

State of Emergency - Fast Purchasing, or the Pandemic and Public Procurement

The Czech government has declared a **state of emergency** due to the health threat caused by the spread of coronavirus.¹ The contracting authorities are obliged to introduce strict measures and award certain **essential contracts**, such as for the supply of disinfectants, medical material, contactless equipment and related services **as soon as possible**. The need has arisen for other contracts that cannot be processed in a standard manner. Below, we offer a brief summary of how to award those contracts quickly, simply and in accordance with Act no. 134/2016 Sb., Act on Public Procurement, as amended ("**the Act**").

Whatever approach the contracting authorities choose to implement, the important thing is to remember the basic principle of **due managerial care** in compliance with the Act, while observing other formal requirements. We recommend recording the reasons for indispensability of the contracts, the reasoning regarding their economy from the point of view of price, scope and conditions, and the reasons for selecting each particular contractor. The emergency situation may naturally restrict the activities of the contracting authorities and the suppliers, but it is still worth the effort to carry out a basic "desk survey" and to record the results.

1) General exception from special security measures

The government declared a state of emergency under Act no. 240/2000 Sb., Act on Emergency Management and Amendment to Some Acts (Emergency Act), as amended ("**Emergency Act**"). One of the exceptions under section 29 (c) of the Act, where the contracting authority is not obliged to implement the tender procedure, is the exception applicable to purchases *in relation* to special security measures, which exception expressly refers to the Emergency Act. **The exception is applicable if the measures cannot be implemented in the form of a tender procedure**, and in our opinion that means an open tender procedure in compliance with the statutory time limits. The application of the exception is thus an *alternative* to the application of negotiated procurement without publication (see below), while the choice is up to the contracting authority.² The current crisis where each day plays

a crucial role (and the government measures are getting stricter), justifies the application of the exception to purchases that are essential and in connection with the security measures (in particular face masks, disinfectants etc.).

2) Negotiated procurement without publication due to extreme urgency

Another possibility is the application of negotiated procurement without publication ("**NPWP**") under section 63 (5) of the Act as the least formal type of procurement procedure under the Act. NPWP may be applied to a *broader range* of contracts than those permitted under section 29 (c) of the Act. In NPWP the contractor does not have to comply with any obligations regarding the publication of tenders or time limits for submitting the bids. It can be implemented informally and the conditions may be adapted by the contracting authority according to its needs. The competition is thus legitimately restricted even to a single contractor or to a small group of contractors, in view of the state of **extreme urgency**. According to the decision of the Office for the Protection of Competition ("**the Office**"), contracting authorities should apply the procedure only in the case of indispensable purchases.³ The level of detail in proving the compliance with the conditions of the NPWP must be gauged by the extent of the crisis and the necessity to act quickly.

Conditions for the application of NPWP

In our opinion, there is no doubt that the first two conditions for the application of NPWP under section 63 (5) of the Act have been met. The current situation displays a sufficiently intensive state of extreme urgency and the current situation, i.e. the speed and intensity of spreading of the virus, as well as the security measures that have been adopted, are unparalleled both in the Czech Republic and in the EU. The third condition for the application of the NPWP is the impossibility to comply with the time limits for a more transparent tender procedure. In particular, this concerns the time limit for the submission of bids and the blocking period for raising objections.⁴ The minimum time limit for

¹ Resolution no. 194 of the Czech government dated 12 March 2020 for the period of 30 days.

² Cf. judgment of the Supreme Administrative Court ref. no. 5 Afs 48/2013 dated 30 May 2014.

³ Cf. e.g. decision of the Office ref. no. R0305/2016/VZ-07889/2017/323/ZSř dated 3 March 2017.

⁴ Cf. section 246 of the Act.

Public Flash

March 2020

an open procedure will be between 5 and 6 weeks (without any objections or other remedies). In the case of necessary supplies and services that cannot be delayed, we consider the conditions for the NPWP to have been met.

Obligations of the contracting authority under NPWP

Even in the NPWP, the contracting authority is obliged to assess the qualification and to verify the registration of shares and the information regarding the actual owner. Even though the Act does not specify it, we are of the opinion that if the contract is awarded directly under NPWP, the fulfilment of those requirements does not have to be upheld. In the current situation, a contracting authority may be in a situation where it is unable to verify all the requirements and from the point of view of the market situation and due managerial care, the interest in acquiring the supply from such a contractor may prevail. A failure to comply with the requirements of the Act in such a direct way of awarding the contract will probably not influence the selection of the contractor. If the Office carries out a review at a later stage, it should not find any infraction and impose sanctions because "influencing the selection" is one of the essential characteristics of an infraction.⁵ **However, the contracting authority should not neglect the obligation to publish the announcement about awarding the contract, and the contract itself, in the register of contracts.** In the case of over-limit public tenders by central public authorities, the duty to inform the government without undue delay after the contract is awarded still applies.⁶

3) Dividing public tenders?

In purchasing disinfectants for everyday use the contracting authorities may currently be asking whether they are at risk of what is called dividing public tenders. We believe that the crucial argument is that the need to purchase disinfectants in such quantities has arisen in an *unpredictable* manner. The consumption is also dependent on the duration and the scope of the special measures, as well as the impact on the behaviour of the entities involved, so the extent may not be determined reliably. In our opinion, the contracting authority may (for the time being) rely on the current wording of section 19(3) of the Act and make individual contracts with specific suppliers, according to their current needs or according to the availability of the goods on the market and the current quotation.

The current situation raises numerous unusual issues and questions in all areas of law, and public procurement is no exception. We keep monitoring the topical issues, and are intensively involved in looking for solutions. Whether you are a public contracting authority, contractor, or a supervisory authority, please feel free to approach us with any question or concern you may have. Our public sector practice group, comprising 25 legal practitioners, combines expertise and know-how derived from a large number of successfully completed projects. We will be happy to share our know-how with you and to assist you in efficiently addressing any issue.

⁵ Cf. section 263 (2) of the Act and section 268 (1) (a) of the Act.

⁶ Cf. resolution of the Czech government no. 208 dated 22 March 2017.

Authors:

Adéla Havlová | Partner

Romana Derková | Senior Associate



The most successful law firm in the Czech Republic and Slovakia according to the total number of nominations and awards (2008–2019)



Czech Law Firm of the Year (2018, 2019)



Best Law Firm of the Year in the Czech Republic (2018)



Best M&A Law Firm in the Czech Republic (2018, 2019)



No. 1 legal advisor according to the number of M&A deals in the Czech Republic (2009–2018)



HAVEL & PARTNERS

CONNECTED THROUGH SUCCESS

Our team

220 lawyers and tax advisors | 400 employees

Our clients

2,000 clients | 100 of the Fortune 500 global companies
50 companies in the Czech Top 100 league | 7 companies in the Czech Top 10 league

International approach

Legal advice
in more than 90 countries of the world
in 12 world languages
up to 70% of cases involve an international element

www.havelpartners.cz

PRAGUE

Florentinum, Reception A
Na Florenci 2116/15
110 00 Prague 1
Czech Republic
Tel.: +420 255 000 111

BRNO

Titanium Business Complex
Nové sady 996/25
602 00 Brno
Czech Republic
Tel.: +420 545 423 420

BRATISLAVA

Zuckermandel Centre
Žižkova 7803/9
811 02 Bratislava
Slovak Republic
Tel.: +421 232 113 900

PILSEN

Nepomucká 144
326 00 Plzeň
Czech Republic
Tel.: +420 371 005 320

OLOMOUC

Salm Palace
Horní náměstí 371/1
779 00 Olomouc
Czech Republic
Tel.: +420 581 000 310

OSTRAVA

Smetanovo náměstí 979/2
702 00 Moravská Ostrava a Přívoz
Czech Republic
Tel.: +420 255 000 111