Czech system of remedies and compensations in public procurement

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1. Czech system of remedies in public procurement

The public procurement directives 2004/18/EC and 2004/17/EC together with remedies directives 89/665/EEC and 92/13/EEC have been transposed into the Czech law by the Act No. 137/2006 Coll., on Public Contracts ("***PCA***"). The Act came into effect on 1st July 2006.

Our remedies system consists of two stages – objections to the contracting entity and review by the Office for the Protection of Competition ("***OPC***"). Decisions of the OPC may be subsequently review by the administrative court (the Regional Court in City of Brno) and the Supreme Administrative Court. The system has been in place (with minor modifications only) since 1995.

Objections

Any supplier that has had an interest in obtaining a particular public contract and its rights have been harmed as a consequence of alleged infringement of the law by an action of the contracting entity is entitled to lodge written and reasoned objections with the contracting entity. In the objections the complainant shall specify i.a. the alleged infringement of the law and what he claims otherwise they has to be rejected.

Objections shall be delivered by the complainant to the contracting entity not later than within 15 days from:

- the date of delivery of the respective notice to the complainant in case of objections against the decision on the selection of the most suitable tender or against the decision on the exclusion from the participation in the award procedure;
- the date when the complainant learned of the alleged infringement of the law by the contracting entity, however, not later than by the date of the conclusion of the contract, in other cases.

According to the judicature of the OPC the objections against tender conditions shall be lodged at latest simultaneously with the submission of the bid (the moment of submission of the tender is considered to be the last moment when the supplier should learn about the mistakes in the tender conditions).

Until the delivery of the decision of the contracting entity on the objections and prior to the expiry of the time limit for lodging objections in the first case, the contracting entity shall not conclude the contract or annul the award procedure.

The contracting entity shall review the lodged objections and send to the complainant a written and reasoned decision on whether or not it complies with the objections within 10 days. If the contracting entity complies with the objections, it shall state how the procedure will be corrected (e.g. that the decision on the exclusion of the complainant from the procedure will be cancelled and all following steps will be repeated).

If the contracting entity does not comply with the objections, it shall notify the complainant by a written decision of the possibility to file a proposal with the OPC to initiate the review procedure. In such a case the ban to conclude the contract or annul the procedure is

prolonged until the expiry of the time limit for filing a proposal to initiate the review procedure.

Review procedure
In the second stage award procedure may be reviewed by the OPC which is an independent administrative body. The prerequisite for filing a proposal for the review procedure is a submission of objections to the contracting authority and payment of the deposit amounting to 1 % of the petitioner´s tender price. The OPC is not bound by the proposal, so it has to examine the procedure in its entirety.

When the OPC finds out that the contracting entity breached the PCA, it will impose a corrective measure, i.e. it will annul a decision of the contracting entity or the whole procedure. Before the final decision in the case OPC usually imposes as interim measure the suspension of the procedure or the ban to conclude the contract. The decision is usually adopted within 30 days. OPC may not decide on compensations to the tenderers.

The decision of the OPC in the first instance may be review by the Chairman of the OPC (advised by the Review Commission composed of public procurement experts from different state bodies, universities as well as law firms). The decision of the second instance is normally adopted within 2 or 3 months.

The review procedure may also be initiated ex oficio.[1] In this case, when the breach of PCA is identified after the conclusion of contract the OPC may impose a fine amounting up to 5 % of the contract value. The OPC may neither suspend the contract nor declare it null and void.

Court review
The decision of the Chairman of the OPC may be review by the administrative court and subsequently the Supreme Administrative Court. They may either confirm its decision or annul it (or annul even the decision of the first instance) and order a new procedure (the OPC is then bound by the legal opinion of the court). The administrative courts may not decide on any compensation for tenderers.

Compensations
As follows from the above mentioned, neither OPC nor the administrative courts may decide on compensation for tenderers that could be harmed by the contracting authority. This claim would have to be made before ordinary courts. However, there is no judicature in this matter in the Czech Republic so far.

In my opinion, one of the main reasons is the fact that the vast majority of the breaches of the PCA may (and have to) be challenged before the contract is made. Consequently, there is no

[1] The OPC is obliged to commence the review procedure when it has suspicion that the PCA has been breached (based on its own findings or announcement of third person).

reason for compensation as the breach of law may either be remedied or the procedure annulled and recommenced.[2]

[2] In the Czech Republic we also have no judicature concerning the compensation of expenses of tenderers in cases where the award procedure had to be annulled due to mistakes of the contracting authority.

2. Answers to the cases

Questionnaire

1. Did the Contracting Authority act in accordance with the national implementation of the EC directive no. 2004/18/EC of 31 March 2004 ("*Directive*")?
2. If not - which articles in the national implementation of the EC directive were not complied with?
3. Which measures would be appropriate if the rules in the national implementation of the directive were not complied with?
4. Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

Case 1 – The floors

The procurement procedure concerned the floor in a big new collective housing building. The award criterion was the "cheapest tender". The contracting authority requested a price for a well-known floor product named "A" and another product named "B or a similar product". The total floor area was not specified. The bid schedule only had one blank space for the pricing.

Tenderer 1 only quoted a price for product A, whereas tenderer 2 gave the price for product "A" in the blank space and in handwriting added a reduced price per square metre for product "B or a similar product".

To compare the prices, the authority measured the floor area, calculated the price reduction for "B or a similar product" and asked tenderer 2 to confirm the calculation. The consequence was that tenderer 2's price was the lowest and the contracting authority accordingly awarded the contract to tenderer 2.

Tenderer 1 decided to challenge the decision. The owner of this small company was in charge of the administration himself and took part in the different administrative tasks. The company's organisation had made a report stating that the average margin for small companies similar to the claimant's had been 19.5% for the year prior to the relevant year.

The company's chartered accountant had calculated the average margin for the 3 previous years to be 13%. For the actual year the margin was -13%, which - due to the financial statement of the supervisory board - was a result of the loss of the contract of DKK 3.2 mill., in which an 18% margin was included. On basis hereof the claim was set at DKK. 575,000. As the company had expected to be awarded the contract and had thus started preparation of the work, no attempts were made to obtain other contracts. After the unjust decision by the contracting authority, the company had been unable to get other assignments for the relevant period.

The contracting authority claimed the company had not fulfilled its loss-reduction commitment (under Danish law an obligation to minimize the loss suffered)

In my opinion the contracting authority did not act in accordance with the Czech PCA and Directive.

The first problem is that the contracting authority did not specify properly the subject-matter of the contract as it has not specified the floor area and it breached art. 23/8 of the Directive[3] (§ 44/9 of the Czech PCA) because it required specific well-known product (i.e. technical specifications were not neutral).
The second problem is that the price quotation was requested in variants[4] and moreover in a confusing manner. This would lead to the fact that the tenders would not be mutually comparable (offering cheaper but worse product or more expensive but better product). In my opinion the contracting authority should use the award criterion "the most economically advantageous tender" and combine price and technical characteristics of the product.
From the point of view of the tenderers they could challenge the tender conditions if they consider them to be in contradiction with the PCA. This would have to be done simultaneously with the submission of tender at latest (see part 1 above). If they had any doubt about the requirements for price quotation, they should ask the contracting authority for clarification.
However, if the tenderer 1 did not submit his objections against the tender specifications he would have to respect all the requirements of the tender conditions including requirements for price quotation. In the Czech Republic quoting price for product A only would lead to the exclusion of the tenderer 1 from the award procedure.
Tenderer 1 could then challenge its exclusion and the OPC would probably annul the award procedure because the tender conditions were not correct.
As follows from the above mentioned, if the tenderer 1 used his rights to challenge the tender conditions or his exclusion from the procedure, the contracting authority could not legally conclude the contract with the tenderer 2. However, even if the contracting authority did not obey the ban to conclude the contract[5], in my opinion tenderer 1 would not be given any kind of compensation because he could not have legitimate expectations to be awarded the contract.

Case 2 – The waterfront

The procurement procedure concerned a major construction of apartments. Part of the works was the construction of a waterfront, including major dredging works in the sea. According to the announcement, "no bid containing major reservations would be considered". The award criterion was "the most economically advantageous tender".
One tenderer's bid included a reservation in respect of winter measures concerning the dredging works.
The contracting authority found that it could calculate the economical consequences of this reservation. Having added the value of the reservation to the tenderer's bid, the tenderer could still be awarded the contract as it was the economically most advantageous bid. This decision was challenged by another tenderer who argued that it was a major reservation since it was not possible to foresee the costs of winter measures within an acceptable degree of certainty.

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[3] Unless specified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.
[4] According to art. 24/1 of the Directive (§ 70/1 of the Czech PCA) variants may be allowed only if the criterion for the award is that of the most economically advantageous tender.
[5] Such a contract would be null and void but this would have to be decided by the court on the proposal of the tenderer 1.

The company's bid for the contract was approximately DKK 190 mill. The costs to carry out the contract were in the bid calculated to approximately DKK 170 mill. Consequently the loss was estimated at DKK 20 mill. The contracting authority claimed that a margin of 10% was unrealistic compared to the financial statement for the previous years. Furthermore, as contracts involving work in nature or at see will always includes an unforeseeable risk, the result will often be a smaller profit than calculated or perhaps even a loss. This risk, however does not exist anymore. Accordingly, the claim must be reduced.

I have doubts whether the contracting authority acted in compliance with the principle of transparency when it calculated the value of the reservation and this was not foreseen in the tender conditions. According to the practice in the Czech Republic this would not be possible. The contracting authority has to specify precisely the requirements for price quotation in unambiguous way so that the tenderers could submit mutually comparable bids. Subsequently, when evaluating the bids, the contracting authority must not change the way of price calculation or other award subcriteria.
The tenderer who has not been awarded the contract could challenge the award before the conclusion of the contract (with the effect of ban to conclude it). If the decision of the OPC would be in his favour there would be no reason for compensation. If he did not use this possibility he could not demand any compensation as he did not use all means provided by the law to defend his rights.

Case 3 The carpets
The procurement procedure concerned the supply and installation of carpets for an office building. The tenderer was required to document his ability to supply the material in the proper quantities and install it in accordance with the time schedule fixed by the contracting authority.
The award criterion was "the most economically advantageous tender". Furthermore, it was stated that the final decision regarding the award would be taken on the basis of an "overall estimate of the tender".
One of the unsuccessful tenderers, who only had very few employees, decided to challenge the award arguing that the contracting authority had not complied with the principle of transparency. Furthermore, the claimant referred to the fact that the quality of the material submitted by the winning tenderer to some extent deviated from the specifications for the material that should be supplied, but not to any considerable degree.
The contracting authority argued that the claimant could never have been awarded the contract since he only had very few employees and therefore had not been able to document that he would be able to supply the required quantities in the required quality and be able to observe the time schedule.
The company's bid for the contract was approximately DKK 1.3 mill, specified as consumption of material 40%, wages for the employees 30%, subcontractors 10%, margin 20%. Consequently the loss was calculated to be DKK 260,000. The claim was substantially documented and supported by an evaluation by a neutral expert witness. Furthermore, it was substantiated that the performance of the contract would have had none or only very little impact on the company's fixed costs.

According to Czech PCA the contracting authority has to specify the required capacity/qualification of the bidders in the tender conditions. Consequently, if the bidder does not meet the capacity

requirements, he has to be excluded from the procedure (this decision of the contracting authority may be challenged). Therefore the low capacity of the bidder cannot be considered when evaluating the bids itself.
Moreover, the criterion based on the "overall estimate of the tender" would not be admissible without further specification of the facts that would be considered. In any case these subcriteria may not include the capacity of the tenderer.[6]
To conclude, the unsuccessful tenderer would have several opportunities to challenge the procedure before the contract was made (to challenge either his exclusion from the procedure or the evaluation of bids/award of the contract) and consequently there would be no reason for compensation. If he did not use this possibility he could not demand any compensation as he did not use all means provided by the law to defend his rights. Beside that from the example given we do not know whether the tenderer could have legitimate expectations to be awarded the contract (whether his tender was the most economically advantageous one).

Case 4 - The Cleaning

The procurement procedure concerned the cleaning of office buildings. The award criterion was "the most economically advantageous tender".
The contracting authority presumed, without any substantive reason, that the most economically advantageous tenderer would not be able to fulfil his obligations. On this basis the tender procedure was annulled.
This annulment was challenged as well by the winning tenderer as by other tenderers on grounds of the annulment being unjustified. The winner sought "full compensation for the loss of profit". The others claimed compensation of the costs stemming from the preparation of their respective tenders.
However, the contracting authority now argues that the procedure could have been annulled due to a general reorganisation of the public authorities that had been established after the initiation of the procurement procedure, but before the annulment. The reason being, that reorganisation has "changed the face" of the contracting authority, as it in general has lead to the contracting authorities becoming larger entities
The bid for the contract was approximately DKK 70 mill, the second lowest bid approximately DKK 100 mill. The bid was specified as consumption of material, wages for the employees and subcontractors, unforeseen problems and a margin of 13%. The loss was calculated at DKK 9 mill.
The company's organisation had made a report stating the average margin for the industry in the previous years had varied from 3% to 7%, the last year. The company's financial statement for the same period showed a margin between 1.3% and 4.5%. Furthermore, it was alleged by the company that the performance of the contract for this large company would have had no or only very little impact on the company's fixed costs. If this should be the case, no large company would be able to claim compensation on a bid only sufficient to cover fixed costs.
The contracting authority claimed that the bid was "unreasonably low" and consequently could have been "set aside" according to Article 55 in the directive, as implemented in the

[6] This is explicitly forbidden by the § 50/4 of the PCA and it follows from the ECJ judgements (see C-315/01 Gesellschaft für Abfallentsorgungs-Technik GmbH v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)).

national legislation. Furthermore, the bid in itself would entail no margin to the company, and the employees could have been employed in other activities.

The contracting authority did not act in accordance with the Czech PCA. Pursuant to the art. 84 of the PCA the possibilities of annulling the tender procedure are limited to exhaustive list of reasons. However, there is no similar reason for exclusion as in the case. There might also be doubts whether the annulment (in case the contracting authority would be entitled to do so) was in compliance with the principle of transparency (see judgement of ECJ in case C-244/02 Kauppatalo Hansel Oy proti Imatran kaupunki) as there was no substantive reason for exclusion of the tenderer.
In my opinion, the main problem is that the process itself was not correct as the contracting authority did not respect the sequence of phases of the award procedure. At first the qualification of the tenderers shall be verified, then the tenders submitted should be checked whether they comply with all the requirements of the contracting authority and only those tenders that have complied with all the requirements may be evaluated according to the award criteria. That means that the contracting authority cannot find out in the end that the tender selected would not be able to fulfil his obligations.
According to the Czech PCA the tenderers are entitled to lodge objections against unlawful annulment of the award procedure and consequently initiate the review procedure. If the OPC would find out that the annulment was unlawful it would order the contracting authority to continue the procedure (till the decision of the review procedure the contracting authority must not start a new procedure for similar contract).
The general reorganization of the contracting authority after the initiation of the procedure could be a lawful reason for annulment of the procedure. On the other hand, arguments that the bid was "unreasonably low" or that it did not fulfill other conditions could lead only to exclusion of this particular bid in the proper phase of the procedure, not to the annulment of the procedure as a whole.
With regard to the following my conclusion is that neither the winning contractor nor the other tenderers would be awarded any kind of compensation as they had several opportunities to protect their rights.