



NEWSLETTER 8/2016

New public procurement

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- As of 1st October a **new Act No. 134/2016 Coll., on public procurement**, became effective.
- The new legislation cancelled **the existing Act No. 137/2006 Coll., on public procurement**, and **the existing Act No. 139/2006 Coll., on concession license procedure and concession license contracts (“the License Act”)**. The concession license procedure is newly regarded as a specific type of procurement procedure and the concession license as a specific type of a public procurement.
- **The general aim** of the new legislation according to its preamble is:
 - (i) to provide the conformity with the law of the European Union;
 - (ii) to set clear rules, which are capable to prevent corruption, to guarantee the economical use of public funds, the prompt realization of needed public projects and the fair contest of the contractors;
 - (iii) to reduce administrative demands of public procurement and to ensure a sufficient level of its transparency at the same time.
- **In particular** the new law aims especially for the reduction of: the duration of the procurement procedure, the number of cancelled procedures, the number of objections, the number of cases filed with the Office for the Protection of Business Competition and the reduction of the difference between the expected and the realized price of the public procurement.

I. TYPES OF PUBLIC CONTRACTS AND TYPES OF PUBLIC PROCUREMENT PROCEDURES

- The new act distinguishes **five types of public contracts** with respect to their objects (Sec. 2 (2) of the Public Procurement Act):
 - (i) public supply contracts (Sec. 14 (1));
 - (ii) public services contracts (Sec. 14 (2));
 - (iii) public contracts for building works (Sec. 14 (3));
 - (iv) concession licenses for services (Sec. 174 (3)) and
 - (v) concession licenses for building works (Sec. 174 (2)).

- Further, the new law regulates **nine different types of procurement procedures** (Sec. 3 of the Public Procurement Act), which are:
 - (i) simplified subthreshold procedure (Sec. 53);
 - (ii) open procedure (Sec. 56 – 57);
 - (iii) restricted procedure (Sec. 58 – 59);
 - (iv) negotiated procedure with publishing (Sec. 60 – 62);
 - (v) negotiated procedure without prior publishing (Sec. 63 – 67);
 - (vi) competitive dialogue (Sec. 68 – 69);
 - (vii) innovation partnership (Sec. 70 – 72);
 - (viii) concession license procedure (Sec. 180 – 183) and
 - (ix) the procurement procedure with simplified regime (Sec. 129).

- Apart from the above mentioned procurement procedures, it is also possible to award a tender in other special procedures, i.e. in a dynamic purchasing system (Sec. 138 – 142) or on the basis of a framework agreement (Sec. 131 – 137). A specific type of procurement procedure is also a design contest (Sec. 143 - 150), where a most suitable design is chosen.

II. PRINCIPLES OF PUBLIC PROCUREMENT

- Basic principles of public procurement are set down in **Section 6** of the Public Procurement Act. The procurement authority shall respect them during each and every action in connection with the public procurement and in all phases of the public procurement procedure. The aim of these principles is to protect the competition during the public procurement.
- **Basic principles of public procurement** are as follows:
 - (i) principle of transparency,
 - (ii) principle of proportionate manner,
 - (iii) principle of equal treatment and
 - (iv) principle of non-discrimination.

III. IMPORTANT NEW LEGAL INSTITUTES

- **Preliminary market consultations** (Sec. 33). Before launching a procurement procedure, the procurement authority may conduct preliminary market consultations with independent experts, authorities or market participants. The aim of this institute is to prepare the public procurement properly and to inform economic operators of its procurement plans and requirements.
- However, such consultations must not have the effect of distorting competition and must not result in a violation of the principles of the non-discrimination and the transparency. In the case of a distortion of the competition, the procurement authority is entitled to **exclude the** respective **participant** from the procurement procedure (under the fulfillment of other legal conditions) (Sec. 48 (5) (c)).
- **Clarification and Completion of data, documents, samples or models** (Sec. 46 (1)). Pursuant to this provision the procurement authority is entitled to ask the participant of the procurement procedure to clarify already submitted data or documents or to submit further or missing data or documents. The procurement authority may call for it anytime during the procedure, even repeatedly.

IV. BASIC CHARACTERISTIC OF TYPES OF PUBLIC PROCUREMENT PROCEDURE

- **Open procedure**

It is a single-phase procedure, in which any interested bidder may submit a tender offer in response to a call for competition. The tender offer shall be accompanied by the information for qualitative selection that is requested by the contracting authority. The tender offer must be submitted in the set time limit. It is not allowed to negotiate about the submitted tenders. This type of procedure may be used in every case of a public procurement (except of the area of defence and security).

- **Restricted procedure**

This type of procedure has two phases. Initially, any bidder may submit a request to participate in response to a call for competition. The request shall contain the information for qualitative selection that is requested by the procurement authority. After the assessment of the fulfillment of the required qualification, the selected bidders are invited by the procurement authority to submit the tender offer. It is not possible to negotiate about the submitted tender offers. This type of procedure may be used without any restriction.

- **Negotiated procedure with publication**

Also this type of procedure is divided into two phases (a call for submission of the request to participate + a call for submission of a tender offer). The procurement authority negotiates with participants in order to

achieve the most suitable conditions of the offer. This type of procedure may be used only under the fulfillment of conditions laid down in **Section 60** (e.g. the needs of the procurement authority cannot be met without adaptation of readily available solutions, the needs include design or innovative solutions, the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up; prior open procedure or prior restricted procedure were cancelled).

- **Negotiated procedure without publication**

This type of procedure may be used **only under the fulfillment of conditions** laid down in Sections 63 – 67 of the Public Procurement Act (e.g. in prior open procedure or in prior restricted procedure no tender offer or no suitable tender offers have been submitted, provided that the initial conditions of the contract are not substantially altered; the works, supplies or services can be supplied only by a particular economic operator because the aim of the procurement is a creation or an acquisition of a unique work of art or artistic performance; or competition is absent for technical reasons). The procurement authority is obliged to justify the reasons for this type of procedure. The procurement authority calls on only one certain bidder or a restricted number of parties to negotiate. After the negotiations, the invited bidders submit their tender offers. It is considered as the less formalized procurement procedure.

- **Competitive dialogue**

This is a three- phases procedure, which may be used under the conditions stated in Section 60 (see above).

During its first phase, any party may submit a request to participate in the response to a contract notice by providing the information for qualitative selection that is requested by the procurement authority. In the second phase, the procurement authority negotiates the most suitable solution with selected participants. After finding the most suitable solution, the procurement authority calls for the submission of tender offers (the third phase). This type of procedure will be used when the procurement authority knows its needs and aims, but is not able to find the most suitable solution by its self (e.g. in cases of large investment projects).

- **Innovation partnership**

It is a new type of procurement procedure used in cases, when there is the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. The estimated value of such tender shall not be disproportionate in relation to the investment required for their development.

- **Simplified subthreshold procedure**

The procurement authority shall open this procedure by publishing its call for submission of tenders on its website, where any bidder may submit a tender in response to this call. After publishing the call, the procurement authority may also send the call directly to certain bidders (at least to five subjects). In this procedure it is possible to award all subthreshold public procurements except subthreshold public contracts for building works with the estimated value of such works exceeding CZK 50 million.

- **Concession License procedure**

Within the new concession license procedure, the procurement authority is entitled to set the actual procedure parameters. Any party may submit its request to participate together with its preliminary offer or its tender offer in response to the call for competition. The type of submission depends on the method, how the procurement authority had set the conditions for the license procedure (i.e. if the procedure will have only one or more phases; or if the procurement authority will negotiate with the participants during the procedure or not). In the procedure opening notice, the procurement authority shall describe the license and provide the conditions for participation and the assessment criteria.

V. PROTECTION AGAINST ILLEGAL PRACTICES OF THE CONTRACTING AUTHORITY

- **The basic protection** against illegal practices of the procurement authority is represented by **the institute of objections** (Sections 241 - 247). The objections may be submitted by any entity, whose rights are at risk of being harmed or have been harmed by the practices of the procurement authority made in connection with the public procurement. The objections shall be submitted within 15 days from the day, when such party had found out about the alleged infringement of the law (unless the law provides other statutory period). The procurement authority must decide about the objections within 15 days from notification.

- If the procurement authority fails to comply with the objections, the next possible step is to file **a request for review with the Office for the Protection of the business Competition** (Sections 249 - 267 of the Public Procurement Act).

- Further instrument for protection is a new institute of **the ban on the execution of the tendered contract** (Section 246) setting down that the procurement authority must not execute the tendered contract with the winner:
 - (i) during the time limit set for the submission of any objections against the decision about an exclusion of a tender participant or against the decision about the selection of the winning party, or against the voluntary notice regarding the intention to conclude the contract;
 - (ii) during the time set for the delivery of the decision about the objections (if applicable),
 - (iii) during the time limit set for the filing of the request to review practices of the procurement authority with the Office for the Protection of Business Competition (if applicable),
 - (iv) during the time limit of 60 days following the day, when the proceeding reviewing practices of the procurement authority by the Office for the Protection of the Business Competition has been opened, (if applicable).

We hope the above summary will ease your orientation in the new legislation. We are available for any of your additional requests or information.

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