Legal update

June 2020

Weinhold Legal

Contents

The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics listed in this bulletin should be consulted before investment decisions are made.

Banking, Finance & Insurance:
Pavel Jendrulek, Věra Tovey

Mergers and acquisitions:
Daniel Weinhold, Václav Smetana, Václav Štraser

Insolvency and Restructuring:
Zbyšek Kordač, Václav Smetana

IT, Media & Telecommunication:
Martin Lukáš, Václav Smetana

Real estate:
Pav Younis, Václav Štraser,

Personal Data Protection:
Martin Lukáš, Anna Bartůňková, Tereza Hošková

Labour law:
Anna Bartůňková, Eva Procházková

Slovak law:
Tomáš Čermák, Karin Konečná

Dispute resolution: Milan Polák, Zbyšek Kordač, Anna Bartůňková, Michaela Koblasová

Competition law / EU law:
Tomáš Čermák, Jana Duchoňová, Tomáš Kočař

Public procurement & Public sector:
Martin Lukáš, Monika Skálová, Tereza Hošková

News in Legislation

Draft of Amendment to the Public Procurement Act

On 11 May 2020, the Government submitted to the Chamber of Deputies of the Parliament of the Czech Republic a draft of amendment to Act No. 134/2016 Coll., Public Procurement Act ("**Act**"). Although this proposal is intended to amend only a few provisions of the Act, moreover mainly formally, it nevertheless contains one provision which significantly interferes with the course of the negotiation procedure without publication.

The draft of amendment to the Act stipulates that in the case of a negotiation procedure without publication pursuant to Section 63 (3) (i.e. the possibility of fulfilling a public contract only by a certain supplier) and Section 63 (5) (i.e. extremely urgent circumstances) the provisions of

- the obligation to verify with the selected supplier, which is a joint-stock company or has a legal form similar to a joint-stock company, whether exclusively book-entry shares have been issued, and if not, to exclude such a supplier from the tender procedure (Section 48 (9) of the Act);
- the obligation to prove fulfillment of qualification according to Section 73 of the Act;
- the obligation to submit originals or certified copies of evidence of qualification (Section 86 of the Act)
- the obligation to select the supplier whose offer has been evaluated as the most economically advantageous (Section 122 of the Act),

shall not apply.

According to the explanatory memorandum, "in view of the need to conclude the contract as soon as possible, it is not appropriate to insist on actions which should ensure the qualification of the supplier, since there is an overriding public interest in the speedy performance of the contract. Verification of qualifications is also unnecessary if there is a single supplier."

If this amendment to the Act was approved and entered into force in the submitted wording, contracting authorities using the negotiation procedure would also be released from other obligations under the Act. Such an amendment would, on the one hand, lead to even greater flexibility and speed up the negotiation procedure without publication, but on the other hand it would entail many risks, such as the possibility of awarding a public contract to "problematic" persons (e.g. convicted persons, persons in tax arrears, in liquidation or insolvency) including legal entities with an unclear ownership structure, or the possibility of choosing a supplier who has not submitted the most economically advantageous offer.

The draft of amendment to the Act is currently being discussed in the Chamber of Deputies as Chamber Press No. 862.

Draft of Bill on Abolishing Real Estate Acquisition Tax

The Chamber of Deputies is currently also discussing a government bill repealing Senate Legislative Measure No. 340/2013 Coll., on Real Estate Acquisition Tax ("**Legislative Measure**") According to the Legislative Measure, the acquirers of ownership of an immovable property are obliged to pay real estate acquisition tax in the amount of 4 % of the acquisition value, reduced by an eligible expenditure (e.g. an expert´s report). Buyers are now obliged to pay in principle 4 % of the price of the purchased real estate to the state budget, which represents not a small financial expense for the acquisition of real estate.

Legal update

June 2020

The government bill abolishes the real estate acquisition tax and does so with retroactive effect. Thus, in the case of approval of the bill, buyers who acquired the real estate (a registration was made to the Land Register) in December 2019 or later will not have to pay the real estate acquisition tax. As this is a government bill which supported by the opposition, no major problems are expected in its approval by Parliament.

New Case Law

Obligation of members of the Supervisory Board to attend the General Meeting of the Company

(Judgment of the Supreme Court of January 30, 2020, 27 Cdo 481/2019)

In this case, the plaintiff demanded the annulment of "all" resolutions of the General Meeting of M E T A L a. s. for various reasons, one of the reasons being the non-participation of the members of the Supervisory Board at the General Meeting of the Company. The question of the obligation of the members of the Supervisory Board to participate in the General Meeting, including the consequences of their possible non-participation for the validity of the resolution of the General Meeting, came before the Supreme Court of the Czech Republic.

The Supreme Court of the Czech Republic stated that the members of the Supervisory Board (unless they are prevented from doing so by serious reasons) are obliged to participate in the General Meeting. The obligation to attend the General Meeting arises for the members of the Supervisory Board from the obligation to act with due diligence. However, the non-participation of the members of the Supervisory Board at the General Meeting cannot in itself be a reason for declaring the resolutions adopted by the General Meeting invalid.

Despite that, however, the Supreme Court of the Czech Republic added that

> *"although the absence of members of the Supervisory Board at the General Meeting is not in itself a reason to declare resolutions adopted by the General Meeting invalid, if in the absence of members of the Supervisory Board at the General Meeting the shareholder´s right to an explanation is limited and if that creates a violation of Section 359 of the Business Corporations Act, this fact may constitute a violation of the shareholder´s right to an explanation justifying the annulment of the resolution of the General Meeting; provided that the breach had serious legal consequences and it is not in the interest of a company worthy of legal protection not to declare the resolution invalid."*

So, under certain conditions, the non-participation of members of the Supervisory Board at the General Meeting may be a reason for declaring the General Meeting resolution invalid.

The instruction to "go home" addressed to employees does not constitute an explicit prohibition of activities from the employer

(Judgment of the Supreme Court of January 21, 2020, 21 Cdo 2034/2019)

The plaintiff, applying for a job offered by the defendant (in the position of welder-locksmith), was assigned work consisting in repairing "gitterboxes". He was to do the work till 3:30 p.m. After the plaintiff told the manager of the company that "he is done and has nothing to do", the manager sent him home and assumed that the plaintiff would not arrive until the next day, when he would decide whether to conclude an employment contract with him or pay him for 4 hours of work. The plaintiff disobeyed the instruction and on his own initiative began to cut wood on a saw disconnected from the power supply and marked with a sign "out of order", while at around 3:00 p.m. he suffered an injury to his right hand. Consequently, the applicant sought a monetary compensation for non-material damage, loss of amenity and compensation for loss of earnings as a result of the injury.

The Supreme Court of the Czech Republic proceeded from the fact that repairing of "gitterboxes" performed by the plaintiff represents signs of dependent work, which the plaintiff could perform for the defendant only within the framework of an employment relationship. This is not hindered by the fact that the defendant´s manager assumed the possible conclusion of an employment relationship the next day ("examination work").

An activity performed without the employer´s order and without the external initiative of other persons, only on the basis of the employee´s own decision, if he does not need special authorisation for it or if he does not act against the employer´s explicit prohibition, is also considered fulfillment of work tasks, provided that it is activity performed for employers. Based on the facts and the above-mentioned legal definition of performance of work tasks, the Supreme Court of the Czech Republic concluded that the defendant´s instruction for the plaintiff to stop working for him on that day, together with the marking of the machine, on which the plaintiff had been injured, with a sign "out of order" and disconnection of the machine from the power supply, does not constitute an explicit prohibition of work addressed by the employer to the employee. The defendant´s instruction for the plaintiff to "go home" does not contain an express prohibition of work and does not indicate any activity, performed on his own initiative, which would be prohibited to the plaintiff.

The fact that the saw was marked with a sign "out of order" and disconnected from the power supply could be relevant in assessing whether and, if so, to what extent, the defendant relieved itself from liability for damage caused by an accident at work. However, in itself (even in conjunction with the defendant´s instruction that the plaintiff "go home") cannot lead to the conclusion that the plaintiff acted against the defendant´s express prohibition and therefore that it was not a case of performance of work tasks. The Supreme Court of the Czech Republic thus ruled in favour of the plaintiff, calling the plaintiff's injury a work accident.