

A stylized map of Central Europe, showing countries like Poland, Czech Republic, Slovakia, Austria, Hungary, and others. The map is rendered in a light blue color against a darker blue background.

## CERHA HEMPEL CEE NEWSLETTER *Czech Republic*

### **The amendment to the Act on Public Procurement is approaching the final stage of discussion in the Chamber of Deputies**

In The draft of the amendment (hereinafter the “**Amendment**”) to Act No. 134/2016 Coll., on Public Procurement, as amended (hereinafter the “**Public Procurement Act**”), which has been in preparation for over two years, is approaching the final stage of discussion in the Chamber of Deputies of the Parliament of the Czech Republic.

One of the objectives of the Amendment is to reduce the administrative complexity of procurement procedures, especially in terms of submitting evidence to fulfil qualification requirements before concluding a public contract. The Amendment also aims to eliminate shortcomings in the transposition of the European procurement directives and to remove the disproportionate strictness of some rules that go beyond the scope of the aforementioned European procurement directives. At the same time, the Amendment should also partially extend the rights of participants in the procurement procedure.

Below, we summarise some of the specific changes that the Amendment intends to introduce:

a) Change in the definition of a public contract

The amendment revises the definition of a public contract so that the acquisition of a security or investment instrument, an enterprise, its separate organisational unit or a share in a commercial corporation is not explicitly considered a public

contract. We view this as quite significant as it makes it clear that, for example, the acquisition of a share in a commercial company by an entity subject to the public procurement regime is not a public contract. In the past, there was uncertainty in the Czech legal space on this matter, supported by the decision-making practice of the Supreme Court of the Czech Republic, which held that the acquisition of a business share should be governed by the Public Procurement Act.

b) A new reason for exclusion of a participant due to bid rigging

There is a new ground for the exclusion of tender participants, based on the case law of the Court of Justice of the European Union, in particular judgments C-144/17, C-531/16, according to which it is also possible to exclude related persons from the tender procedure if substantial coordination of the preparation of their bids is proven, even if no prohibited agreement under competition law has been concluded between them.

Exclusion is not designed to be mandatory here, as it may be difficult for the contracting authority to assess whether it has sufficient evidence to apply it. If it decides to exclude, it must always invite the participants concerned to explain whether they have prepared their bids independently.

Any cooperation in the preparation of bids will not be a ground for exclusion, but only cooperation defined as acting in concert in the preparation of those parts of the bids which are relevant for the evaluation



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according to the evaluation criteria. This could therefore be the case in particular in cases of coordination on price or on qualitative aspects of the bids relevant to their evaluation. Formal or administrative cooperation in the preparation of bids is not a ground for exclusion. The added provision therefore prevents the submission of bids coordinated to the detriment of the contracting authority, but does not prevent the submission of bids by related party suppliers, provided that they prepare their bids independently.

c) New rules on the provision of information from the bids

A new obligation is imposed on the contracting authority to communicate or publish the information from the bids corresponding to the numerical evaluation criteria within five working days of receipt of a participant's request. The data are to be provided without identifying the participants in order to prevent the conclusion of prohibited agreements.

The reason for this change is to provide participants with information on the basis of which they can estimate their position in the procurement procedure, which may be important for the purpose of planning their operational capacities. Changes to this effect have been requested by professional organisations representing public procurement contractors.

d) Reducing the administrative burden

The contracting authority will now be entitled to provide the Office for the Protection of Competition with access to the documentation on the procurement procedure via a certified electronic tool, so it will no longer be necessary to send the documentation made available to the Office for the Protection of Competition in this way.

Furthermore, the contracting authority will not have to require original documents proving qualification before concluding a contract, in particular if this would constitute an excessive administrative burden. The documents in the bid will not always have to be translated into the Czech language, but it is also possible to translate them into another language if the contracting authority has designated it as the language in which bids may be submitted.

e) Other changes

The Amendment also aims to clarify the issue of signing certain documents and communication between the contracting authority and suppliers. It is also intended to modify in part the rules for changes of an obligation arising from a public contract, removing the limit of 50% of the value of the change (i.e. the total price specified in the contract) for additional works, supplies and services and for unforeseeable works, supplies and services, which appears to be redundant.



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We will continue to monitor the process of approving the Amendment, both from the point of view of contracting authorities and the administration of procurement procedures, as well as from the point of view of participants in procurement procedures, and we believe that the Amendment will bring some relaxation of some unjustifiably strict rules in procurement procedures.

### For more information

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