

Ľubica Páleníková\*

## **CORRUPTION IN PUBLIC TENDERS CONCEPT OF SELF-CLEANING**

### **ABSTRACT**

Public tender procedures shall be conducted according to the fundamental principle of transparency. Candidates and bidders who have been the subject of a conviction by final judgment for a statutory offence (e.g. due to corruption, fraud, money laundering) shall generally be excluded from the participation in a public tender. According to the new proposal of the European Commission regarding the reform of the current directives on public procurement, the bidder shall be given the opportunity to demonstrate its reliability, despite the existence of an exclusion ground. For the purpose of the re-admission into the public procurement process, the bidder shall implement appropriate preventive measures in the technical, organisational and personal respect (e.g. dismissal of employees responsible for the criminal offence, implementation of an effective compliance programme).

If the new proposal of the European Commission is adopted, it could establish an EU-wide level playing field regarding the concept of self-cleaning. Furthermore, it could result in the strengthening of the fair and open competition among reliable economic operators.

**Key words:** Public tender, reliability, corruption, exclusion, self-cleaning.

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\* Dr. iur. Ľubica Páleníková works as an associate with the international law firm Wolf Theiss. She is a certified public procurement expert in Slovakia.

## 1. Public tenders – High risk of corrupt practices

The public procurement market in Europe raises significant economic opportunities for interested investors. The governments of EU-Member States each invest approx. 17% of the GDP in public contracts annually. However, the intriguing market environment also bears important corruption risks.

Public tender procedures shall be conducted according to the fundamental principle of transparency. However, corrupt practices seem to be widespread in many sectors related to the public procurement (e.g. oil and gas industry, mining, power generation and transmission, defence and security, pharmaceuticals). The public procurement sector is „*highly vulnerable*“ to the corruption.<sup>1</sup> The public procurement raises corruption risks at every stage of the process, ranging from the initiation of the public tender, the selection procedure, to the contract performance by the successful bidder.<sup>2</sup>

## 2. Award of public contracts to reliable bidders

Pursuant to Art 44 para. 1 of the Directive 2004/18/EC<sup>3</sup> („*Public Procurement Directive*“) and Art 54 para. 4 of the Directive 2004/17/EC<sup>4</sup> („*Utilities Directive*“), public contracts shall be awarded to economic operators which are reliable and suitable to perform the contract tendered. The contracting authority shall verify the reliability of candidates and bidders in accordance with the following participation criteria:

- personal situation;
- suitability to pursue the professional activity;
- economic and financial standing;
- technical and professional ability.

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<sup>1</sup> Schnitzer, Compliance im Bereich der (öffentlichen) Auftragsvergabe, Compliance Praxis 2012/1, 32.

<sup>2</sup> Harris/Witten/Yukins/Schnitzer, Anti-Corruption Enforcement Controls in Government Procurement in Central and Eastern Europe – Call for Redoubled Compliance Efforts, White Collar Crime Report 2011-6, 1.

<sup>3</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Official Journal of the European Union L 134/114 ff.

<sup>4</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, Official Journal of the European Union L 134/1 ff.

In contrast, unreliable economic operators shall be excluded from public tender procedures if they have been convicted of certain (corporate) offences.

### 3. Exclusion of unreliable bidders due to corporate offences

Pursuant to Art 45 para. 1 of the Public Procurement Directive and Art 54 para. 4 of the Utilities Directive, any candidate or bidder which has been the subject of a conviction by final judgment for a statutory offence shall be excluded from the participation in a public tender. The term „*final judgment*“ typically means that the decision is no longer subject to appeal. The relevant criminal offences encompass:

- participation in a criminal organization;
- corruption;
- fraud;
- money laundering.

According to a new proposal of the European Commission regarding the reform of the current directives on public procurement,<sup>5</sup> the contracting authority shall generally exclude a candidate or bidder also if the conviction by final judgment has condemned the following persons within its organisational structure:

- company directors;
- any person having the power of representation, decision or control (with regard to the candidate or bidder).

### 4. Rehabilitation of unreliable bidders

According to the new proposal of the European Commission, bidders who would generally be subject of the (mandatory) exclusion might be given the opportunity to regain their reliability. The bidder shall implement the following measures in order to be re-admitted into the public procurement process:

- payment of compensation for damage caused by the criminal offence;

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<sup>5</sup> *European Commission*, Proposal for a Directive of the European Parliament and of the Council on Public Procurement (20.12.2011).

- active collaboration with the investigating authorities;
- implementation of concrete technical, organisational and personal measures, which are appropriate to prevent further criminal offences.

The contracting authority shall evaluate the measures taken by the bidder. In this respect, the gravity and the particular circumstances of the criminal offence shall also be taken into account. If the contracting authority considers the measures to be insufficient, it shall exclude the bidder and state the reasons for its decision.

#### **4. 1. Self-cleaning – General concept**

The possibility of bidders to demonstrate their reliability, despite the existence of an exclusion ground related to criminal offences, concerns the so-called „concept of self-cleaning“. The concept is already recognized in a number of EU-Member States (e.g. Austria, Germany). However, the national regulations and the case-law vary considerably (e.g. duration of the exclusion, disregarding of convictions after the expiry of a certain time period).<sup>6</sup>

If the new proposal of the European Commission is adopted, it could establish an EU-wide and uniform level playing field regarding the concept of self-cleaning.

#### **4. 2. Self-cleaning – Concrete measures**

Despite the existence of an exclusion ground related to criminal offences, bidders may provide the contracting authority with evidence demonstrating their (re-established) reliability. The evidence should refer to appropriate technical, organisational and personal measures.

The self-cleaning measures should be implemented by the bidder preventively (i.e. before its participation in a public tender procedure).<sup>7</sup> The measures should be economically justifiable.<sup>8</sup> Therefore, the concrete measures may vary from bidder to bidder, depending on the size of the economic operator.

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<sup>6</sup> *Arrowsmith*, The law of Public and Utilities Procurement<sup>2</sup> (2005) 1312.

<sup>7</sup> *Denk/Steinbach*, Die vergaberechtliche Selbstreinigung, ZVB 2008/5, 135.

<sup>8</sup> Explanatory notes regarding the Austrian Federal Public Procurement Act, ErläutRV 1171 BlgNr. XXII. GP 64.

The appropriate technical and organisational measures may encompass:

- effective reporting and controlling;
  - an (internal or external) revision organ („compliance officer“) reviewing the compliance with the relevant legal provisions (e.g. public procurement law, cartel law, criminal law);
  - regular seminars for the employees („whistleblowers“) regarding the relevant legal provisions;
  - concepts regarding the internal re-organisation;<sup>9</sup>
  - safety precautions regarding employees who inform the competent revision organ about possible offences.
- Furthermore, the appropriate personal measures may encompass:
- dismissal of employees responsible for the criminal offence;
  - introduction of the respective business ethics and code of conduct;
  - principles of good conduct in employment contracts;
  - internal regulations on liability and compensation for damages in case of non-compliance with the relevant legal provisions.

## 5. Conclusion

Candidates and bidders may minimize the risk of being excluded from the participation in public tender procedures by implementing an effective compliance programme. Despite the existence of an exclusion ground related to a corporate offence, the bidder can take a „second chance“ and regain its reliability according to the new proposal of the European Commission. If the bidder undergoes sufficient self-cleaning measures, it shall not be automatically excluded from future tenders. In contrast, the bidder shall be re-admitted into the tender. Consequently, the concept of self-cleaning may result in the strengthening of the fair and open competition among reliable bidders.

In public tenders, the fundamental principle of transparency should prevail in line with the saying: „The light is the best disinfectant“. The hope remains that common corrupt practices can be barred from the public procurement process.

<sup>9</sup> Austrian Federal Public Procurement Review Authority BVA 24.6.2004, case 17N-48/04-24.

## **KORRUPTION IM VERGABEWESEN – KONZEPT DER SELBSTREINIGUNG**

### **ZUSAMMENFASSUNG**

Bei der Durchführung öffentlicher Vergabeverfahren haben Auftraggeber den fundamentalen Transparenzgrundsatz zu beachten. Bewerber und Bieter sind von der Teilnahme an Vergabeverfahren auszuschließen, wenn sie aufgrund bestimmter Delikte rechtskräftig verurteilt wurden (zB wegen Bestechung, Betrug, Geldwäsche). Nach dem neuen Vorschlag der Europäischen Kommission zur Reform der Vergabe-Richtlinien soll Bieter die Chance eingeräumt werden, ihre berufliche Zuverlässigkeit bzw Eignung trotz Vorliegens eines Ausschlussgrundes nachzuweisen. Dabei hat der Bieter das Ergreifen konkreter Selbstreinigungs-Maßnahmen in technischer, organisatorischer und persönlicher nachzuweisen (zB Entlassung von für die Verurteilung verantwortlichen MitarbeiterInnen, Umsetzung eines effektiven Compliance-Programms).

Mit der Verankerung des Selbstreinigungs-Konzeptes in den neuen Vergabe-Richtlinien könnte der Wettbewerb zwischen (zuverlässigen) Unternehmen gestärkt werden.

**Schlüsselwörter:** Vergabeverfahren, Ausschreibung, Zuverlässigkeit, Korruption, Ausschluss, Selbstreinigung.