

ELECTRONIC SIGNATURES AND ACTS IN ELECTRONIC TOOLS USED IN PUBLIC PROCUREMENT

by

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The contribution analyses a specific role and character of electronic signatures and electronic acts in electronic tools which are used in public procurement. It describes a complete new legal regulation of electronic tools and acts taken electronically in awarding public contracts (Decree No. 9/2011 Coll.) that is in effect from 1st July 2011 and brings a lot of questions. The questions are connected with a new terminology, e.g. what does it mean "secured document" or if it possible to use handwritten signature or only electronic signature or what are processes of sending and receiving internal data reports of contracting authority?

Because of many questions there is still poor will of using online public procurement and it could become less and less popular. The situation is far away from the aims of the Ministerial Declaration approved on 24 November 2005 in Manchester, United Kingdom and i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All made on 25th March 2006 that stated: "By 2010 at least 50% of public procurement above the EU public procurement threshold will be carried out electronically." In the Czech Republic there are only 18% of contracting entities using e-tenders (further see Report on performance of National Plan for the Introduction of Electronic Public Procurement 2006 – 2010 at <http://www.portal-vz.cz/CMSPages/GetFile.aspx?guid=b4ee2397-f719-4237-a030-9e13a7d5a1b8>)

KEYWORDS

electronic signature, electronic act, electronic tool, public procurement

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1. INTRODUCTION

There are the 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 (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 in the European Union (hereinafter "Directives").

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 which their use will allow. 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.

In my opinion what is very important to mention is that the Directives states that 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. The existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.

The contribution analyses a specific role and character of electronic signatures and electronic acts in electronic tools which are used in public procurement in the Czech Republic. It describes a complete new legal regulation of electronic tools and acts taken electronically. In the Czech Republic

there are only 18% of contracting entities using e-tenders.¹ The reason is, in my opinion, imperfect legal regulations. This reason is studied in this contribution.

2. ATTESTED X CERTIFIED ELECTRONIC TOOLS

In the Czech Republic as the member state of the European Union there is a complete new legal regulation of electronic tools and acts taken electronically in awarding public contracts and particulars concerning certificate of conformity - Decree No. 9/2011 Coll. (hereinafter "Decree"). The Decree is in effect from 20th January 2011.

The new regulation should be interpreted together with the amendment to the Act No. 137/2006 Coll., on public contracts (hereinafter "the Act on Public Contracts") No. 179/2010 Coll. (hereinafter "Amendment") which is in effect from 15th September 2010. The Amendment states that contracting entities are entitled to make use of electronic tools attested under hitherto regulations by 30th June 2011 (Article II Transitional Provisions).

From 1st July 2011 electronic tools are certificated pursuant to the Decree. The process of certification and use of certified electronic tool brings a lot of questions. The questions are connected with a new terminology, e.g. what does it mean "secured document" or if it possible to use handwritten signature or only electronic signature or what are processes of sending and receiving internal data reports of contracting authority?

3. CERTIFIED X NON-CERTIFIED ELECTRONIC TOOLS

There is no change in the definition of electronic tool in the Paragraph 149 sec. 1 of the Act on Public Contracts. Electronic tool shall be understood as a software and, where appropriate, parts thereof, linked to the electronic communication networks or services and facilitating the performance of acts in electronic format under this Act through such electronic communication networks or services, including processing, which comprises digital compression, and data storage.

Contrary to the previous legal regulation (note of the author – before the effectiveness of the Amendment) the contracting entity is now entitled to use certified and non-certified electronic tools but the non-certified electron-

¹ Further see Report on performance of National Plan for the Introduction of Electronic Public Procurement 2006 – 2010. [cited on 31st July 2011]. From: <http://www.portal-vz.cz/CMSPages/GetFile.aspx?guid=b4ee2397-f719-4237-a030-9e13a7d5a1b8>.

ic tools should be nondiscriminatory, generally available and interoperable with information and communication technologies in general use.

In the Decree there is still the same definition of electronic act – in the award procedure shall be understood as an action of an acting person performed by means of an electronic tool (Par. 1 letter d) – as it was in the previous legal regulation in the Decree No. 329/2006 Coll.

4. NEW IMPLEMENTING REGULATION ON CERTIFICATION AUDIT

The Decree provides detailed conditions relating to electronic tools and acts taken electronically in awarding public contracts, and particulars concerning conditions for the issue of the certificate of conformity, data in such a certificate of conformity and validity of the certificate of conformity (Par. 1).

According the Par. 2 letter m) certification audit shall be understood as a process of verification of an electronic tool conformity conducted by an entity for the assessment of conformity accredited by the national accreditation body based on separate legal regulation².

In the certification audit the applicant³ shall prove conformity of the electronic tool to the requirements set forth by legal regulations in respect of functionality of such an electronic tool and in respect of the environment in which the electronic tool is operated.

Functionality shall be understood as a totality of functional characteristics, which the electronic tool holds (Par. 2 letter f). Environment shall be understood as conditions under which the electronic tool is operated (Par. 2 letter g).

Where the electronic tool holds a valid certificate of conformity in respect of functionality and is operated by the person other than the applicant that the certificate of conformity was issued to, the other person in the capacity of an applicant shall prove before the certification body only the satis-

² Act no. 22/1997 Coll., on Technical Requirements for Products and on Amendment to Certain Other Acts, as amended.

³ Applicant shall be understood as an operator that applies for the assessment of compliance and award of the certificate of compliance (Par. 1 letter i); operator of an electronic tool shall be understood as a natural or legal person that specifies operational parameters and secures operation of such an electronic tool, by means of which the electronic acts are or are to be performed for the purpose of awarding public contracts or for the purpose of acquiring a design in a design contest, and that meets requirements established under the law and Decree (Par. 1 letter h).

faction of requirements in respect of the operational environment in which the electronic tool is operated (Par. 9 sec. 2).

In my opinion the certification is totally different than attestation so who is not applicant even operator of electronic tool should individually follow at least these rules:

- archiving documentation of tender (T5)
- sending and obtaining messages at contracting authority (T9)
- dealing of evaluation committee /jury/ contracting authority (T19)
- electronic signature of document (T20).

Control of access to actives in awarding procedures (T3)

Contracting body should control access to actives in awarding procedures in the following options:

1. *autentization and authorization of accessing person is based on typing her/his name and password. A provider of document must ensure that distribution of name and password to accessing persons is adequately safe,*
2. *autentization and authorization of access person is based on certificate of the public key of accessing person or*
3. *autentization and authorization of accessing person is based on other technologies; it must be adequately safe all the time.*

The decree defines asset as any element of an electronic tool and operational environment, sources included, which is indispensable for the operation of such an electronic tool to the intended extent (Par. 2 letter p).

In my opinion, contracting body who is not operator of an electronic tool should have an internal regulation for founding new user accounts, distribution of access codes to users and records of canceled accesses.

Use of „open format of documents“ (T4)

Contracting body ensures that the format of data messages in award procedures is „open.“

What does it mean „open“ is not described in the Decree. I recommend to use opensource software like pdf, tiff or zip. In my opinion, contracting body should it state in internal regulation for electronic public procurement.

Archiving documentation of tender (T5)

Contracting body ensures that the documentation of a public contract signed with electronic signature should be stored in data storage with controlled access. The access should be regulated with rules in the section 2.3 (note of the author - Control of access to actives in awarding procedures (T3). Electronic tool must ensure that storage of documentation is joined with qualified time stamp.

Documentation of public contract which contains confidential information must be stored in data storage with controlled access. The access should be regulated with rules in the section 2.3. Documentation can be stored in encrypted form. If documentation is stored in encrypted form, contracting body must store private key of contracting body in a safe way and it must conform to a public key of contracting body which encrypted the documentation. The time of storage of private key of contracting body must conform the time of storage of documentation.

In my view, contracting body who is not an operator of electronic tool should regulate archiving of electronic documentation of public contract, for example in an internal regulation.

Sending and obtaining messages at contracting authority (T9, T10)

The format of data message of communication of contracting body is chosen according to the requirements of the body. Contracting authority should choose a format which covers documents against unlawful change. Electronic protocol used for data message transfer is chosen according to the requirements of the contracting body. Contracting body states, if the message is encrypted and states rules for key encrypting the message.

Contracting body must respect format and electronic protocol of incoming message of communication of the body. In case of encrypted message contracting body must state rules for decryption of the message. Rules for validity of electronic signature or mark are stated by contracting body. The obtaining of data message must be recorded as an electronic act (T2).⁴

The Decree defines what is non-encrypted message. According par. 2 letter j) non-encrypted data message shall be understood as a data message in which the transmitted data are not hidden e.g. by encryption and are directly legible. The Decree does not define "secured" message. In my opinion,

⁴ Record of electronic act (T2): Contracting body ensures that each of electronic acts contain: 1. Identification of the act at the contracting body; 2. Identification of person who did the act, if it is the act of the person and not the act automatically done by electronic tool (e.g. in-come of offer; 3. Information about nonstandard result of the act, if there was any mistake in electronic act and 4. Record of time of electronic act.

the “secured” message could be understood as encrypted one. Encrypted data message shall be understood as a data message, in which the transmitted data are hidden by means of encryption and thus are not directly legible (Par. 2 letter k).

The fundamental question is which of the message of communication of contracting body (note of the author – never mind in this case if the message is non-encrypted or encrypted etc.) should be certified. Contracting body should regulate which of the messages are recorded and which not. From my point of view, for example, discussion about some question in award procedure among administrators of tender at contracting body, isn't necessary to record.

Dealing of evaluation committee /jury/ contracting authority (T19)

Contracting body ensures the record of dealing of committee/jury/contracting authority is in form of protocol of dealing. A record of electronic act must be done according the section 2.2 (note of the author – Record of electronic act (T2)).

Electronic act in the award procedure shall be understood as an action of an acting person performed by means of an electronic tool (Par. 2 letter d).

In my opinion, according the new certification rules⁵ it is not possible to deal as a committee or jury or contracting body with e-mail or use other communication means than electronic tool. Contracting body should states in an internal regulation that the only possible dealing is in electronic tool or personally (paper form) and in this case storage of the protocol of dealing is in electronic way in electronic tool. Conditions of archiving were mentioned above (T5).

Electronic signature of document (T20)

Contracting body ensures electronic signature of document in the following way:

1. *The format of document must conform the requirements in the section 2.4 (see above T4). The document must be signed with electronic signature based on a qualified certificate or electronic mark based on a qualified system certificate. After signing the document there must be a record of electronic act about it according the the section 2.2 (note of the author – Record of electronic tool (T2)) or*

⁵ According to the Decree certification rules shall be understood as a totality of conditions and prerequisites established by the certification body (Par. 2 letter n).

2. *In case of multilateral electronic signature based on a qualified certificate the document is signed with sequential change of message. Contracting body must send data message with document signed with electronic signature based on a qualified certificate in way stated in section 2.11 (note of the author – Sending encrypted data message signed with electronic signature based on a qualified certificate (T11). Supplier must respect format of incoming data message. In case the message was encrypted, the supplier decipher the message. Supplier verifies validity of electronic signature based on a qualified certificate. Supplier must deny data message, if the electronic signature based on a qualified certificate is not valid or qualified certificate was revoked. Supplier must use for decryption her/his own electronic signature based on a qualified certificate and send it in data message according the section 2.14 (note of the author – Income of crypted data message with electronic signature based on a qualified certificate (T14). The procedure of multilateral electronic signature is possible to do in reverse sequence. It means that the document is signed by supplier first and then she/he hand over it to contracting body. All of the above mentioned requirements are used similarly.*

The question which is long-term and has not been solved in legal regulation yet is, if it is necessary to be signed a document or only a data message because of validity.⁶

⁶ For example see Peterka, J., Podaný, J. Problematika elektronického podpisu v soudní praxi. *Právní rozhledy*, 2010, No. 19, p. 689.

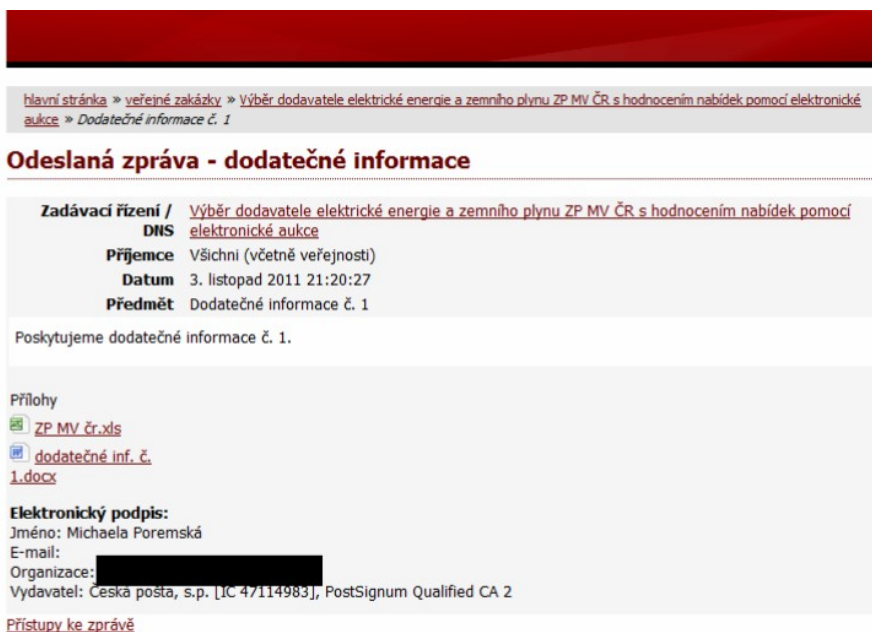


FIGURE 1: ELECTRONIC SIGNATURE ON DATA REPORT.

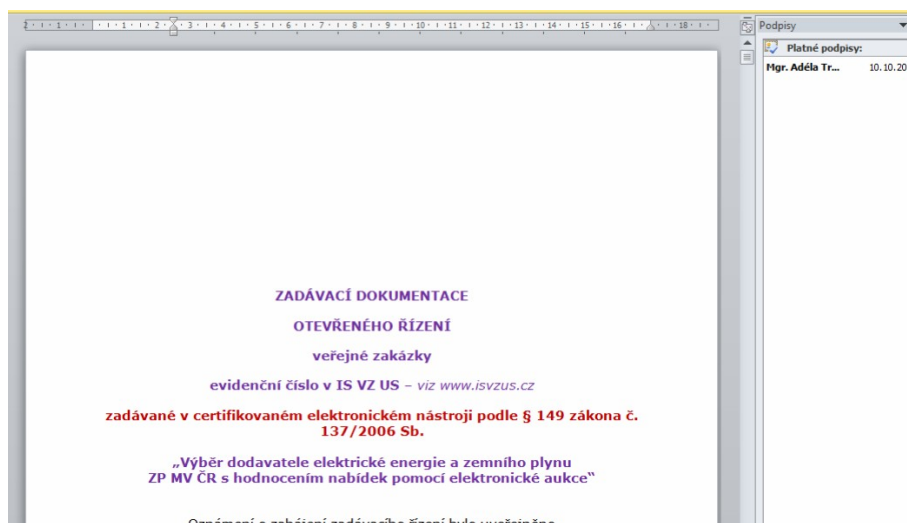


FIGURE 2: ELECTRONIC SIGNATURE ON DOCUMENT.

The Decree started to solve it. It states when it is obligatory to sign a document and divides the situation of signature of a data message. See the T20 in the Decree (see above). I remind the Paragraph 149 section 4 of the Act on Public Contracts (see below).

5. ELECTRONIC SIGNATURES IN PUBLIC PROCUREMENT

In praxis there is a huge problem that not many people have electronic signature. The fundamental question is, if it possible to use handwritten signature instead of electronic one. According to my experience, nowadays there is no other possibility than to use handwritten signature because persons authorised to act have not got any electronic signature. The aim of this article is not to analyze to use of handwritten signatures instead of electronic ones or electronic signatures themselves.⁷

According to the legal regulation (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 in the Czech Republic the Act No. 227/2000 Coll., on electronic signature) there are several types of electronic signatures. The fundamental information is that valid advanced electronic signature based on a qualified certificate is used in public procurement (hereinafter “qualified signature”).

According to the Paragraph 149 section 4 of the Act on Public Contracts *an economic operator submits a tender, request to participate, objections against practices of the contracting entity or where it demonstrates the fulfilment of qualifications by electronic means, or in the case of a request to participate or a project in design contest or where the contracting entity transmits by electronic means the contract notice or the call for competition, invitation to negotiate or to submit a tender in an award procedure or to take part in competitive dialogue, contract award notice, advice note of the manner of settling objections or decision on the most suitable project in a design contest, the data message 71) shall bear valid advanced electronic signature based on a qualified certificate. The contracting entity is entitled to require that such a data message bear electronic signature based on a qualified certificate or electronic mark based on a qualified system certificate, in respect of any data messages transmitted by electronic means.*

The usage of electronic signature based on a qualified certificate was solved in one of decisions of Czech Office for the Protection of Competition⁸

⁷ The possibilities of usage of handwritten signatures instead of electronic one see e.g. Poremská, M. 2011, “Elektronické podpisy v elektronických nástrojích po jejich certifikaci”, *Časopis pro právní vědu a praxi*, vol. XIX, no. 3, pp. 258–263.

⁸ 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.

(hereinafter as “Office”) which has competence for issuing decisions on public procurement or on competition.⁹

Even there are only few decisions about certified electronic signatures in public procurement, in my opinion, it is important to analyse them.

Decision No. ÚHOS-S332/2009/VZ-15412/2009/540/KKo of 5th January 2010 states that because of this reason that it is needed to use the general legal regulation in Par. 40 sec. 3 of the Civil Code (Act No. 40/1964 Coll.; hereinafter only “Civil Code” or “CC”), which regulates, if the legal act is done by electronic means, it may be signed in an electronic way according to special regulations.

The provision states that contracting parties have possibility (not the obligation) to do any legal act in electronic way. It is not a fault of contracting body that she/he does not use electronic signature.

The Office adds that: “the communication between the contracting body and suppliers was with e-mails from the beginning of award procedure and it is clear from the documentation of tender.”

On the basis of facts the Office says that: “even the request for explanation of tender price was not signed with electronic signature based on a qualified certificate, the legal act is valid. Contracting body backs up confirmation e-mail which proves delivery and reading the e-mail of proposer.”

In my opinion, it is difficult to follow this Office’s opinion because Paragraph 40 section 4 CC that states *the written form shall be kept if the legal act is done by telegraph, teleprinter or electronic means that allow picking up of its content and determining of the acting person*. My question is – how we can be sure that the sender of the message sent (wanted to send) the message we obtained, if the message is not signed? For example the message could be send by the sender’s child who was playing with computer.

My opinion is that each of messages should be signed with electronic signatures and only in this case the legal act can be valid (not only for e-procurement) otherwise the validity is not sure.¹⁰

6. CONCLUSION

Because of many questions in e-procurement connected with electronic signatures and acts there is still poor will of using online public procurement

⁹ Besides the Act on Public Contracts 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).

¹⁰ Further see Hulmák M. In Švestka, J., Spáčil, J., Škárová, M., Hulmák, M., & coll. 2009, *Občanský zákoník I. § 1 až 459. Komentář*. 2.edition. C.H.Beck, Prague, pp. 371.

and it could become less and less popular. The situation is far away from the aims of the Ministerial Declaration approved on 24 November 2005 in Manchester, United Kingdom and i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All made on 25th March 2006 that stated: "By 2010 at least 50% of public procurement above the EU public procurement threshold will be carried out electronically." In the Czech Republic there is only 18% using e-tenders (further see Report on performance of National Plan for the Introduction of Electronic Public Procurement 2006 – 2010 at <http://www.portal-vz.cz/CMSPages/GetFile.aspx?guid=b4ee2397-f719-4237-a030-9e13a7d5a1b8>).

The using of electronic tools should be supported. We can see that no governmental programmes but legal regulations which prescribe using of electronic acts and electronic signatures enlarge the use of electronic tools in public procurement like it was in case of the Amendment No. 179/2010 Coll. and the new Decree No. 9/2011 Coll.

In my practice I have not seen a new internal regulation on electronic acts and signatures according the new legal regulation yet. We can observe, if there will be any change with the new Amendment to the Czech Act on Public Contracts (Parliamentary Press 370). The new Amendment has the No. 55/2012 Coll. and came into effect on 1st April 2012.

The Amendment No. 179/2010 Coll. spread the use of electronic acts in public procurement, e.g. it supported the use of electronic auction as instrument for the evaluation of tenders or it stated that tender documentation should be given in electronic way, if supplier likes.

In my opinion, the new Amendment No. 55/2012 Coll. "presses" on using electronic tools in public procurement because it states obligatory publishing of contracts, prices and sub-suppliers or publishing of decision on the selection of the most suitable tender etc.