

Qualification criteria in legal regulations in the Czech Republic

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Introduction

The new Act No. 137/2006 Coll., on Public Contracts (hereinafter referred to as the "PCA") came into effect on 1.7.2006. The main objective of this legislation was to transpose two new EU implementing directives into the Czech legal environment, namely Directive No. 2004/18/EC of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (hereinafter referred to as the "traditional directive") and Directive No. 2004/17/EC of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the award of contracts to entities operating in the water management, energy, transport and postal services sectors (hereinafter referred to as the "sector directive").

Besides the indicated primary objective, the new PCA also intended to eliminate some uncertainties and deficiencies in interpretation that appeared during the practical application of the previous regulation contained in Act No. 40/2004 Coll., on Public Procurement; thanks to the fact that both pieces of legislation (the original as well as the new) are conceptually similar in a number of their institutions, it was possible to also take the identified problems into account in the new PCA. This means that the new PCA reflected not only the findings from the existing practical application, but also the decision-making practice of the domestic supervisory body (Office for the Protection of Economic Competition – ÚOHS), as well as of EU bodies (namely then the practice of the European Court of Justice – ECJ). A series of problems was eliminated, the legislation contained in the PCA clarified, as a result of which the new PCA can be said to represent an undoubted benefit for the Czech legislative environment and the awarding of public contracts; this increased contracting authorities' legal certainty, as well as that of the supplier sphere.

But at the same time it must be said that, despite all the effort made by the legislators when drafting the new PCA, some problems remained unresolved, which also pertains to the qualification criteria area. In my contribution I will therefore attempt to point out some selected problems of individual parts of the qualification criteria area, thereby lending support to expert discussions in this topic.

Qualification criteria generally, definition of four qualification criteria areas

The term supplier qualification is defined in Section 17(e) of the PCA as the *capability of suppliers to perform public contracts*. This is a prerequisite on the basis of which a certain supplier can perform (realise) a public contract, but also a prerequisite on whose basis a supplier can take part in the tender proceedings for the awarding of a certain public contract pursuant to the PCA in the first place. For this reason the PCA refers to the component qualification criteria areas as the *supplier's qualification requirements*.

The legal regulation of supplier qualification contained in the PCA is divided into provisions pertaining to qualification pertaining to public contracting authorities or, more precisely, subsidised contracting authorities, in respect of whom the same legal regulation pertains (Section 50 to Section 62 of the PCA), qualification pertaining to sector contracting authorities (Section 63 to Section 66) and into provisions pertaining to the special possibilities of a supplier to prove compliance with the qualification requirements (Chapter 4 of the Act, Section 125 to Section 145).

In the light of the regulations contained in the PCA the term supplier qualification should be viewed as a general term for the individual component parts of the supplier qualification. The PCA provides for four component parts of the supplier qualification (four types of qualification requirements). These are as follows:

- basic qualification requirements,
- professional qualification requirements,
- economic and financial qualification requirements,
- technical qualification requirements.

Thus, only a supplier having sufficient basic, expert, professional, economic, financial and technical qualification requirements can be referred to as a qualified supplier (capable of performing a public contract). Proving compliance with these qualification requirements prior to the actual awarding of a public contract gives the contracting authority the certainty that it will be able to select from suppliers who are capable of performing the given public contract in a comprehensive manner; we could, at a stretch, say that this gives the contracting authority the certainty that a sort of "personal" supplier profile has been met.

It is important to make a thorough distinction between the qualification phase and the tender evaluation phase – whereas in the qualification phase the contracting authority assesses whether the prescribed supplier profile (qualification requirements) is complied with in a due and complete manner (its compliance is met), the supplier qualification (its capability of performing the public contract) cannot in any way be evaluated during the tender evaluation phase, with this phase focusing solely on the contents of the supplier's tender (parameters or quality of performance offered by a supplier). Only a tender submitted by a fully qualified (capable) supplier, who duly proved its compliance with the qualification requirements in the previous (qualification) phase, can be accepted into the tender evaluation phase.

Supplier qualification, which designates a supplier's capability to realise a certain public contract, is *defined by general legislative requirements* on supplier qualification, as well as by the *contracting authority's individualised requirements* on supplier qualification, which are set in view of the subject matter of performance of the given public contract.

As far as the general legislative requirements on supplier qualification is concerned, this refers to those qualification requirements ensuing directly from the PCA, which the contracting authority must, as a rule, demand upon submitting every public contract. These are namely basic qualification requirements and part of the professional qualification requirements. Nevertheless, it must be added that in some tender proceedings it is not necessary to prove compliance with the qualification requirements at all, or only to a certain limited scope. This pertains to certain cases of negotiation proceedings without publication (in cases stipulated in Section 51(3) the contracting authority must not require that a supplier prove compliance with qualification requirements), public contracts published by sector contracting authorities or below-the-threshold public contracts or, more precisely, awarding of small-scale contracts (presumed value of up to CZK 2 million for supplies and services and up to CZK 6 million for construction works), where the contracting authority is not obliged to publish these contracts in the form of tender proceedings pursuant to PCA.

Besides the legislative requirements pertaining to the supplier qualification the contracting authority also has the option of requesting that the supplier prove that competence of the supplier pertaining to its economic and financial infrastructure or position or its technical equipment and expert experience, which the supplier can use to perform the given public contract (whether by itself or by using the capacities of other suppliers). These qualifications of the contracting authority are reflected in the two component parts of the qualification - economic and financial qualification requirements and the technical qualification requirements. The last two areas of qualification requirements mentioned are optional, and as such it is solely up to the contracting authority whether or not it will require them from the suppliers, or which of the component requirements belonging to the two areas it will require of the suppliers.

General requirements imposed by the PCA on a contracting authority in defining the qualification requirements

The requirements for proving compliance with the qualifications (qualification requirements) must be *stipulated* by the contracting authority *in its notice on the commencement of the tender proceedings or in its invitation to commence tender proceedings* (with a sector contracting authority also required to include this stipulation in its invitation to confirm interest to take part), depending on what type of tender proceedings is involved and the manner by which the tender proceedings for the public contract was commenced (see Section 26).

The contracting authority may stipulate precise (or more detailed) conditions of proving compliance with the qualifications and the manner of proving compliance with the required qualification *in the qualification documentation or in the tender documentation*. In this case the notice or invitation on the commencement of the tender proceedings must stipulate in which documentation the detailed qualification requirements may be found. If the contracting authority decides to specify its qualification requirements in the qualification documentation, it is obliged to make this documentation available on its web site or in any other suitable manner (e.g. official notice board) as of the moment of the publication of the notice of the tender proceedings or the sending of the invitation to commence the tender proceedings.

Section 50(3) of the PCA contains a rule, the objective of which is to protect suppliers from unjustified requirements on the part of a contracting authority as far as suppliers' qualifications are concerned. This provision provides that a contracting authority must limit the scope of any qualification requirements to be met by suppliers *solely to information and documents directly relating to the subject matter* of the public contract. This provision would,

for example, prevent a contracting authority from requiring that a supplier prove that it has at its disposal 20 tradesmen from a certain construction area, should a mere 10 such tradesmen be undoubtedly sufficient to perform the given contract. It would also be possible to apply this provision as one form of legal protection (inter alia, besides using the argument that the contracting authority proceeded in a manner contrary to the principles stipulated in Section 6 of the PCA – in particular contrary to the principle of non-discrimination and equal treatment), e.g. in the event that a contracting authority requires that a supplier submits, as part of a public contract for construction works, a certificate from the environmental protection area (ČSN EN ISO 14000), despite the fact that the performance of such a contract is in no way related to environmental protection (either directly or indirectly).

If a supplier encounters a breach of the last rule mentioned and is convinced that the qualification requirements of the contracting authority are not stipulated in a reasonable manner with regard to the character and scope of the public contract (or, if they prevent a supplier from participating in the tender proceedings), it can select from two possible forms of protection:

- 1) exercise the option of applying legal remedies, submitting an objection to the procedure employed by the contracting authority within the statutory 15-day limit commencing from the time of familiarising itself with the qualification requirements; or
- 2) exercise the option to submit a written request for additional information about the tender conditions (Section 49 of the PCA), as part of which it shall notify the contracting authority of its errors and request it to eliminate them or to make appropriate rectifications.

Of major importance, from the viewpoint of the general requirements imposed by the PCA on qualification, is the rule contained in Section 50(4) of the PCA, which ensues from the previously mentioned principle of strict separation of the qualification phase and the tender evaluation phase. This rule provides that neither economic and financial qualification requirements (Section 55 of the PCA) or technical qualification requirements (Section 56) may be the subject matter of the evaluation. In other words, the contracting authority is prohibited from making the particulars falling within the two given qualification areas the subject matter of the valuation as part of the process of evaluating the tenders of individual tenderers. This means that the contracting authority cannot, for example, evaluate the degree of qualification or experience of individual persons making up a supplier's realisation team, as well as being prohibited from evaluating the experience of the tendered with the performance of similar contracts. For the sake of completeness it is important to add that this ban applies in concrete tender proceedings whether or not the contracting authority requested tenderers to prove compliance with an economic and financial qualification requirement or a technical qualification requirement (to which the said ban pertains).

From a comparison of the current version of Section 50(4) (valid for a public contracting authority) and Section 63(7) (valid for a sector contracting authority) it could be possible to arrive at a theoretical conclusion that in the case of a sector contracting authority the rule in question is broken in the case of a public contract for financial, advisory or consulting services (*"Data pertaining to economic, financial or technical qualifications of a supplier cannot form the subject matter of evaluation criteria, except in the case of public service contracts, the prevailing subject matter of which is the provision of financial, advisory or consulting services."*). This deficiency is the result of an administrative error during the process of approving the PCA in the legislative committees. It must be said that, in the opinion of domestic institutions (ÚOHS, Ministry for Local Development) as well as EU institutions (European Commission) the given rule (ban) pertains to both a public as well as

sector contracting authority and as such this deficiency is the subject of a pending amendment to the PCA.

This general part can be concluded by adding one more observation from practice. It is a legitimate endeavour of contracting authorities to link the qualification requirements with the realisation phase, thereby making sure that the selected supplier meets certain qualification requirements even after the end of the tender proceedings. The fact of the matter is that the PCA regulates the qualification requirements and the consequences of their non-compliance only up to the phase of selecting the most suitable tender, or up to the phase of concluding the contract with this winning supplier. But the PCA (or, more precisely, the European tender directive) does not regulate the consequences of a loss of a certain qualification requirement after the conclusion of the contract. For this reason contracting authorities include in the contract conditions pertaining to the maintenance of a certain important qualification requirement for the duration of performing the public contract (or part thereof). This typically involves the requirement to keep current third party liability insurance (a qualification requirement pursuant to Section 55(1)(a) of the PCA), or the requirement to maintain the validity of a ČSN EN ISO 9000 or a ČSN EN ISO 14000 certificate, etc. (a qualification requirement pursuant to Section 56(2)(c) and (3)(d) of the PCA). A failure to comply with these conditions during the course of performing the public contract thus gives the contracting authority a contractually guaranteed claim to the payment of a contractual penalty, possibility to withdraw from the contract, etc.

It is not uncommon, however, that the contracting authority regulates an identical requirement (e.g. third party liability insurance) in one way as part of the qualification requirements and in another way in the binding draft of the contract (business terms and conditions), as a rule attached as an appendix to the tender documentation. Even though the contracting authority is responsible for the correctness and completeness of the tender documentation (Section 44(1) of the PCA), meaning that this is a breach of its obligation, in such cases it can be recommended that suppliers do not, in such cases, leave such a deficiency without remark and to always exercise the right to submit a written request for additional information about the tender conditions (Section 49 of the PCA).

Proving compliance with qualification requirements – via a sub-contractor, and via a joint tender submitted by several suppliers

In order to be included in the tender proceedings a supplier must prove its compliance with all the qualification requirements stipulated both directly in the PCA (basic and professional qualification requirements) as well as those defined by the contracting authority itself with regard to the performance of the specific public contract (economic, financial and technical qualification requirements).

Proving compliance with qualification requirements – via a sub-contractor

Compliance with qualification requirements may, in all its component areas, be proven by a supplier itself or else compliance with a certain *part of the qualification requirements may be proven via a sub-contractor*. In other words, the PCA provides that a supplier who is unable to prove full compliance with qualification requirements sought by the contracting authority or under law it may prove compliance with the remaining parts of the qualification requirements via a third party – a sub-contractor (Section 17(i)). This possibility was brought

by the amended PCA, which thereby reflects the conception ensuing from the new tender directives⁴⁵, as well as by the decision-making practice of the ECJ⁴⁶.

A supplier is entitled to prove compliance, via a sub-contractor, with those parts of the qualification requirements that the supplier does not itself cover. But a sub-contractor cannot be employed in this manner to prove compliance with the basic qualification requirements (Section 53) and to prove the entry of the supplier in the Commercial Register by the submission of an extract from this register (Section 54(a)). This negative qualification could give an impression that all other parts of the qualification requirements (professional, economic and financial, and technical qualification requirements) could thus be proven via a sub-contractor automatically and without any limitation. Let us look at this problem in more detail.

In employing a sub-contractor to prove compliance with the qualification requirements a supplier (tenderer) is obliged, pursuant to Section 51(4) of the PCA, to submit to the contracting authority the contract it concluded with the sub-contractor, subject to the following conditions:

- this contract must be concluded with the sub-contractor via whom the supplier is proving compliance with the missing part of the qualification requirements;
- under this contract the given sub-contractor is obliged to render certain things or rights with which the supplier will be entitled to dispose with when performing the public contract, at least to the extent to which the sub-contractor has proven compliance with the qualification requirements on behalf of the supplier.

It is in accordance with the given requirements if the contract concluded between the supplier and the sub-contractor includes a condition precedent which determines that this contract shall only take effect once the contracting authority selects the supplier's tender as being the most suitable or, as the case may be, shall only take effect upon the conclusion of the contract between the contracting authority and the supplier. Likewise, the governing law of the contract with the sub-contractor is not decisive. But the contracting authority must always be presented with a valid contract with the sub-contractor. Compliance with the missing part of the qualification requirements may also be proven by more than one sub-contractor; in such a case the supplier must present a contract concluded with all of these sub-contractors, always for the relevant part relating to the missing parts of the qualification requirements.

Problems in the interpretation and the practical application shall not ensue from a situation whereby a contracting authority, as part of the technical qualification requirements, required that a supplier has a certain minimum technical equipment (e.g. two truck-mounted cranes with certain minimum parameters) and a supplier who does not have such equipment borrows such equipment in the required scope from a sub-contractor and documents this to the

⁴⁵ Article 47(2) and Article 48(3) of the traditional directive and Article 54(5) and (6) of the sector directive (*"the supplier may, in appropriate cases, place reliance for a concrete public contract on the capabilities of third parties, regardless of the nature of the legal relations that it has with such third parties; in such a case, however, the supplier must prove to the contracting authority that it will have the required resources truly at its disposal, e.g. by presenting a commitment to this effect"*)

⁴⁶ Decisions taken by the ECJ:

C-389/92 *Ballast Nedam Groep NV vs Belgie* C-5/97,

C- 176/98 *Holst Italia SpA vs Comune di Cagliari*, interveners: *Ruhrwasser AG International Water Management*

contracting authority by presenting a signed contract on the lease or borrowing of the equipment. Similarly, doubts will not be raised if a bidder proves compliance with the contracting authority's requirement for the presentation of a certain trade licence by presenting a contract concluded with a sub-contractor (who is a holder of the given licence), under which the sub-contractor undertakes to perform activity corresponding to the given licence on behalf of the supplier.

Doubts are evoked, however, by the *option to use a sub-contractor to prove* component areas of the qualification requirements such as the contracting authority's requirement for the proving of *information on the total turnover* of a supplier for the last three accounting periods (Section 55(1)(c) of the PCA), a *list of important contracts or services* realised by the contractor during the last 3 years (Section 56(1)(a) and (2)(a) of the PCA) or a *list of construction works realised by a supplier* during the last 5 years (Section 56(3)(a) of the PCA). This is because, by their nature, these qualification areas document the existence of a certain history on the part of a supplier and thus reflect its past state. The question then is whether these requirements can actually be "transferred" to a supplier, or whether it is possible to render them as a certain right or thing (as ensues from the requirement placed on the contract pursuant to Section 51(4) of the PCA). Questions concerning the formal legal nature, the type of contract that is possible to use in such a case and what should be the subject matter of the contract concluded between the sub-contractor and a supplier are related to this.

Similar doubts are also raised by the requirement of a contracting authority for a supplier to present an *insurance policy* proving that a supplier is insured for damage caused to third parties (Section 55(1)(a) of the PCA) and the option to prove compliance with this qualification requirement via a sub-contractor.

I am of the opinion that in order to evaluate the above-mentioned questions it is necessary to take into account:

- a) the nature and purpose of the given qualification requirement,
- b) whether it is possible for the sub-contractor to be able to actually render (tenderer) the given thing or right to the supplier and, if so, whether it is actually rendering it on the basis of the concluded contract.

It is important that the act of proving compliance with the qualification requirements does not become a mere formality, whereby a supplier presents a contract concluded with a sub-contractor, who will not actually participate in the given contract, not in real terms (performance of certain activities or realisation of the subject matter of the contract), or by the rendering of certain things or rights.

As far as the economic and financial qualification requirement on the *information on the total turnover for a certain period (up to the last three accounting periods) pursuant to Section 55(1)(c) of the PCA* is concerned, from the nature of this qualification requirement ensues the contracting authority's requirement that only those suppliers with a certain economic and financial stability, as evidenced by the turnover attained in the past years, should tender for the contract. Thus it is highly debatable to what degree such a requirement of the contracting authority can be covered (proven) via a sub-contractor. The turnover attained for the previous accounting period is information of an accounting character, from which certainly does not, by itself, ensue the possibility of assigning to a certain party things or rights (as required in Section 51(4) of the PCA for the contract between the sub-contractor and a supplier).

Although I may have doubts as to the correctness of admitting the opinion that this qualification requirement may be proven via a sub-contractor (an exception could, in my opinion, be if this proof of compliance were provided via persons comprising the same concern with a supplier), in view of the above-mentioned decision-making practice of the ECJ (see footnote no. 2) and the absence of Czech decision-making practice in the given matter it is appropriate to indicate how such a requirement could be proven via a sub-contractor and what should be the subject matter of the contract with the sub-contractor required by Section 51(4) of the PCA. In view of the nature of the given qualification requirement the subject matter of the contract with the sub-contractor pursuant to Section 51(4) of the PCA should be such a commitment of the sub-contractor to render things (money) or rights that would give (compensate) the contracting authority the certainty of economic stability and preservation of a firm financial footing. The contract concluded between a supplier and the sub-contractor pursuant to Section 51(4) of the PCA should include the commitment of the sub-contractor to grant the contracting authority certain "guarantees", or another security instrument (accession of the sub-contractor to the supplier's obligations towards the contracting authority, pledge, supplier's subsidy during a certain realisation phase, etc.) which, by its nature, enables the supplier to rely on the economic and financial capacity of such a sub-contractor.

Another of the qualification requirements that raises the questions of whether it is possible to prove it via a sub-contractor is the *list of important contracts or services* realised by the contractor during the last 3 years (qualification requirement pursuant to Section 56(1)(a) and (2)(a) of the PCA) or, as the case may be, a *list of construction works realised by a supplier* during the last 5 years (qualification requirement pursuant to Section 56(3)(a) of the PCA). For the purposes of further though on this topic I will refer to this requirement as a "reference contract" and will focus on this requirement only in relation to public construction contracts.

By its nature this requirement of the contracting authority is designed to ensure that the suppliers are sufficiently experienced for the purpose of the given contract and reliable for the contracting authority, with reference given to construction contracts already realised for the elapsed periods (not more than the last five consecutive years). Although Section 56(3)(a) of the PCA does not employ a similar formulation as that used in respect of supplies and services (it does not refer to "important" construction works, but merely to a "... list of construction works realised by a supplier...") it is possible, in view of obligation of the contracting authority to define the presumed minimum level of each technical qualification requirement (Section 56(7)(c) of the PCA), to determine the minimum scope of reference construction works that a supplier has already realised (namely as far as the nature of such reference contracts, their financial volume, standing of the supplier, etc. is concerned). This also supports the fact that this list must be substantiated with certificates issued by the clients testifying to the due and proper performance of the most important of the contracts realised. The decision on whether the contracting authority shall define the minimum level by setting it only in relation to the realised contracts (e.g. number, total financial volume) or whether it sets it only in relation to the most important contracts (again, the number and/or financial volume, whilst it is also necessary to define the term "most important construction contract"), or a combination of these two models, as the case may be, is then fully up to the contracting authority.

The question of whether it is possible to "transfer" such experiences with the realisation of reference contracts (and, from the viewpoint of the contracting authority, reliability) from a sub-contractor to the supplier and whether it is thus realistic for the sub-contractor to render the supplier (tenderer) the given thing or right associated with the given qualification requirement (i.e. to "transfer" its capability to the supplier by contract) is raised once again. Despite the fact that this once again concerns a qualification requirement which pertains to a

supplier's past, it is also clear that the given requirement also has an impact on the future performance – when realising every future contract a supplier uses the experience it gained during previous contracts, thereby giving the contracting authority a certain degree of assurance of a higher quality and thereby less risky performance. In view of this aspect it would then be possible to concede that this category is transferable from the sub-contractor to the supplier (who does not have the required experience or has not realised the reference contracts, as the case may be). But in order for the experience to be transferred, it must be materialised either into certain procedures or know-how (production, technological, etc.) or into persons who will realise the required contract and thereby apply their experience in favour of the contracting authority. In connection with this it would thus be possible to prove compliance with the requirement for the submission of a list of reference contracts via a sub-contractor – by submitting a contract pursuant to Section 51(4) of the PCA, but according to my judgement this would only be on the condition that the sub-contractor provides the supplier with persons who, preferably, participated in the realisation of reference contracts (e.g. as a construction foreman, head of a realisation team, controllers of procedures and quality, etc.), or if the sub-contractor directly pledges to the supplier that it will realise the given contract (at least in that part that pertains to the nature of the required reference contracts).

The third of the selected qualification requirements, which are the most problematic to interpret as far as the possibility to prove compliance via a sub-contractor, is the requirement to present an insurance policy demonstrating the existence of insurance covering liability for any damage that a supplier may cause to a third party (Section 55(1)(a) of the PCA). If we again use the meaning of this qualification requirements, the reflection of the contracting authority's requirement is to have a supplier duly insured during the course of the tender proceedings, as well as for the realisation of the public contract itself, thereby having a guarantee that in the event of damage occurring the contracting authority will be able to reliably satisfy its claims on this basis. It must be noted that this requirement must surely be perceived not only for the phase of the tender proceedings (i.e. only up to the selection of the most suitable supplier and the conclusion of the contract with this supplier), but that this is a requirement giving the contracting authority certainty for the actual realisation phase of the public contract. At first glance it may seem that this qualification requirement may be proven, ipso jure, prove via a sub-contractor, i.e. by the presentation of the sub-contractor's insurance policy having at least the parameters required by the contracting authority. But the problem lies in the fact that insurance companies (the insurer) will pay the insurance benefit to the damaged party (insured – the contracting authority) only for the damage caused by (for which is liable) its contractual partner (the party that concluded the insurance policy with the insurance company). Thus, if the damage suffered by the contracting authority was caused by a supplier, who proved the qualification requirement in question via a sub-contractor and

- this supplier was not also the party that concluded the given insurance policy with the insurance company (jointly with the sub-contractor), or
- the sub-contractor's insurance policy (via which the given qualification requirement was proven) does not expressly stipulate that an insurance benefit would also be paid in the event of damage caused by (for which is liable) a different party, the supplier (which would be a provision thus far very unusual in an insurance policy),

then the insurance company would not pay the insurance benefit to the contracting authority.

In other words, it can be said that the presentation of the insurance policy, which was concluded with the insurance company by the sub-contractor of the tenderer, only covers, as a rule, the liability for damage caused by (for which is liable) the sub-contractor and thus not possible damage caused by the supplier itself.

Proving compliance with qualification requirements when submitting a joint tender

Section 51(5) and (6) of the PCA anticipates the possibility that the subject matter of the public contract is to be performed jointly several suppliers, who submit or intend to submit a joint tender for this purpose. The tender of these suppliers is viewed as a tender submitted by one tenderer.

A joint tender of several suppliers must be distinguished from the case stipulated above, where the tender is submitted by only one supplier (tenderer), even though compliance with part of the qualification requirements is proven via a sub-contractor, or the case where a part of the public contract can be performed by a party other than the supplier (tenderer), i.e. the sub-contractor, as the case may be. In the event of a joint tender being submitted by several suppliers this involves a horizontal ordering of parties participating in the performance of the public contract, whereas in the case of the performance of the public contract (proving of compliance with the qualification requirements) via a sub-contractor this involves the ordering of parties in a vertical level. This diverse ordering of persons also relates to the question of the different concept of liability towards the contracting authority— whereas in the case of a joint tender all the suppliers submitting the joint tender shall be bound jointly (they shall be jointly and severally liable, save for cases stipulated in special legislation or by the contracting authority), in the case of performance being provided via a sub-contractor the supplier shall always be full liable.

From the viewpoint of proving compliance with qualification requirements Section 51(5) of the PCA stipulates that in the event of a joint tender being submitted each of the joint suppliers shall be obliged to prove, on its own behalf and in full, compliance with the basic qualification requirements and professional qualification requirements pursuant to Section 54(a) (extract from the Commercial Register or another similar record). In the case of the remaining part of the qualification requirements (other professional qualification requirements pursuant to Section 54, and namely then in the case of economic and financial qualification requirements pursuant to Section 55 and technical qualification requirements pursuant to Section 56) it is sufficient, in principle, if all the suppliers meet them jointly (“summed up”).

The given “summation” principle applied to such a syndicate of suppliers means, for example, that in the case of the submission of the relevant trade licences it will suffice if each of the suppliers participating in the joint tender submits only some of these licences necessary for the performance of the public contract, on the condition that the tender includes all the necessary trade licences required by the contracting authority. Similarly, this may apply, for example, in the event that the public contracting authority demanding the proving of compliance with a technical qualification requirements, that being in the form of the submission of a list of technicians and technical divisions pursuant to Section 56(1)(b); in such a case it will be sufficient for each of the suppliers to submit its own list of technicians and technical divisions whereby, even though each individual list does not meet the minimum level required by the public contracting authority stipulated pursuant to Section 56(7), the sum of all the lists submitted by the suppliers submitting the joint tender will meet this minimum level.

Somewhat more problematic is the interpretation and degree of application of this “summation” principle, once again with respect to the same items that were analysed above in the case of the proving compliance with qualification requirements by the sub-contractor. This once again concerns requirements for information on total turnover (Section 55(1)(c)), reference contracts (Section 56(1)(a), (2)(a) and (3)(a)) and insurance (Section 55(1)(a)).

In view of the above-mentioned decision-making practice of the ECJ (see footnote no. 2), it is possible to expect that the “summing of qualifications” will be accepted in these cases as well,

but regardless of this my opinion in respect of these selected qualification requirements is that it is essential to always evaluate the possibility of summation with respect to these prerequisites on an individual basis and to give regard to the nature of such qualification requirements. The situation whereby the required minimum level (in the case of the total turnover and reference customs) is proven in full by one of the suppliers submitting a joint tender is not disputable. Disputable is whether, from the viewpoint of the contracting authority, which requires a minimum level in the form of at least three reference contracts, it obtains sufficient certainty of erudition and future quality of performance (with regard to the nature of this qualification requirement) when a tender is submitted by a syndicate of three suppliers where each is only experienced in the performance of one reference contracts. Similarly, these doubts also arise in the case of the qualification requirement for the minimum turnover (e.g. when a public contracting authority requires that the total turnover for the last three accounting periods is CZK 120 million in sum for this period and when this qualification requirement is proven by a syndicate of 6 suppliers, with each supplier having a turnover of CZK 20 million). My personal opinion is that the summation principle should not apply in the case of reference contracts and the total turnover (maybe with the sole exception being in cases of entities with ownership links – entities affiliated in a concern – who submit a joint tender). As far as insurance is concerned, the same rules as those given above with respect to the proving compliance with qualification requirements via a sub-contractor apply without exception (insurance is always linked to the fault of the entity with which the insurance company concluded the insurance policy).

Section 51(6) of the PCA stipulates that suppliers submitting a joint tender must submit to the public contracting authority an agreement containing a commitment that all of those suppliers will be bound jointly and severally. This agreement must be submitted together with documents of compliance with the qualification requirements, otherwise the qualification of these suppliers could not be proven jointly (combined). The statutory requirement for the joint and several liability of these suppliers shall not apply in two cases, i.e. if a special legislation stipulates otherwise (e.g. in the case of co-insurance pursuant to Section 30 of Act No. 37/2004 Coll., on insurance policies, as amended), or if the public contracting authority stipulates otherwise (stipulates a so-called separate liability for certain activities – e.g. separate liability for engineering, or design activity and liability for the construction part performed by the given supplier). Of course the question then is how a tender with a separate liability differs (both from the aspect of legal risks on the part of the contracting authority, as well as from the aspect of economic and financial benefits) from a tender made using a sub-contractor.

Basic qualification requirements

The legal regulation of basic qualification requirements expresses the public interest in public contracts being performed by suppliers that are unimpeachable in all aspects (para. 1(a) to (c) and (f) to (i)) as well as by suppliers meeting the elementary economic qualification requirements for the performance of the public contract (para. 1(d) and (e)).

In some cases the proving of the basic qualification requirements is, in some cases, required not only in relation to the territory of the Czech Republic, but in the case of foreign suppliers also in relation to the country of their registered office, place of business or residential address.

A contracting authority cannot limit the basic qualification requirements (e.g. by requiring the proving of compliance with only some of them) nor may it extend their scope with the addition of requirements other than those stipulated in the commented Section 53. The basic

qualification requirements are set out in Section 53 in an exhaustive (complete) list, with this section also giving the binding manner by which compliance with these requirements is proven.

The individual requirements stipulated by the PCA in the area of the basic qualification requirements may be designated as follows:

- a) Criminal probity in respect of the crimes listed in Section 53(1)(a) and (b) of the Act
- b) Non-fulfilment of the facts of the case of unfair competition pursuant to special legislation
- c) Not under bankruptcy, settlement or forced administration
- d) Not in liquidation
- e) No tax debts (non-existence of tax arrears)
- f) No insurance debts (non-existence of arrears of public health insurance premiums)
- g) No social security debts (non-existence of arrears of social security insurance premiums)
- h) Disciplinary probity.

The manner of proving compliance with the above-mentioned basic qualification requirements is prescribed directly in the PCA (Section 53(2)).

According to the PCA compliance with the basic qualification requirement under letter a) above is proven by the *submission of an extract from the Criminal Register* in relation to the persons stipulated in Section 53(1)(a) and (b) (in view of the fact that suppliers tend to be legal entities this requirement applies to statutory bodies, or to all members of the statutory body, as the case may be, or also to the head of the branch, if the tender is served by a foreign legal entity).

Meeting the basic qualification requirements under letters b), c) d), f) and h) pursuant to the above is proven by suppliers by the submission of an *affidavit*. This affidavit must be executed by a supplier, i.e. by the persons entitled to act in the name of the legal entity, in the case of a legal entity signed. Compliance with the said basic qualification requirements must be clear from the contents of this affidavit and it must relate to the supplier, not to the statutory body of the supplier (e.g. the executive director) or its members (e.g. the board of directors).

Compliance with the basic qualification requirements under letters e) pursuant to the above is proven by suppliers by the submission of a *confirmation of the relevant financial office* and, in relation to consumption tax, by an affidavit.

Finally, Compliance with the basic qualification requirements under letters g) pursuant to the above is proven by suppliers by the submission of a *confirmation of the relevant body or institution* (confirmation of the relevant social security administration authority).

Interpretation or application problems in the area of basic qualification requirements arise namely when a supplier fails to submit the extracts from the Criminal Register for all members of its statutory body (e.g. all members of the board of directors). Contracting authorities then ask whether they must or may eliminate the given supplier from further participation in the tender proceedings, or whether they must or may not apply Section 59(4) of the PCA.

Section 59(4) of the PCA gives the contracting authority the option, as part of the assessment of qualification, *to request that a supplier give a written explanation of the submitted documents or information or to submit other additional information or documents*. But this option cannot be exercised if any certain part of the qualifications has not been proven by the supplier at all.

From the interpretation aspect there is no problem in stipulating that the procedure pursuant to the given provision represents an *option (right) on the part of the contracting authority rather than an obligation*.

In applying the procedure pursuant to Section 59(4) the contracting authority must still respect the basis principles stipulated in Section 6 of the PCA. Thus, if it decides not to apply the procedure pursuant to Section 59(4) of the PCA as part of the assessment of qualification, it must proceed in this manner in respect of all suppliers. For example, if the contracting authority were to find that the affidavit submitted by one supplier to prove it has no social security debts is missing the words "...and for penalties ..." and invites this supplier to add to this particular, whereas in the case of the same deficiency in such an affidavit it were to eliminate another supplier from further participation, the contracting authority would be acting contrary to the principle of equal treatment.

Somewhat less clear in terms of interpretation is what is meant by the term "*certain part of the qualification requirements*". May this part of the qualification requirements be considered to be, for example, economic and financial qualification requirements (the working title I used for the above was component part of the qualification requirements), or should this term be interpreted more narrowly, i.e. only as a certain item of the component part of the qualification requirements (e.g. only as an item minimum turnover for the last three accounting periods pursuant to Section 55(1)(c) of the PCA)? Or is it possible to include under this term only a certain component particular as part of one of the items (e.g. meaning only the missing turnover for one analogous activity of many activities which is to be proven as part of the turnover for the last three years)? I personally incline towards the last variable, i.e. the most narrow interpretation of this term. As far as the missing extract from the Criminal Register for any of the members of the statutory body is concerned, I would consider the conditions of applying the procedure pursuant to Section 59(4) of the PCA met (this would thus be merely a defect in a certain part of the qualification requirements) and the contracting authority could (but not have to) invite the given supplier to supply the missing extract. The same would apply if a mere copy of such an extract were submitted for a statutory body and not the original. On the other hand, I presume that failure to submit any information on the total turnover or failure to submit any extract from the Criminal Register in respect of the said persons would not give justification for proceeding pursuant to the given provision and such a supplier should be eliminated from further participation in the tender proceedings for failure to prove compliance with the qualification requirements.

Professional qualification requirements

Professional qualification requirements define the legal and legal-corporate competence of a supplier to perform the public contract. They stipulate that a supplier is authorised to render the requested performance in accordance with legal regulations, meaning that it is authorised perform the relevant activities.

As ensues from the nature of the individual professional qualification requirements, stipulated in Section 54(a) to (d), in a concrete public contract it is always necessary, depending on its nature, to investigate whether all or only some of these qualification requirements must be complied with. For that matter, this corresponds to the duty of the contracting authority to always restrict the scope of the qualification requirements solely to information and documents directly related to the said subject matter of the public contract (Section 50(3)).

Compliance with the professional qualification requirement pursuant to letter b) (authorisation to do business) will need to be proven by a supplier at all times. Every supplier is obliged to give proof of its authorisation to do business pursuant to special legislation, with this cover the entire scope of the subject matter of the performance of the public contract; thus all authorisation to do business for the complete scope of the subject matter of the performance of the public contract must be submitted at all times. This will, as a rule, be the trade licence issued pursuant to the Trade Licence Act, or a certain licence (e.g. pursuant to the Energy Act, etc.).

In other cases compliance with the professional qualification requirements is proven by a supplier in dependency to other legal facts.

If a supplier is entered (recorded) in a record (register) set by law, it is always obliged to prove this fact (i.e. the entry in this register); this register will, as a rule, be the Commercial Register.

The professional qualification requirement pursuant to letter c) only applies to public service contracts. Proof issued by a professional autonomous chamber or any other professional organisation confirming a supplier's entry or registration in such a chamber or organisation must be submitted to the public contracting authority as part of proving compliance with the qualification requirement if such entry or registration is essential for the performance of activity (rendering of service) (this concerns namely notaries, attorneys, tax consultants, auditors, experts, interpreters, etc).

A supplier is obliged to prove compliance with the professional qualification requirement pursuant to letter d) (professional capability) only if the proving of this requirement is essential for the performance of the public contract pursuant to special legislation. Thus, if special legislation stipulates that the requirement for the performance of a certain activity is a special professional capability, this professional capability must be proven to the contracting authority (e.g. professional capability pursuant to Act No. 174/1968 Coll., on professional state supervision of work safety, as amended).

Economic and financial qualification requirements

By requesting compliance with economic and financial qualification requirements a contracting authority is endeavouring to gain certainty that parties interested in a given contract have sufficient economic and financial strength and stability, as well as giving a contracting authority a certain degree of assurance that a supplier is not directly dependent on the public contract.

If a contracting authority decides that it shall require suppliers to prove compliance with economic and financial qualification requirements, it may require them to prove compliance of one, several or all of the following qualification requirements:

- a) a third party insurance policy concluded by the supplier,
- b) the latest balance sheet compiled pursuant to special legislation or a certain part of such a balance sheet, or
- c) information on the total turnover of the supplier, and/or the turnover attained by the supplier in view of the subject matter of public contract, for up to the three previous accounting periods, or
- d) other requirements pertaining to the economic and financial capability of the supplier in relation to the subject matter of public contract, albeit always simultaneously with one of the above.

A common mistake made by contracting authorities is that when defining the given requirements they do not duly comply by their obligation stipulated in Section 55(3), meaning that they fail to clearly define the requirements on

- the scope of any required information and documents (in other words, which of the above-mentioned possibilities under letters a) to d) it will require to prove),
- the manner of proving compliance with these qualification requirements (in other words, which documents are the suppliers to submit in order to prove compliance with the given requirements; e.g. whether the information on the total turnover is to be submitted in the form of a certain part of the financial statements or in the form of an affidavit executed by the supplier, whether it is to be an original or a copy of the said document, etc.)
- and namely then the minimum level of these qualification requirements reflecting the type, scope and complexity of the subject matter of the public contract.

Particularly the last requirement for defining the minimum level evokes frequent questions not only on the part of contracting authorities, but also on the part of suppliers. The reason for this is that by this requirement the contracting authority sets a compulsory imaginary bar for each of the above-mentioned requirements under a) to d), which each of the parties interested in the given contract must jump over; this bar must be set in such a way as to reflect the type, scope and complexity of the public contract (e.g. in the case of an insurance policy this is a requirement on the minimum amount of the insurance amount, or the maximum amount of the co-insurance, the scope of the insurance cover, or the negative definition of the insurance exclusions, etc.). An assessment of whether a given requirement is set in such a way as to reflect the type, scope and complexity of the public contract must always be made on an individual basis, namely with regard to the type of public contract, the character of the subject matter, payment conditions, the degree of risk and negative impacts in the event of the performance rendered by the supplier is unsuccessful or defective, etc.

In recent days a requirement of a contracting authority for a certain minimum registered capital amount has appeared in certain cases; such a requirement is not in accordance with the PCA as it does not provide the contracting authority with certainty of a supplier's economic and financial stability, but is merely an "accounting item", which need not be a faithful reflection of a supplier's economic situation.

In relation to the requirement for the submission of an insurance policy I am of the opinion that it will generally suffice for a supplier to submit to the contracting authority a binding pledge of an insurance company that the insurance shall be concluded per the required parameters the moment of the conclusion of the contract on the performance of the public contract. A contracting authority should accept such a pledge, as it does not lower its degree of certainty in any way.

In so much as Section 55(2) of the PCA permit a contracting authority to require the submission of other documents (proving compliance with other capabilities of the supplier), it must be added that these other requirements must always pertain to the supplier's economic or financial spheres, must be directly related to the subject matter of the public contract and that their corresponding required level must be defined. Frequently a contracting authority will require the submission of a certain type of document proving that a supplier is not involved in legal disputes or other disputes with the contracting authority or that a supplier has no outstanding liabilities towards the contracting authority; such requirements are, as a rule, not justified, or are not precisely formulated in legal terms (involvement in a legal dispute which does not take the substance of the dispute into account or the legitimacy of the decision, the

requirement for the supplier not to have any obligations towards the contracting authority, which does not take the various forms of obligations into account – financial, non-monetary in the form of performances hitherto rendered – the repayment of the obligations, the legal enforceability of the obligations, legitimacy, etc.).

If the supplier is not capable of objectively proving compliance with economic and financial qualification requirements according to the contracting authority's requirements, but has at its disposal another equivalent document which proves the contracting authority's concrete requirement for economic or financial stability, compliance with this part of the qualification may also be proven by way of this alternative manner and the contracting authority is obliged to respect this fact and to accept the document. The contracting authority may refuse such an alternative document only on the grounds of objective reasons and this refusal must be duly justified. It is appropriate to always verify the standpoint and opinion of the contracting authority prior to the submission of such a document (as part of a request for additional information about the tender conditions). If such an alternative document should be an affidavit executed by the supplier itself on compliance with the given requirement, then the prevailing expert opinion does not consider this form to be a document, as it is executed by the supplier itself; as such only a deed issued by a party other than the supplier can be considered a proper document.

Technical qualification requirements

The technical qualification requirements are governed by the same basic principle as the economic and financial qualification requirements in the sense that the contracting authority may decide whether or not to request the fulfilment of such qualification requirements.

Unlike the economic and financial qualification requirements, the contracting authority is limited in this respect by the fact that if it decides to request the compliance with such requirements, it may only select from among the requirements listed in Section 56 of the PCA; thus, it has no such possibility as the option offered by Section 55(2) of the PCA in the first named area (i.e. to demand the compliance with requirements other than those defined by the law).

Section 56 of the PCA defines the possible range of technical qualification requirements; the requirements concerning public supply contracts (para. 1) always differ from the requirements concerning public service contracts (para. 2) and public works contracts (para. 3). However, in case of a "mixed" subject-matter of a public contract (i.e. a subject-matter which includes performances relating to more than one type of public contracts, i.e. public works and supply or services), the contracting authority may require a proof of compliance with technical qualification requirements relating to all such types of performance. Thus, if the performance of a public works contract (with respect to which the contracting authority may request a proof of compliance with the technical qualification requirements under para. 3) also includes performance which falls, by its nature, under the definition of the public service contract, the contracting authority may also request the compliance with technical qualification requirements listed in para. 3.

As regards individual technical qualification requirements set forth in Section 56, I will only focus on those relating to public works and will refer to several selected pitfalls relating to their proof.

Reference contracts

The contracting authority may request the submission of a list of reference construction works carried out by the supplier. The following applies to the documentation of this part of qualifications:

- the contracting authority must be presented with a list of works performed and, at all times, with certificates issued by the clients testifying to due execution of the most important reference contracts;
- even though it is not evident from the PCA whether this should relate, as to time, to the last five calendar or general years (i.e. whether you should refer, in proving e.g. the compliance with this part of the qualification requirements in September 2007, to the period of January 2002 – September 2007 or only to the period of September 2002 – September 2007), I believe that the “general” year and not the calendar year rule should apply in this case, which means that the relevant period for reference contracts would be the period between September 2002 and September 2007;
- the clients' certificates must include all information required by the PCA and the contracting authority (you cannot even plead business secret in this respect); thus, such information concerns the due performance of the most important works, the price, time and place of performance of each of the reference contracts, as well as information whether the works have been executed duly and in a professional manner;
- what has been said about the possibility to prove the economic and financial qualification requirements by another equal document also applies accordingly to the possibility to prove this requirement (as well as any other technical qualification requirement), because Section 56(8) contains a similar provision; it has to be only noted that, with regard to this requirement concerning reference contracts, a statutory declaration issued by the supplier itself cannot be accepted as another equal document (because it is not a document issued by a third party); on the contrary, a handing-over protocol in conjunction with, e.g., the contract for work indicating compliance with the relevant requirements, the occupancy certificate etc. should be accepted as equal documents;
- the contracting authority is obliged to define exactly the minimum level and, if bound to the term “most important works”, also such term.

List of technicians and technical divisions

As regards this technical qualification requirement, the requirements of the contracting authority may relate to any person participating in the performance of the public works (of course, in an adequate scope) and not to a technician in the very meaning of the word. The contracting authority may only request a proof of compliance with the qualification requirements by technicians and not by technical divisions. Nevertheless, with regard to the basic principles set forth in Section 6 of the PCA, requirements that the technicians are native Czechs or have been employed with the supplier for at least x consecutive years, etc. cannot be accepted.

Certificate of education and professional qualifications

The contracting authority may request presentation of a certificate of education and professional qualifications of the supplier or the supplier's management or persons of similar standing (e.g. of the supplier's statutory body) or persons in charge of the provision of the services which are the subject of the public contract. This also requires the definition of the minimum required level of this part of the qualifications in a scope adequate to the subject-matter of the public contract (e.g. the minimum achieved education documented, in particular, by diplomas and various certificates, minimum work experience or length of service in each required profession, etc.). In this respect, the contracting authority must take care that its requirements for presentation of various certificates or other documents do not discriminate

against certain suppliers, particularly in case of certificates issued by private legal entities within the scope of their business policies.

Measures relating to environmental protection management

This requirement relates to the assurance of the quality of provided services in relation to their environmental impact. To prove the compliance with this technical qualification requirement, the contracting authority may also request, in addition to the general requirements relating to measures used in the protection of the environment, the submission of a certificate pursuant to para. 5. This will generally mean a certificate under ISO 14000 or the EMAS certificate.

Overview of the annual average number of employees

If the contracting authority requests the submission of an overview of the annual average number of employees, such overview has to be based primarily on the calculation made in accordance with the Decree of the Ministry of Labour and Social Affairs No. 518/2004 Coll. The legal regulation is based on a principle according to which it is irrelevant whether the subject of performance of a public contract is implemented by the supplier's employees or by some of the supplier's sub-contractors; therefore, even if the supplier does not have in a certain period the necessary number of employees, it can prove this part of the qualifications through a sub-contractor (details see above).

An overview of tools or aids

The contracting authority may require that certain tools or aids, operating or technical equipment necessary for the performance of the public contract (e.g. certain specific tools, technical equipment, etc.) are available to the supplier. In this case, the supplier need not own such tools, aids or equipment but has to arrange for the possibility to use them for the purposes of performance of the public contract (e.g. under a contract with a sub-contractor).

Like in the case of the economic and financial qualification requirements, the contracting authority must always stipulate with respect to the technical qualification requirements

- a) the scope of any required information and documents;
- b) the manner of proving compliance with these qualification requirements; and namely then
- c) the minimum level of these qualification requirements reflecting the type, scope and complexity of the subject matter of the public contract.

(See accordingly the above explanation relating to the economic and financial qualification requirements).

Conclusion

The legal regulation according to the PCA has also removed a number of interpretation and application discrepancies relating to supplier qualifications. However, it would be appropriate to accompany the existing legislation with interpretations of the supervisory authorities relating to the application of some provisions and with binding decision-making practice. Therefore, I do not deem it necessary to resolve these problems by amendments to the existing legislation, because the interpretation and decision-making practice would be sufficient and much more flexible in this respect. I believe that these steps are required most urgently with respect to the proof of qualifications and submission of a joint tender, particularly in relation to selected economic and financial qualification requirements and technical qualification requirements.