

PRINCIPLES OF PUBLIC CONTRACTS IN EUROPE

Collective Research Project

National Study: Czech Republic

Public Contracts and their Principles in the Czech Republic

- Czech equivalent of term “Public Contract” = veřejná zakázka, classical tender awarded per EU procurement directives
- Sources of principles:
 - ❖ Public procurement legislation, esp. Public Procurement Act (Act no. 134/2016 Coll., “PPA”) + dir. applicable principles of EU law
 - ❖ Civil law, esp. the Civil Code and its constitutional background
 - ❖ Public policy requirements – many sources in hard and soft law, incl. good governance, social responsibility and environmental procurement
- Oversight split:
 - ❖ Infringements of PPA: Office for the Protection of Competition (“Competition office”), appeal to administrative courts
 - ❖ Disputes between awarding authority and contractor / participant: civil courts
 - ❖ Oversight over public funds: many Czech and EU bodies; from internal or statutory audit, through budgetary authorities (Min. Finance and financial administration), EU funds oversight at nat. level (varies, large role Min. Reg. Development), police for criminal investigation, all the way to DGs of Commission, OLAF or new EU prosecutor

Classical fundamental principles: equal treatment, non-discrimination, transparency...

- PPA regulates esp. the procedural aspects of the contracting authority's conduct
 - ❖ Not many substantive requirements upon contract content, but for example limits on amendments
- Transparency
 - ❖ Ambiguous tender conditions (dual possible interpretation) incl. unclear contract award criteria – if no easy answer to which bid is “better”
 - ❖ Insufficient evaluation of tenders, unquantifiable criteria, verbal evaluation does not correspond with the points scored
 - ❖ Potential clash of principles: environmental or social criteria often bring much more risk of Competition office quashing tender
- Proportionality
 - ❖ Defining technical conditions and commercial conditions – must be appropriate, necessary, not excessive
 - ❖ “Soft” principles (enviro/social etc.), can clash with economic effectiveness & savings of public funds (good governance), since risk of second-guessing contracting authority priorities by Competition office and admin courts
- Non-discrimination, equal treatment
 - ❖ Covert discrimination: “apparent disproportionality” of tender requirements - problem of excluding too many contractors by qualification criteria or technical conditions. For example, “can we want extra-ecological vehicles if only one possible supplier in given category?” (Answer: Probably not).
- Result: classical procurement principles can have chilling effect on innovation in procurement, non-financial priorities, etc.

Principles of Civil Law and Public Policy

- Civil law principles
 - ❖ Does “good faith” have a role? Limited: PPA concerned with limitations to freedom of contract, “presumption of guilt,” i.e. the contracting authorities are prone to excesses
 - ❖ Historically: any PPA infringement means a risk of contract invalidity (null and void). Today: only if the Competition office says so (rare)
- Administrative contracts
 - ❖ Special kind under Administrative Procedure Code, own set of principles of public administration (legality, conferred competences and prohibition to misuse discretion, respect of rights acquired in good faith, public interest and principle of equal treatment/non-discrimination)
 - ❖ But an unusual kind of contract, not a commercial purchase; rather entrusting public powers to someone is requisite – closer to concessions
- Financial / budgetary control principles (important, officials can get personally penalized for non-compliance)
 - ❖ duty of economy, effectiveness and efficiency while using public funds (3E principles)
 - ❖ similar to fiduciary duty of care owed by bodies of corporations
- Social and economic procurement
 - ❖ Soft law – tertiary source of rules, some recognition by PPA but mostly recommendations / guidelines
 - ❖ Attempts to reconcile economic requirements and classical principles (“choose the cheapest bid to save public money”), but still difficult in practice
 - ❖ E.g., theory: PPA says it’s to have life cycle costs; practice: Competition office will say bids are not comparable because each product has different life cycle, evaluation unpredictable, etc.

Thank you for your kind attention!

Martin Ráž

martin.raz@havelpartners.cz



<p>Domestic Law Firm of the Year in the Czech Republic (2015, 2017, 2018)</p> 	<p>The most successful law firm in the Czech Republic and Slovakia based on the number of nominations and awards in all years of the competition</p> 	<p>Czech Law Firm of the Year (2018, 2019)</p> 	<p>Best Law Firm of the Year in the Czech Republic (2018)</p> 	<p>Best Law Firm of the Year in the Czech Republic (2017, 2018)</p> 	<p>Best M&A Law Firm in the Czech Republic (2018, 2019)</p> 
-------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------