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FAIR PUBLIC PROCUREMENT

A handbook for contracting authorities

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A handbook for contracting authorities

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INTRODUCTION

Public procurement is a key aspect of public investment. According to the European Commission's data published as part of the 2017 European Semester, public contracts awarded by contracting authorities in the EU account for approximately 14% of GDP, and it is assumed that around 48% of the funds from the European Structural and Investment Funds (ESIF) are spent in connection with public procurement.

In addition, public procurement is one of the most vulnerable areas of public funding in terms of corruption risk. The risk of corruption is increasing not only due to the volume of transactions and the financial interests of stakeholders, but also due to the complexity of the process, the close cooperation between the state and the private sector, and the number of entities involved in public procurement. According to an OECD report on bribery (2014), the overall majority of bribery crimes are related to public procurement, an average bribe reaching almost 11% of the total transaction value and around 35% of profits.

EU funds (especially ESIF – European Structural and Investment Funds) have been an important source of finance for public procurement in the Czech Republic for several years now. In 2016, there was a decrease in the share of EU funded public contracts to only 11%. Although the year-on-year decline compared to 2015 was caused by a slow start of projects implemented within the new 2014–2020 programming period, the high share of EU funded contracts in 2015 was influenced by the considerable drawdown of funds from the 2007–2013 programming period. In 2017, there was already a significant increase in the volume of public contracts funded from this source (22%). Another important change is the overall significant increase in the size of the public procurement market in 2017 compared to the previous year, which was also reflected in the increase in the share in relation to GDP. In 2017, the share of the public procurement market in relation to GDP was approximately 11% (CZK 559 million). In terms of the share of allocated funds, contracting authorities can be considered as the key players in the public procurement market, accounting for about 9% of GDP. According to predictions, a further increase in the volume of contracts awarded by contracting authorities can be expected in 2018, not only because of the start of drawing funds from the 2014–2020 programming period, but also in view of the very favourable financial situation in relation to public budgets and an increase in public investment. With regard to the Czech Republic, some recurring cases of misconduct in public procurement which have a negative impact on the implementation of the 3E principle in practice can be inferred from the conclusions of the control authorities. These failures lead to inefficient use of public funds, restriction of competition or breach of the principle of non-discrimination and the principle of equal treatment. In drawing EU funds, the total number of discrepancies has been largely caused by misconduct due to misapplication of the rules for public procurement. On the other hand, new trends in the approach to public procurement are displayed by some contracting authorities. Their aim is not only to procure performance at the lowest price, but they also place emphasis on the quality of the procured performance and are open to transparent communication with contractors, which are seen as experts in their field. They devote sufficient time and effort to both the preparation of the procurement conditions and the implementation of the public contract. The contracting authority's proactive approach is particularly important in connection with continuous monitoring of the quality of the performance provided. Using examples and experience of selected contracting authorities, the first part of the publication

attempts to provide readers with some best practices which can help increase the transparency of procurement, and motivate contracting authorities to implement some innovative procedures in their internal public procurement rules. The second part of the publication focuses on the risk areas within the public procurement cycle and cases of misconduct identified in the control authorities' findings, supplemented by cases based on the decisions of the Office for the Protection of Competition and judgements of the Supreme Administrative Court of the Czech Republic. The publication is intended primarily for contracting authorities using EU funds for the implementation of projects. However, it can also be used by members of the general public who would like to become acquainted with the currently discussed public procurement issues or are interested in ensuring that public funds are spent economically, efficiently and effectively.

The rules of fair public procurement

1. **Know your weaknesses and cultivate the environment**

   Focus on precautions that are tailored to your organisation. Map your own risk areas and learn from past cases of misconduct. Set ethical rules for public procurement.

2. **Clearly define competences and personal responsibility**

   Clearly define the obligations and responsibilities of specific individuals and remember to separate responsibilities during the individual phases of the public procurement process. The entire process must always have one responsible manager – project manager.

3. **Plan openly and involve civil society**

   Do not underestimate the thorough preparation and high-quality management of the project from early phases, including the preparation schedule. Familiarise the market with your plans early on and obtain feedback from the public concerned.

4. **Map current market offers**

   Procure currently available performance and do not be afraid to obtain feedback from potential contractors.

5. **Standardise documents and formalise internal procedures**

   Minimise the room for ambiguous interpretation of the required procedures and use sample documents.

6. **Require quality at a reasonable price and award responsibly**

   Where effective and appropriate, prefer non-price competition, i.e. evaluation of the economic advantageousness that makes it possible to obtain quality, taking into account the contracting authority's priorities and strategic objectives in the social area or other areas.

7. **Open procedure as a starting solution**

   Procure performance in an open, competitive environment.

8. **Optimise, award and cooperate electronically**

   Minimise the room for manipulation and human error using common and open data environments.

9. **Know your contractors**

   Examine the counterparty to avoid potential future complications.

10. **Evaluate transparently**

    Avoid conflicts of interest and proactively publish relevant documents concerning contractor selection.

11. Do not underestimate the quality of the terms and conditions of business

Use standardised contracts and distribute risks appropriately (effectively) to involve the project participant that is able to manage them most efficiently (find inspiration in risk allocation based on standardised models).

PART I: BEST PRACTICES IN PUBLIC PROCUREMENT

1. BASIC ASSUMPTIONS

This part of the publication focuses on selected practices of contracting authorities to illustrate ways of preventing risks in connection with the public procurement process. The procedures respond to the most common risk areas dealt with in the second part of the publication.

The main condition for successful promotion of the idea of fair public procurement is the setting of the ethical framework for the internal culture of each (not only public) contracting authority. A basic prerequisite is a culture based on **zero tolerance of fraud or any corrupt practices**, at all levels of the organisational structure and in public procurement decision-making processes.

The most effective tool in combating fraudulent practices is **prevention**, which should aim to reduce the factors that create opportunities for unfair practices. The setting of preventive measures should always be based on the identified fraud risks. Creating the right conditions for open and fair public procurement and building a culture based on a negative attitude towards fraud can be based on **international anti-corruption standards**, which particularly place emphasis on the following:

- support for the idea of fair public procurement should be provided by the senior management of the contracting authority;
- the knowledge of one's own weaknesses, i.e. identification of risk areas in the public procurement process or related processes, is crucial;
- the implementation of measures aimed at reducing the identified risks should reflect the specific possibilities and needs of the contracting authority, taking into account the financial volumes of the most frequently awarded public contracts or their types;
- it is a dynamic process evolving over time, and the findings can be used to further improve the processes and training of the public procurement staff;
- the existence of a functioning internal system for reporting unfair practices and their efficient investigation cannot be underestimated;
- adoption of the idea of fair public procurement should be viewed as a sign of the quality of the contracting authority, which should be further promoted not only within the organisation (e.g. through regular training of its own staff, including e-learning), but also externally, in relation to contractors and the general public.

Know your weaknesses and cultivate the environment

An important prerequisite for successful risk management is the **knowledge of weaknesses, i.e. the correct identification of risks relevant to a particular organisation**. Based on this knowledge, it is possible to prepare targeted preventive measures (including those aimed at combating corrupt practices), the effectiveness of which should be regularly evaluated. Such preventive measures should not aim to overwhelm employees with a number of vaguely formulated internal rules.

Preventive tools also gain importance in the context of the need to strengthen the public procurement integrity. One of the outputs of fraud risk identification, which lists the weaknesses of the existing internal procedures, is a **map of corruption risks**.

Map of corruption risks

The aim of the map of corruption risks is to identify the main risk areas (according to their severity) in the public procurement process which have not yet been adequately protected against the occurrence of potential corruption opportunities. If the map of corruption risks is "tailored" to a particular contracting authority, the proposed measures can be efficiently targeted at the specific problematic elements of the contracting authority's internal procedures based on the risk analysis results, thereby gradually eliminating or, as the case may be, at least effectively reducing these risks.

A map of corruption risks in the area of public procurement has been successfully created by the Oživení association for many years.

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The existence of internal **codes of ethics** aimed at employees' behaviour is now also a common standard in many organisations. Sometimes, this document is viewed only as another of a number of generally formulated internal documents that do not meet the needs of the particular organisation. While it is impossible to create a universal code of ethics that would acceptable for all organisations and that would cover all risks, it is possible to formulate at least the **basic principles** to be kept in mind when creating it:

- avoid vague, formal statements or formulations that allow different interpretations;
- prefer simplicity and concreteness to "specifically" address the conflict situations in your organisation;
- enable your employees to participate in the preparation of the code and give them the opportunity to propose improvements;
- do not forget about the control procedures to enforce compliance with the set rules;
- this is a "living" document that should always correspond to the organisation's current needs.

Clearly define competences and personal responsibility

ESIF-funded public procurement is associated with higher demands on compliance with the procedural rules laid down, which also applies to small-scale public procurement. Procedural procedures for ESIF-funded public procurement, to which Act No. 134/2016 Coll., on public procurement, as amended (Public Procurement Act), does not apply, are regulated in detail in the Methodological Guidelines of the Ministry of Regional Development of the Czech Republic for Public Procurement for the 2014–2020 Programming Period. However, neither the Methodological Guidelines nor the Public Procurement Act specify the rules for the management of a wide range of risks occurring in connection with the award and implementation of a public contract.

The specific **definition and separation of powers, simplification of decision-making and management, and unambiguous assignment of personal responsibility within the individual phases of public procurement** increase the transparency of the public procurement process, forming preventive measures against manipulation of the procurement process or human error. The roles of the individual members of the public procurement working group should be clearly determined, and the contents of the activities for which they are responsible should be specified. The entire preparation process must have one responsible manager – project manager.

More complicated or time-consuming projects should naturally involve project management and supervision during their implementation or, more precisely, appointment of a project manager who is responsible for personal management of the project on a daily basis, based on a contract with the contracting authority. For this reason, it is completely ineffective if this role is conducted, for example, by a statutory representative or a senior manager who does not have time and competence for this activity.

Making project management more efficient, especially for above-threshold works contracts, is one of the goals of the working group of the BIM Concept department in the Czech Republic (i.e. a professional platform for standardisation and methodological support for the digitisation of the construction sector in connection with the government's Concept of Introducing the BIM Method in the Czech Republic approved in 2017). The aim should be to create and universally implement standardised model contracts as used in other developed EU countries or, more precisely, to support the standardised contractual terms and conditions (FIDIC) for large-scale engineering works contracts and to create a national standard for small-scale works contracts. The recommendation concerning project management focuses on strengthening project management, especially in the preparation and implementation phases of the project, with the aim of defining the basic requirements for project planning (management, communication), as well as in particular on:

- the project manager and his/her team, with an emphasis on a clear, contractually regulated definition of the roles and responsibilities of the individual team members;
- creating and updating a schedule based on the project participants' proactive approach, including the need to contractually regulate delays or time extensions for project completion based on clearly assigned responsibilities for such delays and the time demands of the specific contracting party;
- cost management using a financial schedule (following the plan of work), enabling continuous control;
- project change management, including the need to contractually regulate the way of valuating change, as well as the assessment of essentiality or necessity, and the contractual definition of the rules for meeting the mutual information obligation, compensation claims or formal requirements for change administration.

2. BEFORE COMMENCING A PROCUREMENT PROCEDURE

The actual commencement of a procurement procedure should be the outcome of the process of thorough planning and preparation of a public contract in order to procure performance that corresponds to the **currently identified** and **real needs** of the contracting authority. It is a frequent

phenomenon, especially at the end of an accounting period or, as the case may be, at the end of an electoral term, that the performance of a considerable financial volume is procured, often in order to quickly spend the remaining funds or to make the results of the current management's activities visible, regardless of the current or real needs of the contracting authority concerned or, more precisely, the interests of the territorial self-governing unit and its citizens. Moreover, if the stakeholders' conflicts of interest in procurement are not consistently addressed, frequent occurrence of corruption risks associated with the preference of interests of only a narrow group of persons at the expense of public interests cannot be ruled out.

The key recommendations for the preparation phase of public procurement can be summarised in the manner of the OECD recommendations published in connection with risk assessment in the construction of infrastructure projects, where the OECD places emphasis on **reducing contractor uncertainty during public procurement**, namely by:

- a clear and unambiguous determination of the functional parameters of the procured performance;
- early and continuous focus on risk management (and risk allocation); the crucial aspects are identification of risks already in the preparation of the assignment and the preference for the proactive approach to risk management rather than the reactive approach;
- active sharing of relevant information;
- careful choice of the contract implementation model (e.g. in terms of risk distribution);
- a well-prepared procurement procedure, including a realistic timeframe and an emphasis on value added rather than the tender price.

Plan openly and involve civil society

This is the pivotal phase of the entire public procurement cycle. Early planning linked to continuous budget spending can prevent the emergence of unforeseen situations that some contracting authorities resolve by awarding the contract through the negotiated procedure without publication, without objectively justifying this procedure.

Experience from abroad: Annual public procurement plan

The Estonian Public Contracts Act imposes an obligation on contracting authorities to draw up internal public procurement rules if the total estimated value of the contracts awarded by them in the budget year exceeds the threshold of EUR 80,000 (goods and services) or EUR 500,000 (works). The internal rules should also include rules for public procurement planning, including rules and time limits for the preparation and approval of the annual public procurement plan. In addition, contracting authorities are obliged to **publish internal rules and plans related to public procurement on their website, entering a link to them in the public contract register**.

It is advisable, especially at this phase of the public procurement cycle, to prefer **a transparent and open approach to the market sufficiently in advance**, which may strengthen competition and increase the number of candidates' tenders to participate in the procurement procedure. An investment intention published early on and an open access make it possible to make the most of the market. The idea of proactively publishing information in this early phase of public procurement is one of the main pillars of the Clean Contracting Manifesto, adopted in November 2017, in connection with the implementation of infrastructure projects, by several multinational non-governmental organisations dealing with public procurement issues. In connection with the implementation of major social investment projects, the initiative recommends that particularly **the following range of data and documents be published in the form of open data** (machine readable and standardised information) **in the planning phase**:

- project plan and public procurement plan;
- all studies (including feasibility studies) prepared in connection with the planned public contract;
- information from the market consultations conducted;
- assessment of the resources and the contracting authority's commitment with regard to the public procurement process and the impacts of the planned project (e.g. on the environment);
- assessment of the contracting authority's needs with regard to the planned public contract, including the project requirements or investment from the perspective of the public concerned.

In the context of the Czech Public Procurement Act, it is advisable to use the institute of **prior information notice** more proactively for all public contracts above a certain threshold determined by the contracting authority depending on its size, annual volume and type of public contracts awarded. A similar purpose may also be fulfilled by publishing the **intention** with the basic characteristics of the key parameters of the planned public contract.

With regard to investment projects, a **discussion of the investment intentions with the public concerned** may increase the chances of correctly identifying the needs of the contracting authority or, conversely, reducing the risks associated with ineffective or uneconomical spending of public funds. It is already possible to encounter good practice used by some contracting authorities that have decided to involve citizens and enable them to decide which projects will be implemented in the territory of their municipality. One example is the involvement of citizens in decision-making on the municipal budget (at least up to a certain percentage) through **participatory budgets**.

Experience from abroad: Involvement of citizens

In connection with the planned improvement of the quality of life in the city and the improvement of the reputation of the Dutch city of Eindhoven as a "city of light", the city decided to follow an **open and innovative path**. Unlike the "classical" procurement procedure, a form of cooperation between the contractor, the citizens of the city, the research institutions and the city as the contracting authority was selected. The procurement procedure (conducted in the form of innovation partnership procedure) was preceded by a (preliminary) market consultation and a competitive dialogue in three

phases with three selected consortia. The evaluation of the tenders was based on the assessment of the economic advantageousness of the tenders (using the best value method), one of the evaluation criteria being also the aspect of innovativeness of the offered solution (including the contractors' experience with the implementation of open innovative solutions). The result was the creation of an interconnected, cleverly designed open public lighting system (taking into account the public's use of it) open to other innovative solutions for the future.

CityVizor application

Promoting the idea of the open functioning of town halls in the Czech Republic, including a more transparent public procurement process, is also one of the aims of the **Open Towns** platform. Within the cooperation of this grouping with the Ministry of Finance of the Czech Republic, the CityVizor application was created for municipalities and towns, which allows them to publish data on management in a user-friendly and accessible form. In contrast to the "click-through" budgets, the application goes further: in addition to data on current incomes and expenditures, it provides information to the general public on the ongoing fulfilment of the planned budget in a given year, including data down to the level of municipality-issued invoices. Furthermore, the application interconnects the data relating to the municipality or town from the official board with the contract register. The application is available as open source.

With regard to **strategically important public contracts with a broader social impact**, what may also be considered is the possibility of voluntary supervision and monitoring of the procurement process by civil society representatives, for example, using a horizontal instrument such as **Integrity Pacts**. The basic prerequisite for the successful implementation of Integrity Pacts in the public procurement practice is the real motivation and readiness of the contracting authority to make efforts to minimise or, as the case may be, eliminate (especially corruption) risks during the public procurement process, which is voluntarily subjected to monitoring by civil society representatives.

Monitoring the public procurement process by civil society

A voluntary instrument such as **Integrity Pacts** can also be used to increase the transparency of the public procurement process.

It is a contract concluded between the contracting authority and potential contractors tendering for a public contract, with the participation of an independent monitor as a civil society representative. Integrity Pacts are based on the mutual trust of the stakeholders. An essential element of the contract is the **obligation of the contracting parties to refrain from any corrupt practices, in particular not to use undue advantages or to accept performance** (for themselves or for a third party involved in the implementation of the public contract) potentially **affecting their impartiality**. The contracting authority undertakes to lay down in the procurement documents the contractors' obligation to accede to the Integrity Pacts or to further define the related obligations (e.g. the obligation

of a selected contractor to provide the monitor with relevant documents or other assistance on request) in the contract with that contractor. **An independent monitor has access to relevant information and documents, participates in meetings or monitors the process of the procurement procedure.** In addition, it is entitled to make recommendations on preventive or remedial measures in case of the risk of breach of the public procurement rules.

The idea of Integrity Pacts was also supported by the European Commission through the pilot project **"Integrity Pacts – Civil Control Mechanism for Safeguarding EU Funds"**, which has been implemented in 11 EU Member States, including the Czech Republic. The pilot project has been implemented in cooperation with Transparency International (Transparency International's Secretariat is the coordinator of the entire project) within the Commission's Action Plan on Public Procurement for the 2014–2020 programming period.

The use of the Integrity Pacts in the Czech Republic was made possible thanks to active cooperation between the Ministry of Regional Development of the Czech Republic as the contracting authority and Transparency International Czech Republic as the independent monitor, in connection with the public contract **"Technical Supervision Services for the Operation of the MS2014+ Information System"**.

Map current market offers

In addition to timely provision of information on the contracting authority's plans, **knowledge of current market offers** is also crucial in the preparatory phase of public procurement. It allows the contracting authority to:

- clearly define the subject of the public contract and set non-discriminatory technical parameters or other procurement conditions;
- realistically estimate the expected value of the public contract;
- select the appropriate type of procurement procedure based on objective grounds.

In many cases, market research is only carried out as a necessary formality, and competition is sometimes eliminated by repeatedly inviting the same range of "proven" contractors. Sometimes, market research can also be negatively affected by potential contractors that are interested in determining the highest expected value of the public contract and, therefore, they deliberately overestimate the data provided for the market research.

The **preliminary market consultation** may be a useful instrument, especially for specialised or more complex performance. This institute, relatively new in the Czech public procurement environment, can help contracting authorities to face some difficulties in connection with the preparation of public contracts because, due to the lack of knowledge of the market, the contracting authority may (unintentionally) set procurement conditions that are discriminatory or disproportionate given the subject of the public contract. Unlike the contracting authority, contractors are in most cases market experts, following the latest trends. However, it must be borne in mind that communication with potential contractors in the early phase of the public procurement cycle places **greater demands on the transparency of the course** of the entire consultation. Its course must therefore be properly

documented. For example, the Public Procurement Act requires written documentation of all communication. The information resulting from the consultation must be indicated in the procurement documents, and all relevant documents and data from the consultation should be published on the Internet. In addition, the preliminary market consultation allows the contracting authority to inform the market of its intentions and ideas sufficiently in advance. This enables the contracting authority to **obtain up-to-date feedback from the market**, based on which the contracting authority can modify the procurement conditions to best suit its needs, reflecting also the real and current performance possibilities in the market.

Popular consultations of more general nature or, more precisely, meetings known as **"Meet the Buyer"** are also popular abroad (e.g. in the UK, Ireland or the Netherlands), aiming to inform potential contractors of intended projects (without links to a specific public contract), to obtain feedback from contractors or to exchange information on current trends in the market. As this form of communication with contractors is not explicitly regulated in the Czech law, it is necessary to proceed in accordance with the basic principles of public procurement pursuant to the Public Procurement Act and analogously document the course of such communication as in the case of conducting a preliminary market consultation.

Masaryk University's experience with preliminary market consultations

Masaryk University uses the possibility of conducting preliminary market consultations especially **in public contracts where it introduces new, innovative elements**. Recently, it has done so, for example, in connection with an innovative tender evaluation method (for more details, see the example in the part of the publication concerning tender evaluation based on quality). What is particularly beneficial is the **possibility to hold a discussion with contractors** where the contractors are given room to ask questions and the contracting authority **introduces a new element of public procurement**.

The invitation to the preliminary market consultation was published to communicate the information to the widest possible range of contractors: it was published in the contracting authority's profile and distributed to 20 specific contractors. Since the Brno University of Technology was preparing a contract with the same evaluation system, the consultation was conducted together with that contracting authority. The contractors were offered three dates before the preparation of the procurement conditions was commenced and two dates before the actual procurement procedure was started. In total, 10 contractors participated in the consultation, some of them repeatedly.

As previous experience had shown that the contractors found it difficult to express their expertise and quality through numerical data, the presentation of the new evaluation model was supplemented by **sample forms** (also available in the contracting authority's profile) that the contracting authority was planning to use in the subsequent procurement procedure. The consultation also included an explanation of the related institutes, such as anonymity of forms and the two-envelope method.

Although the contracting authority strives to initiate discussion and obtain feedback from contractors, the adjustment of the evaluation criteria setting based on the contractors' proposals was not implemented yet due to the lack of the contractors' practical

experience with the new evaluation method.

No request for clarification was submitted by the contractors during the period for submitting tenders. The contracting authority received three tenders, and one contractor had to be excluded from the procurement procedure.

Based on the contracting authority's experience, preliminary market consultations become important especially **in pilot projects for quality evaluation**, where contractors do not always have experience with the new way of evaluating tenders, and in tenders present information that they are not able to substantiate with the required evidence or incorrectly work with numerical expression of their quality or, more precisely, they are not able to express their quality by numerical values, or only use vague proclamations.

A responsible approach to public procurement involves all phases of the public procurement cycle; therefore, the contracting authority must devote sufficient care and time to preparing the contract to ensure that the award of the contract could bring the desired benefit.

The dialogue with contractors in the preparation phase of the public contract allows us to map the contractor environment, especially in cases when we procure performance with which we have no experience or when we are not sure what we can demand. The scope of consultations varies, from individual consultations with each contractor to more general market consultations to verify the acceptability of the procurement conditions for the given sector or to verify the comprehensibility of the conditions set by us. We strive to be transparent and predictable for contractors, and we expect the same from contractors in order to avoid mutual misunderstanding or objections on their part or proceedings with the Office for the Protection of Competition.

Mgr. Martin Hadaš, LL.M., Head of Public Procurement Department, Masaryk University

Standardise documents and formalise internal procedures

A frequent weakness of internal regulations is an excessive emphasis on the procedural aspect of individual procedures, i.e. mere "copying" of statutory requirements or methodological guidelines without connection to the real needs of the contracting authority concerned. Although the result may be formally correct setting of procedural steps and proper administration of the contract, the final implementation may not meet the contracting authority's needs. A clearly formulated internal regulation that is free from mere rewriting of statutory requirements can **minimise the scope for different interpretations regarding the required procedures**.

With regard to process standardisation in formal terms, it is also possible to seek inspiration for improvement abroad. In addition to the existence of editable sample templates or forms, contracting authorities can find it helpful to use other IT solutions, depending on the specific type of procurement procedure. These also make it possible to ensure consistency and the required quality of the procurement documents and to reduce the room for creating unnecessarily complicated solutions or ambiguously determined conditions.

Experience from abroad: Simplification of administrative procedures

The Business Process Management Office of the Luxembourg State IT Centre focuses on streamlining processes in connection with state-provided services and their simplification. As part of these activities, the Office has developed the common central framework PROMETA, which makes it possible to define and specify common procedures applicable in public administration. The Office has developed several **support applications** to simplify administrative processes. One of these applications is the **DocGen – Cahier des Charges** application, which makes it possible **to automatically generate documents that are relevant to the procurement of public service contracts** (such as cleaning, security, auditing and IT consulting), in accordance with the statutory requirements. The required documents are automatically generated after the contracting authority has completed the necessary answers in an online questionnaire that covers all parts of the relevant document, depending on the specific type of procurement procedure. Another application (Prometa Spec.) provides contracting authorities with support in processing procurement requirements for IT systems.

Require quality at a reasonable price and award responsibly

The competition focused exclusively on the quality of the performance will still be a major challenge for the Czech public procurement market in the future, because the price of the procured performance remains the main criterion for tender evaluation. The reason tends to be the persisting uncertainty or concern about the decision-making practice of the control authorities in the case of multi-criteria evaluation. Evaluation based on the lowest tender price is still the easiest and most objective way of evaluating tenders.

Qualitative evaluation should primarily reflect the 3E principle, i.e. economy, efficiency and effectiveness of the use of public funds. **The choice of non-price competition is appropriate in the case of ordinary consumer goods, services that can be simply specified or simple works.**

For all public contracts with a **more complex subject of performance**, regardless of their expected value, it will be necessary to compare the tender price with the required quality of the performance. The Public Procurement Act (Section 116) stipulates the following **basic assumptions** for the use of **multi-criteria evaluation** of tenders:

- an objective link to the subject of the public contract;
- a definition of criteria that is clear and comprehensible for contractors (i.e. enabling them to prepare and to submit an eligible tender in the competition) and that allows mutual comparability of tenders and verifiability of the fulfilment of the offered solution parameters (the contracting authority should avoid formulations that are too general, such as a solution at the highest technical level or with the best aesthetic characteristics, etc., without further specification, and the evaluation criteria should also be based on the purpose (objective) of the contract expressed in the form of requirements for the expected output, performance or function;
- exclusion of the contractual terms and conditions the purpose of which is to confirm the contractor's obligations or payment terms as quality criteria.

An innovative way to evaluate tenders based on quality

Using foreign experience from the Netherlands (Best Value Approach method based on contractor selection depending on the best ratio of quality and tender price at the time and on the contracting authority's available funds), Masaryk University verified the evaluation method based on the following criteria:

(a) professional level – enabling the contractor to express its expertise (expertise of its team) or, more precisely, contribution to the fulfilment of the purpose of the contract, with each contractor having the opportunity to express its expertise at its discretion while respecting the objectives and needs significant for the contracting authority;

(b) risks – making it possible to verify the contractor's ability to respond to potential risks (relevant to the subject of the contract) in the light of its previous experience and to propose appropriate measures to eliminate them or to minimise their impact;

(c) advanced solution – enabling contractors to offer qualitatively better performance in relation to the subject of the contract (while respecting the requirement of proportionality of such improvement in terms of time and price laid down by the contracting authority) or, more precisely, performance with better parameters than the minimum requirements laid down by the contracting authority;

(d) project manager's characteristics and abilities – making it possible to express and, through a personal interview managed by the contracting authority, to verify the characteristics and capabilities of the key person that are essential for the successful implementation of the public contract;

(e) the tender price – where the tender price is evaluated, but the contracting authority also specifies in the procurement documents both the maximum admissible tender price and the value below which the tender price is automatically considered extremely low.

The contracting authority used the sample templates for submitting tenders based on which the scope of the required information according to the individual evaluation criteria was to be made clear to contractors. With regard to the criteria focused on quality verification (i.e. professional level, risk, advanced solution), contractors provide their "statements" to demonstrate their expertise, ability to face risks or value added, and this "promise" must be expressed by a corresponding numerical value (e.g. using a scale of 1, 6, 8 and 10). In addition, the contractor must demonstrate that its "statement" can be met in the given public contract and, if the contractor is selected by the contracting authority, it must be able to justify its statements and prove their truth by relevant documents during the so-called verification phase (its course must be described in the procurement conditions, and it cannot be considered negotiation on the tender). The numerical expression of quality allows the contracting authority to evaluate the tenders in transparently and objectively, and the point-based evaluation must be accompanied with

verbal reasons. In addition, the contracting authority should ensure in the tender acceptance phase that the contractors tendering for the contract in question remain anonymous (or, as the case may be, to arrange this by itself in accordance with the requirements of the procurement documents). The persons who will carry out tender evaluation must not be involved in this phase.

An example of a "statement" for the professional level criterion in a cleaning work contract:

Public contract for cleaning work (a large number of employees and members of the public, cleaning for 6,000 sq m)	
Purpose of the public contract: high-quality cleaning for user satisfaction and minimisation of complaints	
Statement = what do you offer us?	The project manager who will be responsible for the implementation of the public contract in question has gained experience during his 10-year practice with similar public contracts.
What does the statement mean to us (expressed in a numerical value) in relation to the purpose of the public contract?	Based on the project manager's skills and experience, we guarantee ≥ 95% user/visitor satisfaction with the cleaning quality in the building ≤ 5 complaints about the cleaning quality per year
Prove that what you offer works.	The project manager has experience with 5 similar contracts from the past 5 years, each of them meeting the following parameters: – ≥ 6,500 sq m, administrative building – ≥ 95.3% satisfaction with cleaning quality (using the sample of ≥ 500 workers/visitors) - not more than 3 complaints per year (long-term continuing cooperation)

Proper setting of the rules for qualitative evaluation of tenders is complicated and, therefore, it is one of the riskiest phases of the preparation of the procurement procedure (e.g. due to the risk of hidden discrimination). Therefore, it is advisable to use at least a **framework definition of the rules for tender evaluation also in the contracting authority's internal rules** (e.g. by laying down the requirement to formulate the purpose of the contract, i.e. why the contracting authority is

implementing the contract, as a necessary prerequisite for its award, as well as the requirement that the evaluation criteria be based on this purpose or, as the case may be, the requirement that the evaluation criteria take into account the contracting authority's priorities, for example, in the social field, or that the quality of the material provided which is crucial for the given construction, etc., be also always evaluated in contracts for more complex works).

Furthermore, laying down clear internal rules for public procurement allows the contracting authority to **take into account its priorities or strategic objectives** declared in the field of corporate social responsibility **in public procurement**, for example, in connection with the inclusion of people disadvantaged in the labour market or the long-term unemployed, support for small and medium-sized enterprises or for environmentally friendly solutions. Although it may seem at first sight that the practical implementation of the **responsible public procurement concept** only complicates the entire process of public procurement, unnecessary complications can be avoided if some basic assumptions are taken into account. In this respect, the recommendations published in the Methodology of Responsible Public Procurement issued by the Ministry of Labour and Social Affairs of the Czech Republic in 2017, which contains the following necessary prerequisites, can be used:

- specific identification of areas that the contracting authority wishes to address (e.g. reduction of high unemployment rate), with emphasis on priority areas with the greatest social impact;
- knowledge of the cause of these problems (e.g. mapping the situation in the local market, composition of the disadvantaged people in the labour market, etc.);
- establishing a specific, achievable and measurable goal, including the determination of the time horizon for achieving it;
- creating a strategic document and considering its requirements in the contracting authority's other internal rules, including public procurement rules;
- implementation of a (small) pilot public contract taking into account the responsible public procurement concept and, subsequently, gradual introduction of the individual elements in practice in all appropriate contracts. For example, if the goal is to reduce a high level of unemployment at local level, it is not possible to lay down the requirement to employ only the local unemployed as a procurement condition, since this would violate the principle of equal treatment, but this social aspect can be taken into account in the specific conditions of performance of the contract in accordance with Section 37 (1) (d) of the Public Procurement Act. For example, it can be required that a certain percentage of the persons involved in the implementation of the contract (rather than the percentage of the persons from the total number of employees) be persons disadvantaged in the labour market. When formulating requirements, it is advisable to cooperate with the Labour Office, which is knowledgeable about the local labour market. Alternatively, this social aspect can be taken into account as a partial evaluation criterion within the meaning of Section 116 (2) (d) of the Public Procurement Act to evaluate the number of persons from the target group who will be employed by the contractor for the determined working hours during the performance of the contract. Local contractors can also be

motivated by appropriate division of the contract into parts. Moreover, compliance with the determined conditions should be checked throughout the implementation of the contract, and their breach should be sanctioned (by a contractual penalty or withdrawal from the contract);

- regular evaluation of the results achieved (including evaluation of their sustainability) in relation to the requirements of the strategic document and sharing of best practices with other contracting authorities.

Methodological setting of a framework for responsible public procurement

The South Moravian Region adopted the idea of responsible public procurement as early as 2014 and since then it has been trying to put this concept into practice. In 2015, it prepared a practical handbook for this issue entitled "The Basic Principles of Responsible Procurement", which identifies key areas of socially responsible public procurement with regard to the region's priorities. The handbook was updated in 2017 and contains recommendations for applying the principles of responsible procurement in practice, focusing in particular on the social and environmental aspects of public procurement and the possibilities of taking them into account when preparing procurement documents, whether by incorporating them into technical specifications or within the evaluation criteria.

An example of environmental recommendations (abbreviated version):

Objective: Optimising the carbon footprint of the car fleet and buildings

Measures and categories of procurement: Taking into account the CO_2 emission level when buying vehicles / *Procurement category*: car fleet

Formulation and recommendations / Suggestion for inclusion in the procurement documents: When purchasing vehicles, it is recommended to take into account the cost of their operation, in particular the volume of CO_2 emissions or, as the case may be, other parameters and, within technical conditions, to require values that are stricter that those mandatory, expressed in absolute terms, or to use evaluation criteria for the selection. The Green Public Procurement criteria of the European Commission for green procurement of vehicles should serve here as a guideline.

The methodological handbook also gives an example of the recommended formulation for CO_2 emissions that must not be exceeded, as well as examples of other environmental parameters that can be appropriately taken into account in the procurement documents (e.g. requiring gear indicators, tyre pressure monitoring systems and fuel consumption indicator).

The reason to create a methodological handbook was the effort to present the concept of social responsibility in public procurement in a simple or, more precisely, "unofficial" and clear form, including practical examples, to all those interested in the issue, including

those involved in public procurement.

The adoption of the idea of responsible public procurement was motivated by the desire to do things differently, better. To gain more than just the procured goods or service for the public money spent. We wanted to look for new solutions and prevent purchases of "poor-quality" performance.

Although responsible public procurement is more demanding with regard to the conducting of the procurement procedure, it is more advantageous for the contracting authority, as it enables it to achieve the required quality or purpose. For example, based on our practical experience gained so far, we used non-price criteria in the contract for cleaning services to prevent abuse of people disadvantaged in the labour market and to procure high-quality services.

We recommend to other contracting authorities not to be afraid of awarding public contracts in a different way, better and using elements of responsible procurement, to seek inspiration and to use the experience of other contracting authorities.

Mgr. Martin Koníček, Head of the Director Office Department, Regional Authority of the South Moravian Region

Masaryk University's experience with responsible public procurement

Masaryk University adopted the concept of responsible public procurement in 2016 as part of the participation in the **Support for the Implementation and Development of Socially Responsible Public Procurement** project, implemented by the Ministry of Labour and Social Affairs of the Czech Republic. Inter alia, the concept seeks to promote the qualitative evaluation of tenders, where non-price criteria (technical, functional and environmental) are also considered in the evaluation. The aim is to obtain the highest quality and the most user-friendly performance possible. As a contracting authority, the university also seeks to minimise the administrative burden on contractors by using simple forms in procurement, allowing contractors to focus on supplementing the specific parameters of the performance offered by them instead of formal tender requirements. It is also through this approach that the contracting authority wants to motivate small and medium-sized enterprises to participate, thereby strengthening competition.

One of the examples of contracts with elements of responsible public procurement was a small-scale public contract for the **interior equipment of the Dean's Office of the Faculty of Science**, where the delivered interior was to use high-quality materials ensuring high durability and, therefore, longer life. The technical specifications of the work were set as a minimum standard and, in addition, the technical level ("above-standard qualitative criteria", i.e. the use of higher-quality materials beyond the minimum technical specifications) with a weight of 80% and the tender price with a weight of 20% were evaluated. To calculate the points, a formula was used (including the determination of the minimum and maximum tender price) after the completion of which the contractors knew the exact number of points they would receive for their tender. The contracting authority laid down in the procurement conditions that it was entitled to invite the selected

contractor to submit documents proving compliance with all declared standards. Since the contractor that was placed first was unable to demonstrate the adequacy of the tender price and the fulfilment of the above-standard criteria that it declared, the second participant was selected, since it offered a qualitatively higher performance and, based on the samples presented, it was able to demonstrate the ability to fulfil the above-standard criteria that it declared.

Open procedure as a starting solution

In some cases, the use of an open procedure may seem impractical, especially from the time perspective or because of increased demands on financial and capacity resources, but, on the other hand, it offers many advantages. One of the advantages of the open procedure is a high level of competition of the competition environment, transparency, lower corruption potential (including the occurrence of collusive practices), simpler justification of the choice of this type of procurement procedure and, ultimately, speed with regard to the time limits laid down by the law.

The Public Procurement Act partially simplified the rules concerning the contracting authority's procedural procedure. For example, the contracting authority is not obliged to **check all the received tenders in terms of meeting the conditions for participation in the procurement procedure, but only the tender submitted by the selected contractor**. In this respect, the law gives the contracting authority relative freedom regarding the choice of the order of the individual procedural procedures in selecting the winning contractor.

Choosing a contractor in implementing construction projects using the Design-Build method

The Design-Build form of public procurement, which offers a number of advantages to contracting authorities compared to "classical" approach to public procurement, becomes increasingly common also in the Czech public procurement practice, namely in preparing and implementing construction projects, for example, in the field of energy efficiency (Environment Operational Programme) and transport constructions (State Transport Infrastructure Fund). A key advantage is the transfer of responsibility for the preparation of project documents and for the overall quality of the execution in whole or in part to the contractor. Therefore, the contracting authority gains the advantage of a higher degree of certainty that the tender price will be observed (elimination of changes in the project documents by the contractor in the implementation phase) and that the project implementation time limits will be met. In this case, the contracting authority determines its ideas through performance and functional parameters, thereby also reducing the risk of discriminatory setting of procurement conditions. However, awarding a contract using this form places increased demands on the contracting authority, especially with regard to the preparation of the project assignment, the selection of the appropriate operating model and the contracting authority's preparation team.

One of the barriers to awarding a contract using the Design-Build form can be the selection of an inappropriate type of procurement procedure which does not enable negotiations with the participants about tenders or which blocks the possibility of using the contractor's innovation potential.

It is in such cases that the selection of the appropriate type of procurement procedure is of crucial importance for the successful implementation of the contract. In this case, it is appropriate to award the contract through a negotiated procedure with publication, which allows the contracting authority to negotiate with the contractors about their indicative tenders in order to improve them as required by, and to the benefit of, the contracting authority. With regard to the below-threshold regime, the use of this type of procurement procedure is not particularly limited under the Public Procurement Act. With regard to the above-threshold regime, the use of this type of procurement procedure in contracts using the Design-Build method can be justified in many cases by the element of innovation of the solution or, as the case may be, on the grounds that the contract cannot be awarded without prior negotiation because of the special circumstances arising from the nature, complexity or legal and financial conditions connected with the subject of the contract.

In the Czech environment, the use of the **negotiated procedure without publication** represents a separate option. Under Act No. 137/2006 Coll., on public contracts, as amended (Public Contracts Act), the negotiated procedure without publication was most often applied because of the need to award additional performance, for example, additional work for works contracts. The more flexible rules of the Public Procurement Act for changes to the commitment now make it possible to implement a substantial part of the additional construction work in an administratively simpler way by changing the commitment. The decline in contracts under this regime, which was recorded in connection with the change in the rules, is therefore a formalistic change rather than a result of opening the market to other contractors.

One of the reasons for using the negotiated procedure without publication is the protection of exclusive rights in ICT contracts, where the situation of exclusivity or, more precisely, dependence on the existing contractor is created due to insufficient regulation of licence conditions. Although this situation may not always be caused by the contracting authority or, more precisely, it may be a natural part of the subject of the public contract, the Commission recommends using **open** procedures to strengthen competition. In its Guidelines on Procuring IT Solutions, the Commission recommends the implementation of the following **precautionary measures** to reduce the risk of developing a vendor lock-in effect:

- thoroughly examine the existing alternative solutions in the market;
- use templates with pre-filled fields to specify the required characteristics of the subject of performance;
- require IT solutions that are easily accessible to the general public;
- avoid references to specific trademarks, patents, etc., and prefer a description of system performance requirements (operation, performance) instead; refer to standards and technical specifications of the subject of performance that can be mutually compared;
- do not require system compatibility with the existing IT solution but their interoperability;
- support the use of open standardised, not proprietary, solutions;

- arrange sufficiently broad licences allowing further development, sharing and use by third parties;
- do not unnecessarily require customised and expensive IT solutions;
- contractually regulate the handover of relevant documents not only during the contractual relationship but also at the end of it;
- include the future cost of ensuring the openness of the purchased IT solution in relation to alternative solutions in the price of the contract;
- regularly evaluate the justification and up-to-dateness of the standards, technical specifications or other benchmarks used in awarding IT contracts.

3. PROCUREMENT PROCEDURE AND CONTRACTOR SELECTION

For public contracts awarded under the Public Procurement Act or subsidy public contracts, the Public Procurement Act or, as the case may be, the relevant methodological guidelines of the Ministry of Regional Development of the Czech Republic stipulate formal-procedural rules for the course of the procurement procedure which is ended by the selection of the contractor. Nevertheless, misconduct occurs in this phase, which may result, inter alia, in the impossibility to review the contracting authority's procedure in tender evaluation or in doubts about the objectivity of the evaluation. In addition, the consequences of misconduct that occurred in the earlier phases may also be manifested in this phase of the procurement procedure.

Optimise, award and cooperate electronically

One of the effective tools to minimise manipulative practices during the procurement procedure is the more massive **use of electronic tools**. Electronic auctions can be recommended especially for the purchase of **common consumer goods** (office supplies, simple computer technology, cleaning services and other generally available supplies or services) or for the implementation of small-scale public contracts. **Electronic auctions** make it possible to purchase performance in real time and under the currently most favourable price conditions. Tenders are evaluated automatically by the system, based on the criteria determined by the contracting authority. The **dynamic purchasing system** can also be used as a suitable electronic tool within an open procedure, providing the contracting authority with flexibility in purchasing commonly available goods (e.g. office supplies) and simple services (e.g. cleaning or translation services) or works (e.g. repeatedly procured construction-assembly works). The main advantage of introducing the dynamic purchasing system is the simplification of processes for repeatedly procured performance, thereby reducing the administrative burden for the contracting authority and thus saving public funds. Unlike the previous legislation, the introduction of this system is no longer time-limited by the law.

Coordinating purchases of common consumer goods and simple services

The dynamic purchasing system as a tool for procurement centralisation was introduced by Masaryk University in 2010 to purchase standard goods and services for the individual economic centres of the university. Currently, it has eight systems in place, namely for

toners, chemist's goods, office supplies, printing services, promotional items, standard furniture, audio-visual equipment and selected standard office ICT equipment. It is a fully electronic procurement system that makes it possible to flexibly respond to the contracting authority's current needs and to repeatedly award contracts for which it was introduced. An advantage is often not only a lower price than those in ordinary shops, but also the possibility for small and medium-sized enterprises to participate in recurring sub-contracts without the need to submit formal documents. For some performance (e.g. ICT equipment), the university seeks to extend the life cycle of products through the requirement for a longer guarantee period, thereby promoting environmentally friendly solutions.

At the end of 2017, the university started to rebuild its central purchasing strategy to accelerate deliveries and create a comfortable ordering environment in its internal e-shop. As the changes will affect contractors, the university decided to conduct thematically structured preliminary market consultation in the form of a general debate with potential contractors to make the new system more attractive for more contractors, to optimise the environment for users and to discuss some practical issues (e.g. goods delivery options and a way of dividing goods into smaller groups in individual competitions).

In order to make participation in procurement procedures available to as many contractors as possible, including small and medium-sized enterprises, and to strengthen competition or to eliminate opportunities for entering into collusive agreements, consideration should be given to the appropriate **division of the contract into lots**. Opportunities for collusive practices can also be limited by reducing the predictability of the parameters of the purchased performance that is divided into parts. The procurement model where contracts are divided into lots should be varied from time to time, not only in relation to the parameters of the individual lots, but also in view of the way of procuring the performance (e.g. a combination of centralised procurement and separate procurement or a dynamic purchasing system and framework agreement, including appropriate variation of categories).

Experience from abroad: Improving traffic management system

The agency of the Dutch Ministry of Infrastructure and Environment and the government agency Highways England decided to improve the traffic management system by using innovative solutions that were not available on the market at that time. The aim was also to eliminate the vendor lock-in effect and to involve small businesses focusing on developing innovative solutions in the solution.

The performance was procured within two parallel procurement procedures. The purpose of one of them was to replace the existing solution (custom-made software) with a new solution (open interface). Another part of the performance was procurement in the pre-commercial procurement phase (i.e. in the research and development phase before certain technologies or services are introduced; the elements of this awarding method were reflected in the innovation partnership procedure), where new modules were developed, the contract being divided into lots based on the individual modules to

enhance competition and interoperability between the modules. The result was, inter alia, the creation of new traffic management modules to reduce traffic congestions and CO_2 emissions, to increase traffic safety and to encourage the introduction of new, innovative types of transport systems.

Know your contractors

The importance of verifying the ownership structure of contractors or their references in connection with public contracts implemented in the past is sometimes underestimated by contracting authorities. Too close links between individual contractors or between contractors and those involved in public procurement on the part of the contracting authority may raise doubts about the transparency and impartiality of the course of the procurement procedure.

The Public Procurement Act allows contracting authorities to exclude those contractors which have committed, for example, breaches of labour law or environmental law, distortions of competition, including bid rigging, or conflicts of interest (all grounds are specified in Section 48 (5) of the Public Procurement Act). In addition, it should be noted that the aforementioned breaches do not lead to the automatic exclusion of the contractor, but the Public Procurement Act leaves the assessment of these grounds for exclusion and, where appropriate, subsequent exclusion to the will of the specific contracting authority. The contracting authority is only obliged to exclude a contractor for the misconduct described above if such a contractor has been selected.

A key prerequisite for proper verification of all circumstances that may result in exclusion of any contractor is the contracting authority's access to sufficient information and proactive verification of such information. Information can be obtained from publicly available sources (e.g. from a commercial, trade or insolvency register). In some Member States, information based on the interconnection of information and data from public registers can also be obtained about contractors **through publicly available information**, which can significantly simplify the verification process for contracting authorities.

Experience from abroad: Public registers and transparent platforms

Since 2017, the Slovak Ministry of Justice has been running a publicly accessible **register of public sector partners** as a public administration information system. The purpose is to make available data on the ownership and management structure of the entities that enter into contractual relations with the public sector. The register also contains information on whether or not the end user is also a public official. The law prohibits contracting authorities (under penalty of up to 5% of the contract price) from entering into a public contract with an entity that is not recorded in this register although it is obliged to do so.

In addition, the law imposes on contracting authorities the **obligation to make references** according to a model form which are then collectively recorded in electronic form in a publicly accessible **reference register**, i.e. a public administration information system maintained by the Public Procurement Office. These references include, inter alia, assessment of the quality of performance according to the statutory criteria (e.g. early termination of the contract, the total delay on the part of the contractor, the number of reasonably submitted complaints) and the resulting score from 0 to 100. When assessing

the fulfilment of the conditions for participation in the procurement procedure, contracting authorities are obliged to take into account the reference in the reference register for the contractor.

Transparent platforms, whether created on a voluntary basis or with state support, may also be a good source of data. One of the measures with international success implemented in Slovenia to increase the transparency not only of public procurement but of public sector spending in general is the **ERAR web application** (formerly known as SUPERVIZOR, making it possible to search for data back to 2003), launched in an improved version in 2016. The application is managed by the Commission for the Prevention of Corruption, and it is also used to detect conflicts of interest and to indicate links between different entities involved in public procurement. It allows the general public, in a user-friendly form, to retrieve, download and analyse data in a machine-readable form, regardless of the specific data owner (data is collected from different sources, such as public administration information systems operated by various government bodies, e.g. the Ministry of Finance). The data in the application is transformed from primary sources to the application's own database. Most of the data is updated automatically, in some cases it must be imported manually (e.g. if the data is not provided in a machine-readable format, in the event of temporary outage of a primary source or if incorrect data needs to be corrected). In the event of data relating to public procurement, the data is obtained from the national public procurement portal (eNaročanje).

In addition, transparent platforms similar to the Slovenian ERAR platform, allow "additional" economic control by the general public and can be used as effective prevention against wasteful spending of public funds or can lead to detection of manipulative practices in connection with public procurement. However, the key is the quality of the data aggregated by the platform. With regard to the Czech environment, the zIndex platform can be mentioned, but it only works on a voluntary basis. There are also risks associated with transparent platforms operated on a voluntary basis, because (as opposed to platforms operated by the state) it may be problematic to ensure that data is updated regularly in the long run or there may be possible limitations due to the lack of financial or personnel resources.

Evaluate transparently

The tender evaluation phase is one of the key phases of public procurement and it is a test of accuracy and transparency of the setting of the tender evaluation rules in the procurement conditions. **Correct setting of the evaluation rules is also a basic prerequisite for processing a potentially successful tender.** In the case of multi-criteria evaluation, the requirement of compliance with the transparency principle needs to be related to the subjective evaluation criterion as a whole, including its sub-criteria and their individual content requirements.

In connection with potential corruption risks, it is advisable to focus on the **unambiguous specification of the rules for tender evaluation and the clear separation of responsibilities of individual persons within the internal rules of the contracting authority**. This measure can reduce the room for the opportunities for manipulative practices of the persons concerned and generally strengthen the transparency of the process. For all contracts, including those funded from the ESIF,

confirmation of the absence of conflicts of interest should be a rule before the assessment and evaluation of tenders is commenced, for example, based on the contracting authority's requirement to submit a statutory declaration of the absence of conflicts of interest. A suitable solution is also to explicitly reflect the requirements of the Public Procurement Act regarding conflicts of interest both in the procurement documents and in the contract with the selected contracting authority (subject to contractual penalty in case of breach).

An example of the conflicts of interest clause in procurement documents or, more precisely, in the contract for work for a construction project (State Transport Infrastructure Fund)

The contractor is under all circumstances obliged to prevent any conflict of interest and to prevent conflicting interests in construction design and management, in particular it must verify and ensure that none of its subcontractors or suppliers at the lower levels of the subcontracting chain, or any entity that is related to these entities in terms of assets in any way (e.g. in relation to these entities, it is a controlled or controlling entity within a single holding), which potentially prepares any project documents for the contractor, including construction implementation documents, or participates in its preparation in any way, prepared the project documents for the implementation of the construction at any time, made any design in any other way for the client in connection with the contract or supervised the project documents for the implementation of the construction. The contractor is under all circumstances obliged to verify and ensure that none of its subcontractors or suppliers at the lower levels of the subcontracting chain, or any entity that is related to these entities in terms of assets in any way (e.g. in relation to these entities, it is a controlled or controlling entity within a single holding), will exercise authorial supervision of the client or the function of the construction manager, including any assistants in relation to this contract.

Experience from abroad: Obligation to define and publish rules to deal with conflicts of interest in connection with public procurement

In connection with the obligation to prepare internal public procurement rules, the Estonian Public Contracts Act imposes an obligation on contracting authorities to define, as part of these rules, **measures relating to the prevention and identification of conflicts of interest and appropriate remedial measures**. If any contracting authorities do not reach the annual financial volumes subject to the obligation to prepare internal rules, the obligation is imposed on such contracting authorities (as a minimum standard) to adopt at least an internal regulation for the prevention and identification of conflicts of interest and appropriate remedial measures. It is also in this case that contracting authorities are obliged to publish the internal regulation.

It is also in this phase of public procurement that the contracting authority should use an active approach in connection with the **publication of all relevant data and supporting documents from tender evaluation**. The Methodological Guidelines of the Ministry of Regional Development of the Czech Republic can again be used as a minimum standard for the scope of published data for the

area of awarding contracts for the currently running programming period, not only for contracts subsidised from the ESIF.

Do not underestimate the quality of the terms and conditions of business

A well-written public contract is one of the other basic prerequisites for risk management in the implementation phase of the public contract. The vagueness of the individual contractual provisions allowing a double interpretation or leaving some issues crucial for the implementation of the project only to the application of the general legal regulation may entail various difficulties and lead to complications in the implementation of the project. The contract is often conceived as disadvantageous for the contracting authority, with a substantial part of the risk being transferred to the contracting authority. On the other hand, risks are sometimes unduly transferred to the contractor due to poor project preparation.

In a number of EU Member States, the practice of using internationally recognised, **model contractual terms and conditions**, based on, for example, the documents of the International Federation of Consulting Engineers (FIDIC), may be encountered in construction projects. The **higher degree of standardisation of contractual documents**, especially for **major or strategic public procurement** (e.g. in the construction sector), underlined by the **contracting authority's proactive approach** in connection with the implementation of the public contract, can offer the contracting authority the advantage of **optimising risk distribution**.

Experience from abroad: Standardised procurement and contracting rules for works contracts

In Germany, the law imposes an **obligation on contracting authorities to use the standard contractual terms and conditions of the VOB** (Construction Contract Procedures) **for public works contracts** issued in the form of national standards (DIN) by the German Institute for Standardisation. The standards are divided into three parts: Part A, regulating public procurement rules in accordance with EU procurement directives; Part B, regulating contractual terms and conditions within the individual construction regulating the contractual terms and conditions of the individual phases of construction; and Part C, concerning technical standards. The advantage of using standardised contractual terms and conditions may also be the so-called VOB/B privilege, granted to these conditions by the German Civil Code. Indeed, if standardised contractual terms and conditions are used unchanged, there is no need to be reviewed by court, because they are deemed fair and balanced by courts under the law.

The use of international contractual models in the construction sector in the construction of the Campus athletics hall in Brno-Bohunice

In 2015, the Statutory City of Brno, Masaryk University and the Czech Athletics Federation signed a Memorandum on Mutual Cooperation and Support, Construction and Operation of the Athletics Centre – Athletics Hall in Brno. The implementation of the athletics hall construction project is based on the Concept of the City of Brno in the area of physical education and sports for the period 2011–2016, and the hall should meet the criteria of the International Association of Athletics Federations, including the use for national and international competitions. The project is implemented in accordance with the conditions of the FIDIC Yellow Books (based on the Design-Build principle). This procedure allocates a substantial part of the risk to the contractor, which is responsible for the project documents and implementation of the work according to the specific requirements of the contracting authority (client). The selected contractor will have 35 months to complete the construction, including the issue of the zoning decision and the building permit, and the actual construction of the hall will be carried out under the contract in 19 months. The contract price is almost CZK 650 million (exclusive of VAT). The award of the hall design and construction contract was preceded by a preliminary market consultation and, in addition to the price, the quality criteria were used in the evaluation of the tenders (not only the time limits or the duration of the guarantee period, but also the consideration of the annual energy costs and annual CO_2 production).

It is because of the transparent redistribution of risks between the client and the contractor, the transfer of responsibility for the project documents to the contractor and the higher certainty in compliance with the tender price that the Statutory City of Brno agreed to use the model contractual terms and conditions of the International Federation of Consulting Engineers (FIDIC). In deciding on the type of the contractual relationship being concluded, the Statutory City of Brno also took into account the facts that the FIDIC model contractual terms and conditions are applied in more than half of the world construction projects and that many world banks and investors make their financing of large construction projects conditional on the use of the FIDIC contractual terms and conditions. Another important goal in using the FIDIC Yellow Book was to shorten the entire construction process, because a common contractor was selected in the procurement procedure for both the design part and for the construction itself.

It is difficult to evaluate the decision to apply the FIDIC contractual terms and conditions until the contract has been performed, but given the aforementioned attributes of these contracts, such as transparency and balance, we would not change our decision.

We would like to advise other contracting authorities not to be afraid to go beyond the "Czech territory" in procuring construction projects for large constructions and, as other major contracting authorities in the Czech Republic have done, to start using these or other internationally recognised contractual standards.

Ing. Karel Vlček, Head of the Department of Preparation and Construction of Building

Structures of the Brno City Hall

Introduction of the Building Information Modelling (BIM) principles in public procurement

The open standard of data and workflows in the design, construction, operation and management of buildings, i.e. throughout the construction life cycle, is enabled by the BIM tools. Section 103 (3) of the Public Procurement Act provides contracting authorities with the possibility to use **special electronic formats** for public works contracts, project activities or design contests, including **building information modelling**; in such a case, the contracting authority is obliged to specify the requirements for the content, structure or format of the data or, as the case may be, to provide the contractors with access to these formats. According to the Ministry of Industry and Trade of the Czech Republic, which is responsible for the introduction of BIM in the conditions of the Czech Republic based on the government-approved Concept of Introducing the BIM Method in the Czech Republic, the BIM method represents a **basic condition for the digitisation of the construction sector, increase in productivity, innovation and competitiveness of this sector**. From 2022 onwards, the obligation to use the BIM method should be imposed for above-threshold public works contracts financed from public budgets and for the preparation of their preparatory and project documents.

At present, one of the pilot projects of public procurement using the BIM model is the **construction of the new Supreme Audit Office headquarters**, which aims to build a **model state administration building**. In the long term, the Supreme Audit Office, in cooperation with the Czech Technical University experts, evaluated the construction of the new headquarters as the most economical and efficient solution. The pilot project is to verify the conditions for modern, economical and efficient operation of buildings using the BIM tools or to test the choice of the construction contractor based on the lowest life cycle costs of the building. The costs of the construction of the new headquarters should not exceed CZK 689 million. In the summer of 2018, a preliminary market consultation was conducted on the intention of the construction. The implementation should take place from May 2019 to September 2021, after which the building should also be operated using BIM. The building will include a library and archive of the Chamber of Deputies of the Czech Republic. In view of the absence of any Czech contractual standard, the Supreme Audit Office decided to apply the FIDIC standards, which are recognised internationally.

4. AFTER AWARDING A PUBLIC CONTRACT

In the contract implementation phase, emphasis should be placed on the successful completion of the project in accordance with the procurement conditions, for which the contracting authority should rely on the contractual terms and conditions accepted by the selected contractor. Impacts caused by insufficient regulation of risk management in the contract may also be manifested in this

phase of the public procurement cycle. As a result, there may be significant lags or delays compared to the originally set schedule or a significant increase in the contract implementation costs due to changes, which, however, should have been potentially anticipated by the contracting authority and reserved in the contract. Failures are often caused by insufficient or absent project management of the public contract, whether in terms of time, costs, changes or responsibility of the stakeholders.

Since the Public Procurement Act does not regulate the rules for the implementation of specific changes to commitments in more detail, **it is appropriate to have at least a framework specification of these rules in the internal regulations of the contracting authority**. For works contracts in transport infrastructure, the methodology of the State Transport Infrastructure Fund for managing work changes (variations) in works contracts can be used as an example.

Standardisation of the rules for changes to commitments in internal regulations

The internal public procurement rules used by the district of Prague 7 set a minimum time limit for submitting a request for an insignificant change to the commitment, namely at least 14 calendar days before the expiry of the validity and effect of the relevant contract. In addition, the internal regulation unifies the model document for submitting a request for the implementation of such change, including a request concerning annexes (e.g. change sheets including recapitulation confirmed by the technical supervision of the construction in the case of works contracts). The individual changes must be described in more detail, and their estimated value (readings/additions) must be quantified, including the repeated recapitulation of the total price of the performance including the changes in question. Enclosed with the request is also the handover report.

PART II: RISK MANAGEMENT AND RISK AREAS OF PUBLIC PROCUREMENT

1. THE REASONS FOR RISK MANAGEMENT IN RELATION TO PUBLIC PROCUREMENT

Reducing the risk of suspension of drawing funds

In connection with the implementation of projects co-funded from the ESIF, the public procurement phase forms one of the key process phases. KPMG's April 2012 analysis assessing the experience from the 2007–2013 programming period shows that breaches of public procurement rules are one of the areas with the highest risk in project preparation and implementation. Such misconduct may ultimately jeopardise the very EU funding of the project itself. Due to concerns about the **failure to draw the allocated funds within a specific programming period**, a number of projects are implemented in haste at the end of the programming period, which increases the risk of errors in procurement procedures. As the probability of occurrence and the impact of risk in public procurement are higher for the aforementioned reasons, the public procurement process is one of those project phases that risk management should focus on.

In addition, it should be noted that the drawing of EU funds should not only be quantified and measured as to whether all or only a part of the funds have been drawn, but each contracting authority should primarily consider whether these funds will be spent effectively.

Compliance with the 3E principle

In addition, potential failure of management and control mechanisms leading to a serious breach of public procurement results in public funds being used contrary to the 3E principle, i.e. the principle of economy, effectiveness and efficiency. According to the report of the Association of Certified Fraud Examiners (ACFE), financial losses caused by fraud may reach up to 5%.

Reducing the error rate and complications of the project and increasing the efficiency of, not only, public procurement

Deficiencies in project planning or preparation coupled with misconduct in the public procurement process can in many cases be reflected in increased occurrence of complications. However, most of these complications can be predicted to some extent, or at least their potentially negative impact on timely and proper completion of the project can be minimised. In addition, better project planning and preparation, including risk management, can increase the efficiency of the organisation's functioning and use of public funds.

Preventing fines and the need for remedial measures

At the administrative law level, the most serious breaches of public procurement rules can be qualified, for example, as offences within the meaning of the Public Procurement Act, where the Office for the Protection of Competition is responsible for the execution of supervision. Depending

on the severity, the breach of the rules is punishable by a fine of up to 10% of the price of the public contract or CZK 20 million. In addition, the effect of remedial measures, which may have a greater impact than the imposition of the fine itself, for example, the imposition of a prohibition on performance of the contract (Section 264 of the Public Procurement Act), should also be mentioned.

Beyond the execution of supervision by the Office for the Protection of Competition, a breach of the public procurement rules by the relevant grant provider may be assessed as a breach of budgetary discipline within the meaning of the budgetary rules (Act No. 218/2000 Coll.), punishable by the imposition of a payment by the relevant tax office. Moreover, the institute of breach of budgetary discipline is broader in content than the institute of offence within the meaning of the Public Procurement Act.

Preventing financial corrections

In the case of contracting authorities' misconduct restricting competition or breaching the principles of transparency and equal treatment, resulting in favouring one of the contractors at the expense of other tenderers, the amount of the financial correction may be as high as 100%. The highest level of financial correction will also be applied in cases where the breach occurred due to fraudulent practices on the part of the contracting authority or the beneficiary of the subsidy.

Examples of the most serious types of breaches of public procurement rules with the possibility of 100% financial correction

Procurement procedure phase	**Type of breach**
Contract notice and procurement conditions	Failure to publish or send the procurement procedure notice
	Artificial division of the subject of the public contract
Tender assessment and evaluation	Conflict of interest
Contract performance	Significant change in the commitment under the contract performance
	Award of additional works, services or deliveries without the existence of reasons or in excess of 50% of the original contract

Source: *Methodological Guidelines of the Ministry of Regional Development of the Czech Republic for Public Procurement for the 2014–2020 Programming Period*

Preventing criminal sanctions

For the most serious breaches associated with deliberate manipulative practices, it cannot be ruled out that criminal sanctions will not be applied; a criminal sanction imposed on the territorial self-governing unit itself (municipality or region) as a legal entity, which is excluded from the scope of the aforementioned Act only in the exercise of public authority, cannot be ruled out either.

It is a criminal offence that is endangering by its nature, because it is not necessary to be completed to produce a harmful effect (enrichment and causing damage to another person's property), but it is sufficient if only the possibility for the emergence of a harmful effect, which does not have to occur, is created. The possibility of joinder with other criminal offences, including bribery or abuse of the authority of an official, is not ruled out either.

An example of a joinder of the criminal offence of damage to the EU's financial interests (Section 260 of the Criminal Code) and the criminal offence of subsidy fraud (Section 212 of the Criminal Code)

At the contact workplace of the Labour Office of the Czech Republic, in relation to his request for payment of the price of the selected retraining course Group D Driving Licence, submitted as part of the "Education and Skills for the Labour Market" project within the Human Resources and Employment Operational Programme, financed from the European Social Fund (85%) and from the state budget of the Czech Republic (15%), the defendant personally submitted a psychological opinion designated as "Transport-psychology examination accredited by the Ministry of Transport of the Czech Republic", whose positive result was a necessary condition for approval of his request, although he had never undergone any such examination and, therefore, knew that the submitted opinion was a counterfeit and, for the purpose of drawing funds for the retraining course, a false document; the incorrect use of funds from the state budget of the Czech Republic and the budget administered by the EU in the total amount of CZK 18,000 was only prevented because, due to the doubts a labour office worker, this counterfeit psychological opinion was revealed. A total sentence of two years of imprisonment was imposed on the defendant.

Source: *Judgement of the Supreme Court of 2 December 2015, Ref. No. 5 Tdo 109/2015*

Preventing negative impact on the contracting authority's reputation and credibility

The contracting authority's reputation and credibility may also be significantly affected by the media coverage of misuse of funds from the ESIF or breach of subsidy rules. In this regard, the long-term unsatisfactory perception of EU funds among the general public can be pointed out, because the positive benefits of this important source of project funding are often overshadowed by more newsworthy cases of misconduct or fraudulent practices in connection with the drawing of funds.

2. THE CZECH RISK MANAGEMENT FRAMEWORK

The basic legislative framework for risk management in public administration is provided by the **Financial Control Act (Act No. 320/2001 Coll., as amended)**, which lays down the rules for the management and control of the use of public funds in order to protect them from wasteful use. Financial control within the meaning of the Financial Control Act consists of a system of public administration control, control under international treaties and an internal control system. From the viewpoint of contracting authorities, the basic prerequisite for successful risk management is the **efficient setting of the internal control system**, depending on the nature of the activities carried out by the organisation concerned.

Risk management is one of the management and control mechanisms whose introduction and maintenance is the **primary responsibility of the chief public authority** under the Financial Control Act; in the case of territorial self-governing units, it is typically the mayor of the municipality (lord mayor of the statutory city) or the director of the regional authority. If the internal control system is set up correctly, it should be able to identify, evaluate and minimise in a timely manner the operational, financial, legal and other risks arising from the fulfilment of the approved intentions and objectives of the organisation concerned.

Within their defined duties, powers and responsibilities, the **managers of the public authority** are those who are obliged by the Financial Control Act to ensure the functioning of the internal control system and to provide the top management with timely and reliable information on significant risks and remedial measures taken. The responsibilities of the chief public authority include the obligation to ensure **preliminary control** of the planned and upcoming events.

It is already **before the organisation's commitment is established** that the **originator of the operation** (i.e. the organisation's management or, as the case may be, authorised managers) is responsible, within preliminary control, for checking the correctness of the procedure and meeting the public procurement requirements, including achieving the optimum relationship of economy, effectiveness and efficiency of the operation in question. The Financial Control Act or, more precisely, its implementing decree envisages, in connection with the public procurement process, a clear division of responsibility within the organisation, according to the individual approval phases. An integral part should also be the **separation of the responsibility for the individual activities** within the public procurement process (four eyes principle), in particular the responsibility for the activities related to the procurement procedure administration, from control activities. However, it also happens in practice that the entire process of administration and implementation of a public contract is only perceived by the managers or management of the organisation as an excessive administrative burden or as another formality without any link to their personal responsibility. As a result, there is an undesirable separation of the management control process from real management and decision-making on the use of public funds.

Weaknesses of the current financial control system

The explanatory memorandum to the unapproved government bill on management and control of public funds assessed the current financial control system as relatively complex and rigid, often not enabling to efficiently cover and respond to the risks associated with the use of public funds that would correspond to the functioning and organisational structure of a particular organisation (e.g.

the obligation to set up an internal audit is automatically imposed on municipalities with more than 15,000 inhabitants, irrespective of, for example, the budget of the municipality, the number of employees or the amount of subsidies. It is not uncommon that in practice it is preferable to pursue a mere formal fulfilment of the letter of the law, irrespective of the purpose of the functional control system, which should be a clear division of tasks and responsibilities in the decision-making processes to ensure that the public funds are used in accordance with the 3E principle. **Unclear division of responsibilities** contributes to a **greater probability of the occurrence of risk** and associated negative impacts.

In addition, the effectiveness of control mechanisms is significantly weakened in practice by some external factors, such as the **occurrence of undesirable duplicate controls** (in the case of drawing EU funds, however, the real possibility of limiting these duplications is minimal) or differences in the control conclusions of the individual control authorities. The absence of more active sharing of results from control activity between and among the individual control authorities in practice mutually reduces the full application of the **single audit principle**, which should aim at reducing duplicate controls, thereby reducing the administrative burden for both the controlled entities and control authorities.

Case study of non-compliance of control conclusions

Based on the findings of the audit authority, the Ministry of Regional Development of the Czech Republic submitted a complaint to the Office for the Protection of Competition to review the contracting authority's conduct in the procurement procedure. The Office stated that, following an enquiry into the facts set out in the complaint, no reasons were identified for initiating an administrative procedure. The tax authority, in agreement with the audit authority, found that the taxpayer did not respect, and breached, the principles of transparency, equal treatment and non-discrimination when awarding the public contract, namely by:

a) not assessing the changes in the procurement documents consisting in tightening and extending the requirements for proving the fulfilment of the tenderer's technical and qualification requirements and extending the subject of the performance of the public contract;

b) not using the possibility under Section 59 (4) of the Public Contracts Act and not requiring all excluded tenderers to clarify the submitted information or documents or to submit additional information or documents proving the fulfilment of the qualification even though one tenderer, excluded for submitting an incomplete tender, was returned to the procurement procedure after the contracting authority's decision was objected to and the tender was additionally supplemented;

c) requesting a specific type of authorisation in a discriminatory manner to prove the qualification requirement even though contractors from other countries are not obliged to apply for a permit in the Czech Republic to perform the given service. In the event that a person wishing to participate in the performance of the contract applied for an authorisation, it could not, in due time, meet the contracting authority's requirements due to the time limit for submission of tenders (55 days), which did not take into account

the time limit for the issue of the authorisation in question (60 days). This limited the participation of potential candidates from other countries. Although the Office for the Protection of Competition did not initiate administrative proceedings, it was stated that a breach of budgetary discipline had been committed.

Source: *Ministry of Finance's analysis on the system of controls of territorial self-governing units (2017)*

3. RISK MANAGEMENT FROM THE PERSPECTIVE OF EU LAW

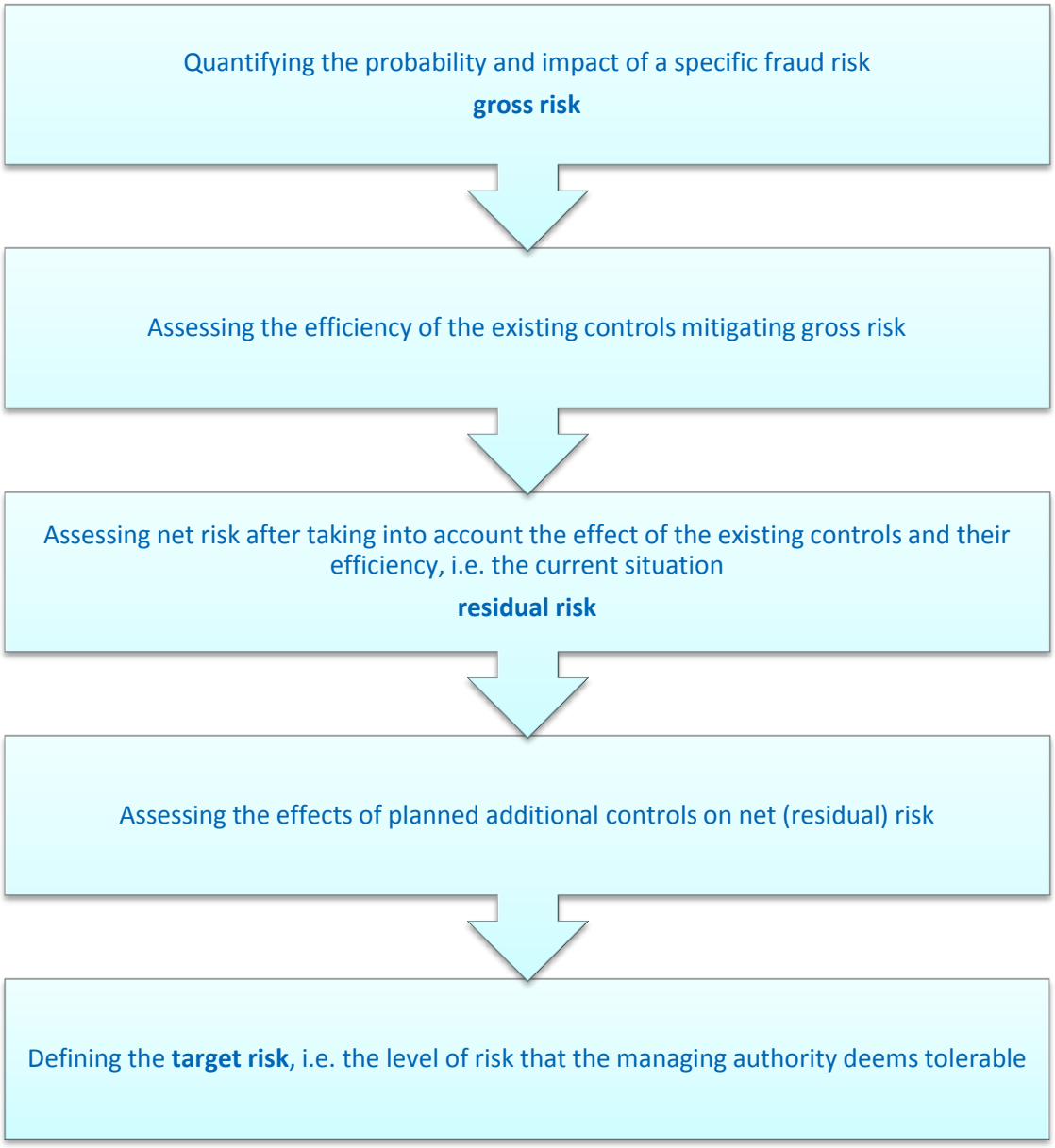
The primary responsibility for protecting the EU's financial interests in relation to activities funded from the EU budget lies with the individual Member States, which are **obliged to prevent, detect and correct discrepancies and fraud**. This also implies the obligation of regular controls in relation to the implementation of projects financed from the ESIF, recovery of payments unduly made, and setting of sufficiently effective, dissuasive and proportionate sanction mechanisms.

Furthermore, within the general principles of management and quality systems, the aforementioned obligation in relation to the ESIF is generally regulated in the General Regulation (Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006). The key role in financial management and control aimed at effective, efficient and economical use of EU funds at national level is played by the **managing authorities of the individual operational programmes** whose responsibilities are defined in Article 125 (4) of the General Regulation. In relation to the drawing of ESIF funds, the Commission places **emphasis on identifying and managing the risks associated with fraudulent practices by stakeholders**. In addition to the obligation to verify compliance with the applicable legislation, the conditions of the operational programme concerned and the specific conditions for granting a subsidy in implementation of projects co-financed from EU funds, each managing authority is obliged to **introduce effective and proportionate anti-fraud measures taking into account the identified risks**.

Further guidance in this regard is provided by the Commission's Fraud Risk Assessment and Effective and Proportionate Anti-Fraud Measures (2014), which also place a special emphasis on the public procurement process. The Commission calls on individual managing authorities to pursue an **active, structured and targeted approach to fraud risk management**. The risk assessment tool developed by the Commission serves to **self-assess the risks of fraud** by the managing authority concerned in order to specifically assess the probability and impact of these risks within all key procedural phases associated with the implementation of a specific project co-financed from EU funds, namely:

- selection of the applicant;
- performance and verification of operations;
- certifications and payments.

The Commission's risk assessment methodology consists of five main steps:



However, the above fraud risk (self-)assessment tool must be seen in the broader context of establishing a general framework for effective and proportionate anti-fraud measures, as required by the General Regulation. In this regard, within its instruction, the Commission calls for the **implementation of the structured approach**, from the establishment of a general anti-fraud strategic framework (policy) to effective preventive measures (e.g. creating an ethical culture through codes of conduct, clear division of responsibilities, regular training and raising awareness both inside and outside the organisation, functional internal control mechanisms and the use of analytical tools such as ARACHNE) to early detection and punishment of offenders, including clear conclusions on identified shortcomings and possible lessons, specific measures, responsible persons and time limits.

4. RISKS IN PUBLIC PROCUREMENT

Recurring misconduct in public procurement

The Czech Republic has been dealing with a number of cases of misconduct in public procurement for several years. Given that the new law (Public Procurement Act) came into effect approximately two years ago, it would be premature to assess whether the new legislation has a positive effect on the prevention of misconduct in procurement procedures. Therefore, the question remains to what extent some of the below-mentioned cases of misconduct will continue to be a phenomenon of Czech public procurement.

According to the control authorities' data published in the annual report on public procurement in the Czech Republic in 2017, the following cases of misconduct **are the most frequent shortcomings in public procurement**:

- public procurement without open competition or, as the case may be, non-transparent direct award to selected contractors;
- calculated division of the subject of the public contract with the aim to implement it under less stringent conditions (as a small-scale or below- threshold contract);
- insufficient or too narrow definition of the subject of the public contract or, as the case may be, vague or ambiguous specification of the procurement conditions;
- insufficient competitive environment in the procurement procedure or, more precisely, breach of the prohibition of discrimination or the principle of equal treatment, in particular the occurrence of "tailor-made" contracts, discriminatory setting of qualification requirements, non-exclusion of a tenderer for failure to meet the qualification requirements and subsequent conclusion of a contract with this tenderer or, on the contrary, unlawful exclusion of a tenderer.

Closed procedures in public procurement, in particular direct award or repeated and unreasonable inviting of the same, narrow range of contractors to tender or frequent use of negotiated procedure without publication, **restrict competition and do not guarantee economic advantageousness**.

Negotiated procedure without publication

For several years, control authorities have been negatively assessing the **frequent use of the negotiated procedure without publication**, often without meeting the statutory reasons for its use, such as extreme necessity or technical reasons, or, in ICT contracts, the situation of objectively provable incompatibility of systems or operational problems. The Czech Republic has also long been criticised for the excessive use of this type of procurement procedure by the Commission. One of the indicators of the "healthy" competitive environment in the Member State is the use of procurement procedures that do not restrict competition between and among contractors.

A common reason for using the negotiated procedure without publication is **to protect contractors' exclusive rights, including intellectual property rights**. This is typical in ICT public contracts: for example, technical support for software is awarded to the same contractor which provided the software. In the case of chaining public contracts to the same contractor, an undesirable **vendor lock-in effect** may occur, i.e. creating exclusivity for the selected contractor.

Another legal reason for using the negotiated procedure without publication is the **existence of an extremely urgent circumstance** which the contracting authority (objectively) could not foresee, nor did it cause such a situation by its actions or omissions. Extreme necessity is connected with the condition of time pressure, i.e. the impossibility of the contracting authority to comply with the statutory time limits for another type of procurement procedure, more transparent in nature. Only performance directly related to remedying the situation caused by extreme urgency may be the subject of such a public contract. The extension of the subject of the public contract with performance which is not strictly necessary for this purpose can be regarded as an unjustified use of this type of procurement procedure. Therefore, if the contracting authority also procured replacement of the windows of the building concerned due to extreme necessity caused, for example, by broken water pipes, it would not meet the condition for awarding the contract in the form of negotiated procedure without publication.

Small-scale public procurement

Another problematic area of Czech public procurement that has not been addressed for a long time is small-scale public procurement. More detailed modification of the rules for awarding small-scale public contracts is left to the discretion of individual contracting authorities, namely through their internal rules. Exceptions are small-scale public contracts co-funded from the ESIF or other subsidies where the beneficiary is obliged to proceed, from a procedural point of view, in accordance with the Methodological Guidelines of the Ministry of Regional Development of the Czech Republic for Public Procurement for the current programming period. The Public Procurement Act, with some exceptions concerning obligations outside the procurement procedure, only generally stipulates the obligation to comply with the **general principles for the contracting authority's procedure within the meaning of Section 6 of the Public Procurement Act** in their procurement. As pointed out by some supervisory authorities, this is negatively manifested in **frequent errors in their procurement**. Moreover, the situation is complicated by the absence of a legal framework for effective control of individual procedures in small-scale public procurement (e.g. by the Office for the Protection of Competition).

Setting risk management rules before commencing a public procurement process

For more complex projects, the Commission highlights a proactive approach to risk management as best practice. This is linked to the requirement that a **list of risks** (related to a specific contract) and a **contingency plan** be created in an early phase of the public procurement cycle which should be **regularly updated** during project implementation.

In connection with the **risk assessment to establish a list of risks**, all project-related risks should be identified and quantified, and the probability of their occurrence (high/medium/low) and their impact on the contracting authority's activity concerned (significant/medium/low) should be assessed. The importance of evaluating the risks associated with project financing should not be overlooked either. This should allow the contracting authority to choose appropriate **measures (strategies) against the risks** associated with project financing, for example, to consider the assumption of risk, reinforce preventive measures or, as the case may be, appropriately reallocate them among the contracting parties, or transfer the risks to a third party, e.g. by insurance, or decide that the project will not be implemented at all due to the significance and impacts of the risks. In addition to laying down the obligation for the individual persons responsible for the individual risks

assigned to them, the risk management strategy chosen should include a schedule for their implementation. As pointed out by the Commission, when drafting a list of risks, the contracting authority should **take into account the broader context of the functioning of the organisation as a whole**, including other factors, such as risks associated with the organisation's other activities, the contracting authority's priorities or strategies (e.g. anti-corruption strategy or objectives in responsible procurement defined by the contracting authority), links to the contracting authority's other contracts or, as the case may be, projects and possible impact on their implementation, the need to ensure the continuity of the organisation's activities, the current status of the contracting authority's assets, etc.

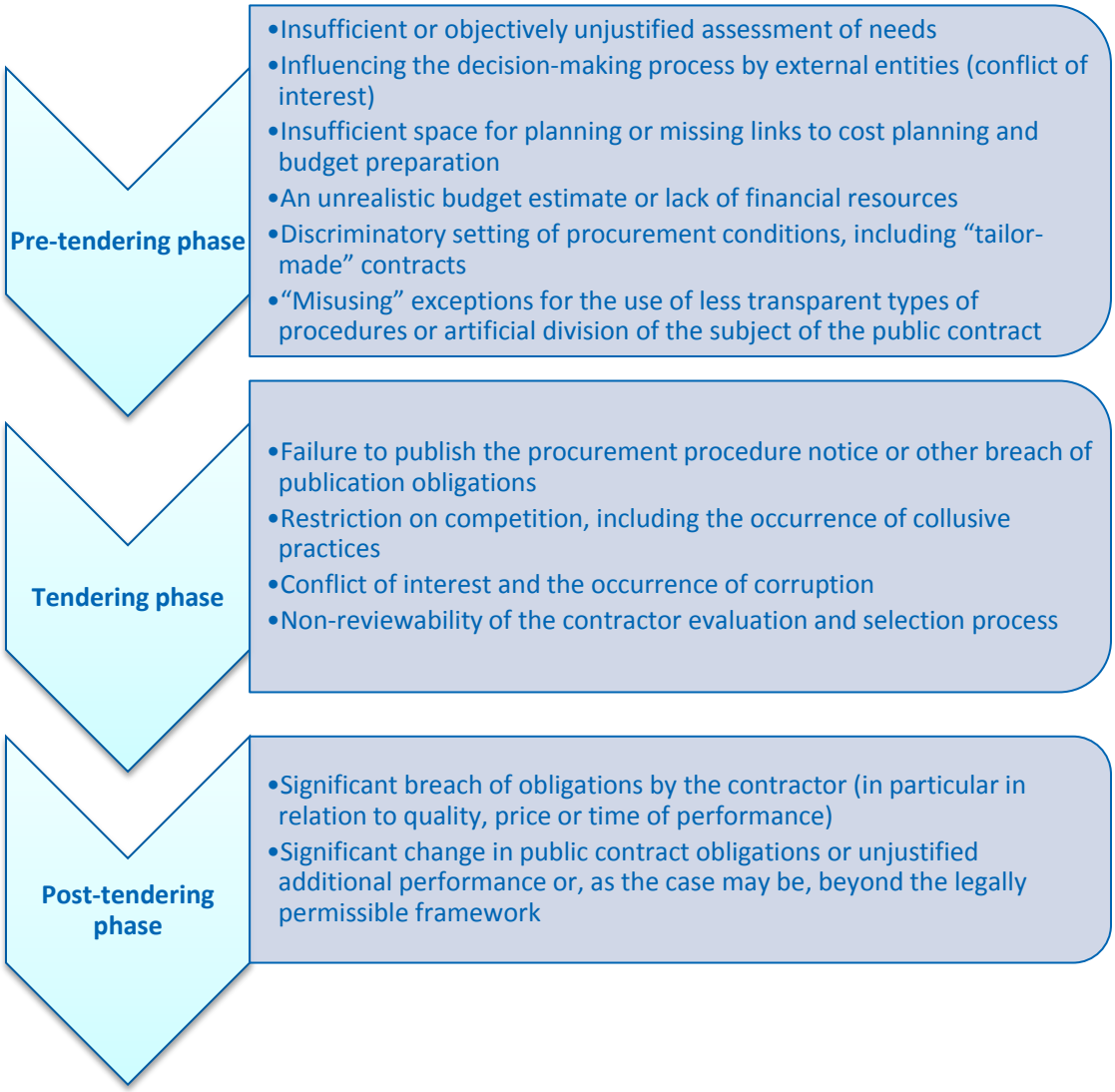
In view of the fact that the contracting authority is not able to cover all the facts that may arise in project implementation, it is also necessary to consider the **preparation of a contingency plan for dealing with unforeseen events** that are beyond the control and fault of the contracting authority (typically obstacles caused by force majeure). The plan should also include appropriate measures or, more precisely, **scenarios** for these situations, as well as allocations of responsibility for reimbursement of unforeseen expenses that may arise in relation to them. In the event of emergency, the contracting authority should be able to identify the key operational functions of the organisation whose continuity should be maintained even in such cases. The contracting authority should also reflect those measures identified in the contingency plan in the procurement conditions or, as the case may be, in the draft contract with the selected contractor.

The following part of the publication deals with **specific risk areas in the individual phases of the public procurement process**.

The OECD divides the public procurement cycle into **three key phases**:

- pre-tendering phase
- tendering phase
- post-tendering phase

Overview of risks to integrity in public procurement (OECD)



Source: *Prepared and modified on the basis of the "Preventing Corruption in Public Procurement" document (OECD, 2016)*

4.1 RISK AREAS IN THE PRE-TENDERING PHASE

Failure to ensure consistent and professional preparation of the public contract often leads to significant misconduct that cannot be removed in subsequent phases of the procurement procedure. However, if sufficient time is devoted to project planning and preparation, the contracting authority may, in many cases, anticipate some of the risk aspects and take their impacts into account, whether in the schedule or in the budget reserved for the project (e.g. by incorporating a certain **time reserve** in the schedule, specifying the conditions under which the contracting party concerned is entitled to use such reserve, or by setting an **adequate financial reserve** by the contracting authority, where the conditions of its use are also agreed in advance with the financing institution). Ideally, based on its previous experience, a prudent contracting authority should **reserve as many potentially foreseeable and recurring changes as possible in advance** in the procurement documents and in the agreement for the public contract.

The Public Procurement Act pays crucial attention to binding, formal procedures only in the public procurement process itself. Therefore, in particular the **general principles of public procurement, i.e. the principles of transparency, equal treatment, proportionality and non-discrimination**, can be seen as a guiding principle in the preparatory phase. Above and beyond the framework of the principles explicitly specified in the Public Procurement Act, the main purpose of public procurement, namely the obligation to take into account the economic aspect of the use of public funds, i.e. **compliance with the 3E principle**, namely **economy, efficiency and effectiveness**, should not be omitted either. The contracting authority should therefore support the implementation of any purchase with a **real and objective assessment of needs**, both from the factual and temporal perspective (urgency of the need).

Definition of the subject of the public contract

The correct and unambiguous definition of the subject of the public contract and the selection of an adequate type of procurement procedure are key prerequisites for the implementation of the 3E principle in practice.

A definition of the subject of the public contract that is too broad prevents some contractors which would otherwise be able to carry out the required performance from participating in the procurement procedure and may therefore constitute an unlawful restriction of competition. An objectively unjustified narrowing of the circle of potential contractors is usually assessed as an unlawful restriction of the competitive environment and is therefore considered to be a **hidden form of inadmissible discrimination**.

> **An example of breach of the principle of non-discrimination**
>
> **(subject of the public contract defined too broadly)**
>
> The contracting authority awarded a contract for the purchase of hospital instrumental equipment (digital mammography equipment, CT equipment and pulmonary ventilator). The delivery of these instruments does not have to follow each other, since each of them is able to work and be operated independently and is designed for different patients. Therefore, by their nature, these are different performances which are not related to each other. In addition, the contracting authority did not allow submitting tenders for parts of the performance without an objective reason, making it impossible for those contractors which would be able to submit tenders for the delivery of individual instruments but unable to deliver all three instruments at the same time to tender for the contract. This led to an unjustified restriction of competition, which could have affected the course of the procurement procedure and hence the selection of the best tender.
>
> ***Source:*** *Judgement of the Supreme Administrative Court of 3 September 2015, Ref. No. 3 As 212/2014-36*

With regard to the definition of the subject of the contract and its presumed value, misconduct consisting in **artificial or, more precisely, calculated division of the subject of the public contract** can be encountered in the Czech environment the purpose of which is to circumvent the statutory obligations and to implement the contract as a small-scale public contract or at least as a below-threshold public contract under "softer" conditions.

In the event that the contracting authority requests a set of relatively independent performances, the key aspect will be a thorough **evaluation of the local, temporal and factual connections of the performance of the public contract**. As stated by the Supreme Administrative Court, if the contracting authority procures **performance which is the same or similar in nature** (e.g. the same or comparable type of performance executed for the same contracting authority in the same period of time and under the same conditions), it must procure such performance as a **single public contract**.

An example of artificial division of the subject of the public contract

A contracting authority divided the performance into two separately procured performances (reconstruction of the building, delivery of an outdoor lift for this building) in a small-scale public contract regime without taking into account the factual and functional connection of these performances. However, both contracts were based on a single goal of providing barrier-free access to all floors of the building. It was not decisive whether it was a secondary or principal objective for the contract in question. In addition, the lift was to be implemented simultaneously with the overall renovation of the building. The resulting construction (increased by one floor), including the lift, must be considered as a single functional unit. Therefore, both public contracts (or, as the case may be, parts of a single public contract) are closely related factually, economically and functionally. Although this type of misconduct has been abandoned in practice, the automatic division of the contract with performances differing in nature (works versus delivery) was not exceptional.

Source: *Judgement of the Supreme Administrative Court of 17 September 2015, Ref. No. 7 As 211/2015-31*

An example of artificial division of the subject of the public contract in terms of territoriality

In the course of the second half of 2009, the contracting authority entered into 14 (partial) small-scale contracts (the position of regional coordinator for conducting prevention in the area of road safety and traffic education) for the individual regions of the Czech Republic, thereby reducing the expected value below the statutory threshold. Although the contracting authority justified the division of the subject of the contract by the territorial specifics of the individual regions, the Supreme Administrative Court pointed out the single aim of the contracts, namely to ensure the selection of the regional coordinator for the individual regions. However, the procured performance was almost identical in nature (the main text was identical for all contracts and the differences in the annexes were only minimal; they consisted, for example, in a different number of entities cooperating with the coordinator in the given region). Therefore, the contracts were closely related to each other and should have been awarded as a single contract. As the Supreme Administrative Court pointed out, if the contracting authority considered it more effective to divide the contract so that regional companies could also tender for its individual parts, the contracting authority should have added up the total value of all partial performances when dividing the contract into parts.

Source: *Judgement of the Supreme Administrative Court of 15 August 2018, Ref. No. 10 As 94/2017 – 39*

Cases of **circumvention of the Public Procurement Act through lease agreements** can also be encountered in practice. Contracting authorities should be particularly vigilant in cases where the lease agreement obliges them, as lessors, to provide a consideration or a rental discount for the performance provided by the lessee – for example, due to the reconstruction of the subject of the lessee's lease where, depending on the circumstances of the case concerned, redemption of the cost of the reconstruction in rent payments can be viewed as repayment of the price of works by the lessor (contracting authority) to the lessee.

Specification of procurement conditions

In 2012, a transparent amendment to the Public Contracts Act introduced, inter alia, stricter rules for setting technical qualification requirements. Within the economic justification of the contract, an obligation was imposed on contracting authorities to justify the adequacy of their requirements for contractors, including the evaluation of the number of contractors that would potentially be able to deliver the performance required by the contracting authority. A frequent indicator of **"tailor-made" contracts** is that the **technical conditions are set as too narrow** to guarantee an unjustified competitive advantage only for some contractors.

Below is an overview of some of the warning signals potentially indicating a "tailor-made" contract:

- relatively unusual or unjustified technical requirements without connection to the contracting authority's specific need and the subject of the public contract concerned;
- the wording of the technical requirements that is too detailed or restrictive, without any justification by the subject of the public contract;
- the contract is awarded in a less transparent type of procurement procedure or, as the case may be, in the form of direct award;
- only one tender is submitted in the procurement procedure or, as the case may be, interest is expressed by a minimum number of contractors in a sector where the level of competition is not low;
- a greater number of objections from multiple tenderers pointing out biased setting of the technical requirements;
- potential existence of a conflict of interest or existence of links between the contracting authority and the selected contractor or, as the case may be, subcontractor;
- a reference to the specific technical specifications of the manufacturer's particular product without allowing equivalent performance.

The last case of misconduct mentioned above may not always indicate deliberate fraudulent practices, but may be caused by the contracting authority's efforts to obtain a product which it has been "used to" and which has been sufficiently tested by the contracting authority. Alternatively, such misconduct is due to insufficient competence of the persons responsible for preparing the technical specifications of the procurement documents.

Another cause of misconduct in the public procurement process is often the **lack of experts to be used by the contracting authority**. As a consequence, some of the indicators of "tailor-made" contracts may be manifested without the contracting authority intending to reserve the contract for a particular contractor. Less qualified employees may not be well acquainted with the technical parameters of the required performance and, as a result, are unable to sufficiently define the subject of the public contract. This leads to failures where, in order to simplify their work or not to forget any of the important parameters of the product, authorised persons simply copy the parameters of the particular device in the procurement documents from the instruction manual currently used by the contracting authority. **Failure to become acquainted with the current offers in the market** or, as the case may be, **inadequate or purely formal market research** also lead to failure to prevent situations where the contracting authority requires the supply of goods that are no longer available on the market and is not informed of this fact until objections to the procurement documents are raised by potential contractors. Similar cases of misconduct may also occur as a result of a long, **administratively demanding internal process of approving the procurement documents by the contracting authority**. Particularly complex public contracts may rotate around individual departments for several years, resulting in the wording of the procurement documents with an outdated definition of the needs or demand for outdated technologies or procedures.

Another risk area is the preparation and formulation of tender evaluation rules, in particular **illegal or non-transparent setting of evaluation criteria**, including their unclear wording in the procurement documents. In the case of tender evaluation based on the economic advantageousness, the procurement documents must include, in addition to the form of tender evaluation and the specification of the selected evaluation criteria, the method of evaluating tenders in the individual criteria (i.e. the contracting authority's preferences) and the weight or other mathematical relationship among these criteria. The rules for tender evaluation should be based on the subject and the overall nature of the particular public contract and, in the case of multi-criteria evaluation, should allow the contracting authority to select a contractor which is able to implement the subject of the public contract under the most advantageous conditions in terms of price, quality and deadline of the implementation.

The Commission has been criticising the Czech Republic for choosing too often the only criterion for evaluating tenders, namely the lowest tender price. According to the Commission's data, the criterion of the most economically advantageous tender was only used in 18% of public contracts for the evaluation of tenders in 2016, compared to the EU average of 45%. Although decision-making based on the lowest tender price is the least complicated and the most transparent way of selecting a contractor, the Public Procurement Act (especially for the above-threshold regime) clearly prefers the evaluation of tenders according to their economic advantage. **For some types of performance, procurement based only on the price may not be a suitable solution for the contracting authority in terms of compliance with the 3E principle**. Therefore, the criterion of the lowest tender price should only be used if the **contracting authority is able to clearly define the quality of performance**.

An example of setting evaluation criteria contrary to the principle of transparency

In the contract for the creation of training modules and the provision of further professional training and in the contract for the evaluation of educational events, teachers

and teaching methods, the contracting authority set out partial evaluation criteria as follows: the evaluation committee will assess the submitted proposals (overall concepts) based on the evaluation sub-criteria laid down in the procurement documents, assessing the strengths and weaknesses of the individual tenders within each sub-criterion. However, the contracting authority did not describe the perspectives for assessing the actual content of the submitted solutions, including the parameters that would be assessed as positive and the characteristics that would be considered as deficiencies. As a result, the contracting authority made it impossible for the tenderers to have a clearer idea of what the contracting authority would consider to be a strength or weakness of their tender or what specific elements should be included in the tender in order to meet the contracting authority's requirements and to ensure that the tenderer receives more points in tender evaluation.

Source: *Decision of the Office for the Protection of Competition of 28 February 2017, Ref. No. ÚOHS-R0286/2016/VZ-07268/2017/323/MOd*

Selection of the type of procurement procedure

The Public Procurement Act provides contracting authorities with relatively broad discretionary powers concerning the selection of a particular type of procurement procedure. However, in some types, contracting authorities are limited by other statutory requirements which must be met if the given type of procedure is to be used.

A persistent deficiency of Czech practice is the **excessive use of less transparent procedures in public procurement**, in particular direct award using negotiated procedures without publication, although the **statutory prerequisites** for this procedure **have not been objectively met**. This deficiency is pointed out by the individual supervisory authorities and, from the perspective of the identified problematic areas of the public procurement market, it has been a burning problem for several years.

In this respect, risky public contracts particularly include **contracts implemented in the construction and IT sectors**, where misconduct frequently occurs in the preparation of the project, for example, by ambiguous definitions of the subject or price of the public contract or by creating "exclusivity" in relation to the selected contractor as a result of poorly set contractual terms and conditions and insufficient access of the contracting authority to the technical information on the performance provided, which leads to an "exclusivity status" caused by the contracting authority's conduct. Such misconduct results in a future need to **procure additional performance form a particular contractor**. In such cases, contracting authorities often resort to the use of negotiated procedure without publication, procuring performance from the originally selected contractor, which leads to objectively unjustifiable exclusion of competition.

An example of unjustified use of negotiated procedure without publication in an IT contract

The contracting authority awarded a contract for the optimisation and consolidation of its information systems in a negotiated procedure without publication. In the case in question, no legal analysis of the licence terms of previously concluded contracts with the existing IT system contractor was submitted by the contracting authority which would imply that the contractor was the only possible contractor of the performance in question due to the protection of exclusive rights. The contracting authority's justification was merely the statement that the existing contractor was the owner of the exclusive rights to the information system, noting that there was no doubt about the issue of copyright and the scope of the licence. However, this does not meet the requirement for an objective legal assessment of licence terms and related copyright. In addition, the subject of the case in question did not involve a modification or mere extension of the existing software, but a comprehensive consolidation of the contracting authority's information systems, and the contracting authority managed only part of its responsibilities through the information system. The Supreme Administrative Court confirmed that the conditions justifying the use of negotiated procedure without publication were not met, stressing that the strict rules for the division of the burden of proof were justified by the exceptional nature of the negotiated procedure without publication, which de facto denies competition.

Source: *Judgement of the Supreme Administrative Court of 28 March 2018, Ref. No. 2 As 292/2017-34*

Compared to 2016, there was a **significant decrease in the volume of public contracts awarded in the form of negotiated procedure without publication** in 2017 (from 21% to 10%). The Czech Republic approached the EU average last year, which is between 5–10% of the total number of procurement procedures. The decrease in the number of public contracts awarded in negotiated procedures without publication is likely a consequence of relaxation of legal rules.

4.2 RISK FACTORS IN THE TENDERING PHASE

A negative phenomenon of the Czech public procurement market is the long-term **low average number of tenders submitted in procurement procedures**, which was 2.15 tenders in 2017. For comparison, the EU average is around 5.5 tenders. The low number of submitted tenders may indicate an **insufficient level of competition in the contractor environment**, but also a **higher degree of administrative complexity** in the public procurement process, which may discourage individual contractors from participating in procurement procedures.

The situation is particularly alarming **in the area of public works contracts**, which is a relatively highly competitive environment with a significant year-on-year **increase in procurement procedures with only one tender**, namely from 33% in 2016 to 80% in 2017; however, the situation is complicated by the persistent labour shortage in this sector and frequent competition focused only on the lowest tender price.

In 2012, the transparent amendment to the Public Contracts Act attempted to increase the number of tenders submitted to indirectly reduce the occurrence of "tailor-made" contracts by introducing the **obligation** (with the exception of specific cases) **to cancel the procurement procedure if only one tender was received** or **if only one tender was left for evaluation after tender evaluation**. In 2013, most likely as a result of this legislative change, an increase in the average number of tenders was recorded, which was considered to be a positive trend. However, the question remains how many of the tenders submitted were relevant and how many tenders could have been submitted by prior arrangement to prevent cancellation of the procurement procedure and, therefore, thwarting of its purpose. These agreements could have been made between contractors or initiated directly by the contracting authorities which needed to award a specific contract but failed to ensure at least two submitted tenders without major intervention.

As a result of further amendment to the Public Contracts Act, a deviation from the aforementioned trend was already recorded in 2014. With effect from January 2014, the requirement for compulsory cancellation of the procurement procedure if the contracting authority has received only one tender was relaxed. Naturally, the reduction in the number of tenders submitted, especially in the construction sector, was assessed negatively; the reason could also be the growing complexity of construction projects. Since the obligation to cancel the procurement procedure if only one tender has been received caused considerable problems in practice, it was eventually completely abolished in 2015, or, more precisely, the contracting authorities were given the option (not the obligation) to cancel the procurement procedure. In terms of corruption risks, the abolition of the obligation to cancel the procurement procedure if only one tender has been received can be considered as a measure that increases the risk of corruption, but it must be acknowledged that the formal fulfilment of the condition of at least two tenders received has not proved very successful. Instead of introducing similar, administratively demanding solutions, it would be suitable in the future to focus on measures that reinforce competition on the supply side or, as the case may be, reduce the administrative burden for contractors (e.g. by using simple, standardised and instruction-based forms by contracting authorities for easier tender preparation or by greater use of preliminary market consultations).

Manipulation of the public contract on the supply side

One of the risk areas in the post-tendering phase is the **manipulation of the public contract on the supply side**, i.e. by candidates tendering for the contract. This issue is also pointed out by the Security Information Service in connection with the monitoring of activities that may potentially jeopardise the Czech Republic's significant economic interests, especially for contracts that are significant or strategic for the state. This phenomenon mainly concerned **public contracts in transport infrastructure**. According to the Security Information Service, the form of manipulative practices took various forms, ranging from voluntary agreements on the tender price to various pressure actions to eliminate the competitive environment.

Given the complexity and "informality" of most prohibited agreements between contractors, it is not easy to prove their existence in many cases. Parallel actions of potential contractors suggesting collusive practices can take a variety of forms which can be further mutually combined:

- agreement on the price of the tender which is subsequently selected by the contracting authority as the "most advantageous" in terms of price, but in fact it is an

objectively overvalued tender price, where the "symbolic" tenders submitted by other tenderers ("formal" tenders) are seemingly more expensive;

- agreement on the participation of a limited number of tenderers in the procurement procedure or, as the case may be, withdrawal of tenders submitted by other tenderers ("suppression" of tenders) before the end of the procurement procedure;
- "rotation" of the winning contractors in a specific period of time or at a specific location;
- the existence of a system of mutual performances, for example, within subcontracts, different performances or costs within the implementation of the contract or, as the case may be, "resale" of the public contract.

In some cases, the **contracting authorities themselves unconsciously create conditions for the emergence of prohibited agreements**. The risk factors particularly include the need to rapidly invest a certain amount of funds for a given public contract by the end of the accounting period, regardless of its economic advantageousness, lax attitude to setting procurement conditions due to lack of market knowledge, competition only focused on price or lack of experience with public procurement.

Tender evaluation

Another risk area in public procurement is the tender evaluation phase, where the control authorities point out the **lack of transparency of contracting authorities' procedures in evaluating tenders** or, as the case may be, contrary to the evaluation criteria laid down in the procurement documents. In order to comply with the principle of transparency, contracting authorities must duly document the individual procedural steps they have taken in relation to tender evaluation. Although the obligation to draw up a written report on tender evaluation is explicitly imposed by the Public Procurement Act on contracting authorities in the case of public contracts awarded in the above-threshold regime, this procedure may also be recommended in other cases. Similarly, the requirement to **draw up a report on the opening, assessment and evaluation of tenders** is also laid down for public contracts funded from the ESIF.

Conflicts of interest

According to Flash Eurobarometer 2017, which captures the perception of corruption by the business environment, the frequent **occurrence of conflicts of interest** or, more precisely, failure to take sufficient measures or to resolve the situation where one of the contractors also participates in the preparation of the procurement procedure or, more precisely, procurement conditions, is also negatively perceived in the Czech public procurement environment. If the contracting authority's decision-making is influenced by other than non-objective needs of the contracting authority, such a procedure is contrary to the 3E principle and does not guarantee the impartiality and independence of the contracting authority's procedure in accordance with the general principles of the Public Procurement Act.

The new procurement directives for the first time brought a unified definition of the conflict of interest at EU level in connection with public procurement. However, the Member States were given the possibility to go beyond this EU standard or, more precisely, to adopt stricter rules at national level.

During the effect of the Public Contracts Act, this area was only addressed through a requirement for **impartiality of the members of the evaluation committee or invited experts**. These were the situations in which those persons would be involved in the processing of the tender or, in relation to the result of the procurement procedure, they could have a personal benefit or suffer damage, or they could have a personal interest in awarding the contract, or they were connected with any of the tenderers based on a working relationship or other similar relationship. The member of the evaluation committee was obliged to submit a written declaration about his/her impartiality to the contracting authority. If there was a reason for partiality in the course of the committee's activities, the member was obliged to inform the contracting authority about this fact without delay, while the contracting authority's obligation was to exclude that member from further participation in the procurement procedure.

The definition of the **conflict of interest** is **broader in content** in the Public Procurement Act, and it also covers the entire course of the procurement procedure. Furthermore, the Public Procurement Act envisages that the existence of a conflict of interest may be a reason for the exclusion of the participant in the procurement procedure for its ineligibility or, as the case may be, a compulsory reason for the exclusion of the selected contractor.

Selecting an ineligible contractor

According to the conclusions of the control authorities, frequent cases of misconduct include the **failure to exclude the selected contractor which did not meet the qualification requirements** or, more precisely, was unable to prove that it had met such requirements, and yet a contract was concluded with such a contractor.

If the exclusion of the selected contractor significantly affected the original order of the tenders, the Public Procurement Act requires re-verification of the order of the tenderers. The need for re-verification of the order will arise in particular for those public contracts where tenders were evaluated on the basis of multiple criteria, i.e. not only the lowest tender price. Another procedure permitted by the law is the possibility to cancel the entire procurement procedure, namely after the termination of the selected contractor's participation.

Inappropriate or ineffective risk allocation complicating the implementation of the public contract

The contracting authority should also ensure that the contractual terms and conditions are properly set that appropriately and effectively divide the risks between the two contracting parties, where the risk should be passed on to the contracting party that is best able to control it. Therefore, in the case of contracts where the competition is only focused on the price, the contracting authorities' practice to **transfer a substantial part of the risk to the contractor without the contractor being able to assess and control such risk** may be problematic.

4.3 POST-TENDERING PHASE

In the final phase of the public procurement cycle, i.e. during the provision of performance, it is no exception to encounter situations where the negative consequences of poor planning or inadequate preparation of the entire project may be fully manifested. During the implementation of the project,

there are often **complications that may have a negative impact on the contractually agreed price of the performance, its quality or the completion date of the entire project**.

Within the implementation phase of the public contract, **negative impacts may arise, mainly due to insufficient contractual regulation of potential risks that the contracting authority should anticipate based on its previous experience**. Typically, there may be risks arising, for example, from events due to force majeure (e.g. war conflicts, strikes), risks arising from liability for procurement documents, risks caused by natural forces (e.g. unpredictable or extreme climatic conditions in works contracts), risks associated with physical obstacles (especially in the case of complex works contracts, where it is necessary to respond to real conditions on the spot that could not be predicted by the contractor, e.g. archaeological finds), risks due to delays caused by authorities or failure to obtain the necessary decisions or permits, etc. There are also **risks due to failure by the contracting authority** (e.g. failure to provide timely assistance to the contractor or insufficiently proactive approach in relation to the control of the course of the performance of the contract implementation in terms of quality, cost and time) or **by the contractor** (e.g. breach of the contractual obligations) or, as the case may be, their employees or staff for whom the contracting party is responsible. This often leads to ineffective spending of additional funds, complications that hamper the successful completion of the project or even the early termination of the project.

Significant change in the commitment under the public contract

As mentioned in the first part of the publication, the Public Procurement Act brought a number of significant changes in relation to the issue of changes in the commitment under the public contract. Compared to the abolished legislation, they led to certain **liberalisation of the rules** or, more precisely, clarification of the conditions for the implementation of changes to the commitment permitted by the law or reserved changes.

One of the impacts of the new legislation is undoubtedly a **significant reduction in the proportion of public contracts awarded through the negotiated procedure without publication**, because such performance can now be implemented as part of the change in the commitment, for example, by concluding an appendix to the contract up to the statutory limits.

FINAL RECOMMENDATIONS

Public procurement is a major contributor to GDP and, in many cases, the successful use of ESIF funding is conditional on a more detailed description of the public procurement rules in the internal regulations of the contracting authority concerned and beyond the statutory requirements and their consistent application in practice. By adopting the new Public Procurement Act, the Czech Republic created a modern legislative framework that takes into account the harmonised requirements of the EU procurement directives. At present, it would be premature to assess whether the new rules have created sufficient room to eliminate the problems historically recurring in the Czech public procurement environment, including in particular the excessive use of closed public procurement procedures and the frequent occurrence of “tailor-made” contracts or, more precisely, breach of the principle of non-discrimination and the principle of equal treatment. In some cases, the deficiencies are caused by the lack of experience of persons involved in public procurement or by the absence of

appropriate project management or, more precisely, insufficient professional preparation of the project, whether in terms of facts, time or economy.

Strengthening preventive measures can be one of the steps to successfully minimise misconduct or failures in public procurement. Essential prerequisites in this respect include clearly and transparently set internal procurement rules, including procedures for dealing with conflicts of interest, and a clear division and separation of stakeholders' responsibilities in the individual phases of the public procurement cycle, as well as their proper application and control of their compliance. In addition, the importance of continuous controls focused on the areas with the highest risk by the persons outside the preparation and administration of a specific public contract and the implementation of measures minimising the occurrence of historically recurring misconduct in the individual phases of public procurement should not be omitted.

The next step towards streamlining public procurement is the contracting authority's proactive approach from the early phase of planning a project, including its thorough preparation and implementation of project management elements. In procuring more complex performance sufficiently in advance, while respecting the requirements for transparency of the course of such communication, contracting authorities can be recommended to inform the market about their plans and to work more actively with the institutes to obtain feedback from the market regarding current market trends that can be used to define the parameters of the public contract or, as the case may be, to use this way to acquaint potential contractors with innovative elements that the contracting authority plans to implement, for example, in connection with the qualitative evaluation of tenders.

In addition to strengthening the methodological support (supplemented by illustrative case studies or real-life examples) in connection with increasing the expertise of the administrative capacity, a more active use of modern forms of education with a potentially broader scope, such as e-learning and webinars, can also be recommended. Increasing the professional qualifications of the staff involved in public procurement can also be suitably complemented by establishing a helpdesk for smaller and less experienced contracting authorities, or by more active sharing of best practices aimed at implementing new, innovative institutes in the day-to-day practice of public procurement, such as the concept of socially responsible public procurement.

For more complex performances, the public procurement process can be further streamlined and made more transparent by more actively using internationally recognised standardised procedures or, more precisely, by introducing uniform, standardised contract templates also at national level.

In addition to sharing best practices, sharing the most common cases of breaches and discrepancies, including recommended procedures for preventing and addressing them, is also a valuable source of information. Another challenge for the future is the possible revision of the current approach focused on strict compliance with, in particular, the formal requirements of the law in the public procurement process at the expense of implementing new, innovative solutions, including strengthening of the competition and quality-based evaluation using the experience of foreign contracting authorities.

There is still room to further enhance the transparency of the public procurement process in Czech public procurement practice, especially in the early phases of the public procurement cycle, namely planning and preparation of the project or, more precisely, the procurement procedure. In particular, small-scale public procurement should be complemented by other statutory procedures, including

the minimum scope of the publication obligations. Emphasis should be placed on the up-to-dateness and completeness of the data and its openness for use by the general public, as well as more consistent control and more efficient enforcement of compliance with the publication obligations. Experience from abroad concerning the operation of transparent platforms that enable integration of data from different sources regardless of the operator of a particular public administration information system can also be used as inspiration. Enabling control by the general public can be seen as an effective preventive measure in relation to possible failures of manipulative nature in the public procurement process.

Targeted reduction of the use of closed procedures in public procurement and the strengthening of the motivation of contracting authorities to procure high-quality performance in a sufficiently competitive environment opens up the room to take into account the requirement of the 3E principle in practice. Potential failures are also minimised by the full computerisation of public procurement, with a focus on a user-friendly environment and more consistent integration and interoperability of data from the existing systems.

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