WARDYŃSKI & PARTNERS

Changes in the public procurement law

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Contents

Public procurement in Poland: An incomplete revolution

Poland did not manage to implement the EU's new procurement directives on schedule, but contracting authorities are required to conduct proceedings in full compliance with EU law.

"In Principle": The deadline for implementation of the new procurement directives into national law passed in April, but the old act is still in force in Poland. Why is that?

Mirella Lechna: Legislative work has not been completed yet on the government's proposed Act Amending the Public Procurement Law and Certain Other Acts (Sejm print no. 366), designed to implement the new Classic Directive (Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC) and the new Utilities Directive (Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC).

Both of the new directives were adopted on 26 February 2014 and published on 28 March 2014. They entered into force following publication in the *EU Official Journal*, but the deadline for implementing them in the legal systems of the member states was set at 18 April 2016. The repeal of the prior procurement directives also occurred on that date.

This means that the 2004 directives ceased to be in force from 18 April 2016. The existing Public Procurement Law in Poland formally remains in force, but it can no longer be applied where inconsistent with the 2014 directives.

What does this mean for participants in the public procurement market?

This situation unnecessarily complicates application of the Public Procurement Law and thus also the award of public contracts. This is because contracting authorities are required to conduct contract procedures in full compliance with EU law, and contractors seeking award of public contracts have the right to enjoy the advantages flowing from the new directives.

The Polish reality when it comes to application of the Public Procurement Law is known for excessive formalism. Thus the situation where some rules are supposed to be applied without an express legal basis under the act currently in force in Poland, but formulated universally in a European legal act, is hard to imagine.

Nonetheless, this obligation arises under fundamental principles of the functioning of EU law in the legal systems of the member states. The Court of Justice held long ago, including

in the *Simmenthal* case (C-106/77) in 1978, that if there is a true conflict between a rule of Community law and a rule of national law, the Community law should be applied directly, without the need to wait for implementation. In other cases, such as *Fratelli Costanzo SpA* (C-103/88) in 1989 and *Ciola* (C-224/97) in 1999, the Court of Justice held that it is not only courts that must refrain from applying national regulations inconsistent with Community regulations, but also administrative bodies, which clearly imposes an obligation on contracting authorities in this respect. So even though the 2014 procurement directives have not been implemented into Polish law yet, where their provisions are unconditional and sufficiently precise, they must be applied nonetheless.

Can contracts still be awarded relying exclusively on the current form of the Public Procurement Law?

This is not a legal option. Such a procedure would be defective. Failure to comply with the principle of the primacy of Community law would be particularly serious in the case of contracts financed with EU funds, where violation of procurement law would result in financial sanctions. Besides, there is no doubt about issue. The president of the Public Procurement Office has even published guidelines on how to apply the Public Procurement Law during the period up to adoption and entry into force of the amended act. The guidelines confirm that in the case of procurements above the EU threshold values, the principle of direct effect of the directives must be applied. But in practice, applying and taking advantage of this solution could be problematic for participants in the public procurement market.

What new solutions are introduced by the directives?

Before the directives were adopted, detailed studies were conducted into the functioning of the European public procurement system. Following those studies, the new directives provide for simplified procurement procedures. They introduce a "light regime" for certain types of contracts, e.g. for services that had been classified as non-priority, while the new regulations eliminate the distinction between priority services and non-priority services.

The negotiation procedure will be applied more broadly, and also has been made more flexible. The directives also introduce solutions making it easier for SMEs to access the procurement market. This involves the documents that bidders must file, evaluation of the contractual capacity of SMEs, and a requirement to allocate contracts under the principle of "divide or justify."

The directives also address in detail the possibility of modifying a procurement contract, permitting replacement of the contractor in certain circumstances. They introduce a mechanism for direct payments to subcontractors. A different system for evaluation of offers has been introduced, foregrounding the criterion of the "economically most advantageous tender." The directives also include provisions on strategic use of public procurement, which will enable other state policies to be pursued while performing public contracts.

In terms of qualification of contractors, Directive 2014/24/EU focuses on the capacity to perform the contract. This is a departure from the previous approach, which permitted

contracting authorities to apply more restrictive exclusion criteria. This is a fundamental change, particularly in terms of Polish law, which is known for its highly restriction position on this issue (as illustrated for example by the *Forposta SA* case, C-465/11). The grounds for exclusion of contractors have been revised, resulting in new rules not found in Polish law before.

It should also be pointed out that the directive expressly introduces a "self-cleaning defence" mechanism. Using this, a contractor can show that even though grounds for exclusion do exist, the measures taken by the contractor ensure its capacity to perform the contract. This can protect the contractor from exclusion.

These aspects alone are enough to show that procurement procedures will taken on a new character, and the approach to qualification and selection of bidders should be more practical and flexible. This whole approach is not typical for the Polish public procurement system.

Will the Polish Public Procurement Law come into full compliance with the new European law?

That's a very difficult question. The Public Procurement Office had projected that despite the delay, the amending act would be adopted before the end of April, but that became unrealistic.

Two years ago it appeared from the initiative of the government committee, the Ministry of Economy and the Public Procurement Office that the new rules would be implemented smoothly, and it would be more than just a legislative change but would also introduce a new quality into public procurement in the spirit of the reforms at the European level. But since then the process of amending the Public Procurement Law has gone most chaotically. There were numerous competing drafts, one of which had provisions mechanically pasted from the directive, which was clearly not the right approach. The provisions expressed in the peculiar language of the directives, verbatim, could not function effectively and harmoniously in the Polish legal system.

So the time allowed for transposition of the directive was wasted. Consequently, instead of a totally new and modern public procurement act, we have only an act amending the 2004 law.

This approach ultimately results solely from the lack of time to enact the intended complete overhaul of the Public Procurement Law. Thus it can be assumed that the amending act currently in the works is not the ultimate target, but will have to undergo further revisions.

On top of this, Poland is also required to implement the new Concessions Directive (Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts). Work on that act is only at the initial phase.

New catalogue of grounds for excluding a contractor from procurement procedures

Hanna Drynkorn

The proposed amendment to the Public Procurement Law would introduce grounds for excluding contractors not previously recognised under Polish law, but would also expressly depart from the existing restrictive approach to exclusion of contractors. The "self-cleaning" procedure and the optional nature of certain grounds are new solutions.

The amendment would repeal all of the existing grounds for exclusion of bidders from procurement procedures and then introduce a new catalogue of grounds, regulated more clearly than before.

Apart from replacement of the catalogue of grounds, two major modifications favourable to contractors are provided for.

The first of them is designation of certain existing grounds and several of the new grounds as optional grounds for exclusion.

The second is the possibility for contractors to escape from the negative consequences of certain occurrences that generally are grounds for exclusion. For this purpose they must present compliance measures, discussed further below.

Optional and mandatory grounds

The bill follows the provisions of the new directive in dividing the grounds for exclusion of contractors into mandatory grounds and optional grounds. Under prior law, all of the grounds listed in the act, apart from grave professional misconduct, were mandatory: if they arose in any procurement procedure, the contracting authority had to exclude the contractor.

Under the new rules, it is obligatory to exclude contractors who have committed certain types of offences deemed to be particularly harmful to the public interest, or who have violated tax or social insurance obligations.

As indicated in the justification for the bill, "These circumstances always negatively impact the proper functioning of the public procurement system. They cause distortion of fair competition in the procedure and can unlawfully affect the result. The consequence is typically a loss to the contracting authority because of the need to select a less advantageous offer than if the procedure were conducted under conditions of true competition, based on accurate documents and declarations of the contractors. Moreover, they have a negative impact on economic efficiency, transparency, and the image of public procurement, and also tend to increase the bad will of contractors seeking public contracts."

But in other situations, identified as optional grounds for exclusion, under the proposed amendment the contracting authority will be permitted to decide whether or not the given event is grounds for rejecting the offer (or application). The optional grounds for exclu-

sion are described in the proposed Art. 24(5). If the contracting authority provides for exclusion of a contractor on the basis of optional grounds, it must indicate the specific grounds in the contract notice, the terms of reference, or the invitation to negotiations.

On one hand, the grounds for exclusion seek to insure selection of only reliable contractors, but on the other hand they limit the group of potential contractors. Now it will be up to the contracting authority to decide whether certain events in the contractor's history, or characteristics of the contractor, such as a declaration of bankruptcy, represent a threat to performance of the contract in the given instance. Thus the contracting authority itself will determine whether to include these grounds.

Consequently, in every case the contractor will have to examine carefully the grounds for exclusion, as they will not be identical for all proceedings, as was previously the case. The practice will show whether contracting authorities seek to limit the group of potential contractors by employing optional grounds for exclusion.

What does the "self-cleaning defence" involve?

The proposed new Art. 24(8)–(11) provides for a "self-cleaning defence" which a contractor may use to prevent exclusion from a procurement procedure despite the existence of grounds for exclusion. Here the contractor must present appropriate remedial measures to demonstrate that it can ensure performance of the contract. This is a rejection of the formalism which involved an absolute duty to exclude a contractor affected by the grounds indicated in the act.

The contractor may use this opportunity in the case of nearly all of the grounds for exclusion, except for failure to meet the conditions for participation in the proceeding, lack of an invitation to participate further in the proceeding, or issuance of an order prohibiting the contractor from seeking public contracts. In other cases—but with differences—the new law permits a contractor to avoid the stigma connected with past occurrence of one of the listed events.

To this end, the contractor may present evidence that the measures it has taken are sufficient to demonstrate the contractor's reliability, in particular by demonstrating redress of the loss caused by the criminal offence or tax offence, compensation for loss, an exhaustive explanation of the facts, cooperation with law enforcement authorities, and taking specific technical, organisational and personnel measures necessary to prevent further criminal or tax offences or other improper behaviour by the contractor. This does not apply if a legally final injunction against applying for public contracts has been issued against the contractor and is still in force.

If the contracting authority finds that the evidence presented by the contractor is insufficient, it will exclude the contractor. This raises the question of what evidence should be regarded as sufficient. This issue is obviously discretionary to some extent, and practice will show what types of documents may be used for this purpose.

Exercising the option of the self-cleaning defence is up to the contractor; the contracting authority will not do so at its own initiative. So if the contractor does not present the appropriate evidence, the contracting authority will exclude it under the general rules.

- **Membership in a capital group**

It is similar in the case of entities from the same capital group. In this respect, prior law

also allowed contractors to avoid exclusion. The general rule is that two entities belonging to the same capital group are excluded if both of them submit offers (or applications) in a procurement procedure. But the law provides that in this situation, when submitting a statement that it belongs to the same capital group as another contractor, the contractor may present evidence showing that the connection will not distort competition in the procedure.

- **Participation in preparing the tender**

The compliance measures indicated above may be applied at the initiative of the contractor itself. It is different with respect to grounds consisting of involvement by the contractor or its staff in preparing the given tender proceeding.

Then, under Art. 24(10) of the Public Procurement Law, before imposing mandatory exclusion of the contractor, the contracting authority would have to provide the contractor an opportunity to show that its participation in the tender will not distort competition. This is an element of the self-cleaning defence. However, this ground for exclusion is not in itself categorical, as it is provided that the contracting authority may decline to apply it if the resulting distortion of competition can be eliminated in some other way than excluding the contractor from the tender.

Thus there is a notable trend to reserve such a serious consequence as exclusion from the tender for situations where it is absolutely essential.

New grounds for exclusion

- **Modified catalogue of serious and petty offences**

The catalogue of offences whose commission will always result in exclusion from a tender is to be modified. These are the offences listed in the proposed new Art. 24(12)(a) of the Public Procurement Law, such as financing of terrorism, human trafficking, giving or taking bribes, influence-peddling, election fraud, organised crime, fraud, and corruption in sports.

Another basis for exclusion consists of several groups of felonies defined in the Penal Code, involving terrorism, forgery, property offences, economic offences, environmental offences and employment offences, as well as offences defined in the Fiscal Penal Code as fiscal offences or money laundering.

Additionally, optional grounds for exclusion that are being added to the list include a legally final conviction of a contractor or its authorities for a petty offence against the rights of employees or against the environment. The contracting authority may also regard issuance of a final administrative decision as sufficient basis for invoking one of the grounds for exclusion.

Thus there is noticeable promotion of goals connected with the social policy of the state, in terms of protection of employees and the environment, by making it difficult for businesses to win public contracts if they have previously violated these interests.

- **Commission of criminal offences by corporate authorities**

The grounds for exclusion of contractors whose corporate authorities include persons who have committed an offence barring participation in public procurement have been reformulated. Now there is to be only one provision governing this issue: Art. 24(1)(14), which refers collectively to an active member of the management board or supervisory board, a partner in a registered partnership, professional partnership, limited partnership or joint-stock limited partnership, or a com-

mercial proxy, convicted in a legally final judgment for one of the offences listed in the preceding point. This is clearer than under prior law, when it was broken down into numerous subpoints making up the greater part of the grounds for exclusion.

- **Grounds designed to protect competition**

In terms of mandatory grounds for exclusion, the amended act includes behaviour by contractors which could distort competition in the procurement procedure, namely:

  - Participation by the contractor or related persons in the preparation of the tender procedure
  - Unlawful influence or attempted influence over the actions of the contracting authority, or obtaining confidential information that could give the contractor an advantage in the tender procedure
  - Conclusion of an understanding with other contractors with the purpose of distorting competition between the contractors, if the contracting authority can demonstrate this with appropriate evidence.

- **Taxes**

Among the mandatory grounds is a legally final judgment or administrative decision finding arrears in payment of taxes, fees, or social insurance contributions.

But non-compliance with obligations to pay taxes, fees or social insurance contributions can be optional grounds for exclusion, if indicated in the tender documentation, and the contracting authority can demonstrate this with relevant evidence.

Nonetheless, merely being in arrears in payment of taxes, fees or social insurance premiums will no longer be an absolute ground for exclusion, as it has been in the past.

Conditions for lending resources must reflect the subject matter and purposes of the procurement

Hanna Drynkorn

The proposed amendment of the Public Procurement Law, despite introducing certain changes in the rules for participation by third parties in performance of public contracts, does not resolve all doubts concerning the existing practice. For some of them, it would be helpful to consult the guidelines from a recent judgment of the Court of Justice.

Under the proposed amendment to Poland's Public Procurement Law, the issue of reliance on the capacity of third parties is addressed more extensively than in prior law, but the

change does not appear that it will have much practical impact.

Changes introduced by the amendment

The proposed new Art. 22a of the Public Procurement Law is devoted entirely to the issue of reliance on the capacity of third parties, in place of the current Art. 26(2b), which is to be repealed. These rules are thus moved from the section concerning submission of documents to the section concerning fulfilment of the conditions for participation in the tender procedure.

It is clarified that the contracting authority will evaluate fulfilment by these entities of the conditions for participation in the procedure in terms of lending their capacity or economic and financial standing, as well as non-exclusion of the party.

Seeking to ensure selection of entities truly capable of performing the contract—realistically, and not only on paper—lawmakers have proposed a provision under which, with respect to conditions concerning education, professional qualifications or experience, the contractor may rely on the capacity of other entities if those entities perform the construction works or services for which these capacities are required.

This regulation is designed to avoid situations where the capacities of a third party are used by the contractor for fulfilment of the conditions for the procedure, and then the portion of the contract requiring appropriate education, qualifications or experience is performed by another entity. It is therefore designed to prevent the phenomenon of "reference trading."

The amendment also introduces joint and several liability of the contractor relying on the economic and financial standing of other entities, together with those entities, for injury suffered by the contracting authority as a result of failure to provide those resources, unless the contractor is not at fault for failure to provide the resources.

Guidelines from the Court of Justice

The reasoning presented by the Court of Justice in the recent case of *Partner Apelski Dariusz v Zarząd Oczyszczania Miasta* (C-324/14, judgment of 7 April 2016) will continue to be relevant with respect to certain issues under the proposed new law.

The *Apelski* decision was handed down shortly before repeal of Directive 2004/18/EC, which is no longer applicable. But not all of the doubts were resolved by the new Directive 2014/24/EU, and, consequently, by the proposed amended version of the Public Procurement Law.

In *Apelski,* the Court of Justice responded to a request for a preliminary ruling submitted by Poland's National Appeal Chamber (KIO). Doubts arose in a procurement case involving the contractor Partner (Apelski Dariusz) and the Warsaw municipal cleaning authority. The subject of the contract was comprehensive mechanical cleaning of Warsaw's streets during the winter and summer seasons of 2014–2017. KIO was unsure about the rules for reliance on the capacity of third parties, the possibility of combining the capacities of third parties, as well as the possibility of sharing resources in the form of consulting.

The guidelines handed down by the Court of Justice are generally not categorical, but it is clear from the judgment that the conditions for reliance on the capacity of third parties must depend in each case on the subject matter, purpose and specifics of the particular contract. The court refers more to reasonableness than rigid rules. So where clear rules are lacking, the room for dispute is greater.

Reliance on capacity of third parties—the rule, not the exception

The Court of Justice confirmed firstly that the possibility of a contractor relying on the capacity of other entities should be treated as the rule, not the exception. Consequently this entitlement should not be excessively limited by contracting authorities. As the court found, the possibility of relying on the capacity of other entities "where appropriate," as prescribed in the directive (and also in the Polish Public Procurement Law), cannot be interpreted to mean that third-party capacity can be relied on only in exceptional instances.

The proposed amendment to the Public Procurement Law maintains the possibility of relying on the resources of third parties "where appropriate and for a particular contract" (new Art. 22a)—like the directive. The interpretation by the Court of Justice indicating a broad right to rely on the capacities of third parties thus remains current—subject to one essential change to be introduced by the amendment.

The Public Procurement Law permits the contracting authority to require personal performance of specific portions of the contract (under Art. 36a(2), key portions of a contract for construction works or services, or, in a supply contract, work connected with siting and installation). The proposed amendment, following the directive, provides that such a reservation will also exclude the use of the support of the entity sharing its resources—repealing Art. 36a(3).

This is a major change. Under prior law, an entity sharing its resources was treated as equal to the contractor itself. Whatever the contractor could do, could also be performed by the third party. Certain portions of the contract—those deemed under Art. 36a to be critical tasks in a works contract or service contract, or siting and installation operations in the context of a supply contract—only could not be assigned to subcontractors.

Rules for reliance on the capacity of other entities

The bill does not propose to modify the required method for reliance on the capacity of third parties. It retains the general obligation of the contractor to demonstrate that it will actually have the specified resources at its disposal. Such proof could include submission of a commitment by the entity to provide its resources.

In this respect, the response given by the Court of Justice to the question posed by KIO in the *Apelski* case on whether the contracting authority may specify detailed rules in the contract notice or the terms of reference for cooperation between the contractor and the parties whose capacity it is relying on remains current.

In this context, the Court of Justice indicated in its judgment of 7 April 2016 that the contracting authority cannot limit the right to rely on the capacity of other entities. More specifically, it cannot lay down in advance specific rules under which the contractor may rely on the capacity of third parties. Thus, the court held, the contractor "is free to establish links with the entities on whose resources it relies, and to choose the legal nature of those links" (*Holst Italia SpA*, Case C-176/98, par. 29 and cases cited therein).

But the court indicated an exception to this rule. In order to ensure proper performance of the contact, the contracting authority may, in specific circumstances, expressly set out specific rules in accordance with which an economic operator may rely on the capacities of other entities. This must be addressed in the contract notice or tender specifications.

As the court stressed, these rules must be related and proportionate to the subject matter and objectives of the contract. Thus, again, the possibility of limiting the contractor's right to rely on the capacity of third parties requires reasonable justification in the specific instance.

Combining the capacity of third parties

Responding to the next question from KIO, the Court of Justice explained that generally a contractor may combine the capacities of two or more entities which do not individually have the capacities in terms of knowledge and experience required by the contracting authority.

But the court stated that in exceptional circumstances it is permissible for the contracting authority to impose limitations on the ability to combine the capacities of potential third parties—particularly when the procurement involves construction works requiring certain qualifications which cannot be obtained by combining the lower qualifications of multiple entities: "In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, … as long as that requirement is related and proportionate to the subject matter of the contract at issue" (*Swm Costruzioni 2 SpA*, C-94/12, par. 35). It is apparent that an evaluation of the circumstances of the specific case is always required.

Sharing capacity in the form of consulting

Reliance on the resources of a third party in the form of consultation generates controversy in practice. Consultation, in the sense of providing professional advice, is a form of support that is hard to pin down and thus may be doubtful in terms of how real it is. This is particularly true when the contract involves performance of specific services such as the street cleaning and snow removal at issue in the *Apelski* case. Additional doubts were raised because the consulting firm was based in Grudziądz, some 230 km away from Warsaw, where the contract had to be performed. The consulting services would involve training of staff and assistance in solving problems that might arise during contract performance, where the consulting firm would not be directly involved in performing the contract.

The Court of Justice again held that in this situation, KIO should determine whether in light of all the specific elements of the contract, the commitment of resources in this manner meets the requirements firmly established in the case law, i.e. that the resources will actually be available.

The court stressed that a condition for finding that the contractor has effectively relied on the capacity of a third party is to prove that in the specific case the contractor will actually have the capacity at its disposal. It is definitely not enough for the capacity to be made available only for the purpose of qualifying for the tender.

Summary

The conclusions of the Court of Justice with respect to all of the questions submitted generally require contracting authorities (or KIO, as the case may be) to evaluate the situation in each specific instance, reflecting specific circumstances of the given case.

It should be pointed out that when interpreting directives, the Court of Justice does not issue direct commands or prohibitions that must be applied by the member states. On the contrary, in compliance with the principles of appropriateness and proportionality, the court generally places the burden on insti-

tutions applying procurement law in the member states to assess the bounds of permissibility and the rules for relying on the capacity of third parties. This is obviously not the same as allowing them complete discretion in this respect.

The new regulations are designed to ensure that third-party capacity is actually available, but, as indicated, they are not exhaustive in seeking to achieve this goal. They will need to be interpreted in a manner ensuring compliance with the principles laid down in the case law of the Court of Justice.

Electronisation of public procurement

Serom Kim

The development of information technology has changed the public procurement system. An amendment will finally be adopted requiring electronic communication between contracting authorities and potential contractors.

Mandatory use of electronic communications is only one of many solutions for electronisation of public procurement procedures. Other elements include dynamic purchasing systems and electronic auctions, already in place, and the new institution of the electronic catalogue.

The purpose of the changes is to streamline the process of awarding public contracts and improve the efficiency of procurement procedures.

Electronic communications

Under the legal definition, email and fax are "electronic means of communication." The bill to amend Poland's Public Procurement Law provides for an obligation to publish contract notices and provide access to tender documentation using electronic means of communication. Applications and offers must also be filed in electronic form, and must bear a secure electronic signature to be valid. While a secure electronic signature is not a universal tool, the requirement to use one does not limit access to public procurement because anyone can obtain one free of charge.

Electronic communications are to be conducted via the "purchaser's profile" platform, enabling preparation, accessing, forwarding and storing of electronic documents. The purchaser's profile is to be an element of the e-Procurement platform, alongside the Public Procurement Bulletin and electronic auctions. Due to the lack of funding for this project, however, electronisation of procurement in Poland is to be implemented at the minimal level necessary to meet EU requirements.

Thus paper documents are to be eliminated in favour of electronic files.

The obligation to apply modern methods of communication is not absolute, and the act provides a list of exceptions. This form of

communication would not have to be used when justified for technical reasons, when use of electronic communications requires the use of specialised devices, applications, programmes or formats, or it is not technically possible to transmit a document in electronic form. Moreover, the contracting authority may decide on traditional methods of communication for transmission of sensitive information, if the electronic means do not ensure adequate security.

Realisation of statutory goals

The bill provides that these changes would enter into force from 18 April 2017 for central authorities, and for other contracting authorities from 18 October 2018. So even if the bill is adopted soon, contractors will have some time to wait before contacts with contracting authorities are actually conducted through these electronic systems.

The long grace period is primarily intended to allow contracting authorities to make technical preparations, because introduction of mandatory electronic communications will require additional measures to be taken by both the contracting authority and the contractors.

Electronisation of the public procurement system will achieve its intended goal, i.e. expediting and streamlining the process of awarding public contracts, only if the right technical support is prepared. It should be stressed that the contracting authority bears the burden of ensuring that the platform enables communications with contractors in a non-discriminatory manner, not limiting contractors' access to the procedure. In this respect, the EU directive stresses unification of equipment and desired formats across the entire market.

Electronic communications must also not violate other rules for tender procedures. First and foremost, the means adopted by the contracting authority must ensure that applications and offers remain secure until the offers are opened, and guarantee that the relevant information is accessible only by authorised persons. The contracting authority must also ensure the security of data and prevent unauthorised access to the platform.

The technical side is not the only thing if the efficiency of the public procurement system is truly going to improve. It also takes acceptance of new solutions. The grace period will allow contracting authorities and contractors to become accustomed to the new system. Contracting authorities in Poland tend to act conservatively, and prefer to follow the tested practices they have used for years. Introduction of entirely new solutions, such as electronic communications, will force changes and require contracting authorities to develop new methods of behaviour. Contractors will also have to place their trust in virtual means. Electronic communications are not the end, but just one element in a broader trend. The Ministry of Development is working on further electronisation, particularly in the area of electronic invoices. The act on this subject is supposed to enter into force in January 2018.

European Single Procurement Document

Natalia Rutkowska, Maria Hejda

One of the most important changes in the Public Procurement Law is introduction of the European Single Procurement Document, which should make it much simpler for bidders to apply for public contracts.

The new Classic Procurement Directive (2014/24/EU) states in the preamble (point 84) that for many economic operators, "a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria"—conditions for participating in procedures for award of public contracts. Limiting such requirements could deformalise the procedure and encourage a broader groups of contractors to participate in public procurement.

For this reason, the directive introduced the European Single Procurement Document, or "ESPD" for short.

ESPD in EU law

This solution is aimed primarily at simplifying the public procurement system. The ESPD is nothing more than an extensive statement by the bidders themselves on fulfilment of the conditions for participation in a procurement procedure and the absence of grounds for exclusion from the procedure. When the ESPD is used, only the bidder that has submitted the most advantageous offer will be required to present all of the actual certifications and other source documents. This solution was proposed by Elżbieta Bieńkowska, European Commissioner for Internal Market, Industry, Entrepreneurship and SMEs, and was intended to eliminate the administrative burdens placed on SMEs and bidders applying for contracts in other member states.

Based on Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document, the ESPD runs to about 20 pages. The form will ultimately be completed only online. At present, in the countries where the ESPD already functions, every contractor fills out the statement by hand, but can expedite the process by submitting a scan of the document. Every member state is required to create an IT system enabling the forms to be completed, submitted and exchanged between the parties to procurement procedures. These solutions should be implemented by the end of 2018 (in Poland as well).

The form should make life easier for contractors taking part in cross-border procurement procedures, because it will be used in all of the EU's official languages, in theory replacing national documents which often differ in form. Additionally, Art. 59 of Directive 2014/24/EU provides for creation of a national database providing contractors access free-of-charge to all necessary documents and certificates.

Unfortunately, the EU documents do not offer a comprehensive solution. They do not include information about covering the costs of operating the database, or in the case of cross-border procurements, the costs of

translation of documents. However, it is clear that if the contracting authority can use such a database, the contractors will not be required to submit original documentation.

It should also be remembered that every member state is required to implement the e-Certis system. The e-Certis platform will serve as a repository of certifications, to be used primarily by contracting authorities. Under Art. 61 of the directive, the European Commission will make the e-Certis system available and manage it, while the corresponding national teams will oversee updating of the information included in the system.

ESPD under Polish law

Solutions concerning ESPD have been included in the proposal to amend the Public Procurement Law in Poland. Under the proposed new Art. 25a of the act, upon submission of an application for participation in a procedure, or an offer, in procedures where the value of the contract is above the threshold requiring publication of a contract notice in the EU Official Journal, the contracting authority will accept an ESPD as preliminary evidence in place of certificates and other documents issued by public authorities or third parties showing that the contractor meets the conditions for participation and is not subject to exclusion (Art. 25a(1)). The Polish law will allow the contractor to use the information contained in the ESPD in other procurements so long as the contractor confirms that the information is up-to-date (Art. 25a(6)).

The amendment also indicates the rules for filing the ESPD by contractors appearing in a consortium or relying on the capacity of third parties (Art. 25a(3)–(4)). A contractor will be required to submit an ESPD for other entities insofar as it relies on their capacity. If bidders seek a contract jointly, each of them will be required to file an ESPD. The ESPDs will have to confirm fulfilment of the conditions for participation in the procedure, in terms of each of the contractors demonstrating fulfilment of the conditions for participation or the selection criteria.

In accordance with the fundamental purpose of introducing the ESPD, contracting authorities will require documents confirming the conditions for participation only prior to awarding the contract to the bidder whose offer was selected as the most advantageous. Meanwhile, the contracting authority will be permitted to request submission at any stage of the procedure of any or all of the documents confirming fulfilment of the conditions for participation or the selection criteria, if necessary to ensure the proper conduct of the procedure. If the information or documents submitted by the contractors to confirm fulfilment of the conditions for participation or selection criteria, or lack of grounds for exclusion, are incomplete, inaccurate or doubtful, the contracting authority will be entitled to demand submission, supplementation, correction or clarification of the relevant information or documents by a specified time (Art. 26(3)).

Doubts?

The EU rules for ESPD require thoughtful and comprehensive implementation solutions in national law. The very idea of ESPD is clearly worthwhile, but it should be borne in mind that solutions that seem simple at first glance do not always work out better. Here, although the proposed amendment implements the EU directive, it does not resolve doubts in interpretation related to use of the ESPD. The main issues include:

- The actions to be taken by the contracting authority if the contractor whose offer was selected as the most advantageous

fails to submit the required documents. It is unclear whether in that situation the contracting authority should then pick the next-best contractor, re-evaluate the offers, or invalidate the procedure.

- The date of certificates. Since the purpose of the ESPD is to simplify the procedure for seeking contracts, and certificates are to be submitted only by the contractor whose offer is found to be the most advantageous, it would be logical for certificates to be obtained after the contracting authority evaluates the offers. But the rule requiring demonstration of fulfilment of the conditions for participation in the procedure as of the date of filing of the offer or application for admission to the procedure remains unchanged. In practice, this could undermine the whole purpose of the ESPD.
- Incomplete regulations for functioning of databases—at least in terms of operating costs (for example, who will cover the cost of obtaining certificates from foreign databases in the case of contractors from other countries seeking the award of contracts in Poland).

Considering what a huge influence the public procurement sector has on the Polish economy, solutions like ESPD, designed to harmonise the laws across the member states while reflecting their different particulars and the realities under which they are applied, deserve a great deal of attention. Clearly, a lot will depend on the practice of applying the new Art. 25b of the Public Procurement Law, but it is already apparent that further clarification of the regulations governing the European Single Procurement Document may be required.

Innovation in public procurement

Serom Kim

Following Directive 2014/24/EU, the bill to amend the Public Procurement Law seeks to promote innovation in public contracts.

Without a doubt, one of the most significant changes to be introduced in the amended Public Procurement Law is the new procedure known as the "innovation partnership." But there are also notable changes in the negotiated procurement procedures—competitive dialogue and the competitive procedure with negotiation. The bill introduces new solutions in place of the previous rigid framework agreements. The changes should encourage contracting authorities to trust the know-how of contractors offering new and atypical—i.e. innovative—solutions.

Negotiated procedures—competitive procedure with negotiation, competitive dialogue

The bill modifies and consolidates the conditions for using the competitive procedure with negotiation and competitive dialogue.

This change should clearly expand the possibilities for applying negotiated procedures, for example when the contracting authority seeks innovative solutions. When the changes enter into force, the contracting authority will be able to choose the competitive procedure with negotiation or the competitive dialogue procedure in any of the following circumstances:

- In a procurement previously conducted under the open procedure or restricted procedure, all of the offers were rejected for non-compliance with the act or the tender specifications, because of abnormally low price or costs, or because they were submitted by excluded contractors, or the contracting authority invalidated the tender because all of the offers exceeded the amount earmarked for the contract, and the original conditions of the procurement have not been materially modified.
- The contract value is below the EU thresholds.
- The needs of the contracting authority cannot be met without adaptation of solutions readily available on the market.
- The works, supplies or services include design or innovative solutions.
- The contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, complexity, or legal and financial make-up, or because of the risks attaching to the works, supplies or services.
- The technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference.

On one hand the new regulations expand the group of potential contractors, and on the other hand they give the contracting authority tools for limiting this group in order to select the most advantageous offer in a manner that is convenient but also furthers the principles of public procurement.

Selection and reduction

If the number of indicative offers or applications is greater than the number of contractors invited to submit offers, the contracting authority will make a selection of contractors based on objective, non-discriminatory selection criteria established in advance and indicated in the contract notice.

Nonetheless, the existing regulations also require that contractors be selected for invitation to submit offers in an objective and non-discriminatory fashion, and in practice contracting authorities state in the contract notice the criteria under which the contractors will be narrowed down. The change in this respect is rather a codification of the well-established practice.

The bill also provides for the possibility of reducing the number of offers by dividing the negotiations into specific stages. In the reduction phase, the contracting authority will limit the number of offers by applying some or all of the criteria for evaluation of offers. This procedure is permissible only if the contracting authority has provided for it in the contract notice. It also applies as relevant to competitive dialogue, where the reduction phase involves a reduction in the number of solutions proposed by the participants in the dialogue.

The permissibility of modifying the contract in the case of competitive dialogue should also be noted. The bill admits the possibility of negotiating the terms of the contract in

order to adjust the obligations arising out of the offer after selection of the most advantageous offer. However, the permissible changes are limited and cannot involve essential elements of the offer or result in a change in the needs and requirements specified in the notice. Moreover, the changes must not result in violation of principles of fair competition.

Innovation partnership

Obviously the crowning achievement of the new law in terms of support for innovation is the introduction of a new procedure for award of public contracts: the innovation partnership. It opens up access to implementation of public projects for enterprises from the R&D sector.

This procedure could be used to meet the contracting authority's needs for innovative goods, services or works—i.e. new or significantly improved goods, services or processes (including manufacturing and construction processes, as well as new marketing methods or organisational methods applied in enterprise, work organisation or external relations).

This procedure for awarding contracts is based on the competitive procedure with negotiation. The contracting authority would be required to verify the partner's capacity to develop and implement the innovative products, as the partnership covers not only the R&D process but also purchase of the items once they have been developed and produced.

Depending on its needs, the contracting authority could also selected several offers and enter into contracts with several partners. The contract performance process reflects the specific nature of R&D activity. The partnership is divided into stages corresponding to the specific stages of the R&D process. The contracting authority may also set interim milestones. Completion of the individual stages or meeting the interim milestones will then be the basis for payment of the partner's fee and continuation of the work.

Establishing the basis for public entities to take up activity in the R&D sector is clearly a major step in an innovative direction. Contracting authorities will be able to fund and manage R&D projects so long as they fall within the scope of their public tasks.

This approach may seem abstract at this point, but notably it is already functioning in Europe. The European Commission has established three partnerships, in the areas of commodity supplies, sustainable agriculture, and active, healthy aging. From the perspective of public tasks, these are vital fields for national development, but private enterprises are not eager to invest in them. It may be anticipated that in the Polish public procurement system, these are the types of fields where contracts may be awarded in the form of innovation partnerships.

In-house procurement

Natalia Rutkowska

The concept of "in-house procurement," i.e. a contract awarded by one public entity to another public entity, is already recognised under Polish law, but the amendment to the Public Procurement Law proposes major changes in this area.

Under Art. 4(13) of the Public Procurement Law, in force since 2010, purchases from a "public budget institution" for a "body of public authority exercising the functions of the founding body" of that institution are excluded from the procurement regime. This exclusion applies if all the following conditions are met:

- The public budget institution carries out the essential part of its activity for the public authority in question.
- The public authority exercises the same kind of control over the public budget institution as it does over its own units without legal personality, and in particular influences the strategic and individual decisions concerning management of the affairs of the institution.
- The subject of the order falls within the scope of the basic activity of the public budget institution as defined by the Public Finances Act of 27 August 2009.

The new Classic Directive (2014/24/EU) significantly expands the possibility of applying in-house procurements. It permits avoidance of the public procurement regime in the case of purchases from a broad range of state budgetary units and companies owned by the state or local government. But attempts to implement the directive in this area have met with resistance from the business community in Poland. According to the justification for the bill to amend the Public Procurement Law, representatives of employers and employees in the Social Dialogue Council have opposed introduction of the proposed regulations on in-house procurement, while the changes are supported by the Joint Commission of Central and Local Government. The private sector argues that expanding the use of in-house procurement will limit competition and could even drive out the private market for public services.

As a result of the resistance to in-house procurement in some circles, instead of completely excluding application of the act to these types of purchases, the bill provides that in-house procurement will be conducted on a single-source basis.

The bill provides for five categories of contracts between public-sector entities:

- Purchases by a controlling entity from a controlled entity (in-house procurement)
- Purchases by a controlled entity from the body controlling it (reverse in-house procurement)
- Purchases by one controlled entity from another entity controlled by the same authority ("sister" in-house procurement)
- Purchases from a controlled entity by multiple authorities jointly controlling it

- Entrusting of tasks in horizontal cooperation between public bodies.

Below we describe in more detail the conditions for awarding of public contracts within these specific categories:

1) Public contracts awarded to controlled entities (in-house procurement, Art. 67(1)(12))—contracts awarded by a contracting authority (as referred to in Art. 3(1)(1)–(3a) of the Public Procurement Law) to a legal person when all of the following conditions are met:
    - The contracting authority exercises control over the legal person corresponding to the control exercised over its own departments, consisting of a dominant influence over the strategic goals and major decisions concerning management of the affairs of the legal person. This condition is also met if such control is exercised by another legal person controlled by the contracting authority in the same manner.
    - Over 90% of the activity of the controlled legal person involves performance of tasks entrusted to it by the contracting authority that controls it or another legal person controlled by the contracting authority.
    - There is no direct participation of private capital in the controlled legal person.
2) Orders from a controlled entity to the body controlling it (reverse in-house procurement) or orders between entities controlled by the same body ("sister" in-house procurement)—Art. 67(1)(13). Orders are placed by a legal person with the body that controls it, or another legal person controlled by the same body, under condition that there is no direct private capital in the legal person performing the contract.
3) Public contracts granted to an entity jointly controlled by several contracting authorities (Art. 67(1)(14)), when all of the following conditions are met:
    - The contract is awarded by a contracting authority defined in Art. 3(1)(1)–(3a) of the Public Procurement Law.
    - The contracting authority and the other authorities referred to in Art. 3(1)(1)–(4) of the act exercise joint control over the legal person corresponding to the control they exercise over their own departments. Joint control, in turn, exists when all the following conditions are met:
        - The decision-making bodies of the controlled legal person are made up of representatives of all of the participating authorities, although a specific person may represent more than one authority.
        - The participating authorities can jointly exert a dominant influence over the strategic goals and major decisions of the controlled legal person.
        - The controlled legal person is not pursuing an interest conflicting with the interests of the authorities exercising control over it.
    - The two other conditions characteristic of in-house procurements are fulfilled—namely, over 90% of the activity of the controlled legal person involves performance of tasks entrusted by the contracting authorities and

there is no direct private capital involved.

4) Entrusting of tasks in horizontal cooperation between public bodies (Art. 67(1)(15)). Such a contract may be concluded between two or more contracting authorities (as defined in Art. 3(1)(1)–(3a) of the act) if:

    - It establishes or implements cooperation between the cooperating authorities in order to ensure performance of public services they are required to perform, with the aim of achieving their common goals
    - Implementation of such cooperation is guided only by considerations of the public interest, and
    - The authorities carrying out the cooperation perform on the open market less than 10% of the activity that is the subject of the cooperation.

What is particularly controversial in the private sector is that as a result of the proposed amendment, the possibility of in-house procurement would extend to contracts by municipal authorities for collection, or collection and management, of communal waste from owners of real estate. Currently, under Art. 6d(1) and 6g of the Act on Maintenance of Cleanliness and Order in Communes of 13 September 1996, such contracts can be concluded solely through a competitive tender.

In light of the resistance from the private sector and the continuing work on the bill to amend the Public Procurement Law, the fate of in-house procurements in Poland is still an open question. It should nonetheless be pointed out that introduction of the possibility of awarding in-house orders in the currently proposed form would at least to some extent enable review of such contracts—unlike the concept of exempting them altogether from the scope of the Public Procurement Law. There would still be a duty to publish a notice of the intention to award such contracts in a single-source procurement. It would also be possible to challenge the decision by the contracting authority to follow this procedure, and the contract awarded under the procedure would be public knowledge.

At the same time, the drafters of the bill have heightened the conditions for awarding of in-house procurements, as compared to the requirements of the directive, so that as far as possible, entities awarded such contracts without a tender would not be involved in competition on the open market (for example by raising the amount of activity performed by a controlled legal person consisting of performance of tasks entrusted to it by the contracting authority from 80% to 90%). It should also be stressed that under the proposed wording of the amended Art. 67 of the Public Procurement Law, the use of in-house procurement—including in the case of communal waste—would only be an option for the contracting authority and would not be mandatory.

Modification of public procurement contracts: Unchanged, appearances to the contrary notwithstanding

Mirella Lechna

The planned amendment to the Public Procurement Law only seems to revise the rules for modification of public contracts. The decisive role will still be played by the rules outlined in the case law of the Court of Justice and codified in Directive 2014/24/EU.

Control of the process of amending public contracts arises from the necessity to ensure that changes in the contractual relations of the parties do not lead to *de facto* awarding of a new contract, circumventing the procedures designed to guarantee fair competition, equal treatment of entities seeking public contracts, and transparency in the actions of the contracting authority.

The prior law at the EU level, i.e. the previous Classic Directive (2004/18/EC), did not contain provisions governing amendment of contracts. However, the rules for modification of public contracts (and more specifically the rules distinguishing between permissible amendments and amendments requiring a new tender to be held) were developed some time ago in the case law of the Court of Justice. The most significant ruling in this respect is *Pressetext* (Case C-454/04).

In 2014, the rules and guidelines governing modifications of public contracts, as stated in *Pressetext* and other cases, were codified in Art. 72 of the new Classic Directive (2014/24/EU).

Under current Polish law, the permissibility of changes in public contracts is governed by Art. 144 of the Public Procurement Law, in the wording from 22 December 2009. This provision will generally continue to apply to contracts concluded before entry into force of the proposed amendment.

Before 2009, the current Art. 144 was amended twice because of objections by the European Commission that it did not comply with directives 2004/17/EC, 2004/18/EC and 89/665/EEC and the Treaty on European Union, and, as expressly stated in the justification for the amendment at that time, to bring the act into compliance with the case law of the Court of Justice of the European Union.

The importance of these rules was described by the Parliament in 2009: "Currently Art. 144(1) of the Public Procurement Law prohibits introduction of changes in a public contract as compared to the content of the offer, unless the contracting authority provided for the possibility of making such change in the contract notice or the terms of reference, and specified the conditions for

such amendment. To make the process of awarding public contracts more flexible and efficient, and at the same time to reflect the case law of the European Court of Justice, i.e. in cases C-496/99 *Succhi di Frutta* and C-454/06 *Pressetext Nachrichtenagentur*, it is proposed that the prohibition on changes in public contracts apply only to substantial changes to the contract. Thus changes that are not substantial will be permissible, understood to mean that if they had been known at the stage of the contract award procedure they would not have affected the set of entities seeking the contract or the result of the procedure."

In consequence, even though the wording of Art. 144 of the Public Procurement Law is sparse as compared to the current detailed rules in Directive 2014/24/EU (despite being described by the drafters as introducing "unambiguous conditions for permissible modification of a public contact"), the Polish regulations must be interpreted in light of the rules for modification of contracts codified in Art. 72 of Directive 2014/24/EU, based on the existing case law of the Court of Justice.

In describing the permissible scope of amendments to a procurement contract, the European lawmakers focused on the substantiality of the given amendment. It should be determined whether the change will create a situation where there should be found to be essentially a new procurement, requiring commencement of a procedure for award of the contract. Consequently, Art. 72 of Directive 2014/24/EU expressly confirms the general rule of substantiality established in the *Pressetext* case.

Art. 72(1) of the directive lists the grounds for permissible modification of a procurement contract, which emphasise the insubstantiality of the change. They include changes based on review clauses, necessary additional orders, unforeseeable external factors, and replacement of the contractor by its legal successor or other entity capable of performing the contract.

Art. 72(2) governs instances where the relatively small scope of the change allows the contracting authority to dispense with a new procurement procedure. These include situations where the change falls within 10% or 15% of the original value and the value of the change does not exceed the thresholds for application of the directive.

The directive further clarifies that a change is "substantial" "where it renders the contract or the framework agreement materially different in character from the one initially concluded" (Art. 72(4)), and provides that a change is deemed substantial in any of these instances:

- The modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure.
- The modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement.
- The modification extends the scope of the contract or framework agreement considerably.

The proposed new Art. 144 of the Public Procurement Law greatly expands on these conditions for permissibility of modification

of public contracts. Consistent with the tradition of the Polish procurement system, the national provisions begin by saying that modifications of contracts are prohibited (unless the permissible grounds exist), where the directive provides that contracts may be modified in the instances given, but it is nonetheless clear that the amendment is intended to codify in Polish law the rules established for many years for permissible changes to procurement contracts.

Under the interim provisions in Art. 18 of the proposed amending act, contracts concluded under the "old" Art. 144 of the Polish act can benefit from the new regulations, but limited to necessary additional orders, changes caused by external factors, and changes within 10% or 15% of the original value of the procurement.

This wording could suggest that the Polish law currently excludes changes in existing contracts based on review clauses, does not permit a contractor to be replaced by its legal successor, and refuses to apply the codified grounds for determining the substantiality of a modification.

But Art. 18 of the amending act could not achieve this apparent purpose. Interpretation of national law is made in light of the wording and purpose of the directive and must reflect the interpretation of the directive presented in the case law of the Court of Justice. Under Art. 267 of the Treaty on the Functioning of the European Union, the Court of Justice is vested with jurisdiction to issue preliminary rulings on the validity and interpretation of acts issued by EU institutions and bodies. Judgments by the Court of Justice are binding. As indicated in *International Chemical Corporation* (Case 66/80), the competencies vested in the Court of Justice under the treaty should first and foremost encourage uniform application of Community law by the national courts. The binding nature of judgments from the Court of Justice is confirmed by the fact that issuance of a ruling by a national court in clear violation of a judgment of the Court of Justice may expose the member state to liability for injury to individuals for infringement of Community law (*Köbler*, Case C-224/01, par. 56–57).

Consequently, Art. 144 of the Public Procurement Law must always be interpreted in light of the case law from the Court of Justice. This is helped by codification in the directive of the principles developed by the Court of Justice on modifications to procurement contracts. This means that bodies applying Art. 144, in its wording either before or after the amendment, should reach the same conclusions on whether contract modifications fall within the permissible scope.

Thus it may be said that neither Directive 2014/24/EU nor the proposed amendment to the Public Procurement Law introduces any revolutionary changes in this respect. The principles developed in recent years by the Court of Justice, and codified in Art. 72 of Directive 2014/24/EU, will be fully applicable to contracts concluded under the Polish act prior to amendment, while the legislative process is still underway, and also later.

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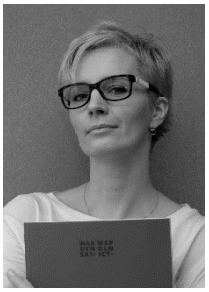

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