OPENNESS OF TENDER PROCEDURES IN THE CZECH REPUBLIC
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Content
Main findings.................................................................................................................. 4
Introduction...................................................................................................................... 5
The problem of a low level of openness in procurement procedures............................... 5
Goals of analysis, methods and procedure used............................................................... 6
I. THEORETICAL SECTION ......................................................................................... 7
1. Definition of basic terms .......................................................................................... 7
2. The influence of corruption on the openness of procurement procedures .................. 8
3. The influence of community law on the openness of award procedures ..................... 10
4. The openness of domestic tender procedures in the context of the EU ....................... 11
4.1 The use of accelerated and negotiated award procedures ....................................... 12
4.2 The success of small and medium enterprises in award procedures ....................... 13
5. Factors limiting openness in procurement .................................................................. 15
II. Empirical section ....................................................................................................... 17
6. Use of prior information notice ................................................................................ 17
6.1 Impact of proposed amendment to Act on Public Procurement on use of prior notice ...... 18
7. Selection of procurement procedure .......................................................................... 19
7.1 Characteristics of individual types of procurement procedure in relation to openness .... 19
7.2 The structure of procurement procedures ................................................................... 21
7.3 Number of bids received in individual tender procedures ....................................... 22
7.4 Special breakdown of simplified below-threshold procedures .................................... 25
7.5 Impact of proposed amendment to Act on Public Procurement on openness of individual types of procurement procedure ................................................................................. 27
8. Setting qualification prerequisites ............................................................................. 28
8.1 The issue of abuse of qualification prerequisites ....................................................... 28
8.2 Examples of abuse of qualification prerequisites ....................................................... 29
8.3 Impact of proposed amendment to Act on Public Procurement on qualification prerequisites and influence of changes on increasing openness .................................................. 30
9. Competition deadlines .............................................................................................. 30
9.1 Length of deadlines for submitting bids by limit of public contracts (in days) ............ 31
9.2 Impact of proposed amendment to Act on Public Procurement on the setting of deadlines and influence on openness of procedures ................................................................. 33
10. Setting award criteria ............................................................................................... 33
10.1 Use of contract conditions as award criteria .......................................................... 34
Main findings

- In comparison with the other countries of the EU, award procedures are less open in the Czech Republic: the Czech Republic ranks last in access of small and medium enterprises to public contracts declared at the European level (TED). The Czech Republic is among the countries that make the most use of restricted and accelerated award procedures.
- Contracting authorities make minimal use of prior information notices, the goal of which is to inform suppliers about an upcoming contract sufficiently in advance. The government proposal for an amendment to the Act on Public Procurement contains a new obligation for contracting authorities to publish preliminary notices on all contracts.
- The use of open procedures for selecting a supplier is still in the minority in the Czech Republic (36 to 37% of the total amount) compared to the other award procedures that limit economic competition in some way. The volume of public resources allocated through open procedures has likewise fallen over the course of the years 2007 through 2010 (64% in 2008; 47% in 2010).
- In connection with the number of accepted offers in the individual types of procedure, contracting authorities received the most offers in open procedures in 2006–2010.
- Contracting authorities overuse the simplified below-threshold procedure for below-threshold construction work contracts, where a marked accumulation of contracts just below the legal limit of CZK 20 million was shown.
- The award practice shows that some evaluation criteria have a markedly manipulative character, e.g. the length of the guarantee period, the amount of fines. Every second evaluation of bids in the economic advantage award procedure contains some kind of guarantee criterion that does not express the real economic advantage of the offer. The proposed government amendment to the Act on Public Procurement prohibits using evaluation criteria that aim to insure the obligations of the supplier.
Introduction

A great number of public institutions are financed from public resources (budgets). It is typical of such public institutions that less effort is put into minimising costs and purchases of unneeded goods or services and that there is insufficient pressure on the quality of work provided. Law-makers attempt to avoid this undesirable behaviour through the institution of public contracts awarded in a tendering process. Thus, leaving aside exemptions, every public institution (contracting authority) is required to award public contracts in an award procedure.

In order to give better idea of the situation, around CZK 270 billion was spent on public tenders in the Czech Republic in 2010.¹ Thus a considerable volume of public funds is invested through public contracts every year.

Tender procedures are meant to ensure effective management of these funds. The primary precondition for functional configuration of the mechanism of public contracts is the openness of tender procedures. The basis of a tender procedure is thus to simulate the market behaviour of those subjects that finance the satisfaction of demand directly or indirectly from public resources and budgets.

This analysis focuses on identifying those phenomena that prevent the openness of award procedures.

The problem of a low level of openness in procurement procedures

According to the statistical data of the Czech Ministry for Regional Development, only 36 % of all public contract tender procedures in 2010 were awarded through an open procedure.² Nearly half of all funding (47 %) was spent on this 36 % of public contracts. The remaining public contracts were awarded through other types of tender procedure with a lower degree of openness.

Aside from the unsatisfactory use of open procedures, another problem is the abuse of qualification prerequisites to limit the number of competitors. In extreme cases the qualification prerequisites can completely eliminate competition among suppliers.

The openness of tender procedures is also prevented through the use of completely untransparent and irrational institutions such as drawing ballots for suppliers in restricted procedures and negotiated procedures with publication. A selection made in this manner runs clearly counter to the demand for the most economically advantageous offer.

The data also testify to the fact that contracting authorities do not make use of open procedures in many cases. For example, in 2010³ the second most frequently used procedure was the negotiated procedure with publication (32 % of the total of all procedures). A significant proportion of that type of procedure consists of simplified below-threshold procedures with a limited number of participants, where there is considerable room for limiting open competition, particularly for construction work. The problem is that the valid legislation allows the use of this procedure (i.e. a less open one) for construction contracts with a value of up to CZK 20 million.

The above facts indicate that the current public procurement system in the Czech Republic does not sufficiently motivate contracting authorities to greater openness in tender procedures. This low

¹ Statistics on public contracts of the Ministry for Regional Development of the Czech Republic (MMR CR) for the year 2010.
³ ibid
motivation for openness in award procedures has a direct effect in terms of higher demands on public budgets and wasteful allocation of public resources through public contracts.

Goals of analysis, methods and procedure used

The purpose of this analysis is to examine in detail the issue of low openness of award procedures in the public procurement system in the Czech Republic. In this analysis the reader is familiarised with the negative effects of low openness as well as with the causes of the malfunctioning institution of public procurement. Also part of the analysis is an assessment of the impact of the proposed government amendment to Act No 137/2006 Coll., on Public Procurement (hereinafter APP amendment) on the openness of tender procedures.

The goal of this analysis is to identify possible legal sources for the restriction of competitiveness in competitions for public contracts. This goal is based on the general assumption that more suppliers in a competition simulate market behaviour and brings the contracting authority an optimal price for realisation of the contract.

Figure 1: Relation between number of competitors and price of contract

![Graph showing the relationship between the number of competitors and the price of contract.](image)

Note: The average savings (% of estimated price) compared with number of bids received. (DG Internal Market and Services, 2007)

It is clear from the above data that with a greater number of bids the effect of competitiveness among bidders is felt in the lower price of the contract. With participation by more than 25 bidders, savings of up to 16% can be had compared to when the contract is awarded without competition.

For the purposes of this analysis, the manifestations of low openness of tender procedures in the Czech Republic are first defined. We then present the appropriate theoretical starting points for the issue of market stimulation in tender procedures and lay out the basic terms of openness and define the desired state. On the basis of these starting points we work within an analytical framework, evaluating the effect of basic factors that can influence the number of competitors in a tender procedure. In evaluating these factors we work with the assumption that open forms of procedure

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5 CASAIS, Veronica Rego (ed.). Internal Market Scoreboard. European Communities, 2009, 31 p., p. 27
are more advantageous for the contracting authority as they better simulate market behaviour in suppliers, with a positive impact on the allocation of public funds for satisfying public needs.

The ultimate goal of the analysis is arrived at by a combination of methods: (i) a qualitative analysis of documents (Act No 137/2006 Coll., on Public Procurement; the case history of the Office for the Protection of Competition), (ii) a quantitative analysis of data from the public procurement information system⁶ and (iii) a secondary analysis of data from statistics on the public contract market in the Czech Republic and the EU.

The subject of the investigation is the openness of award procedures for public contracts. The category of openness itself is studied through an analysis of those institutions in the public procurement process that have a fundamental influence on the number of suppliers in the competition.

I. THEORETICAL SECTION

1. Definition of basic terms

A pivotal and widely accepted principle in the system of public procurement is open competition – with no restrictions in terms of potential suppliers and allowing universal access to the public contract market. Act No 137/2006 Coll., on Public Procurement (hereinafter the APP) understands open competition as an award procedure for an unlimited number of suppliers (Section 27 of the APP). Open competition is also conditioned by the transparency of the tendering process, during which the conditions of selection, tendering procedure and selection of winner should be open to public supervision.

Open competition in the tendering procedure starts when the contracting authority informs suppliers about its requirements and innovations in order to determine their interest and capacity to meet these conditions. It must also be ensured during the tendering process that suppliers are able to meet the specifications for product quality and delivery dates, as well as the continuity of supplies in the case of long-term contracts.⁷

The ideal result of an award procedure should be the selection of the supplier that maximises the public interest.⁸ This is higher when (i) the winning bidder provides higher quality, (ii) the winner requires less compensation for the realisation of the project, (iii) the project produces rich spin-offs, (iv) the government (contracting authority) can defend its reputation as a trustworthy party in the contract, (v) the organisational costs and cost of participation in the tendering procedure are low and the winning bid is the most cost efficient.⁹

In evaluating the true value of a public contract it is important that the contracting authority always take into account the principle of best value for money. This principle is a fundamental test against which contracting authorities must substantiate every contract. The price itself meanwhile need not always express the true value. The best value for money means the best possible offer with regard to all costs and benefits generated over the whole life cycle of the contract. The optimal procurement

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⁸ In the original the term social welfare is used. For the purposes of this analysis it is preferable to define the advantages of public contracts more precisely as the public interest.
procedure is thus set up so as to support a level of competition among bidders that is proportionate to the expected added value of the competition. To obtain the best value, quality and service, it is good procurement policy to encourage the most competitive and able suppliers to respond to their procurement requirements.

For these reasons the contracting authorities must set tendering procedures which are fair, non-discriminatory and transparent. They should lay down the standard specifications of the public contract’s subject and define the conditions of the contract well. Competition can however be limited by many other factors as well, such as the existence of monopolies or cartels, a limited number of qualified suppliers, the urgency of requirements, the need for compatibility with existing products and the difficulty in persuading suppliers to bid.

From the point of view of the general public interest, a sufficient level of competition in public procurement is a guarantee that the needs of citizens for important services will be satisfied as optimally as possible. Competition ensures that businesses are excluded from the market if they do not recognise customer needs or if they fail to meet them at a satisfactory level.

Under this threat, entrepreneurs expend maximum effort in innovations to develop the market and citizens can demand services at a higher level. Regulation of the public contract market can naturally also help stimulate the condition and capacity of suppliers to the advantage of the public sector.

Market competition in the public procurement sector allows for comparison of prices and the quality of services available on the market. Any limitation to competition whatsoever weakens the ability of a (public sector) contracting authority to discriminate and reduces the supplier’s ability to determine whether they will acquire the corresponding value for their invested means.

Considering its volume, effective functioning of tender procedures is one of the key factors determining the competitiveness of a whole country. The public sector as a contracting authority can significantly influence the structure of deliveries and evoke stabilisation of suppliers. Competition of suppliers in the tendering procedure and monitoring of contract implementation are important factors for evaluating public planning, project activities and technical and legal possibilities.

2. The influence of corruption on the openness of procurement procedures

The competitive environment on the public contract market is naturally restricted by a whole range of influences, the most striking of which include corruption, which disrupts the principles of free and fair competition.

If the tender process is deformed by corrupting influences the contract will not be awarded to the one who made the most advantageous bid, but the one who is more adept at practising corruption. This results in the loss of positive expressions of competitive behaviour among suppliers in the award procedure. In the absence of real competition in the public procurement process the provision of work, services or products is more expensive for the contracting authority.

11 ibid
12 Services of general interest: the state as beneficiary?: For fair competition between state and private sector, as well as more investments, greater efficiency and optimisation of charging structures, Federation of German Industries, 2007, 36 p., p. 10.
13 ibid, p. 16
In terms of the effective use of public resources, corruption also gives rise to the risk that further funds will have to be invested to rectify the results of a poorly awarded public contract.\(^{15}\)

A good indicator of the risk of corruption in public contract procurement is a low number of suppliers. This indicator is particularly telling in cases where a readily available product is being sought out and a high number of bidders can thus be expected. A low number of suppliers can then have an influence on the price of the contract (See Graph 1: Relation between number of tenders received and price of contract.)

Corruption in the public procurement process thus deforms standard competitive processes in selecting the supplier. In such cases the contract is generally awarded to a supplier or group of suppliers who were involved in a corrupt transaction rather than to the supplier with the best offer. The effect of corruption mechanisms on the public procurement market can even lead to the conclusion of collusion agreements among suppliers (so-called bid rigging).\(^{16}\)

A **collusion agreement** is an agreement where suppliers that should compete with each other in a tender procedure (competitive bidding) conclude an illicit (secret) agreement, the goal of which is to increase the final price or reduce the quality of the final product.\(^{17}\)

One of the common collusion agreements made among suppliers is that one supplier pays off the other competitors so that they submit non-competitive bids (e.g. with an extremely high price tag) compared to the "merely" high price of the agreed upon supplier. The public contract acquired through corruption is then partially sub-contracted out to the suppliers who submitted unsuccessful bids.\(^{18}\)

Another possibility is a long-term agreement between suppliers whereby they rotate in providing public contracts. This is more likely in those sectors where there is a high concentration\(^{19}\) of suppliers, or in cases where practically the same suppliers are competing for many contracts over the long-term (markets with an oligopolic structure).\(^{20}\) In the Czech Republic such an environment is, for example, the sector of transportation infrastructure (highways, railway corridors, tunnels, bridges, etc.).

Such collusion agreements need not be concluded only among suppliers, but can also occur between the contracting authority and supplier, where the contracting authority, as the body declaring the tender procedure, can deliberately limit competition by setting the conditions for participations so that the procedure is "made-to-order" for one preferred supplier.

In theory, there are thus two models of collusion agreement:

(i) **Vertical**: agreement between contracting authority and favoured supplier, who act together against the interests of the other competitors on the market to compete under equal and fair conditions.

(ii) **Horizontal**: an agreement between suppliers, who act together against the interests of the contracting authority to realise its needs at an optimal price and quality.

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\(^{17}\) OECD 2009, Pokyny pro boj proti kartelovým dohodám mezi uchazeči o veřejnou zakázku. 16 s., s. 1.


\(^{19}\) A high concentration of suppliers means that it is easy to identify the group of potential competitors who control the setting of prices and are capable of agreeing amongst themselves.

\(^{20}\) ibid
Dealing with the problem of limited competition

In dealing with the problem of low or limited competition, we can draw on the recommendations of the OECD\textsuperscript{21} for public procurement contracting authorities. These recommendations primarily deal with preventing bid rigging, but by their nature are also applicable for preventing the risk of reduced competition in general. Among the most important recommendations are:

(i) Design the tender process to maximise the number of bidders. Set the minimum requirements for successful realisation of the contract.

(ii) Define your requirements clearly. The requirements significantly influence the number and type of suppliers who are interested in taking part, as well as the success of realisation.

(iii) Carefully choose your criteria.

3. The influence of community law on the openness of award procedures

With the accession of the Czech Republic to the European Communities came the obligation to uphold EU law. In terms of public contracts, EU law is based on the fundamental treaties and principles of the internal common market.\textsuperscript{22}

The normative treatment of the field of public contracts is contained in three EU directives\textsuperscript{23} (EU Directives). These directives establish the basic conditions for the awarding of public contracts in all relevant fields and activities. In certain aspects of awarding public contracts the EU Directives are supplemented by several EU Regulations.\textsuperscript{24}

In terms of obligation, EU Directives are a legal act that is binding for member states as regards its goal. It is left up to each individual state what means are used to achieve that goal. Directives therefore define a minimum standard for award procedures and the national legislation must attain at least this minimum standard.

EU Regulations on the other hand are legal acts that bind EU member states on a certain matter, directly binding them through the stipulations of the appropriate regulation (thus countries have no room to address the relevant issue on their own).

What is relevant for the relationship between the European and Czech legal treatment of public procurement is that the legal treatment contained in the directives represents a basic standard, generally made up of permissive provisions, i.e. of the formulation "the member state may". The EU Regulations supplement the EU Directives by firmly laying out certain items from which it is not possible to deviate. In terms of awarding public contracts, for example, this includes the common forms, threshold values, etc.

\begin{itemize}
  \item \textsuperscript{21} OECD 2009, Guidelines for Fighting Bid Rigging in Public Procurement. 16 pp., pp. 4–11.
  \item \textsuperscript{22} These principles are the free movement of goods, services, persons and capital
  \item \textsuperscript{24} E.g. Regulation 2083/2005 “on thresholds” or Regulation 1564/2005, Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures. This Regulation was amended by Regulation 1150/2009 as regards the standard forms for the publication of notices in the framework of public procurement.
\end{itemize}
In the interest of preventing the risk of protectionism on the part of contracting authorities in the tendering process, the EU Directives introduced criteria for applied standards in the selection of suppliers for all EU member states. The basis for these standards is the principle of equal treatment and prohibition of discrimination on the basis of nationality. The observance of these principles is achieved through openness of tendering procedures for the widest possible level of competition by applying objective criteria for participation in the bidding process.

Application of the competitive principle in awarding public contracts assumes that the contracting authority accepts multiple bids, from which it will select the one that best suits the needs of the contracting authority. Application of the competitive principle does not however mean that participation in the competition is open to any economic entity whatsoever.

The EU Directives assume that it is legitimate to establish certain requirements for suppliers to take part in the competition. For this reason the Directives allow member states to stipulate qualification criteria by which they can delineate the appropriate bidders.

As a basic precondition for participation in a tender procedure, community law obligatory demands that the supplier have a clean record. This means that all suppliers (members of supplier bodies) who have been legally convicted of certain crimes, such as corruption, criminal conspiracy or fraud, must be disqualified.

The EU Directives stipulate other qualifications facultatively. This is particularly true for the economic and financial prerequisites, the technical or professional qualifications or the norms for ensuring quality and environmental protection.

Community law also supports as broad competition as possible by allowing suppliers to use the qualifications and abilities of other (third) parties to submit bids and prove fulfilment of the prerequisites. If, however, an economic entity uses the qualifications of another, it must prove it is entitled to do so. Ad hoc consortiums can also be formed with other entities in order to submit a bid.

It is therefore entirely legitimate and desirable in practice to exclude dishonest suppliers (a significant tool for preventing corruption) as well as those suppliers that cannot demonstrate their ability to successfully realise the contract. For this second group, however, the exclusion mechanism can be abused to limit competition in an excessive and undesirable manner. In such cases the effect of market competition is eliminated to such an extent that the competition loses its original meaning. Groundless restriction of the potential suppliers can be a source of manipulation or corruption in a tender procedure when the competition is deliberately reduced to the advantage of a preferred supplier.

4. The openness of domestic tender procedures in the context of the EU

In connection with the individual rules for regulating the public procurement market in EU countries, the question proffers itself of what the level of tender procedure openness is in the Czech Republic compared to other member states. A certain impression can be made by comparing data on the rate of use of accelerated and negotiated award procedures and the level of access small and medium enterprises have to public contracts.


4.1 The use of accelerated and negotiated award procedures

EU public procurement law sets out requirements for the publication of information on the possibility of taking part in a tender procedure and requirements on the use of a procedure that allows the broadest participation by potential bidders. The European Commission places considerable emphasis on frequent use of electronic tenders for public contracts, as this makes the negotiation process between the contracting authority and the bidders easier. The Commission also systematically focuses on reducing obstructions in the competition for the contract.

In the countries of the EU the use of open procedures prevails (73.4 % of the total volume of all competitions in 2008). The Commission has however discovered that in 2009 and 2010 a trend appeared whereby accelerated award procedures are being used more extensively. In the first five months of 2009 the number of accelerated and restricted procedures doubled over 2008.27

The overuse of these forms of procurement brings with it the risk of growing corruption and the associated decrease in the effectiveness of procurement. Legal exemptions and restrictive mechanisms can easily be abused to manipulate the award process (e.g. bidding deadlines, drawing lots from a minimum number of competitors, awarding to one supplier without competition, etc.)

Figure 2: Use of restricted and accelerated procedures

Note: Accelerated and negotiated procedures – procedures in which the competition deadlines are exceptionally shortened or the number of participants is limited to one who can submit an offer. In the terminology of the APP, this group includes all procedures aside from open procedures, i.e. restricted procedure (§ 28), negotiated procedure with publication (§ 29) and without publication (§ 34), competitive dialogue (§ 35), and simplified below-threshold procedure (§ 38).

It is positive that the volume of these procedures fell by about 7 % between 2007 and 2008 in the Czech Republic, but unfortunately without a longer time period for comparison we cannot clearly determine whether this is a positive trend or short-term fluctuation. Regardless, it is indisputable that the use of restricted and accelerated procedures is highest in most of the new EU member states, including the Czech Republic, markedly exceeding the values in Western European countries (e.g. Germany, Great Britain, Austria, Sweden). This confirms the need to regulate and control their use more in connection with the subject of the contract.

4.2 The success of small and medium enterprises in award procedures

The level of procurement openness can also be expressed through the rate of success of small and medium enterprises (SMEs) in contract tenders. Their success (or lack thereof) does a good job of representing to what extent the competition conditions are truly open to all potential suppliers on the market.

The level of success of SMEs is expressed by their share of the total value of awarded contracts in the years 2006–2008. The results were determined on the basis of a statistical analysis of data published in the Official Journal of the European Union – TED (Tenders Electronic Daily).

Tab. 1: Characteristics of SMEs

<table>
<thead>
<tr>
<th>size of enterprise</th>
<th>number of employees</th>
<th>yearly turnover / balance (€)</th>
</tr>
</thead>
<tbody>
<tr>
<td>micro</td>
<td>less than 10</td>
<td>2 mil. / 2 mil.</td>
</tr>
<tr>
<td>small</td>
<td>10–49</td>
<td>10 mil. / 10 mil.</td>
</tr>
<tr>
<td>medium</td>
<td>50–249</td>
<td>50 mil. / 43 mil.</td>
</tr>
</tbody>
</table>

Note:
- enterprises that meet at least one of the criteria are counted (number of employees / turnover)
- enterprises with at least 25% control of the public sector are not counted
In terms of the share of SMEs in the overall value of contracts announced in TED, the Czech Republic is in last place in the whole EU (17 %) and far below the average (34 %).

The low level of SMEs in the Czech Republic signifies that our public procurement system likely generates considerable barriers preventing the participation of more, particularly smaller, suppliers. It can of course be expected that the participation of small and medium enterprises in

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selection procedures for the more extensive projects published in TED will be lower, but the examples of other countries show that their participation could be substantially higher. In terms of the difference between SMEs’ share of contracts and their economic role in the real economy, the Czech Republic is among the countries with the greatest negative difference. SMEs disproportionately lose out on their share of public contracts (-34 %), as is the case in Cyprus (-40 %), Spain (-42 %) and Portugal (-46 %).²⁹

5. Factors limiting openness in procurement

In order to analyse the legal conditions in the Czech Republic it is necessary to select the key factors for awarding public contracts that can have a direct or indirect influence on the number of suppliers. If we use the principle and definition of an open procedure (see Chapter 2), we can state that a procedure will be open if:

(i) the call for public contract is addressed to an unlimited number of bidders who can demonstrate sufficient qualification to realise the contract

(ii) the announcement of the award procedure is transparent (clear conditions for participating, clear method of selecting supplier)

(iii) those interested in participating have an adequate description of the scope and complexity of the subject of the contract on which to base their bid

In terms of the laws on awarding public contracts, the following institutions influence the fulfilment of the above optimisation conditions:

1) Selection of an inappropriate procurement procedure

The conditions of individual types of procurement procedures directly determine whether the contracting party will be able to restrict the number of bidders in selecting a supplier even though they otherwise meet the contracting authority’s qualification demands for implementing the contract, e.g. pointlessly limiting the number of participants by drawing ballots.

2) Needlessly high qualification demands

With the exception of the basic qualification prerequisites it is up to the contracting authorities what demands it sets for meeting the professional, economic, financial and technical qualifications in relation to the subject of the public contract. Undesirable restrictions on participation in the tender procedure primarily takes place in situations where the qualification demands are disproportionately high with respect to the subject of the contract. In such cases, openness is for all intents and purposes restricted even in procurement procedures where the call is open to an unlimited circle of suppliers.

3) Insufficient information for suppliers

Suppliers’ ability to take part in a tender procedure is reduced by insufficient information about the planned or declared procedure. This can manifest as:

(i) Low informative value of the indicated or declared procedure; information about the procedure may be unclear or unintelligible or allow various interpretations, which lowers the supplier’s faith in the transparency of the selection process and equality of participants in the procedure.

(ii) Limitation of the access of potential suppliers to information on future or declared procedures. The restriction of openness can manifest more with those procedures where contracting authorities are not required to publish a notice on the central internet portal – ISVZUS³⁰ and

²⁹ ibid, p. 27
suppliers do not have much likelihood of acquiring current information on the maximum number of the procedure.

(iii) Obsolete information. The value of information is not derived merely from its content, but also from the time it is made available. Openness, or the opportunity for potential suppliers to take part in a procedure, can also be limited by the fact that some suppliers only receive information when it is no longer realistic to put together a competitive offer with a realistic hope of success in the tender procedure. This factor can be further amplified by declaring minimum competition deadlines.

4) Inappropriate evaluation criteria

Here we have in mind the criteria for evaluating the economic advantage of the offer. These criteria often (i) do not express the real economic value of the offer (e.g. the amount of contractual fines, the length of the guarantee period), (ii) are not objectively assessable (e.g. various qualitative indicators such as ability to perform contract, quality of design, etc.) and (iii) price has a disproportionately low weight.

Such criteria lower the suppliers' faith in the transparency of the contest as well as the reviewability of the contracting authority's decision. To the contrary, criteria defined in such a way open up room for various forms of manipulation of the bid evaluation. As a result they can indirectly deter many honest parties interested in the contract.

5) Short competition deadlines

The number of bidders for a contract is also directly influenced by the length of the competition deadlines (deadlines for applying for participation or for submitting bids). If these are set at the minimum allowed by law and yet the subject of the contract requires more time to put together an offer, the suppliers come under too much pressure and are often unable to take part in the procedure.

Manipulation of competition deadlines consists of combining demanding conditions for fulfilling the subject of the contract, using the minimum competition deadlines and exclusive provision of information about the contract to a selected supplier before the award procedure is officially announced.
II. Empirical section

Tying in to the theoretical part of this analysis, this section is focused on a detailed break-down of the individual factors determining the openness of procurement procedures using conclusions obtained through a statistical study.

6. Use of prior information notice

One of the basic instruments for increasing the openness of tender procedures is more extensive use of preliminary notification. The current legal treatment of prior information notice is contained in Section 86 and following of the APP. The essence of this institution is the obligation to give advance notice of the intention to issue a public contract and thereby give potential suppliers a longer time to prepare their participation in the tender procedure.

An evaluation of the institutions of advance notice and its use in practice unfortunately leads to the discovery that the existing treatment of prior information notice does not particularly support the openness of procurement. Publishing of the prior information notice is not a general obligation for all contracting authorities but rather an obligation associated (i) just with a certain type of contracting authority and (ii) only for some types of public contract.

(i) Entities that must give prior notice

According to the current legal treatment only public contracting authorities and sector contracting authorities are obliged to publish a prior information notice. In the case of sector contracting authorities the advance notice takes the form of a periodic indicative notice. Subsidised contracting authorities are not affected by the obligation to publish prior notice at all.

(ii) Contracts that must have prior notice

The obligation to issue a prior information notice relates only to a certain range of public contracts, specifically (i) above-threshold public contracts, (ii) those issued by a public or sector contracting authority in the nearest 12 months, (iii) those for which the contracting authority wishes to shorten the deadline for submitting bids.

It is clear from the above that the potential for prior notice is not currently fully made use of to increase the openness of procurement. Contracting authorities essentially only publish prior notice in the cases where it is obligatory by law.

Yet there is nothing preventing contracting authorities (including subsidised ones) from publishing prior notice even in cases when they are not required to by law. In practice this “voluntary” advance notice is the exception rather than the rule.

The following conclusions arise from an analysis of the current legal treatment of prior information notice:

a) the obligation to publish a prior information notice supports openness and a competitive environment for procurement procedures

b) the current treatment of prior notice is not sufficient as the obligation to provide advance notice does not apply to all contracting authorities and only to a certain defined group of public contracts

c) voluntary publishing of prior notices is essentially not taking place
As the data in Table 2 confirm, contracting authorities currently only publish prior notices in the legally stipulated cases. Thorough use of prior notices could however help increase the number of suppliers in a given tender procedure.

In such a case suppliers would be able to plan effective use of their manufacturing capacities and thus better react to the contracting authority’s expected requirements. Increasing the informedness of suppliers would also lead to an increase in the competitive environment and thereby also to a certain reduction of bid prices. Prior notification is thus certainly a tool that supports the purpose of the Act on Public Procurement – economic management of public resources.

### 6.1 Impact of proposed amendment to Act on Public Procurement on use of prior notice

An amendment to the Act on Public Procurement attempts to remove the above shortcomings of prior notice. The basic changes to the institution of prior notice consist of:

- expanding the obligation to give prior notice to include all public contracts (affects all public contracting authorities)
- expanding the content of the prior information notice to include an explanation of the purpose of the public contract
- setting a minimal deadline of one month that must take place between the publication of the prior notice and the start of the tender procedure

The obligation to publish prior notices about all planned public contracts will not affect subsidised contracting authorities, which is however not a fundamental problem in light of the relatively low proportion of such contracting authorities in the total volume of funding invested.

In terms of total volume of expenditures allocated through public contracts, 63 % came from public contracting authorities in 2010, who awarded 95 % of all public contracts.31

The proposed change to the institution of prior notice in the amendment can only be evaluated positively, though it is but one tool increasing the openness of contract procedures.

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### Table 2: Use of prior information notice

<table>
<thead>
<tr>
<th>contracting authority</th>
<th>prior notice (n)</th>
<th>contract notice (n)</th>
<th>representation (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>public</td>
<td>102</td>
<td>4226</td>
<td>2,4%</td>
</tr>
<tr>
<td>sector</td>
<td>4</td>
<td>391</td>
<td>1,0%</td>
</tr>
</tbody>
</table>

Source: Public procurement statistics for the year 2010 MMR ČR.
Note: Data on number of valid forms in ISVZUS.
7. Selection of procurement procedure

The selection of a procurement procedure is one of the key developments of the contracting authority, directly influencing the openness of the procurement process. The current legal treatment distinguishes the following types of procurement procedures: a) open procedure, b) restricted procedure, c) negotiated procedure with publication, d) negotiated procedure without publication, e) competitive dialogue and f) simplified below-threshold procedure.

7.1 Characteristics of individual types of procurement procedure in relation to openness

a) Open procedure
In this type of procedure a contract notice and deadline for submitting bids are published. Up to the deadline for submitting bids an unrestricted range of suppliers can send their offers to the contracting authority.

The contracting authority assesses the fulfilment of qualification prerequisites for the submitted bids and on the basis of the evaluation criteria selects the most advantageous offer. This type of procedure (along with the restricted procedure) can be used at any time without any restrictions.

This is the most transparent and most open type of procurement procedure. Even in this type of procedure, however, undesirable restrictions on openness can take place, through the qualification prerequisites, evaluation criteria or setting of deadlines.

b) Restricted procedure
In this type of procedure the contracting authority first publishes the notice on the start of a restricted procedure and sets a deadline for submitting requests to take part in the procedure. Once again an unrestricted range of suppliers that meet the qualification criteria can submit a request for participation. After the deadline is reached, the contracting authority evaluates the requests and invites the suppliers who meet the qualifications to submit a bid.

The primary difference between an open and a restricted procedure is that in a restricted procedure the contracting authority is entitled to arbitrarily limit the number of suppliers it invites to submit a bid. It must, however, invite at least five suppliers (or three in the case of a sector supplier) to submit bids.

The contracting authority should limit the number of suppliers based on objective criteria. The law defines these criteria as being that they must (i) take into account the nature, scope and complexity of the subject of the public contract, (ii) correspond to some economic and technical qualification prerequisites and (iii) fulfil the requirement of transparency, equal treatment and prohibition of discrimination.

If the number of interested parties cannot be reduced on the basis of objective criteria, the contracting authority is entitled to reduce their number by drawing lots.

The possibility of limiting the number of suppliers unequivocally reduces the openness of the award procedure. The relatively large amount of room for abusing the objective criteria or ballot system to deliberately eliminate "undesirable" suppliers also raises misgivings. For this type of procedure it is also possible that openness can be restricted through the settings for qualification prerequisites, evaluation criteria or deadlines.

32 Section 21 (1) of the APP.
c) Negotiated procedure with publication

The essence of a negotiated procedure with publication is that the contracting authority negotiates the contract conditions with just one or more suppliers. The use of a negotiated procedure with publication is essentially only admissible if the contracting authority has already tried to award a public contract in an open or restricted procedure without success. Sector contracting authorities can award above-threshold public contracts in this way without having had to use another type of procedure first.

The contracting authority initiates a negotiated procedure with publication with a notice that is also an invitation to submit applications for participation in the negotiated procedure with publication. On the basis of this notice, interested parties submit applications to participate and evidence that they meet the qualifications. Based on these applications the contracting authority launches negotiations with the interested parties on the final form of the offer.

The contracting authority is entitled to limit the number of interested parties ahead of time to as few as three. The rules for limiting the number of bidders are similar to those given for the restricted procedure. The level of openness with this type of procedure is likewise relatively low.

d) Negotiated procedure without publication

This type of negotiated procedure is essentially quite similar procedurally to the negotiated procedure with publication with the difference that the discussions on the conditions of fulfilment take place before the submission of bids. A more significant difference is however the list of conditions under which the contracting authority may use a negotiated procedure without publication.

The conditions for using a negotiated procedure without publication can be divided into two categories. The conditions of the first category condition the use of this type of procedure to prior failure to award a public contract in a different type of procurement procedure (i.e. in an open, restricted, simplified below-threshold or negotiated procedure with publication) where no public contract was awarded due to the absence or unsuitability of bids, or because no requests to participate were submitted.\(^\text{33}\) If these conditions are met and the contracting authority does not significantly change the tender documentation, it is entitled to award the contract in a negotiated procedure without publication.

The second category of conditions allows the use of a negotiated procedure without publication even if no previous attempt to award the contract in another type of procedure has taken place. The conditions for this category can be further subdivided into conditions common to all public contracts regardless of the subject and conditions that are connected to the specific subject of the contract.

The conditions common to all types of contracting authorities allow the awarding of a public contracting in a negotiated procedure without publication in the case that such a public contract, for technical or artistic reasons, for reasons connected with the protection of exclusive rights or for reasons ensuing from separate legal regulation, may be performed only by a particular economic operator, or it is strictly necessary to award such a public contract, for reasons of extreme urgency brought about by events unforeseeable by the contracting entity and not attributable thereto, and such a public contract cannot be awarded by another type of award procedure given the lack of time.\(^\text{34}\) Particularly debatable is the possibility of awarding a public contract without publication in a case of extreme urgency.

The above conditions for awarding a public contract in a negotiated procedure without publication are highly vague and considerably reduce the openness of this type of procedure. Attempts to abuse

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\(^{33}\) Section 23 (1) of the APP.

\(^{34}\) Section 23 (4a) and (b) of the APP.
this type of procurement procedure have been demonstrated by cases uncovered by the Office for the Protection of Competition (ÚOHS).

**e) Competitive dialogue**

This type of procurement procedure is designed for awarding particularly complex public contracts and in practice occurs only rarely. The essence of the competitive dialogue is to allow the awarding of a public contract where the contracting authority does not have a clear idea about the method of realisation and in the competitive dialogue searches for an appropriate solution along with the supplier (or suppliers). After an appropriate solution is found, interested parties are invited to submit bids and the contracting authority then chooses the most advantageous offer. Due to the very low occurrence of this type of procedure, we can disregard the competitive dialogue.

**f) Simplified below-threshold procedure**

The simplified below-threshold procedure is reserved for public contracting authorities. As it deems fit the contracting authority sends an invitation to submit bids to at least five interested parties and also publishes this invitation. The obligation to publish the invitation is fulfilled by publishing it on the so-called "contracting entity profile". The contracting authority is thus not required to publish the call in the public procurement information system.

The openness of this type of procedure is very low as the selection of possible suppliers is completely dependent on the will of the contracting authority. This dependence of suppliers on the "favour" of the contracting authority creates an ideal opportunity for corruption. While the contracting authority is obligated to accept and evaluate the offers of suppliers that were not invited in writing to submit a bid, the written call is published only locally and there is a much lower probability that bids will be submitted by anyone other than the invited suppliers. The key factor here is that suppliers are uninformed. Due to these facts it is not possible to consider this type of procedure open.

**7.2 The structure of procurement procedures**

**Figure 4**

*Structure of procurement procedures in 2010* (total number of procedures, in %)

- Open: 36%
- Restricted: 4%
- Negotiated with publication: 23%
- Negotiated without publication: 32%
- Competitive dialogue: 0%
- Not given: 3%

Source: Public procurement statistics for 2010 MMR ČR.

It is evident from the data that in terms of the number of all procurement procedures, the formal conditions of open competition are fulfilled in only 36 % of cases. The remainder is divided up among procedures with varying degrees of restriction on the number of bidders. The fact that the numbers

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35 A detailed address of an electronic tool in the Internet network used by the contracting entity to publish information concerning public contracts and allowing for a remote access – Section 17 (1g).
for open procedures could be higher is confirmed by an international comparison with other EU member states (see Graph 2).

It is also worth noting the significant representation of negotiated procedures with publication, which make up about one third of all procurement procedures. Yet this is a type of procedure that can only be used following an unsuccessful open or restricted procedure (see above). An explanation for the high number of such procedures is proffered by the method of recording simplified below-threshold procedures, which are entered into ISVZUS under the category of negotiated procedures with publication. The conditions for using simplified below-threshold procedures and the data on its use are sufficiently significant from the perspective of restricting competition that a separate chapter is devoted to them.

Let us look now at the real economic impact of open procedures, i.e. the volume of public funds awarded through open procedures. In 2010 this amounted to less than half of all resources allocated through public contracts (47%).

**Figure 5**

![Development of open procedures](image)


The data show that the number of open procedures in individual years has remained practically constant at 37 % while the volume of funds spent in open procedures in the last two years has fallen to its current 47 %. It is evident that the public procurement policy has not been successful in sufficiently motivating contracting authorities to make wider use of open competitions with a higher effect of market competition.

### 7.3 Number of bids received in individual tender procedures

Whether and to what extent certain kinds of procedure are open in practice cannot be deduced merely from their legal treatment. An appropriate indicator of openness can be data on the number of bids received in individual types of procurement procedure, information accessible on ISVZUS. This information includes those offers where the qualification criteria were met and they were evaluated.
Figure 9

Number of bids in restricted procedures
(sector contracting authority)

Figure 10

Number of bids in negotiated procedures with publication
(public contracting authority)

Figure 11

Number of bids in negotiated procedures with publication
(sector contracting authority)
Figure 12

The comparison of types of procurement procedure does not include negotiated procedures without publication, where the contract is generally awarded to a single supplier without a competition, or the competitive dialogue, due to its negligible occurrence in the monitored set of contracts.

Public contracting authorities received the most bids in open procedures. The data on the number of bids in individual procedures do not have as steep a drop-off in the number of procedures with more offers as the other types of procedure do. Even so, the spread of the number of bids is by no means dazzling – in 20% of procedures only a single bid was received, in the remaining cases there were generally no more than five offers.

Public contracting authorities show a very steep drop-off in the number of bids received for restricted procedures where there are more than 5 offers. This points to use of the legal option to limit the number of competitors to at least 5 through drawing ballots or another method. Yet it is rather unlikely that the contract subject and situation on the market are so identical in more than 60% of restricted procedures that the contracting authority would have a rational reason to always limit the number of parties to the legal minimum.

Less steep but still considerable is the drop-off in the number of offers in negotiated procedures with publication above the limit of 5 evaluated bids. Here we must point out that this group contains 62.2% simplified below-threshold procedures, where the contracting authority is required to invite at least 5 suppliers to submit a bid.

7.4 Special breakdown of simplified below-threshold procedures

Simplified below-threshold procedures (hereinafter SBTP) are highly attractive for contracting authorities due to the legal conditions under which they can be used. According to Section 25 of the APP, SBTPs can be used by a public contracting authority for any below-threshold contracts for goods and services and below-threshold contracts for construction work with a value of up to CZK 20 million not including VAT. SBTPs also have shorter deadlines for submitting bids (at least 15 days, in exceptional cases only 7 days) than for open procedures for below-threshold contracts.

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37 If for reasons of urgency it is impossible to fix the time limit at the minimum of 15 days, according to Section 39 (3b), point 3.
Table 3: Use of simplified below-threshold procedures (SBTP)

<table>
<thead>
<tr>
<th>subject of contract</th>
<th>procedures total (n)</th>
<th>SBTPs (n)</th>
<th>proportion of SBTPs (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>goods</td>
<td>12 730</td>
<td>1 892</td>
<td>15%</td>
</tr>
<tr>
<td>services</td>
<td>19 357</td>
<td>2 511</td>
<td>13%</td>
</tr>
<tr>
<td>construction</td>
<td>17 315</td>
<td>5 019</td>
<td>29%</td>
</tr>
<tr>
<td>total</td>
<td>49 402</td>
<td>9 422</td>
<td>19%</td>
</tr>
</tbody>
</table>

Source: Analysis of data from ISVZUS, CERGE-EI 2011.
Note: Procedures total – total number of forms (contract award notices) in 2006–2010.

It is clear from the data (Table 3) that SBTPs are used quite frequently, making up 19% of all procurement procedures. They are used most frequently for construction work contracts, where they represent almost one third of all such contracts.

Table 4: Contract subject entered in simplified below-threshold procedure (SBTP)

<table>
<thead>
<tr>
<th>subject of contract</th>
<th>SBTPs (n)</th>
<th>proportion of subject (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>goods</td>
<td>1 892</td>
<td>20%</td>
</tr>
<tr>
<td>services</td>
<td>2 511</td>
<td>27%</td>
</tr>
<tr>
<td>construction</td>
<td>5 019</td>
<td>53%</td>
</tr>
<tr>
<td>total</td>
<td>9 422</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Analysis of data from ISVZUS, CERGE-EI 2011.
Note: Procedures total – total number of forms (contract award notices) in 2006–2010.

A more detailed look at the subjects of the contracts awarded in SBTPs (Table 4) represents even better their predominant use for construction work. The high limit of up to CZK 20 million before VAT for construction work is evidently a strong factor here.

Figure 13

Accumulation of construction contracts under CZK 20 million cut-off (by estimated price before VAT)

Red line represents limit for simplified below-limit procedure (20 mil. CZK)
The data show a sharp accumulation of construction work contracts just below the CZK 20 million limit for both estimated and competition prices for the use of simplified below-threshold procedures. For 16% of construction contracts the expected value was set in the tight range of CZK 19 to 20 million, which confirms a clear effort on the part of contracting authorities to make the tender procedure easier at the expense of opening up the procedure to market competition and acquiring the optimal bid in terms of price and quality. These facts clearly point to the fact that in the current legal treatment and procurement practice SBTPs present a significant risk to greater openness in procurement procedures.

7.5 Impact of proposed amendment to Act on Public Procurement on openness of individual types of procurement procedure

In terms of openness, an important change is the removal of the option to limit the number of suppliers. The proposed government amendment completely removes the provisions that dealt with limiting the number of interested parties in a restricted procedure, negotiated procedure with publication and competitive dialogue.

Another contribution to the openness of tender procedures is the reduction of the financial limit under which it is possible to award a construction work public contract in a simplified below-threshold procedure. The contracting party would only be able to award a public contract for construction work in a simplified below-threshold procedure if the expected price was less than CZK 10 million. Considering the low level of openness in simplified below-threshold procedures, this change is decidedly a move that increases the openness of procurement.

A shortcoming of the government bill is that it did not tighten the conditions under which it is possible to award a public contract in a negotiated procedure without publication in a highly urgent case.

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38 Cf. provisions of Section 25 of the act as amended by the government bill.
8. Setting qualification prerequisites

The openness of procurement procedures is also influenced by how qualification prerequisites are set. The institution of qualification criteria is based on the assumption that there is a direct dependence between the supplier’s qualification parameters and their ability to properly fulfil the commitments leading to satisfaction of the contracting authority’s demands. The qualification prerequisites can thus be described as a list of information and requirements by which the contracting authority defines the minimum standards for a potential supplier. Ideally the contracting authority should define the qualification prerequisites so that all entities qualified to complete the public contract would pass them.

The legally stipulated qualifications are focused on looking into the supplier’s trustworthiness (basic qualifications), legal and/or entrepreneurial qualifications for the supplier to fulfil the subject of the public contract (professional qualifications), the supplier’s economic and financial stability (economic and financial qualifications) and whether the supplier has a sufficient technical and staffing base to realise the public contract (technical qualifications).\(^{39}\)

8.1 The issue of abuse of qualification prerequisites

Inappropriately set qualification prerequisites can result in two things. The first consequence is that a supplier without the preconditions to fulfil the public contract properly and on time will apply for the contract. The other possible consequence is that a supplier objectively qualified to properly complete the public contract will not pass through the system of qualifications.

In terms of openness, the second case is particularly significant (a supplier qualified to complete the contract does not make it through the system of qualifications). A fundamental precondition for a competitive environment in awarding public contracts is the number of suppliers. The lower the number of potential suppliers, the less competitive the environment will be for bidders.

Practical experience (see examples below) shows that this ideal state is not always achieved. On the contrary, the qualification prerequisites are often set by the contracting authority so as to prevent the participation of suppliers who could objectively complete the contract.

The law expresses the link between the qualification prerequisites and the level of competition with a requirement for the demanded qualifications to be directly related to the subject of the contract.\(^ {40}\) This condition however only applies to public contracting authorities.

It is primarily the economic and financial prerequisites that are abused to limit the openness of tender procedures, as well as the technical prerequisites, where it is essentially at the discretion of the contracting authority what prerequisites it wants demonstrated and what the minimum value is for the requirements.

In the case of the basic and professional qualification prerequisites the scope and manner of demonstrating fulfilment is laid down by the law directly, so the contracting authority essentially has no room for misusing them.

\(^{39}\) Cf. Section 50 and following of the Act.
\(^{40}\) Cf. Section 50 (3) of the APP.
8.2 Examples of abuse of qualification prerequisites

**Economic and financial prerequisites**

*Base capital*

This qualification was abused in the case of the public contract entitled "Šlapanicko – Čistá Říčka and Rakovec" (Ser. No 50017186), where the contracting authority set a qualification prerequisite that an applicant have a base capital of at least CZK 400 million. Meanwhile the price for the public contract was around CZK 0.5 billion.

ÚOHS stated in this case that the base capital has no connection to fulfilment of the subject of the contract as the amount of base capital is a mere accounting item without any factual ability to attest to the economic stability of the applicant. The amount of base capital does not say anything about the supplier's ability to complete the public contract.

*Amount of turnover*

In the case of the public contract " Provision of goods and selected activities in the field of information technology" for a total value of CZK 45 million over a four-year period, the contracting authority demanded proof of a turnover of CZK 300 million for the last three fiscal periods, in each of those periods. For the public contract "Removal of structures at former barracks on Mostecká street, Chomutov", valued at CZK 18 million, the contracting authority demanded a minimum turnover of CZK 70 million for the last three years.

ÚOHS evaluated such demands as disproportionate and covertly discriminatory.

**Technical prerequisites**

*Proof of certification*

Certificate requirements must always relate to the subject of the contract. This condition was, for example, violated in the case of a public contract for winter road maintenance in the Ostrava-Jih district, where the contracting authority demanded an SA 8000 certificate or equivalent issued in the European Union. This certificate attests to the fact that the company upholds the rights of its employees, provides them with appropriate working conditions, etc. ÚOHS rejected the legitimacy of this requirement because this type of certificate cannot be placed in any of the categories of documents that a contracting authority can require according to the law.

*The use of requirements or references to corporations, names or brands*

Despite the fact that such practice is generally prohibited in the APP and allowed only in exceptional cases where the subject of the public contract cannot be specified otherwise, cases of groundless use of trademarks still take place. For example, in the case of the public contract "Renovation and addition to nursery school building" in the village of Horoušany, ÚOHS decided that the use of a specific brand of roof covering was groundless and affected a large part of the public contract. The naming of one brand could exclude other variants and be a deterrent for many potential applicants. The public competition was therefore disrupted.
8.3 Impact of proposed amendment to Act on Public Procurement on qualification prerequisites and influence of changes on increasing openness

The proposed government amendment modifies the treatment of qualifications in quite a significant way. Among the most important changes is the possibility of meeting the economic and financial prerequisites with a statutory declaration. Another fundamental change is that the contracting authority may not use qualification prerequisites that could fundamentally limit economic competition when these prerequisites could be replaced by stipulated conditions in the contract. The government amendment also explicitly states that the supplier’s qualification may not be a subject of evaluation criteria. 41

Another important change supporting the openness of competition is the removal of the possibility of discriminating suppliers through demands for various certificates demonstrating technical qualifications. 42

9. Competition deadlines

One of the factors investigated that influences the openness of procurement procedures is deadlines. The law stipulates a minimum deadline particularly for the delivery of an application for participation in a restricted procedure, negotiated procedure with publication or competitive dialogue, and for submitting bids. 43 The setting of deadlines influences the procurement procedure by the fact that a short deadline reduces the number of suppliers who are capable of putting together a request or bid. For this reason the law requires that all deadlines be established with regard to the subject of the public contract. 44

The statistic evaluations of data presented below show that contracting authorities essentially choose to use the minimum deadlines or make use of legal possibilities to shorten the deadlines. According to the current legislation it is possible for a contracting authority to shorten the deadline even on the basis of a vague condition like the existence of urgent objective reasons. 45

One can thus come to the justified conclusion that the legal requirement for the deadline to be set with regard to the subject of the contract is completely ignored.

The setting of minimum deadlines or even shortening them is a generally undesirable phenomenon as it reduces the suppliers’ chance to put together a request or bid in time and in sufficient quality.

Table 5: Legal deadline limits for submitting bids in an open procedure (in days)

<table>
<thead>
<tr>
<th>contracting authority</th>
<th>limit</th>
<th>legal deadline</th>
<th>shortening of deadlines</th>
<th>cumulation of shortening</th>
<th>for objective reasons deadline cannot be set</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>prior notice</td>
<td>electronic means</td>
<td>electronic tender doc.</td>
</tr>
<tr>
<td>public above-threshold</td>
<td>52</td>
<td>-16</td>
<td>-7</td>
<td>-5</td>
<td>24</td>
</tr>
<tr>
<td>public below-threshold</td>
<td>22</td>
<td>*</td>
<td>*</td>
<td>-5</td>
<td>17</td>
</tr>
<tr>
<td>sector above-threshold</td>
<td>52</td>
<td>-16</td>
<td>-7</td>
<td>-5</td>
<td>24</td>
</tr>
</tbody>
</table>

41 Cf. the provisions of Section 50 in the wording of the bill.
42 Cf. the provisions of Section 56 in the wording of the bill.
43 Cf. the provisions of Section 39 and following of the Act.
44 Cf. the provisions of Section 39 (1) of the Act.
45 Cf. the provisions of Section 39 (2a) point 2 and (2b) point 2 and (3c) point 3 of the Act.
9.1 Length of deadlines for submitting bids by limit of public contracts (in days)

The monitored set **consists of 14 803 open procurement procedures** for which it was possible to determine the deadline for submitting bids.

**Figure 15**

![Histogram of deadlines for submitting bids in above-threshold contracts](image)

*Source: Analysis of data from ISVZUS, CERGE-EI 2011.*

The deadlines for submitting bids for above-limit contracts awarded by public contracting authorities were set **under the legal minimum (deadline > 10 days) in 2.22 % of procedures.** In these cases it could be an error (typo) in the system or a violation of the law. **The legal deadline (10 to 23 days) was used in 12.76 % of procedures,** where the contracting authorities most likely took advantage of Section 40 (1-3) of the APP, where it was not possible to set a deadline for objective reasons. At the same time the contract notice was sent out by electronic means and the contracting authority allowed unlimited and remote access to the tender documentation. **A shortened deadline (24 to 51 days) was used in 62.78 % of procedures;** in such cases the contracting authority evidently used one or all the possibilities for shortening the deadline according to Section 40 (2), where the contract information notice was sent out by electronic means or unrestricted and remote access to the tender documentation was made possible. **Public contracting authorities take advantage of the legal possibilities to shorten the deadlines for submitting bids to a great extent.** This does not however automatically mean that these deadlines are shortened disproportionately in regard to the subject of the contract in the majority of cases. Since the subjects of the contracts are highly specific in their scope, requirements, etc., it is not possible to easily establish a certain optimal deadline with regard to the subject.
For below-threshold contracts the distribution of deadlines is more fortunate; in 75% of cases the contracting authorities set the deadline longer than the legal minimum of 22 days. **65% of contracts had a deadline of between 21 and 36 days.** Even so, contracting authorities most frequently used the minimum deadline of 22 days.

Sector contracting authorities most frequently set the deadline for the submission of bids for above-threshold contracts in the interval of between 42 and 48 days. The distribution of the graph clearly shows that even sector contracting authorities are not willing in most cases to set a deadline of longer than 52 days.

**It is clear from the data that contracting authorities make use of the legal possibilities to shorten the deadlines for submitting bids to a great extent. This does not however automatically mean that these deadlines are shortened disproportionately in regard to the subject of the contract in the majority of cases.** Since the subjects of the contracts are highly specific in their scope, requirements,
etc., it is not possible to easily establish a certain optimal deadline with regard to the subject. It is nevertheless apparent that when setting the competition conditions, contracting authorities usually copy the legally stipulated minimum deadlines for submitting bids. Moreover, it is necessary to take into account the risk that the legal provision on the impossibility of setting deadlines for objective reasons can be misused to disproportionately shorten deadlines for large contracts.

9.2 Impact of proposed amendment to Act on Public Procurement on the setting of deadlines and influence on openness of procedures

The proposed government amendment also focuses on deadlines. The amendment above all limits the abuse of the possibility to shorten deadlines on the basis of urgent objective reasons by removing this possibility of shortening the deadline entirely in the proposed wording of Section 39.

The amendment also limits the possibility of shortening deadlines on the basis of a prior notice or an electronically posted notice.

The last change to the area of deadlines is the introduction of the term significant public contract, for which law-makers extend the basic minimum deadline by half.

Overall the proposed changes on deadlines can be labelled one of the biggest advantages of the amendment, and adoption of the proposed changes should lead to significant growth in the openness of procurement procedures.

10. Setting award criteria

Evaluation criteria are a tool for evaluating bids. The contracting authority evaluates the submitted bids by price (evaluation criterion lowest offer price) or by multiple criteria, of which there must be at least two (evaluation criterion economic advantage).

The contracting authority selects its evaluation criteria essentially at its own discretion; only in the case of competitive dialogue is it obliged to evaluate the offer only on the basis of economic advantage. The law furthermore demands that the contracting authority select the evaluation criteria based on the type and complexity of the public contract.

<table>
<thead>
<tr>
<th>Table 6: Types of contract by method of evaluation</th>
</tr>
</thead>
<tbody>
<tr>
<td>group</td>
</tr>
<tr>
<td>single criteria – lowest bid price</td>
</tr>
<tr>
<td>multiple criteria – economically most advantageous bid</td>
</tr>
<tr>
<td>third group</td>
</tr>
<tr>
<td>total</td>
</tr>
</tbody>
</table>


Cf. the new provisions of Section 16 in the government amendment. To put it simply, a significant public contract is a new category of public contract where the expected price reaches an amount of CZK 20 000 000 (or up to 300 000 000 depending on the type of contracting authority).
In the total set of contracts there is a slight prevalence of evaluating bids based on the criteria of lowest price (approx. 55 % of contracts). In connection with this it would be good to emphasise that the lowest price offered is an appropriate criterion in the case of public contracts where the contracting authority is capable of defining the subject of the contract and the minimum quality relatively precisely. Evaluation using multiple criteria was used in 41 % of cases. The third group is comprised of award procedures where no method of evaluation was listed in ISVZUS; generally these are negotiated procedures without publication.

For a further analysis of the evaluation criteria in terms of possible limitations to competition by setting manipulative, unclear or unreviewable criteria, we will focus only on the group of procedures where multiple criteria were used to evaluate bids.

<table>
<thead>
<tr>
<th>Table 7: Number of criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of criteria</td>
</tr>
<tr>
<td>----------------------</td>
</tr>
<tr>
<td>0</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td>3</td>
</tr>
<tr>
<td>4</td>
</tr>
<tr>
<td>5</td>
</tr>
<tr>
<td>6</td>
</tr>
<tr>
<td>7</td>
</tr>
<tr>
<td>8</td>
</tr>
<tr>
<td>9</td>
</tr>
<tr>
<td>10</td>
</tr>
<tr>
<td>total</td>
</tr>
</tbody>
</table>


In the case of multiple criteria evaluations, bids are most frequently evaluated on the basis of 2 to 3 criteria (68 %), followed by 4 criteria (19 %).

10.1 Use of contract conditions as award criteria

The frequency of procurement procedures with manipulative criteria (e.g. qualitative criteria) is very difficult to determine in light of the fact that each contracting authority can define the criteria completely at their own discretion and the terms are not unified in any way.

For this reason we resorted to searching for manipulative criteria using keywords. We focused on high-risk criteria such as guarantee deadlines and contractual penalties which do not in fact express the economic advantage of the offer but rather fulfilment of the supplier’s obligations in the form of contract conditions. It is criteria such as these that can be a source of manipulation in selecting a supplier, particularly if they are set up benevolently, e.g. no minimum or maximum ranges in which the suppliers can compete. The following example demonstrates how it is possible to select a bid that can hardly be considered the most economically advantageous.
Table 8: Example of selection of supplier for revitalisation of former barracks on Hanácké náměstí in Koměříž

<table>
<thead>
<tr>
<th>Bidder</th>
<th>evaluation criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>bid price incl. VAT weight 70%</td>
</tr>
<tr>
<td>ALPINE stavební společnost CZ</td>
<td>39 098 665</td>
</tr>
<tr>
<td>SMO a. s.</td>
<td>32 925 262</td>
</tr>
<tr>
<td>Consortium of SYNER Morava and JC stav</td>
<td>35 056 318</td>
</tr>
<tr>
<td>Consortium of CONTUNIX &amp; PSVS</td>
<td>32 910 862</td>
</tr>
<tr>
<td>Stav consult s. r. o.</td>
<td>28 889 770</td>
</tr>
</tbody>
</table>

By defining criteria according to generally stable concatenations of the words guarantee, fine, deadline, such as length of guarantee period, amount of contractual fine, a set of 13 063 contracts that contain at least one of these criteria was selected. In light of the wide variability of the evaluation criteria of this type, the analysis may not be entirely precise.

Table 9: Contract conditions as evaluation criteria

<table>
<thead>
<tr>
<th>criteria examples</th>
<th>frequency (n)</th>
<th>occurrence</th>
<th>relative weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>guarantee</td>
<td>7 584</td>
<td>49.30%</td>
<td>16.58%</td>
</tr>
<tr>
<td>penalty</td>
<td>2 778</td>
<td>18.06%</td>
<td>14.69%</td>
</tr>
<tr>
<td>term</td>
<td>2 701</td>
<td>17.56%</td>
<td>20.50%</td>
</tr>
</tbody>
</table>


The criterion of "guarantee" was contained in some form in practically every second bid evaluation (49.3 %) based on economic advantage, with an average weight of 16.5 %. Criteria for fines and deadlines are also by no means exceptional in the procurement practice and nor is their average weight insignificant. It is evident from the above data that the method of setting up multiple criteria evaluations in practice provides room for manipulated selection of a supplier. Nevertheless, it was not possible to demonstrate a practical impact of this group of criteria on the openness of procedures in terms of a lower number of evaluated bids. For an exact examination of the clear influence of these problematic criteria on openness it would be necessary to first know the original number of parties interested in the contract, which cannot realistically be determined.⁴⁷

10.2 Impact of proposed amendment to Act on Public Procurement on evaluation criteria and influence on openness of procedures

The proposed government amendment to the act reacts to repeated attempts to abuse certain criteria that are not related to the subject of the contract. This particularly refers to those criteria that actually aim to ensure the supplier’s commitments. A typical example of such a criterion is the aforementioned contractual penalty or other institutions, the legal point of which is to secure an obligation.

To use the example of the contractual penalty, the amount of the fine itself does not tell us anything about the real possibility of being able to claim such a fine. In such cases, especially where the

⁴⁷ E.g. interested parties deterred before even entering the competition, an absence of data on the number of copies of the tender documentation picked up.
amount of the contractual penalty is assigned a weight in the tens of percentage points, it is highly likely that the real point of such a criterion is to deform the procurement process to the benefit of an unadvantageous (overpriced) bid.

The government amendment reacts to these practices by adding a sentence to the current wording of Section 78 (4) of the Act: Evaluation criteria may not be contractual conditions which aim to ensure the supplier’s obligations.

This change should help increase the openness of tender procedures, as the rationality of criteria and their proper weighting is an important indicator of whether a fair approach to the suppliers can be expected from the contracting authority. The supplier can then reasonably expect a real competition for the contract and does not need to fear that their bid is condemned to failure ahead of time.

In connection with the overall openness of procurement procedures, the proposed government amendment also attempts to react to the possible manipulation of the setting of the tender conditions for public contracts (the subject of the contract, qualification prerequisites, evaluation criteria) which occurs with a change to the contract conditions with the supplier, essentially contravening the original meaning of the competition. For example, the qualification requirements are eased in the contract so that a wider range of suppliers could have actually competed for it, or important parameters in the supplier’s offer thanks to which they won the tender are changed in the contract (e.g. promised delivery deadlines or guarantee period are eased). The draft amendment expands Section 82 to include a new paragraph (7), which states: The contracting authority may not allow any fundamental changes to the rights and responsibilities arising from the contract it has concluded with the selected bidder. A change is considered fundamental if:

a) it would expand the subject of the public contract; this does not affect the provisions of § 23 (5) and (7)
b) it would have allowed the participation of other suppliers in the original award procedure
c) it could have influenced the selection of the most advantageous offer in the original procedure
d) it changes the economic balance of the contract in favour of the selected bidder

This prohibition could become an effective tool against the non-standard and uneconomic practices of dishonest contracting authorities. The effectiveness of this provision could however be problematic as the clearly stipulated prohibition on changing the contract conditions with the selected bidder in a certain manner is not adequately reflected in the draft amendment under the provisions on administrative offences (Section 120 of the APP). If the proposed provisions of Section 82 (7) are violated, it will be problematic to punish the rule-breakers, as the supervisory body (ÚOHS) can only cancel fulfilment of an already concluded contract on the basis of the exhaustively stipulated administrative offences (Section 118 of the APP), just as it can only issue a fine when the conditions of Section 122 of the APP are fulfilled. The practical effectiveness of this prohibition is therefore still unclear and will only be fully known with the case practice of ÚOHS.
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**Internet sources:**
