ALTERATIONS OF CONTRACTS IN PUBLIC PROCUREMENT

DAVID DVOŘÁK
Faculty of Law/Department of Civil Law, Masaryk University

KAREL MAREK

Key words
Public procurement, alteration of the contract, assignment of rights, acceptation of duties, cession of the contract, substantial alteration of the contract, unsubstantial alteration of the contract

1 Introduction

The paper deals with the alteration of contracts concluded in award procedures according to the Czech Public Contracts Act No. 137/2006 Coll. ("PCA"). Although these contracts have been made in specific public procurement procedures they are standard civil contracts governed by Civil Code or Commercial Code. However, when these contracts are amended or altered it has to be taken into consideration that they have been concluded in compliance with the PCA. Therefore, these amendments or alterations shall not contradict or circumvent the Act.

The aim of the paper is to establish to what rules these contracts are subject and whether their alterations are possible and, if yes, to what extend. The alterations are for the purpose of their examination divided into two basic categories:

- alterations of contracting parties and
- alterations of the subject-matter of the contract.

2 Alterations of contracting parties

The alterations of the contracting parties are not regulated nor by PCA (and EC Directives) nor by the Civil Code. The Civil Code contains only provisions dealing with the assignment of rights and acceptations of duties. The contracts made in the award procedures are synallagmatic contracts that are characterized by the pair of mutual rights and duties (the duty to provide supplies, services or works and respective right to obtain them; the duty to pay remuneration and respective right to get paid). However, the contracts cannot be simplified to

this pair of obligations; they contain complex of other complemental rights and duties and the Czech law does not regulate the cession of the contract as a whole. Nevertheless, for the purpose of this paper the alterations of the contracting parties are examined in the simplified manner as the assignment of rights and acceptation of duties in the relation to eventual contradiction with the PCA. Above all, it is assessed whether any of the agreements of the parties or even unilateral consent of one of them required by the Civil Code cannot be considered as (at least de facto) conclusion of the new contract.

In case of the change of the contracting entity, the conclusion is that such a change can be allowed with the exception of the cases where the original and new contracting entity is subject to different procedural rules (i.e. the new contracting entity would be obliged to follow a more strict procedure than the original one).

In case of the change of the supplier, the situation is more complicated as the result of this operation would be the change of supplier whose selection was the main objective of the award procedure. The main problem is that the new supplier would be chosen without any competitive procedure by the contracting entity or the original supplier. Moreover, the consent of the contracting entity that is required by the Civil Code for the acceptation of duties by the new supplier might be even considered as (de facto) new contract. Therefore the alteration of the supplier is not admissible (with exception of some specific cases, e.g. when this is a consequence of another fact as in case of mergers).

The possibility of alterations of the contracting parties in public procurement is at present decided before ECJ in the case C-454/06 Pressetext Nachrichtenagentur GmbH. According to the opinion of the General advocate the alterations on the side of the supplier constitute a substantial change of the contract that is not admissible without new award procedures because such a modification may distort competition and give advantage to certain supplier (i.a. because such a supplier would not be selected in competition with other suppliers). The exception would be in case where the contract is transferred to a subsidiary company which the original supplier controls in the similar manner as its internal department (so called in-house (internal) transaction).

3 Alterations of subject-matter of contracts

Similarly as in the case of alterations of the contracting parties, the modifications of the subject-matter of the contracts in public procurement are not (with some exceptions) regulated by PCA (and EC Directives) or Civil Code.

The alterations of the contracts in public procurement can be specifically divided into two subcategories:

- extension of the subject-matter of the contracts and
- other alternations.

The ground for the division is fact that the extension of the subject-matter of the contract is considered as the new public contract that has to be awarded according to the PCA. Some of the extensions are anticipated in the PCA and may be awarded in the negotiated procedure without publication of the contract notice directly to the original supplier. The other extensions have to be awarded in one of the standard competitive procedures.

Other modifications of the subject-matter of the contract are not specifically regulated but have to be, in conformity with ECJ rulings, judged whether they constitute a substantial or unsubstantial modification of the contract. Substantial changes are such changes that may distort competition or give advantage to a particular supplier and therefore are not allowed without a new award procedure.

The paper finally examines some model examples of modifications with the conclusion whether they should be regarded as substantial or not.

4 Conclusions

The paper concludes that alterations of the contracts made in award procedures according to the PCA are to the limited extent admissible. However, the legal regulation is not unambiguous; especially the relation of the PCA to the § 39 of the Civil Code (void and null contracts) and to the competition law.

In relation to the alterations of the contracting parties, the situation is complicated by not quite clear regulation of the cession of the contract. But even the possibility of the alteration itself is

not unambiguous and a specific legal regulation in the PCA might be considered. The same applies for the alterations of the subject-matter of the contracts where, according to ECJ rulings, the substantial and unsubstantial modifications have to be distinguished. However, before final decision it is necessary to wait for the ruling of ECJ in the case C-454/06. Nevertheless, in our opinion the specific legal regulation of the alterations of the contracts is not suitable (because it would have to be too casuistic or too general which would not eliminate problems of interpretation) and we would recommend to leave the interpretation on the level of ECJ rulings and decisions of the Czech Competition Office.

Contact – email: dvorak@rowanlegal.com

ROWAN LEGAL, Law Office
V Jame 1, 110 00 Praha 1
Czech Republic