

ICT IN PUBLIC PROCUREMENT CAN LEAD TO CYBERCRIMES?

by

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Authorship of computer programs is a wide question itself. The presentation will mention the new directive 2009/24/EC on the legal protection of computer programs.

In public procurement the question is more complicated because in EU directives (2004/17/EC or 2004/18/EC) there is stated that technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. In this situation - how contracting authority can preserve the author's law and follow the rules?

Public procurement, especially contracting authority is strictly controlled by authorities. Tender procedures are recently made with ICT (eProcurement) because the process is more transparent. Even there is such control made by state or transparent electronic public procurement, a lot of crimes are committed. Can we define these crimes in public procurement as cybercrimes?

KEYWORDS

Author's law, computer program, directive 2009/24/EC, eProcurement, public procurement, technical specifications

1. INTRODUCTION

Public procurement is usually called "tenders". Tenders or public procurement is according to the directives on public procurement (see further) characterized as contracts for pecuniary interest concluded in writing between one or more entities.

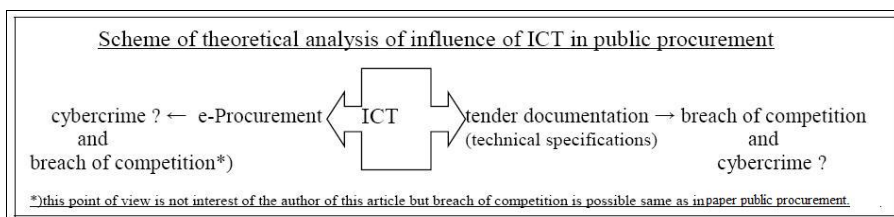
Public procurement is not generally known because it is a specialized branch of law which is subsumed under business law or administrative law but not as often as in the mentioned branches under criminal law.

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Tenders are well known in connection with corruption or similar crimes, e. g. bribery. There is not a typical relation between tender and so called cybercrime. Cybercrime can be defined as breach of law of the information society¹ using modern communications² and the Internet³ in cyberspace.⁴

Modern communications have effect in public procurement. Firstly in electronic procedure of public procurement (it means e-Procurement – see further) and secondly in contractual documents for software and hardware supplies.

In the second point of view there is stated in directives on public procurement (see further) that technical specifications which are part of contractual documents shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.



Because of the development of Information and Communication Technologies (ICT) in tenders, the question we follow is, if ICT in public procurement can lead to cybercrime?

2. PUBLIC PROCUREMENT IN EU LAW

There are the Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entit-

¹ Information society is community using modern devices which are usually connected to the Internet. The development of the society is connected with the development of modern communications, payment cards and the Internet. Nowadays the development of the society is not spontaneous but is regulated. For example the European Union has already issued so many directives that it is impossible to enumerate them all.

² According to the author's opinion, modern communications are telephone (mobile or with a fix connection which is also a traditional communication mean), computer, PDA or MDA (computer and mobile phone in one device) usually connected to a public communication net.

³ The Internet can be also sorted among communications. In my view, the Net itself is not a communication mean because it is a network but not a medium (substantive one) which can be (without any device) the subject of a criminal behaviour or with it we can commit a crime. The Internet is complicated to characterise from the legal view. The Internet is in the whole world so it interferes into national legislations. There has not been issued any international treaty regulating the Internet itself.

⁴ We can separate the Cyberspace from the Internet. Further see Lessig, L. 2006, Code, Basic Books, Cambridge, p. 83.

ies operating in the water, energy, transport and postal services sectors (hereinafter "Directive 2004/17/EC") and the 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 (hereinafter "Directive 2004/18/EC"), which regulate in basics public procurement. The directives are in effect from 30th March 2004 and should have been implemented into the national legislations of the EU member states by 31st January 2006.

In order to guarantee competition of public procurement, it is advisable pursuant to the Directive 2004/17/EC to draw up provisions for Community coordination of contracts above a certain value (note of the author – the value is stated by the EU). Such coordination is based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty⁵ and from Article 97 of the Euratom Treaty.

According to the Directive 2004/18/EC the award of contracts above a certain value (note of the author – the value is stated by the EU) which are concluded in the member states on behalf of the state, regional or local authorities and other bodies governed by public law entities is also advisable to coordinate. These coordinating provisions should be interpreted in accordance with rules and principles and other rules of the EC Treaty.

Pursuant to the Directives new electronic purchasing techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money. Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under these Directives and the principles of equal treatment, non-discrimination and transparency (note of the author – these are the basic principles of public procurement). In view of the rapid expansion of electronic purchasing systems, appropriate rules should now be introduced to enable contracting authorities to take full advantage of the possibilities afforded by these systems and electronic means should be put on a par with traditional means of communication and information exchange. As far as possible, the means and technology chosen should be compatible with the technologies used in other member states.

From the view of electronic public procurement (e-Procurement) the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures and the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particu-

⁵ Before signature of the Lisbon Treaty. Used in the whole of this text.

lar electronic commerce, in the internal market should be applied to the transmission of information by electronic means.

The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality. The use of electronic signatures should be encouraged. Accordingly, the devices for the electronic receipt of offers, requests to participate etc. should comply with specific additional requirements. Pursuant to the Directives the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.

From the view of technical specifications (in case of SW and HW supplies) the Directives states unless justified by the subject-matter of the contract, technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition and shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to the Par. 3 and 4 of the Directives is not possible; such reference shall be accompanied by the words 'or equivalent' (in detail see Art. 23 par. 2 and 8 of the Directive 2004/18/EC and Art. 34 par. 2 and 8 of the Directive 2004/17/EC).

3. NATIONAL LEGAL REGULATIONS OF TECHNICAL SPECIFICATIONS IN PUBLIC PROCUREMENT AND THEIR INTERPRETATION

In the Czech law the relevant legal regulation of the European Communities,⁶ was incorporated with the Act No. 137/2006 Coll., on public contracts (hereinafter "the Act on Public Contract" or "the Act") and the Concession Act No. 139/2006 Coll or "the Act". Both acts came into effect on 1st July 2006. There are two acts on public procurement in the Czech Republic con-

⁶ Directive 2005/75/EC of the European Parliament and of the Council, of 16 November 2005 amending Directive 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

Council Directive 89/665/EEC, of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

Council Directive 92/13/EEC, of 25 February 1992, coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

Commission Directive 2005/51/EC, of 7 September 2005, amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement.

trary to the Slovak republic and the Republic of Hungary (note of the author – these countries are the author’s scope of interest in this article). Further we are interested in the Act on Public Contract.

The most important work in procedures for the award of public contracts is tender documentation. According to the Par. 44 sec. 1 of the Act the documentation shall be the totality of documents, data, requirements, and technical specifications of the contracting entity delimiting the subject-matter of a public contract in detail necessary for drawing up a tender. Technical specifications are defined in the Par. 45 and 46 of the Act. Technical specifications may be characterized by technical norms (further see Par. 46 sec. 1 and 2 of the Act) or in terms of performance or functional requirements that may include environmental characteristics (further see Par. 46 sec. 4 and 5 of the Act)

In the Par. 44 sec. 9 of the Act is written that unless justified by the subject-matter of the public contract, tender documentation, and in particular, technical specifications, shall not introduce any requirements or refer to business names, designations, or names and surnames, specific indication of products and services which is distinctive for a certain person or, where appropriate, for an organisational branch thereof, to patents of inventions, utility models, industrial designs, trademarks or indication of origin, with the effect of favouring or eliminating certain economic operators or certain products. Such reference shall be permitted on an exceptional basis where a sufficiently precise and intelligible description of the subject-matter of the public contract pursuant to the Par. 45 and Par. 46 is not possible. In such a case, the contracting entity shall allow for the use of qualitatively and technically equivalent solutions for the performance of the public contract.

The Act further states that technical specifications shall not be defined in such a manner to give certain economic operators competitive advantage or create unjustified obstacles to competition (Par. 45 sec. 3 of the Act on Public Contract).

The Czech legal regulation is mainly specified with decisions of the Czech Office for the Protection of Competition (further see the chapter Legal effects of breaching legislation of public procurement in part of technical specifications). Neither decisions of the Czech Office for the Protection of Competition nor court decisions are binding sources of law in the Czech Republic.

In the Slovak law there is the Act No. 25/2006 Coll. on public procurement and on modification and amendment of certain acts (hereinafter “the Slovak Act”), that regulates among others public award of supply contracts,

building works contract, service contracts as well as building works concessions. The Act was in effect from 1st February 2006.⁷ It was before the effectiveness of the Czech acts on public procurement.

According to the Par. 34 sec 1 of the Slovak Act tender documents shall contain a detailed definition of the object of contract. The object of contract must be described clearly, completely and impartially on the basis of technical requirements pursuant to Annex 5.⁸ Technical specifications must be defined in a way so as to ensure equal access for all tenderers or candidates and to ensure fair competition.

Same as in the Czech law the description of the object of contract shall be drawn up by a reference to technical norms enumerated in the law and on the basis of functional and performance requirements which may include environmental characteristics (in details see Par. 34 sec. 2 of the Slovak Act) and technical requirements shall not refer to a particular manufacturer, manufacturing process, brand, patent, type, country, area or place of origin or manufacture with the effect of disadvantage or exclusion of certain candidates or products, unless so required by the object of contract. Such reference may only be made if the object of contract cannot be described pursuant to the Par. 34 sec. 2 and 3 (a) of the Slovak Act in a sufficiently clear and intelligible manner, and such reference must be accompanied by the words "or equivalent" (Par. 34 sec. 7 of the Slovak Act).

In the Hungarian law the Act CXXIX of 2003 on Public Procurement (hereinafter "Act CXXIX") was adopted. The Act entered into force on 1st May 2004 except Art. 401 Par. 2-4 of the Act.

The Hungarian regulation of technical specifications is the same (or very similar) as the Czech and Slovak law on public procurement.

Technical specifications shall be defined so as to take into account equal access criteria for all users and shall be defined with technical norms or in terms of performance or functional requirements and are part of tender documentation. According to the Article 58 sec. 7 of the Act CXXIX the contracting authority shall not define the public procurement technical specification as to exclude from the procedure certain tenderers or products, or with the effect of favouring or disadvantaging in any other manner. If the precise and intelligible description of the subject-matter of the public procurement justifies reference to a specific make or source, or type, or a particular process, activity, person, or patent or trade mark, the specification shall state this was justified only by the need to specify the subject-matter pre-

⁷ Except Par. 25 sec. 2, Par. 91 sec. 3 and Par. 99 sec. 2 in Section I of the act, which came into effect on 1st January 2007.

⁸ The annex is about technical specifications.

cisely, and such a reference shall be accompanied by the word “or equivalent”.

National legal regulations are often interpreted with documents which are not binding sources of law but contain whole-spread ideas which should be followed. For example in the United Kingdom the Office of Government Commerce the EU Procurement Guidance was published that states rules for tendering hardware. The Guidance states that “requirements for microprocessors must exclude any reference to brands (e.g. Intel, AMD), manufacturer-specific processor architectures, trademarks, technology-types or other potentially discriminatory descriptors.”⁹

Public procurement is a disputable issue in the whole world. The above mentioned Central Europe national legal regulations are arising from the community law. However the policy of public procurement in part of technical specifications is similar in the rest of the world, e. g. in the USA, Japan, where is prohibit to use specific brand or product names in competition.

For example in Japan the Committee on Information Technology System Procurement issued a memorandum reminding each government ministry and agency to abide with the „Guidance for Preparing Specifications Related to Procurement for Computer Products and Services“ which states that SW & HW public procurement must be transparent and secures fair competition.

4. E-PROCUREMENT IN DOCUMENTS

At governmental level there are various documents granting the usage of ICT in public procurement and at private level there is production of computer programs for e-Procurement (further see the chapter of e-Procurement in the Czech Republic).

At EU level there are two main documents – Ministerial Declaration approved on 24 November 2005 in Manchester, United Kingdom (hereinafter „Ministerial Declaration“) and i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All (hereinafter “Action Plan“) made on 25th March 2006.

Ministerial Declaration mentions that “the effective use of ICT in public procurement is an area of great significance for achieving efficiency gains: public sector purchases in Europe account for 15-20% of GDP and electronic public procurement can reduce costs by as much as 5%. The aggregate impact across Europe is therefore potentially very high. eProcurement benefits

⁹ Procurement Guidelines around the World. [cited on 16th October 2009]. From: <http://breakfree.amd.com/en-us/procurement.aspx>.

administrations and businesses alike, with the potential to improve markets and competition and to stimulate innovation."¹⁰

The Action Plan adds: "Government revenues account for some 45% of GDP and public authorities purchase 15 to 20% of GDP or €1500 to 2000 billion in Europe every year. Electronic procurement and invoicing could result in savings in total procurement costs of around 5% and reductions in transaction costs of 10% or more, leading to savings of tens of billions of euros annually. In particular, SMEs can benefit from easier access to public procurement markets and increasing their ICT-capabilities and thereby competitiveness."¹¹

The Ministerial Declaration further stated that: "By 2010 all public administrations across Europe will have the capability of carrying out 100% of their procurement electronically, where legally permissible, thus creating a fairer and more transparent market for all companies independent of a company's size or location within the single market. By 2010 at least 50% of public procurement above the EU public procurement threshold will be carried out electronically."¹² The Action Plan confirms it.

There are also national documents and plans for e-Procurement. For example, in the Czech Republic there is The National Plan for the Introduction of Electronic Public Procurement over the Period 2006 – 2010 approved by the Government Resolution No. 500 of 10th May 2006, which „ensues from the need of the Czech Republic to address systematically the issue of introduction of modern information and communication technologies in the process of public procurement and the process of public investments. It reflects the efforts of the Government of the Czech Republic to execute the largest proportion possible of public purchases "online" and to encourage contracting authorities/entities and economic operators to embrace appropriate electronic commercial practices."¹³

5. E-PROCUREMENT IN THE CZECH REPUBLIC

According to the Czech law procedures for the award of public contracts are possible to be done electronically (further see Par. 149 of the Act). The Act works with two basic terms - electronic means and tools. Electronic

¹⁰ EU: Manchester Ministerial Declaration 2005. [cited on 16th October 2009]. From: <http://www.epractice.eu/en/library/281737>, p. 2.

¹¹ i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All. [cited on 16th October 2009]. From: <http://www.portal-vz.cz/CMSPages/GetFile.aspx?guid=a6a24e52-d422-4897-b510-c6976b127396>, p. 6.

¹² EU: Manchester Ministerial Declaration 2005. [cited on 16th October 2009]. From: <http://www.epractice.eu/en/library/281737>, p. 4.

¹³ The National Plan for the Introduction of Electronic Public Procurement over the Period 2006 – 2010. [cited on 16th October 2009]. From: <http://www.portal-vz.cz/CMSPages/GetFile.aspx?guid=bbb4e41f-5818-4d0f-9cae-a747ad538241>, p. 3.

means shall be understood as a network and services of electronic communications and fax shall not be considered to be an electronic means. Electronic tools shall be understood as a technical equipment or software and, where appropriate, parts thereof, linked to the electronic communication networks or services and facilitating the performance of acts in electronic format under the Act on Public Contract through such electronic communication networks or services, including processing, which comprises digital compression, and data storage.

There is no free of charge governmental computer program for contracting authorities excluding central authorities¹⁴ so private enterprises are developing computer programs which enable the e-procurement.¹⁵ The computer programs must follow accreditation schemes at the Interior Ministry of Internal Affairs which care of e-Procurement together with the Ministry of Local Development because pursuant to the Act on Public Contract electronic tools may be used in an award procedure only when they have been attested in attestation procedure (Par. 149 sec. 2 of the Act on Public Contract). It means that "general" ICT are not possible to use in public procurement.

Attestation procedure is the framework of which the requirements concerning conformity of electronic tools with the requirements under the Act on Public Contract and implementing legal regulations to this Act and favourable outcome of the attestation ends with delivering of certificate (attestation).

Until today after three years of effectiveness of the Act on Public Contract there are several full operation computer programs for e-Procurement in the Czech Republic. E-procurement systems are computer programs according to the national legal regulations (see further). They are working on the Internet (an common Internet browser is needed) after log in (password is necessary) of a user, administration of a server with the program is usually by the program provider, electronic signature and data encryption are used in communication, then the program assure regular data backup, establishment of time measurement standards and registration of all activities done in the programs.

Safety measures should be number one in providing service of e-Procurement and have to be systematically researched and developed. Security

¹⁴ The Government Resolution No. 683 of 26th June 2002 about measures on coordinate spending financial resources for ICT orders and purchases up the financial limit 2 mil. CZK in electronic market GEM for subjects of government administration.

¹⁵ Not only central authorities can use GEM free of charge but the program is not for tenders over the financial limit 2 mil. CZK.

defects can easily end in criminal conduct (further see the chapter Legal effects of breaching of electronic procedure of public procurement).

6. EU LEGAL REGULATION OF COMPUTER PROGRAMS

Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs was issued on 23 April 2009 (hereinafter "Directive 2009/24/EC") and came into force on 25th May 2009. The Directive has the same text excluding Article 8 about application of other legal provisions, as the cancelled Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

According to the directives computer program shall include programs in any form, including those which are incorporated into hardware. This term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

It shall be protected by copyright as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.

The Berne Convention for the Protection of Literary and Artistic Works¹⁶ of July 24, 1971 which was last amended on 28th September 1979 defines literary and artistic work as every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramaticomusical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science (Art. 1 sec. 1 of the Convention).

Computer program is not explicitly express as an example of work to protect. It is clear because the ICT started to influence the society recently.

7. NATIONAL LEGAL REGULATIONS OF COMPUTER PROGRAMS AND PUBLIC PROCUREMENT

The Czech Act No. 121/2000 Coll. (in effect from 1st December 2000) on Copyright and Rights Related to Copyright and on Amendment to Certain

¹⁶ The Convention was made by the World Intellectual Property Organization (abb. WIPO) which is a specialized agency of the United Nations.

Acts (hereinafter “the Copyright Act”). Act implements the relevant legislation of the European Communities¹⁷ and regulates among others the right of an author to his work.

According to the Par. 2 sec. 1 a 2 of the Copyright Act the subject matter of copyright shall be a literary work or any other work of art or a scientific work, which is a unique outcome of the creative activity of the author and is expressed in any objectively perceivable manner including electronic form, permanent or temporary, irrespective of its scope, purpose or significance. A computer program shall also be considered a work.

The detailed regulation of computer programs is contained in the Par. 65 and 66 of the Copyright Act.

The Slovak Copyright Act (No. 618/2003 Coll.) which is in force from 1st January 2004 relates the community law same as the Czech law. It defines among other definitions the term program computer as set of commands and instructions used directly or indirectly in a computer. Commands and instructions can be written or expressed in source code or in computer code. The background materials necessary for its development shall form an integral part of computer program; if it fulfils characteristic of work (Par. 7 sec. 1),¹⁸ it is protected as a literary work (Par. 5 sec. 8 of the Slovak Copyright Act). The definition classifies pursuant to the international treaties computer program as literary work as well as in the Czech law.

¹⁷ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, as amended.

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, as amended.

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

¹⁸ Par. 7 sec. 1 of the Slovak Copyright Act: The subject matter of copyright shall be a literary work or other work of arts and a scientific work which are the unique outcome of the creative activity of the author, especially

a) a literary work and computer program, b) a literary work expressed by speech, a presentation or otherwise, especially exhibition and lecture, c) a theatrical work, especially a dramatic work, a dramatico-musical work, a pantomimic work and a choreographic work, and also other work created for the purpose of its releasing, d) a musical work with text or without text, e) an audiovisual work like, especially cinematographic work, f) a painting, a drawing, a graphic design, an illustration, a sculptural work and other work of fine arts, g) a photographic work, h) an architectural work, especially a work of architecture and town-planning work, a landscape work and an interior-architectural work and a building design work, i) a work of applied arts, j) a cartographic work in analogue or other form.

Reproduction and modification of computer program and decompilation of a computer program from computer code into the source language of the computer program is in detail governed in the Par. 35 and 36 of the Slovak Copyright Act.

The object of copyright protection stated in the Hungarian Copyright Act (Act No. LXXVI. of 1999, on Copyright; date of entry into force is 1st September 1999) is protection for literary, scientific and art creations, among others computer program creations and related documentation (hereinafter referred to as software), whether fixed in source code or object code or any other form, including application programs and operation system (Chapter I, Par. 1 sec. 2 letter c) of Hungarian Copyright Act). The regulation respects the EC law as well as the Czech and Slovak one.

From the reason of protection of computer program the regulation on public procurement enables to limit in this case the competition. It is possible to sign a contract directly with the author of the program even there are more computer programs for a sphere of business, e.g. electronic public procurement.

The following example demonstrates the praxes. Firstly a contracting authority should follow proceeding of public procurement, e. g. in open procedure (Par. 27 of the Czech Act on Public Contract) but after deciding for one of the programs, the next cooperation is possible directly with the author (producer) only in negotiated procedure without publication. The regulation enables it.

The possibility of negotiated procedure without publication because of exclusive right is stated in Art. 31 sec. 1 letter b) of the Directive 2004/18/EC and in the Article 40 sec. 3 letter c) of the Directive 2004/17/EC.

The national regulations implemented this provision. The Czech Act on Public Contract stipulates that the contracting entity is entitled to award a public contract by negotiated procedure without publication, if such a public contract, for reasons connected with the protection of exclusive rights may be performed by only by a particular economic operator (further see Par. 23 sec. 4 letter a) of the Act on Public Contract; Par. 58 sec. 1 of the Slovak Act; Art. 125 sec. 2 letter b) of the Act CXXIX).

8. LEGAL EFFECTS OF BREACHING OF ELECTRONIC PROCEDURE OF PUBLIC PROCUREMENT

The security threats are firstly connected with basic technical questions as electronic signature or data encryption.

Secondly there can be intent to misuse the program, e.g. breaking in computer system of contracting authority to change data saved in the pro-

gramme or breaking into supplier account to change data or employee of a contracting authority change data in the program to get economic profit.

The contemporary legal regulation already contains the above mentioned illegal behaviour. There is the regulation in the basic document of cyberspace - the Convention on Cybercrime.¹⁹ In connection with computer data and systems the Convention states in Section 1 – Substantive criminal law, Title 1 – Offences against the confidentiality, integrity and availability of computer data and systems (Article 2 - Illegal access, Article 3 - Illegal interception, Article 4 - Data interference, Article 5 - System interference and Article 6 - Misuse of devices).

The Convention further regulates in the same Section, in Title 2 - Computer-related offences (Article 7 – Computer-related forgery, Article 8 - Computer-related fraud) and in Title 4 – Offences related to infringements of copyright and related rights (Article 10 – Offences related to infringement of copyright and related rights).

In the Czech Republic the new Criminal Code No. 40/2009 Coll.²⁰ which is in effect from 1st January 2010 contains, same as in the other European states, e. g. the Slovak Republic (offence of alteration and misuse of record on data carrier in Par. 247) or the Republic of Hungary (in Section 300/C Criminal conduct for breaching computer systems and computer data and in Section 300/E Compromising or defrauding the integrity of the computer protection system or device), the offences with computer data and system (Par. 197 - 199) which are, in my view, in conformity with the Convention on Cybercrime even the Czech Republic did not ratified it.

In my opinion, these days the programs for electronic public procurement are still quite new products in information society and using of them is an exception so they are not in danger. We can compare this situation with first usage of direct banking.

In my view, after recognising possibilities of e-Procurement there will be a lot of breaching into and, the breaching will overshadow “traditional crimes” as corruption because “paper” public procurement is proceeding in which a lot of people participate but electronic public procurement does need “human network.”

¹⁹ The convention on cybercrime was done on 23rd November 2001 in Budapest and entered into force on 1st July 2004. The convention was signed in the Czech Republic in 2005. In the Slovak Republic the convention was ratified in January 2008 and entered into force on 1st May 2008. In the Republic of Hungary ratified the convention in 2003 and entered into force in 2004. Further see Convention on Cybercrime. [cited on 31st October 2008]. From: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG>.

²⁰ The previous Criminal Code which was cancelled with the Act No. 40/2009 Coll. contained among crimes against property (Head Eight) definition of the crime Alteration and misuse of record on data carrier (Par. 257a of the Criminal Code).

9. LEGAL EFFECTS OF BREACHING LEGISLATION OF PUBLIC PROCUREMENT IN PART OF TECHNICAL SPECIFICATIONS

Using trademarks in public procurement usually leads to sanctions in public procurement or in open competition. In the Czech Republic there is Czech Office for the Protection of Competition²¹ which has competence for issuing decisions on public procurement or on competition.²²

One of the last decisions on using trademarks in tender for ICT is No. R154/2007/02-17728/2007/310-Šp of 27th September 2007²³ that confirms that is not possible to assure a competitive advantage (Par. 45 sec. 3 of the Czech Act on Public Procurement) and that is breach of the law when contracting authority not allow the use of qualitatively and technically equivalent solutions for the performance of the public contract (Par. 44 sec. 9 of the Czech Act on Public Procurement).²⁴

Beside civil decisions on public procurement there is the regulation in the new Czech Criminal Code No. 40/2009 Coll. connected with public procurement like the offences exploitation of information and status in business relations (Par. 255), unauthorized advantage of entity in public procurement (Par. 256) or machinations in tender and in public competition (Par. 257). There is no judicature yet.²⁵

Author's rights to her/his work can be also breach in public procurement. There is the offence breach of copyright, rights related to copyright and rights to database (Par. 270)

²¹ The Office is the central authority of state administration responsible for creating conditions that favour and protect competition, supervision over public procurement and consultation and monitoring in relation to the provision of state aid. Further see www.compet.cz.

²² Besides the Act on Public Procurement see also the Act No. 143/2001 Coll., on the Protection of Competition and on amendment to certain Acts (Act on the Protection of Competition)

²³ Then the decision No. R140/2008/VZ-116/2009/310/ASc of 1st April 2009 was issued which confirms the breach of Par. 48 sec. 6 and Par. 49 sec. 2 of the previous Czech act on public procurement No. 40/2004 Coll. about technical specifications that shall not introduce any requirements or refer to business names etc. and about not giving certain economic operators competitive advantage. The decision also mentions the European Commission formal notice No. IP/04/1210 of 13th October 2004 about using "benchmarks" for describing technical specifications.

²⁴ On the other hand the decision No. ÚOHS-S158/09-8101/2009/510/KČe of 8th July 2009, admits that the contractual authority is able to describe the object of contract with characteristics of a concrete product and concrete technical specifications but it must give reasons for it because its decision of allocation of contract should be transparent and reviewed.

²⁵ The previous Czech Criminal Code No. 140/1961 Coll. regulates the offences that can be committed in public procurement as unauthorized advantage of entity (Par. 128a of the Criminal Code), exploitation of information in business relations (Par. 128 of the Criminal Code) or machinations in public competition (Par. 128b of the Criminal Code). There are court decisions, e.g. No. (Rt) Tdo 953/2003 of 24th September 2003 made by the Czech Supreme Court on unauthorized advantage of entity in public procurement.

It should be highlighted that criminal regulation has function of criminal repression so the regulation of economic crimes is applied as subsidiary to the non-criminal regulation mentioned above.²⁶

Similar as in the Czech penal legislation in the Slovak Criminal Code there is regulation of exploitation of information in business relations (Par. 265), of machinations in tender and in public competition (Par. 266-267) or breach of copyright (Par. 283).

In the Hungarian Criminal Code there is regulation of agreements in restraint of competition in public procurement and concession procedures (Section 296/B) or plagiarism (Section 329), infringement of copyright and certain rights related to copyright (Section 329/A) etc.

In the rest of the world there are a lot of disputes on ICT in public procurement. In Case C-359/93, Commission of the European Communities v Kingdom of the Netherlands, was decided that a member state fails to fulfill its obligations under Directive 77/62/EEC of the Council of 21 December 1976 coordinating procedures for the award of public supply contracts where it fails in such notice to add the words "or equivalent" after a technical specification defined by reference to a particular trade mark, when the directive requires them to be added and when failure to do so may impede the flow of imports in intra-Community trade, contrary to Article 30 of the Treaty.

10. CONCLUSION

Having in mind the Theoretical analysis of influence of ICT in public procurement (see the Introduction) we can conclude that the influence of ICT in public procurement forms in fact "vicious circle" (imagine that the line changed to circle) because:

1.	If a contracting authority likes to have SW or HW or e-Procurement computer program, it should do proceeding of public procurement.	<i>(during work)</i>
2.	The basic document of the proceeding is tender documentation which should contain technical specifications.	← threat of
3.	There are rules for make out the technical specifications.	← hacking
4.	There is threat that definition of technical specifications will breach the law.	← modern communi-
5.	There are sanctions for breaching the law – in private law (breach the competition) or in public law (criminal punishment).	← cations
6.	The process is repeating.	

²⁶ Nett, A. 2009, "Ke změnám trestního práva na úseku hospodářské trestné činnosti a k zásadě ultima ratio," Bulletin advokacie, No. 10, p. 77.

Because of the reasons which were summarized above the answer to the question, if ICT in public procurement can lead to cybercrime, is, in my opinion, yes (without no doubt).

The question stands at the beginning of its research and I think that it should be our point of interest because tenders are economic activities and ICT bring these activities new possibilities.