning that for the duration of realisation of the public contract this agreement must be in accordance with the original tender conditions and the submitted winning offer; in other words, the public contract must be realised under the conditions that were arranged during the tender (through public disclosure of the tender conditions and submission of the selected offer) and not under conditions that during the realisation of the public contract will be changed by the tenderer at will. Although the cited decision primarily addresses the issue of amendments to already signed agreements, in our opinion it can be considered related to a situation when an agreement should be entered into for realisation of a public contract in accordance with the draft agreement contained in the selected applicant's offer. Modification of the draft agreement so that it differs with the wording contained in the selected applicant's offer also has the character of a contractual "amendment".

Decision practice of Czech Office for Protection of Economic Competition

Regarding the extent of possible changes to agreements entered into pursuant to the act on public contracts, the Office for Protection of Economic Competition (OPEC) cited that ... *The parties to an agreement for realisation of a public contract may jointly enter into an amendment that changes the provisions of the original agreement, but emphasises that all such changes must be in accordance with the tender and the selected offer.*⁶

Decision practice also addresses what basically changes the tender conditions for a public contract. The OPEC decision of 17 December 2008 (S287/2008/VZ-21603/2008/510/MO) in relation to the particular issue states the following. *All changes that could have or could have had an effect on the list of potential suppliers need first of all to be regarded as fundamental changes. However, the above related to the list of potential applicants/suppliers for the contract does not present evidence in an exhaustive manner about potential influencing of the evaluation of offers in the tender. It is also necessary to examine whether or not a change to the original conditions would affect the very course of the tender. In other words, fundamental changes to the conditions need to be understood as changes whose inclusion in the original conditions could influence the evaluation process itself (particularly if directly related to the evaluation criteria) or the applicants' ability to fulfil new conditions. Additionally, the Office states that as a result of a potential change to the extent of the subject of the public contract (if in the future the extent or volume of the defined subject of the public contract), the tenderer in the future (meaning from the effectiveness of such change) could be considered to have breached the law. In the tender documentation in point 12. "other conditions" the tenderer has reserved the right to "modify the extent of fulfilment of the public contract or divide the contract into phases, depending on the offer price and the volume of financial resources before commencement of and during the construction work and may eliminate certain parts of it. It is obvious from the provisions above, that the tenderer is required in the tender documentation among other things to define the extent of the subject of the public contract in a manner that ensures that the suppliers are capable of preparing offers. The subject of the public contract must be defined clearly, and for the entire duration of fulfilment of the public contract, it must not be changed, and the extent of the subject of the public contract must not be conditioned by other circumstances on the tenderer's side (even based on the volume of available financial resources). In such case, the suppliers while preparing offers will not have clear information about the subject of the public contract for which they are supposed to prepare their offers, including price offers. It is obvious that for setting the offer price, appraisal of individual partial items in the budget is not sufficient, but the total volume of demanded work will also be important (from the point of view*

*of setting margin amounts, allocating necessary capacity for fulfilment of the public contract, elimination of price changes, providing of volume discounts, etc.).*⁷

According to the OPEC decision dated 24 April 2006 with reference No. 2 R 92/05-Hr, *the tenderer fundamentally changed the conditions of the tender compared to the original open proceedings by eliminating a requirement for providing of the service "2 telephone numbers on 1 SIM card". In relation to the other services and their extent, this requirement was marginal.*⁸

In relation to the amendments, it is also possible to cite the OPEC decision dated 16 August with reference No. R087/2007/02-14942/2007/310-Hr, which states that the OPEC *perceives amendments to the agreement in accordance with general legal theory as a sufficient bilateral arrangement between the contracting parties, which changes the original contractual relationship, and that relationship needs to continue to be interpreted only in the wording of the particular amendment. Therefore, if an amendment changes the contents of an original agreement, it is necessary until the moment of its signing to take into consideration its effect in the future, as if it had been agreed upon from the beginning in the wording modified by the amendment. By entering into an amendment, the process of realisation of the public contract returns to the moment before the contract for fulfilment of the public contract was entered into.*

Solutions for public contracts in the field of public administration

Besides the conclusions and decisions initially referred to, it is also possible to cite mainly the verdict by the EU Court Tribunal regarding the matter with reference No. C-454/06, Presstext Nachrichtenagentur GmbH versus the Republic of Austria, which addresses the particular issue. According to that verdict, *changes to the provisions of the agreement during the fulfilment of a public contract require holding of a new tender, if such changes fundamentally amend the original agreement and therefore demonstrate the aim of the contracting parties to renegotiate the fundamental conditions of the agreement. The change shall be considered fundamental, and therefore a new tender will be required if: it imposes conditions, which if they had been part of the original tender would have enabled other applicants to participate besides those who were originally admitted to the tender; or which would have allowed acceptance of offers other than those that were originally accepted; it fundamentally expands the subject of the public contract, to include services that the original contract did not contain; it changes the level playing field for the contractual partners to benefit a particular supplier in a manner not defined in the conditions of the original agreement. The price is a fundamental condition of the agreement.*

According to the cited decision Presstext⁹ and the opinion by the Attorney General J. Kokott

6 See OPEC decision No. R087/2007/02-14942/2007/310-Hr.

7 The economics of public contracts was already discussed (Jurčík, 2007).

8 A similar opinion was expressed by Poulsen, 2012.

9 Presstext Nachrichtenagentur GmbH v Austria (C-454/06).

dated 13 March 2008 in matter C-454/06 Presstext Nachrichtenagentur GmbH, points 48 and 49, fundamental changes are defined as changes that limit competition for a particular public contract.

Summarised, that decision introduced three types of changes to agreements, which are fundamental in nature and therefore at variance with applicable legislation governing assignment of public contracts¹⁰:

- a change that introduces conditions that would enable, if they existed in the original tender, the participation of other applicants besides those who were originally admitted into the tender, or that would enable selection as the best offer a different offer than the one that was originally selected;
- a change that to a significant extent expands the public contract to include services (generally any fulfilment by the supplier) that were not originally anticipated;
- a change that changes in a way that was not anticipated in the original tender conditions the economic balance of the contractual relationship for the benefit of the supplier to whom the public contract was awarded.

In the past it was thought it was for national contract law to decide whether amendments to existing contracts required a new contract award procedure.¹¹ CJEU stated that agreed changes in the terms of payment after contract award was in breach of the procurement rules.¹²

Contractual changes based on the decision precedent of the Czech Supreme Court and the Supreme Administrative Court

An agreement entered into in accordance with the legal definition of public contracts is addressed

in the Czech Supreme Court's verdict dated 21 December 2010 with reference No. 23 Cdo 4561/2008, which was published in the Collection of Court Decisions and Opinions No. 74/2011 with the legal sentence: *An agreement in which the conditions regarding a change of the applicant's offer price have been changed at variance with the conditions set by the tenderer during the announcement of the tender pursuant to Act No. 199/1994 Coll., as amended, is absolutely fully invalid.*¹³

Contractual changes and principles of transparency, equal treatment and prohibition of discrimination pursuant to Act No. 137/2006 Coll., on public contracts

According to the Czech Supreme Administrative Court's verdict dated 31 May 2010 with reference number 8 Afs 60/2009 – 78, *the purpose of the legal regulation of public contracts is, among other things, to ensure transparency, effectiveness, purposefulness and efficiency when investing public funds. Conditions must be created so that the contractual relationships that result in fulfilment from public funds are entered into by tenderers while ensuring properly functioning economic competition and adherence to the principles of equal treatment, prohibition of discrimination and the principles of transparent handling of public resources (compare Section 25 paragraph 1 of the act on public contracts). Regulation of public contract assignment represents one of the cases of legitimate public legal limitation of entities that through their public legal character can enter into a specific relationship as entities regulated by public law, handling their own property or property entrusted to them. However, a breach of any of the obligations set by the respective legal definition is not significant only from the point of view of related definition of the examination of the tenderers' actions and administrative punishment, but can also have an effect on the validity of agreements entered into.*

10 A specific category of contractual changes, where there is no discussion about non-admissibility, is the change in contractual arrangements that were evaluation criteria for assignment of the public contract (e.g. the offer price, warranty or sanction conditions). Their change always represents a fundamental change and as such it is basically unacceptable (According to Section 82 paragraph 2 sentence 2 of the act on public contracts, the tenderer must enter into an agreement in accordance with the draft agreement contained in the selected applicant's offer). A change to these arrangements may be allowed only under important objective circumstances (such as extension of the deadline for realisation of the work due to floods that have prevented the work from being carried out). Other changes that cannot be qualified as fundamental are not fundamental and do not require holding of a new tender.

11 See for instance the opinion of Advocate General Fennely in the case *Walter Tögel v Niederösterreichischer Gebietskrankenkasse* (C-76-97).

12 More in judgement *Commission v CAS Succhi di Frutta SpA* (C-496/99 P). The Court held that all tenderers must be subject to the same conditions, and that all conditions and rules of the award procedure must be drawn up in a clear, precise and unequivocal manner. The selection of the successful tenderer, but until expiry of the contract. The contracting authority therefore may not amend essential conditions in the contracting authority wishes to be able to make amendments after the award of the contract, then the contracting authority is required expressly to refer that possibility in the provisions of the contract.

13 In the particular case, it is necessary to cite the fact that this legal sentence was not issued in relation to the first legal definition of public contracts, which was Act No. 199/1994 Coll. In relation to the legal definition *de lege lata*, the same statement applies.

CONCLUSIONS

The procurement directives contain no provisions directly governing existing contracts, which should be changed in the proposal of new procurement directives.

It is apparent from the above interpretation that without the use of the process based on the act on public contracts, it is possible to carry out only an insignificant change of conditions, which will not have an effect on the list of suppliers for a public contract, which are not to the detriment of the tenderer and which will not change the selected applicant's values offered in the evaluation criteria to the tenderer's detriment.¹⁴ Solutions for changes of public contracts in the field of public administration are following. Material changes are not permitted. In order to provide for flexibility in the period from signature until the end of the contract, the contracting authority is recommended, in the tender documentation, to refer to the possibility of subsequent change so that any changes take place in pursuance of the contract.

Insignificant changes (formal changes to the agreement, which can include, for example, the deadline for fulfilment under certain circumstances)¹⁵, basically do not change the original agreement. Major changes to the agreement are unacceptable, and it may be possible under conditions strictly defined by law to use negotiation proceedings without public disclosure.

Acknowledgement

This contribution was prepared as part of the resolution of research objective project of IGA No 19/2013.

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¹⁴ Most authors have focused on when an amendment entail a duty to retender (Arrowsmith, 2005; Dvořák, 2009). Changes that can be considered fundamental include such changes, which in relation to a particular public contract limit competition or create an advantage for an existing supplier, with a negative effect on other potential suppliers. These include in particular changes in relation to which it cannot be ruled out that other suppliers may under changed conditions offer (whether at the time of assignment of the original public contract or at the time of the considered change) better conditions than the existing supplier, or as a result of the changed conditions an offer could be made by multiple suppliers.

¹⁵ What there are the significant changes, this was discussed on more conference without clear solving (Jurčík, 2012).

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