



## **New legal regulation on public procurements and concessions**

The Lower Chamber has passed in the first reading a government bill to introduce a Public Procurement Act which aims to unify the rules of public procurement and concession contracts and to replace the current Act No. 137/2006 Coll., on Public Procurements and the Act No. 139/2006 Coll., on Concession Contracts and Concession Procedures (the Concessions Act).

The bill is based on the directives of the European Parliament and the Council, which govern public procurement and concessions, and that the Czech Republic is obliged to transpose and for that purpose to bring into force the relevant legislation by 18 April 2016. The following is a summary of some important changes the bill is to bring in public procurement regulation.

In particular, the bill to introduce the Public Procurement Act abandons the use of the lowest tender price as the basic evaluation criterion. Under the prepared new regulation, the primary evaluation criterion will be the economic advantageousness of an offer which is to be assessed on the basis of the most favorable ratio between the bid price and quality, including the ratio of life-cycle costs and quality. However, the contracting authority will be allowed to evaluate within some procurement procedures the economic advantageousness based solely on the lowest bid price, similar to how it has been applicable so far.

Under the bill, the contracting authority will be able to exclude a bidder for incompetence if it proves that, in the past 3 years before the initiation of the procurement procedure, the bidder has committed (i) serious or persistent misconduct in the performance of a previous contractual relationship with the contracting authority awarding the public contract or with another public contracting authority which led to earlier termination of the contractual relationship, damages or other comparable sanctions, or (ii) serious professional misconduct which calls into question the credibility of the bidder, including misconduct for which the bidder has been disciplined or for which a disciplinary sanction has been imposed on the bidder under other legal regulations. On the contrary, the contracting authority will not have to exclude a bidder due to formal errors, in particular lacking data, documents etc. In such a situation, the contracting authority will mainly have the possibility to request any missing data or document to a much greater extent than under the legal regulation that is effective as of today.

The proposed wording of the new statute also brings about significant time savings and minor administrative simplification of procurement procedures. While currently the contracting authority may initiate most of the procurement procedures not earlier than one month after posting an advance notification in the Journal of Public Procurements, the bill abandons the obligation of advance notification, with certain exceptions.

Under the current Public Procurement Act, the contracting authority shall convene an evaluation commission also for minor contracts, while the bill leaves it to the discretion of the contracting authority whether or not to appoint a commission to perform the individual administrative acts; however, the responsibility will be borne by the contracting authority.

Under the existing law, the contracting authority cannot determine what constitutes an extremely low and therefore suspicious price. According to the bill, the contracting authority will be able to set forth in the specifications a pre-determined specific price or costs that will be considered extremely low tender price, or lay down a formula determining an extremely low tender price. The contracting authority would then be able to exclude each bid that contains such an extremely low tender price which is not justified by the bidder, similarly as it is now.

According to the existing Public Procurement Act, the contracting authority has to review all bids regardless of meeting the prerequisites of the tender or otherwise, which is often a very cumbersome process especially for large contracts in which bids are sent by many interested parties. According to the bill, the contracting authority will be able to review the most advantageous bids only. Indeed, the bill proposes in this regard that the contracting authority can assess compliance with the conditions of the tender either before or after the evaluation of bids; for the selected vendor, however, the contracting authority shall undertake an assessment the compliance with conditions for participation in the tender and evaluation of its bid at all times.

Based on the bill to introduce the Public Procurement Act, the criteria for the in-house procurement shall also be refined. In particular, a fixed volume of activities performed by a controlled legal person in favor of the contracting authority that must be met for awarding the procurement in an in-house scheme is laid down. While the current legislation vaguely defines this volume using the term "substantial part of activities", the bill contains a requirement for the controlled legal person to exercise more than 80% of activity for the contracting authority.

The bill also introduces a new type of procurement procedure, called innovation partnership. It is useful when the requested solution is not commonly standardized. The aim of such a tender is in particular the development of an innovative product that is not yet available on the market and its subsequent purchase. In such a case, the contracting authority lays down the desired level of performance and agrees with the participants the maximum cost of the product.

A significant change compared to the existing legal regulation is an extension of the ability to change the content of a concluded contract. The new regulation would allow the contracting authority to change - under specified conditions - the content of the obligations unless the total price increase exceeds 30%

of the initial value of commitment (in case of implementation of multiple changes the sum of price increases under all changes will be decisive). This change will certainly bring significant relief to contracting authorities that would not be so much limited in situations where the need for additional work or additional performance arises.

Although the bill to introduce the Public Procurement Act is still at the second reading stage in the legislative process, the adoption and entry into force thereof can be expected by the date of April 18, 2016 mentioned above as that is the deadline within which the Czech Republic is obliged to ensure the transposition of the relevant Directives bringing about the above-described changes in public procurement.

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## Legislative news

Let's look at the following selected legislative news from Q4 2015.

### Alternative dispute resolution of consumer disputes

The Lower Chamber approved an amendment to the Act No. 634/1992 Coll., on Consumer Protection, which introduces non-judicial resolution of consumer disputes. The bill was returned by the Senate to the Lower Chamber with amendments, whereas if the Lower Chamber passes the bill, the amendment will come into force and become effective.

The bill introduces a new option of resolving consumer disputes arising from purchase agreements and contracts for the provision of services where one of the parties to the dispute is an entrepreneur - the seller or service provider - and the other party is a consumer. Typically, this would regard the exercise of rights under liability for defects when the seller does not recognize, for example, a claim by the consumer. Currently, basically the only option for consumers is to seek their claims in front of the competent court in the event of such a dispute. This procedure is, however, costly and time-consuming. In most cases, it is not worth it for consumers to claim thru judicial process (particularly given the disparity between the value of the dispute and the costs incurred). From the effective date of the amendment in question, the consumers will also be able to exercise their rights free of charge at a competent authority (usually at the Czech Trade Inspection) for the purpose of out-of-court settlement within a period of 1 year from the date when they first raised their right with the entrepreneur.

The result of such out-of-court settlement of consumer disputes will not, however, be a binding decision of a competent authority but an agreement of the parties to the dispute reached as a result of the mediation of the competent authority. This act will only act as a mediator motivating the parties to reach an amicable settlement of the dispute. It is therefore questionable whether this new instrument of ADR would improve the position

of consumers when exercising their rights (since the parties have no obligation to conclude any agreement or reach any settlement) or the consumer would anyhow be forced to assert their rights in front of a court and incur the associated costs. It is worth mentioning that the introduction of the ADR process, the amendment also introduces a new obligation to provide information by entrepreneurs. From the effective date of the amendment, therefore, the entrepreneur will be obliged to inform consumers in a clear, comprehensible and accessible manner (mainly through Internet sites referring to information on business terms) on the body which is responsible for the extrajudicial resolution of consumer disputes. Breach of such an obligation will be punished as an administrative offense by a fine of up to CZK 1 million.

### **Establishing a register of beneficial owners of companies**

On May 20, 2015 the European Parliament and the Council of the European Union adopted the Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. The Directive among others requires Member States to ensure that companies and other legal entities registered in the territory of the Member States will be required to obtain and provide to the relevant authorities information on their actual owners. The actual owner is understood to mean an individual (or individuals acting in concert) with a share of at least 25%, whether they own it directly or through other corporations. The information on the actual owners of companies shall be recorded in a central registry which the Member States will maintain for this purpose.

In this context, a bill that would introduce an obligation for companies to provide information on their actual owners in a central registry is under preparation. This register will likely be included in the Czech Commercial Register.

The envisaged regulation is intended to allow tracking down the ownership structure of companies and other legal entities that are owned through several other legal entities, often with foreign capital participation. However, the question is how the obligation to disclose information on the beneficial ownership of companies and other legal entities is going to be enforced or monitored. In many cases, the details of the actual owner are not known even to the company itself, particularly if it is a part of a large foreign group of companies or when such data cannot be verified in public registers considering an extensive international structure.

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