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New Public Procurement Law

first impressions

March 2019

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New Public Procurement Law: The draft has arrived

Anna Prigan

On 24 January 2019, the Ministry of Entrepreneurship and Technology presented a draft of the new Public Procurement Law. The extensive new law is intended to simplify and streamline regulations so public procurement becomes more efficient and user-friendly.

The Public Procurement Law currently in force has been amended dozens of times. Several of these amendments were very extensive and of crucial importance, as they were the means to implement EU directives into the Polish legal order. Most of the *ad hoc* changes to the law adjusted the law to the needs of the changing legal and economic situation, which, unfortunately, resulted in growing incoherence of the entire law.

Finally, the Public Procurement Law had become illegible for an average market participant and contained so many patches that it had to be rewritten. The draft of the new Public Procurement Law responds to this need. It takes into account the Classic Directive (2014/24/EU), the Utilities Directive (2014/25/EU), the Defence Directive (2009/81/EC), as well as the appeal directives.

Statistical data show the importance of this regulation. The proponents of the new law point out that in many sectors, one in four businesses generate more than half of their revenue from public procurement, and for one in ten businesses it represents 75% of their revenue. Therefore, appropriately targeted and managed public procurement can be an important growth factor for companies. In principle, an effective and clear procedure can promote economic and development objectives, as well as social policy and the labour market. It can support the economy of the state and businesses operating in the country.

The draft of the new Public Procurement Law is much broader than the current law. Although many institutions would remain unchanged, the provisions governing them are extended and regrouped. The main aim of the drafters was to achieve readability, which they tried to attain by minimising the number of cross-references, so that the shape of the regulation could be easily understood. Unfortunately, it seems that this way, in some cases to the detriment of the act, the conciseness of provisions which could have been interpreted in accordance with the spirit of the law has been lost.

The proponents attach greater importance to the stage of planning and preparation of tender proceedings. On the other hand, the draft contains simplifications with regards to the subjective qualification of contractors: it will be easier to take part in procedures, and that should be reflected in the number of bids received.

The proposal also introduces some new procedural features. Some are fundamental, such as the basic procedure. All contracts below the EU thresholds are treated in blocks, i.e. as generally subject to a single selection procedure. The new procedure applicable to them is called the "basic procedure," and provides for three different forms allowing the procedure to be adapted to the nature of the contract. The basic mode is intended to initiate greater dialogue between the contracting authority and contractors.

A new conciliation procedure is also a complete novelty—a new approach for out-of-court settlement of disputes relating to the performance of public procurement contracts. The Public Procurement Court is another new institution: a specialised department of the Warsaw District Court which will handle all complaints against rulings by the National Appeal Chamber (KIO). This will certainly improve the quality of the case law, although it will also cause inconvenience for parties operating far from Warsaw.

Art. 470 lays down an obligation for the contracting authority and the contractor selected in the procedure to cooperate with a view to proper performance of the contract. The existence of such an obligation cannot be denied under the current Public Procurement Law, as it is derived from the Civil Code rules on performance of contractual obligations, which, after all, the new law does not exclude. The justification of the draft states that articulation of the principle of cooperation is designed to achieve the purpose of the procedure, which is the proper performance of the resulting contract. It is certainly to be welcomed that the drafters noticed the phenomenon of excessive one-sidedness of contracts. The aspiration to reduce the disproportion between the parties is also expressed in the ban on framing the provisions of contracts in gross disproportion and in the introduction of regulations enabling escalation of prices in long-term contracts for construction works or services. More flexibility has also been introduced in innovation procedures: a lack of joint and several liability between contractors in such projects can attract innovation to the public sector.

Unfortunately, the draft lacks provisions addressing problems with digital procurement already known to market participants. It is already clear what practical problems require regulation and how *ad hoc* decisions may negatively impact the market in this respect. Perhaps the position of the president

of the Public Procurement Office, strengthened by new regulations, will enable the promotion of good practice furthering the purpose of digitalisation in procurement, which includes the efficiency of proceedings.

The bill now awaits an intense, quite short, consultation stage. It is planned that the new law will come into force at the beginning of 2020 and be adopted in autumn 2019 at the latest. Whether the new regulation meets the hopes placed in it remains to be seen. However, it is already known that some provisions will require fine-tuning at the draft stage. We write about them in other articles in today's edition.

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New PPL: Is everything in line with EU law?

Mirella Lechna

The explanatory memorandum for the draft of the new Public Procurement Law indicates the need to increase the transparency and coherence of national regulations, recognising that the EU's procurement directives have already been implemented in the Polish legal system. However, the effect of the "small amendment" of 2016 has been unsatisfactory from the very beginning. Hence, the draft contains a number of new solutions justified by the need to reflect the regulations of the procurement directives in the Polish act.

Shortlisting of contractors finally in accordance with EU law

The issue of relying on the potential of a third party for the purpose of assessing a contractor's ability to execute the contract at the stage of the selection criteria has been questionable on the Polish public procurement market for several years now. And not only on the part of the participants in the procurement, as the Parliament itself cannot decide how to understand the provisions of the Classic Directive (2014/24/EU) in this matter.

In particular, the most recent amendment to the Public Procurement Law, in 2016, offered a chance to improve the Polish act, but revealed a lack of understanding of the institution of combining potentials introduced at the EU level. During the legislative work on that amendment, the right of contractors to use the potential of a third party also for the purpose of meeting the selection criteria in Art. 22a(1) PPL was initially confirmed, after which this possibility was removed from the draft. However, Art. 25a(3) PPL, indi-

cating which documents of entities on whose resources the contractor relies should be submitted during the proceedings, was inconsistently left intact. The scope of reference to these resources was defined as "fulfilment of the conditions for participation in the procedure or fulfilment of the selection criteria." This solution was in force until December 2016.

However, the idea of introducing into the Polish act permission to rely on the potential of a third party for the needs of the shortlist was criticised in the public discussion. It was accused of broadening, beyond the provisions of the directive, the purpose for which a contractor would be able to rely on the resources of another entity during the proceedings.

In the current draft of the new Public Procurement Law, Art. 132 (also 133 and others) repeats the rule that the contractor may rely on technical or professional abilities, or the financial or economic situation of entities providing access to resources, not only to confirm that the conditions for participation in the procedure are met, but also for the selection criteria. Will this provision survive this time?

In one sentence only, the drafters explain the introduction of Art. 132, saying that it makes the regulation more understandable in this respect. At the concept stage of the new Public Procurement Law, this was justified by the wording of the European Single Procurement Document, which provides for the possibility of fulfilling the selection criteria with the use of available potential.

However, it may turn out that the justification limited to a reference to the ESPD regulation will again be reconciled with the literal interpretation of the Classic Directive, which is established in Poland, that fulfilment of the selection criteria must be demonstrated solely on the basis of the contractor's own abilities.

But according to the Court of Justice of the European Union, the contractor's right to rely on the potential of a third party to demonstrate the ability to perform the contract cannot be limited solely to the qualification stage, but should also cover the selection stage (*Apelski*, C-324/14). Since the aim of the regulation on the use of the potential of a third party is to open up public procurement to the widest possible competition, the right to rely on the potential of other entities is vested in each contractor and cannot be interpreted as existing only in exceptional cases. In addition, it was decided that an entity following this route could not be treated less favourably in its bid than a contractor not using external resources.

Therefore, we should assess positively the proponents' final willingness to implement these principles in the Public Procurement Law, even though the

phenomenon of overregulation in the area of public procurement is itself negative. However, it is necessary to take into account the long practice of applying restrictions unjustified under European law on access to contracts by bidders relying on the potential of third parties and inconsistent modelling of regulations in this respect under the amendment of 22 June 2016. Thus, introduction of a regulation clarifying that the possibility of relying on third-party potential for selection criteria is allowed under the new Public Procurement Law is justified and ultimately removes the incompatibility of Polish law with EU law.

The rules for using the potential of a third party at the stage of contract performance, i.e. making available potential in terms of education, professional qualifications or experience, and joint and several liability for not making resources available in terms of financial or economic situation, will remain unchanged, i.e. as currently regulated in Art. 22a PPL.

Referring outside resources to the date of submission of the application or bid only: Is inclusion of the *Esaprojekt* ruling in the new act needed?

Art. 137 of the proposed new Public Procurement Law provides that it is not permissible for a contractor, who alone demonstrates compliance with a condition at the stage of submission of bids or requests to participate in the procedure, to invoke the potential of a third party in this respect at a later stage.

This regulation complements the temporary provision of Art. 22a(6) PPL. The principle expressed in it is clear, especially as it was confirmed by the CJEU in *Esaprojekt* (C-387/14). However, the idea of introducing the *Esaprojekt* ruling (as discussed in the concept for the act) into the new Public Procurement Law is incomprehensible.

The ruling in *Esaprojekt* is an additional contribution to the interpretation of public procurement law to the extent that it is regulated in particular in Art. 63 of Directive 2014/24/EU, but not only. Under other provisions, it is possible to join the procedure only up to the date specified by the contracting authority, and late applications or bids will be deemed to be inconsistent with the terms of reference (cf. Art. 56(1) of Directive 2014/24/EU). In the Polish act, the impossibility of joining the procedure after the deadline results directly from Art. 50 and 84 (return of the application or bid), as well as Art. 163 and 257 of the draft new act (rejection of the application or bid).

Therefore, any attempt to include a new entity in the procedure or to change the contractor's identity after the deadline for submitting an application or

bid must be considered contrary to the principle of equal treatment, as in the case of such entities the deadline would effectively be extended.

It is a mistake to introduce the position of the CJEU into the national legal order on one chosen ruling. To be consistent, the Polish drafters would have to translate all the CJEU rulings into provisions of national law. Such an expectation is obviously unrealistic, but the practice of selective incorporation of certain rulings into the act may create a risk that as long as the holdings from the CJEU are not enshrined in the national legal order with a proper regulation, the European *acquis* will not be applied in Polish public procurement law.

Completion of documents and statements: single request principle abolished?

The concept for the new Public Procurement Law indicated that the new act would clearly define the principle of one-time submission of additional documents (p. 38 of the concept). However, there is no provision in the draft introducing such a regulation. In particular, it is not included in Art. 142 regulating the issues of summons and supplementation.

This omission appears correct, as the single request principle is not justified by Directive 2014/24/EU or the CJEU rulings.

Art. 56(3) of Directive 2014/24/EU simply allows the possibility for a contractor to submit, add, clarify or complete the relevant information or documentation.

There is no provision that a request to the contractor can only be made once in this respect. On the contrary, in this respect, the European law is guided by the general principles of public procurement and sets limits on supplementation of bids (or applications) not in relation to the number of requests or supplements, but in relation to their substantive content.

Such a limit is the moment when the information provided in additional documents or explanations would lead to a change in the bid (*Slovensko*, C-599/10) or affect the contractor's identity, tantamount to submission of a new bid (*Esaprojekt*, C-387/14) or leading to a significant change in the bid (*Arschus*, C-131/16). The CJEU also allows the submission of information and documents which were not submitted at all with the bid or application, provided that they existed objectively at the date of the bid or application (*Manova*, C-336/12).

In Polish national law, the single request rule has never been enshrined in the act, and its use was based on interpretation of the law in rulings, which in any event were not uniform, as some rulings indicated that there is only

an obligation stemming from the Public Procurement Law requiring at least one request (Case SO IV Ca 223/08), but the act "does not give any indication as to whether a request should be single or multiple" (cases KIO/UZP 827/08 and SO XII Ga 391/08).

In the course of the current legislative work, the intentional abandonment of automatically applying the principle of a single request for supplementary documents or explanations to all factual situations is correct, as it leaves the possibility for contracting authorities to act in accordance with rules developed by the CJEU for supplementing applications or bids. It also fully respects the principle of equal treatment, which incorporates two commands, namely that comparable situations cannot be treated differently and that different situations cannot be treated equally.

The proposed Art. 142(2) introduces the rule that the obligation to request supplementary documents or explanations does not apply if the submitted documents indicate that the application or bid must be rejected. This provision seems to repeat the rule currently enshrined at the end of Art. 142(1). The premise of both regulations is the same: when the documents provided indicate the necessity to reject the application or bid, either because of late submission or because the content proves that the contractor does not meet the conditions for participation in the procedure. Therefore, Art. 142(2) seems redundant.

The new act also introduces a regulation that the winning contractor does not have to repeat statements already made at the stage of the ESPD (Art. 141). In such a case, the contracting authority is only obliged to call for confirmation of the validity of the information contained in the ESPD.

Finally, it is worth noting Art. 142(3) of the proposed new act. It provides that the supplementation of documents and statements at the request of the contracting authority may not serve to confirm that the selection criteria are met. The justification of the draft is silent on this topic and the regulation itself is incomprehensible. It seems to provide a ban on the contracting authority determining the scope of the request for supplementation. However, verification of documents is intended to assess the contractor's ability to perform the contract, and the selection criteria are one of the elements of that verification, which is often based on the conditions for participation in the procedure. The Classic Directive does not provide any basis for differentiation in this respect. We can expect that the draft will be fine-tuned in this respect.

Significant change in the content of technical specifications: it is not possible to increase the competitiveness of the proceedings

The seemingly inconspicuous Art. 153(2) of the proposed new act may lead to blocking the possibility to question the content of technical specifications on the grounds that they contain conditions restricting competition. In an open bid procedure, this provision prohibits the introduction of changes to the content of the technical specifications affecting the circle of contractors interested in award of the contract. This prohibition refers to situations specified in Art. 153(1), i.e. justified cases and in the period before the deadline for submission of bids.

The explanatory memorandum to the draft explains that this regulation is necessary to reflect recital 81 of Directive 2014/24/EU. Indeed, the preamble to the Classic Directive explains that an amendment of procedural documents cannot be such that, as a result of its introduction, other entities may be admitted to the procedure or would be interested in participating in it. However, in this respect, it refers to a situation where pre-selection of bidders took place. Such a situation will therefore concern two-stage procedures, where a possible change of technical specifications would occur after the qualification of contractors.

On the other hand, the general possibility of introducing substantial changes to technical specifications results from Art. 47(3)(b) of Directive 2014/24/EU and is linked to the obligation to extend the deadline for submitting bids accordingly.

Therefore, a change in the content of technical specifications resulting in e.g. expansion of the circle of potential contractors (i.e. lowering of requirements) should be allowed before the deadline for submission of bids in an open procedure, provided that the contracting authority extends the deadline for submission of bids accordingly, which in this case would most likely mean setting a new minimum period. In this sense, the key principles of public procurement remain in place; in particular, each contractor has an equal chance to prepare a bid, guaranteed by a minimum period for submission of a bid. Similarly in the case of a change resulting in reducing the circle of contractors, i.e. raising the requirements (subject to a change in the deadline for submission of bids necessary to revise the bid): Art. 153(2) does not allow this either.

Therefore, Art. 153(2) of the proposed new act requires further refining. Otherwise, it may unjustifiably limit contractors' efforts to increase the competitiveness of procurement by aiming to lower the requirements in the tech-

nical specifications and, at the same time, will not comply with the relevant provisions of the Classic Directive.

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Forced conciliation

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Chapter X of the draft new Public Procurement Law (Art. 620–655) obliges the contracting authority and the contractor to conduct a mandatory conciliation procedure. While the very idea of settlement of disputes deserves full support, the proposed detailed solutions raise serious doubts under the Polish Constitution and EU law.

General assumptions

According to Art. 620(1) of the draft, the contracting authority or a contractor in a particular category of disputes will be required to carry out a new, separate dispute resolution procedure, referred to as conciliation proceedings. Therefore, subcontractors will be excluded from this procedure, as well as those suing the investor as an entity jointly and severally liable (Art. 6471 §5 of the Civil Procedure Code). This regulation is to cover large contracts (worth more than EUR 10 million, and for construction works more than EUR 20 million) and all contracts financed from EU funds, and additionally, only those where the value of the claim exceeds PLN 1 million. As stated in Art. 620(2), before the National Appeal Chamber examines the application—as it is before the chamber that the new proceedings are to be conducted—court proceedings will be inadmissible. However, it will be possible to apply for interim relief, but in such a case, instead of the deadline for filing a statement of claim, the court will set a deadline for submitting a conciliation application.

The right idea

It is very good that the proponents noticed the problem that in the public procurement sector, settlement of disputes does not work. Contracting authorities do not want to settle disputes for a number of reasons. Arguments arising from public finance discipline are invoked. Fear of concluding a settlement also stems from the fact that public officials do not want to take responsibility for the concessions which are a necessary element of any

settlement agreement (Art. 917 of the Civil Code). As a result, it can be concluded that there are hardly any settlements in public procurement cases at the pre-litigation stage. Settlements concluded in the first instance of litigation are also the exception. Usually the contracting authority prefers to await a ruling, especially in such cases as mitigation of contractual penalties, where the ruling determines to what extent the calculated contractual penalty may be reduced. Contracting authorities are afraid to take responsibility for concessions in a settlement and this undoubtedly needs to change.

From one extreme to another

However, an attempt to change the contracting authorities' mentality, and thus increase the percentage of disputes that are settled, should nevertheless be done through small steps. It would be enough to start by introducing a regulation that only encourages contracting authorities to reach a settlement, indicating that concluding a good settlement is always a better solution for everyone than a court dispute. But under the proposed solution, an institution that has been almost completely absent from public procurement practice is suddenly to become a dominant, basic one. This is not how the practice of settlement of disputes is shaped. A system of incentives and assistance should be created for contracting authorities to reach this path on their own. Nobody likes to act under coercion, and the imposition of will by the state on individuals is an expression of the weakness of the state, which apparently cannot find any other way to reach otherwise very socially desirable results.

Time and costs

Conciliation proceedings are to carry a fee. The amount of the fees is not specified in the bill, but is to be set by an executive regulation of the Prime Minister (Art. 655). These are not the only costs incurred in the case, as the draft also provides for costs of legal representation, determination of the legitimacy of costs to be reimbursed by the other party, and advances against payment of expenses. Therefore, it will certainly be an expensive proceeding, whose costs will not differ much from the costs of a typical court proceeding, taking into account the high formal requirements for the application and the entire proceeding. Sometimes it will be even more expensive, because similar to arbitration proceedings, and unlike in the common courts, a defence of setoff will also be subject to a fee (Art. 637(3)). There are great constitutional doubts about leaving the determination of the fee schedule in the hands of the executive, and if an application is not filed and the fee paid, court proceedings are to be excluded.

The conciliation procedure will also be lengthy. The deadlines set in the draft, even excluding the time for circulation of correspondence and the chamber's reaction to the pleadings submitted by the parties, are not short: at least 14 days to cure any defects in the application (although this element will not occur in every case, Art. 630(1)), the potential time needed to verify the amount in dispute (Art. 631), 14 days to reply to a request (Art. 634), time for a mutual request (Art. 636), which may be submitted even later than the first conciliation meeting (Art. 636(2)), and the time needed to verify the formalities and submit a reply. With this in the background, it is completely unrealistic to assume that without the consent of both parties, the proceedings may not last longer than 6 months from filing of the application (Art. 638(1)), under pain of discontinuance of the proceedings (Art. 643(1)(4). On top of that, under Art. 653(1), experts are also expected to participate in the proceedings. Therefore, the party will bear the costs of the application, attorneys' fees and experts' fees, and if the proceeding is not concluded within six months it will be discontinued, not bringing any benefits to the applicant but only exposing it to high costs and a waste of time.

Interestingly, the draft does not propose a deadline for the chamber to draw up a proposed settlement agreement after the conclusion of the conciliation procedure (Art. 647). This means that the parties will have to humbly wait weeks or even months for this document. From the receipt of the draft settlement, each party has 30 days to decide whether or not to agree to the settlement, and to submit a request to supplement the draft with any requests omitted by the conciliators. If the draft settlement is approved, the settlement is to be concluded before the president of the National Appeal Chamber (Art. 650) and is to be enforceable (Art. 651). In the parties cannot agree on a settlement, the proceedings will be terminated (Art. 643(1)(3)).

The right to a fair trial endangered

In total, the real duration of conciliation proceedings, if both parties do not agree to an extension beyond the 6-month deadline provided for in the draft, from submission of the application until the end of the proceedings, will be close to a year. And if the parties agree to an extension, there are no deadlines. The obligatory nature of the procedure and the fees involved threaten the constitutionally guaranteed right to a fair trial, notwithstanding the proponents' claim to the contrary in the justification for the proposal (p. 115).

The Mediation Directive (2008/52/EC), referred to in the explanatory memorandum, indeed indicates that the member states may introduce compulsory mediation, but only "provided that such legislation does not prevent the parties from exercising their right of access to the judicial system" (Art.

5(2)). But this proposal would hinder such access, because it introduces a very formal and costly mediation procedure, lasting for several months and requiring time and effort, but not governed by the principle of proportionality, as it should be.

A party that spends funds for mandatory conciliation proceedings may not have funds later on for court proceedings, and in this sense the limitation of the right to a fair trial by the proposed regulation is evident. Also, depriving a party of the right to a fair trial for a period of almost a year, in conditions of an often pathological court delay in civil cases, violates the principle of proportionality, particularly considering that the culture of settling disputes is still not widespread in Poland and many of these proceedings will not lead to a settlement. Therefore, it may be expected that if this regulation is passed, it will be subject to review by the Constitutional Tribunal or, more likely, because this issue is covered by regulations of Community law, by the Court of Justice of the European Union.

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New "basic procedure" for contracts below EU thresholds

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One new procedure will replace the three most commonly used procurement procedures below the EU thresholds. The open bid will disappear, and the basic procedure without negotiations will appear. It is supposed to be easier and more flexible, but will it work?

The draft of the new Public Procurement Law dedicates an entire separate section to classic contracts below the EU thresholds. The "basic procedure" is a new procedure, appropriate in a substantial number of cases for contracts of a value lower than the EU thresholds. The rules and course of the procedure are not completely new, but to some extent are based on existing contract award procedures (e.g. open bid and negotiated procedure with notice).

The current Public Procurement Law does not provide for a separate procedure below the EU thresholds, but only introduces specific provisions aimed primarily at streamlining the procedure (e.g. a shorter period for submitting

offers, the possibility to waive a bid bond, shorter binding period for offers, etc). Therefore, in most cases, the contracting authority also above the thresholds goes for open, restricted or negotiated procedures with publication of a contract notice. In order to conduct the procedure, they must look for appropriate regulations basically in the entire act. Now it is to be easier: they will turn to Chapter VI, which will guide them by hand through the procedure.

Three scenarios of the basic procedure

According to the draft of the new Public Procurement Law, the contracting authority will generally award contracts following the basic procedure. Only in justified cases specified in the act will the contracting authority be able to award a contract following the innovation partnership procedure, negotiated procedure without a notice, or single-source procurement procedure.

However, this does not mean that the contracting authority is restricted in the manner in which the procedure is to be conducted, as the drafters make it possible to carry out the basic procedure under three scenarios. Negotiations aimed at joint determination of the details of the given contract are the element differentiating these scenarios. Therefore, the choice of the appropriate procedure depends on whether, at the stage of initiating the procedure, the contracting authority is able to prepare the technical specifications, or it cannot yet describe the conditions of the contract with sufficient precision.

Option 1: procedure without negotiations

A procedure without negotiations is the first and simplest basic procedure. According to the justification of the draft, it is analogous to an open bid procedure. This option will be applied when the contracting authority precisely defines the subject and conditions of the procurement at the stage of initiating the procedure, and also will have no need to conduct negotiations on selected elements of the description of the subject of the procurement or the terms of contract performance.

Option 2: Procedure with possibility of negotiations

If at the initial stage the contracting authority is not in a position to independently define precisely all the terms of the contract, it may provide in the contract notice for the possibility of conducting negotiations. In such situation, the contracting authority must indicate the scope of possible negotiations, referring to the description of the subject of the procurement or the provisions of the contract in the contract notice.

The contracting authority may limit the number of contractors it invites to negotiate (but no fewer than three). After completion of negotiations, the contracting authority creates or, if the need arises from negotiations, amends the technical specifications and invites contractors to submit final bids.

The purpose of the negotiations is to "improve" the offers received. According to the explanatory memorandum, negotiations are optional: the contracting authority "may" but does not have to negotiate. Although the current draft does not directly indicate the possibility of waiving negotiations, it seems correct to assume that if the contracting authority receives fully satisfactory bids (i.e. not requiring any change), it may proceed to the selection without conducting negotiations. The criteria for evaluation and weighting of offers will not be subject to negotiations.

Option 3: procedure including mandatory negotiations

The contracting authority will choose the third scenario of the procedure if its needs and the specificity of the subject of the procurement make it difficult or impossible to describe precisely the terms of the contract. In such situation, instead of technical specifications, the contracting authority prepares a description of needs and requirements, in which, in particular, it defines the minimum requirements that all contractors must meet, as well as the criteria for evaluation of bids.

In this scenario, the negotiations are mandatory and cover essentially all elements of the procurement (except for the minimum requirements mentioned above). Contractors may, among other things, negotiate the weights assigned to the bid evaluation criteria. They may also actively participate in the process of creating the terms of the contract in order to ensure the effectiveness of the contract to be executed.

Equitable objectives, but will they be achieved?

The drafters' intention is to simplify the existing two-stage procedures and encourage contracting authorities to use negotiations to a wider extent (so far, when awarding contracts below the EU thresholds, contracting authorities have been reluctant to use procedures providing for a request to participate in the procedure). Whether this objective will be achieved, time will tell. Certainly, whatever name is used, the basic procedure under the third scenario entails similar burdens for contracting authorities as the current procedures. Moreover, the use of the third scenario is possible only if it is justified by the specificity of the contract: its subject or the needs of the contracting authority. From this point of view, it is doubtful whether the new procedure will encourage contracting authorities to engage in dialogue with contractors.

The second point is that, in principle, classic contracting authorities award contracts of different values. The draft of the new Public Procurement Law imposes on them the obligation to familiarise themselves with the new procedure, where scenarios characterised by the drafters as offering flexibility may cause many practical problems. We will see how the establishment of the basic procedure contributes to the effectiveness of public procurement procedures. The new Public Procurement Law should enter into force at the beginning of next year.

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Grounds for exclusion in the proposed new Public Procurement Law: Closer to the directive

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The draft of the new Public Procurement Law, released by the Ministry of Entrepreneurship and Technology on 24 January 2019, proposes changes in the grounds for exclusion of contractors and institution for "self-cleaning," bringing the Polish regulations closer to Directive 2014/24/EU.

The catalogue of grounds for exclusion of a contractor from proceedings for award of a public contract under the current Public Procurement Law was introduced by the amendment of 22 June 2016, implementing Art. 57 of the new Classic Procurement Directive (2014/24/EU) defining the grounds for exclusion. However, the grounds for exclusion provided for in the current Art. 24 (1) and (5) PPL differ to a certain extent from the grounds indicated in the directive, which raises practical problems for contractors, especially when filling in Part III of the European Single Procurement Document. Changes to the exclusion grounds in the draft of the new law simplify the qualitative selection of contractors, limiting the catalogue of mandatory exclusion grounds and adjusting their substance to the equivalents from the directive. The proposed changes should allow a wider range of contractors to participate in public procurement procedures.

Some mandatory exclusions will become optional

In the current Public Procurement Law, some of the premises listed in Art. 57(4) of the Classic Directive, which defines the catalogue of optional premises for exclusion, are made obligatory. This was justified by the view that the

circumstances involved always have a negative impact on the proper functioning of the public procurement system, which leads to distortion of fair competition in the procedure and may illegally influence its outcome. The draft proposes changes to bring the wording and catalogue of mandatory and optional premises into line with those set out in the directive, which should be assessed positively. This will make it easier for contractors to fill in the ESPD, furthering the rationale set out in the directive. Attributing an optional character to most of the premises will leave the contracting authorities to decide on their use, and they will be able to include them in the contract notice or contract documents (which should include the ESPD, based on the newly added definition in the draft act).

The premises for exclusion indicated below are to become optional:

- Final conviction for offences against the environment regulated in Art. 181–188 of the Criminal Code and offences against workers' rights regulated by Art. 218–221 of the Criminal Code (now Art. 24(1)(13)–(14) PPL)
- Bid-rigging (currently Art. 24(1)(20) PPL). Going beyond this premise in the directive, the draft clarifies that an agreement between contractors aimed at distorting competition will exist, for example, if members of the same corporate group submit separate bids, partial bids or requests to participate in the procedure. The contractors will be able to rebut this presumption if they can show that they prepared offers or requests to participate independently of each other.
- Distortion of competition resulting from prior involvement of the contractor in the preparation of the procurement, in particular by advising on preliminary market consultations by the contracting authority. The institution of preliminary market consultations, which is the subject of the proposed Art. 94–97 of the new law, is known as "technical dialogue" under the current law. On the other hand, the terminology proposed in the draft coincides with the name of this institution adopted in Art. 40 of the Classic Directive. According to the explanatory memorandum for the draft, the purpose of clearly defining the situations where it is possible to exclude a contractor engaged in market consultations is to introduce the principle that exclusion can only take place if the distortion of competition caused by such involvement cannot be eliminated in any other way. However, the clarification of this situation in the draft does not introduce much that is new, as it has already been provided for in the present Art. 24(1)(19) PPL. Moreover, under the present Art. 24(10) PPL, before excluding the contractor, the contracting authority must provide

the contractor an opportunity to prove that its participation in preparation of the procurement procedure did not distort competition.

- Misleading the contracting authority, deliberately or negligently, when presenting information contained in the qualitative documents (current Art. 24(1)(16) PPL). The introduction of an additional requirement that such contractor's activity must have a significant impact on decisions taken by the contracting authority during the procedure is new. While in case of negligence on the part of the contractor (which now must be gross negligence), the need to prove such an influence is indicated, deliberate misleading of the contracting authority by the contractor appears to be sufficient to justify the exclusion of the contractor. On the other hand, it is difficult to imagine that such an action would not influence the contracting authority's decisions in the procedure.
- Misleading the contracting authority as a result of recklessness or negligence (current Art. 24(1)(17) PPL) and unlawful influence or attempted influence of the contractor on the contracting authority's activities or acquisition of confidential information (current Art. 24(1)(18) PPL)—both grounds are to be covered by a single point.

In addition, the current optional ground from Art. 24(5)(3) PPL is to be replaced by a reference to the occurrence of a conflict of interest. The change results from the use of this concept by the drafters, modelled on the EU directive, to determine cases where it is necessary to exclude persons performing activities in the contract award procedure on the part of the contracting authority. The situations indicated in the proposed Art. 61 of the new law where there is a conflict of interest generally correspond to the cases set out in Art. 17 of the current law, but some of them are specified in more detail. A conflict of interest will arise both when the impartiality of persons performing activities on the contracting authority's side is endangered as well as when it can only be perceived as endangered by virtue of their interest in a specific outcome of the proceedings.

Reference to crimes defined in Polish acts still misses the point

One of the reasons contractors have trouble filling in the European Single Procurement Document in Poland is the reference in the Public Procurement Law to crimes as defined in Polish criminal law provisions, for which a legally binding conviction results in the exclusion of the contractor. Part III of the ESPD lists the offences set out in Art. 57 of the Classic Directive, with only a general reference to the corresponding national provisions. To help Polish contractors identify which offences under Polish criminal law correspond to the offences indicated in the ESPD fields, the Public Pro-

curement Office has prepared guidelines in its ESPD manual. However, this does not help foreign contractors who have difficulties identifying offences regulated in their state's legal framework corresponding to those mentioned in the directive. Referring in the Public Procurement Law to a catalogue of crimes defined in the Polish Criminal Code and other acts makes it difficult for foreign contractors to submit an initial statement in the ESPD, and after selection of their offer, to submit appropriate documents confirming their lack of a criminal record.

Moreover, the current reference to Polish criminal law prevents exclusion of a contractor convicted of analogous offences under the law in force in its home country. This violates the principle of equal treatment of contractors.

There were hopes that in the work on the new law, references to Polish criminal laws would disappear, ensuring the universality of this ground for exclusion and coverage of foreign contractors. The proposed regulation only partially meets these expectations. References to Polish laws providing for liability for offences are retained, while referring only in part of the grounds for exclusion to the laws in force at the place of residence or registered office of the contractor. As a result, the proposed Art. 122 still differentiates between Polish and foreign contractors, because such economically serious crimes as money laundering or corruption will be a basis for exclusion only if the conviction for them is based on Polish law.

Self-cleaning: more is not better

According to the current Art. 24(8) PPL, in the majority of cases where the contractor is subject to exclusion, it may present evidence that the measures taken the contractor are sufficient to prove its reliability. In particular, the contractor may indicate that it has repaired the damage caused by a criminal or fiscal offence or provided monetary compensation for the harm. The contractor may provide a comprehensive explanation of the facts and demonstrate cooperation with law enforcement authorities and the adoption of specific technical, organisational and personnel measures appropriate to prevent further criminal or fiscal offences or misconduct on the part of the contractor. This wording, introduced by the 2016 amendment, derives from Art. 57(6) of the Classic Directive.

When regulating the institution of the contractor's "self-cleaning," the drafters of the proposed new act went one step further. Not only is the normative content from Art. 57(6) of the directive repeated, but part of recital 102 of the directive is transposed into the draft, indicating examples of technical, organisational and HR measures the contractor should undertake to prove its reliability. Such measures include breaking any ties with persons or en-

tities responsible for the contractor's improper conduct, reorganising staff, implementing a reporting and control system, setting up an internal audit structure to monitor compliance with rules, internal regulations or standards, and introducing internal rules on liability and damages for non-compliance, internal regulations or standards.

Although it may seem that indicating in the act specific measures to be taken by contractors will be helpful for them, there is a concern that these circumstances will be perceived by contracting authorities as minimum actions that must be taken by contractors. Formalistic verification of measures taken by contractors may limit their ability to use this institution, which certainly runs counter to the principle of proportionality, which is essential for the application of the grounds for exclusion. In particular, it is worth reconsidering the measure requiring breaking of any ties with persons or entities responsible for the contractor's incorrect behaviour. For example, in the case of a final conviction of a management board member for an offence listed in the grounds for exclusion, will the only possibility of self-cleaning be that person's discharge or resignation? These doubts call into question whether it is really necessary to transpose the interpretive guidelines contained in the preamble to the directive into national legislation. The list of samples of measures to cure infringements in the preamble of the directive, the role of which is to establish the spirit in which the operative provisions of the directive should be interpreted, certainly has a different purpose and resonance than indicating the same measures in the body of the act.

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Bid bonds in 2020: same problems, same sanctions

ANNA PRIGAN

In the proposed new Public Procurement Law, the contracting authority will decide on the obligation to submit a bid bond, regardless of the value of the contract. However, the same restrictive consequences as in the current act are linked with the improper submission of a bid bond, and there are more grounds for retaining bid bonds.

The draft of the new Public Procurement Law, published on 24 January 2019, does not solve fundamental practical problems related to bid bonds in

an era of digital public procurement. Contrary to what was proposed in the concept for the new law, the obligation to demand a bid bond regardless of the value of the contract was abandoned. Under the new regulations, maintenance periods for bid bonds will be shorter in practice.

Possible to select a bid that is no longer binding

The draft of the new Public Procurement Law provides that a bid whose validity has expired, and thus is unsecured by a bid bond, may be selected if the contractor agrees to it. This regulation directly resolves practical doubts as to the effect of the expiry of the bid validity period. Since the purpose of the procedure is to select a bid, the fact that a bid has ceased to be binding should not prevent the conclusion of a contract with a contractor who upholds the terms of its bid. If the bid validity period has expired, the contracting authority will call upon the contractor whose bid received the highest score to give written consent to the selection of its bid.

Bid validity period will be longer

In the context of bid bonds, the draft of the new Public Procurement Law anticipates longer initial terms when an offer will be binding in proceedings above the EU thresholds (Art. 250). In high-value proceedings, the bid validity period will be as long as 120 days. On the other hand, the contracting authority will be able to request an extension of this deadline only once, by no more than 60 days. In procedures below the thresholds, the offer will be binding for only 30 days, with the possibility of one extension by 30 days at the request of the contracting authority. It should be emphasised that the contracting authority will have a duty to request consent for extension of the bid validity period in any case where it did not manage to select the most advantageous bid.

Bid validity period will be extended only at the request of the contracting authority

Eliminating the possibility of independent extension of bid validity by the contractor should translate into greater effectiveness of the proceedings. Contracting authorities will have a greater motivation to choose a bid in the extended period of bid validity at the latest. If they fail to make a choice during this time, they will be able to ask for the possibility of choosing a bid from contractors whose bids are no longer secured by a bid bond.

At the concept stage of the new Public Procurement Law, regulating the contractor's claim against the contracting authority for reimbursement of costs related to extension of the bid bond validity or resubmission of the bid bond for an extended bid validity period was considered. At that time, it was

pointed out that such a solution would enhance the efficiency of the operations of contracting authorities, and would also be beneficial for contractors from the SME sector, for whom the long settlement time of proceedings and the associated obligation to maintain a bid bond may be a barrier to access to procurement, due to the cost of maintaining a bid bond. It is a pity that this plan was abandoned. Although the new regulations would shorten the time when the bid bond has to be maintained, it could become common practice to prolong the selection process over an extended bid validity period. As a result, in many cases in proceedings above the EU thresholds, it would be necessary to maintain a bid bond for 5 months (90-day base time + 60-day extension).

Timely return of bid bond is an obligation

In the proposed new law, contracting authorities would be obliged to return a bid bond paid in cash no later than 7 days from the occurrence of the circumstances specified in the act, without demand by the contractor. Art. 111(2) also specifies the cases where the contractor may apply for return of the bid bond if it is not interested in further participation in the proceedings. This mainly concerns a contractor whose bid was not selected or was rejected, and who does not intend to lodge an appeal.

What is electronic form?

The provision on the forms for submitting a bid bond does not dispel any doubts concerning the bid bond in electronic form. Under Art. 110(10) of the new draft, if the bid bond is provided in the form of a bank or insurance guarantee or surety, the contractor provides the contracting authority with the original of the guarantee or surety in electronic form. However, neither the draft nor the justification explains what is the original of an electronic form. However, linking the non-legal term "electronic form" with the requirement that the original be submitted to the contracting authority suggests that this is a guarantee or surety which, in its original form, exists only in the form of an electronic file. It seems that this term should cover in particular bank guarantees issued in the form of a SWIFT communiqué, which the proponent of the draft unfortunately does not clarify, even in the explanatory memorandum accompanying the draft.

Retention of bid bond unchanged

The basis on which the contracting authority would retain the bid bond is the same as now in force. However, the justification of the draft states that in a situation where conclusion of a contract has become impossible due to reasons attributable to the contractor whose bid was selected as the most

advantageous, the contractor's bid bond should be retained only when the contracting authority itself has not contributed to the inability to sign a contract. The proponent of the draft points out that a disproportionately short period for signing the contract after selection of the most advantageous bid is such a contributing factor by the contracting authority. By implication, this is a period too short for the contractor, acting with reasonable speed, to comply with all the necessary formalities, such as submitting security for contract performance. On the other hand, avoidance of the contract by the contractor whose bid was selected as the most advantageous or failure to submit security for contract performance within the meaning of Art. 289 of the new law would entitle the contracting authority, at its choice, to either cancel the procedure or reconsider bids submitted in the procedure and select one, in order of priority, even if the period of their validity has already expired, if the relevant contractor agrees to selection of its bid.

Under Art. 454(1) of the proposal, these solutions would also apply to proceedings below the EU thresholds, to which the provisions of Art. 235–290 apply accordingly.

Incorrect bid bond will not be amended

Unfortunately, the draft of the new Public Procurement Law does not attempt to abandon a radical sanction for not submitting a bid bond, i.e. rejection of the bid. It should be noted that the EU directives do not prescribe a link between the lack of a proper bid bond and the duty to reject a bid. The aim of the procedure is to select a contractor who is able to perform the contract properly, and correctly securing the bid with a bid bond does not necessarily reflect badly on the contractor's capacity (although the contractor's inability to bear the cost of the bid bond itself might call its capacity into question). Therefore, at the concept stage of the proposal, it was suggested that an improperly submitted bid bond might be supplemented upon request, but this postulate was not accepted.

Given that higher-value bid bonds are most often submitted in the form of a bank or insurance guarantee, and the rulings from the National Appeal Chamber on the content and form of such guarantees are not uniform, allowing amendment of guarantees incorrectly issued by a third party (bank or insurer) could significantly increase the number of valid bids, which is one of the objectives of the new law. On the other hand, lack of clear guidance on "original in electronic form" (Art. 110(10)) in an era of digitalisation gives room for different interpretations. The new law should address such unregulated issues, especially considering how important bid bonds are in practice.

The new Public Procurement Law is expected to enter into force at the beginning of 2020. Consultations are currently underway.

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A revolution in the required content of public contracts

HANNA DRYNKORN

The draft of the new Public Procurement Law can be called a revolution, if only because the law has never before addressed to such a degree the content of the contract. Although the draft needs to be fine-tuned, it already provides a number of appropriate solutions.

Proportionality is the guiding principle of the new rules on the content of public contracts, and one of the most important principles in EU law. Regarding public procurement, it was laid down in the Classic Directive in 2004, and in Poland was included by the amendment of 2016 in Art. 7 of the Public Procurement Law. Although it is not limited to the stage of awarding the contract, contracting authorities are not used to considering proportionality when drafting the terms of the contract. The authors of the draft seem to have noticed this, and emphasise the importance of proportionality precisely in relation to the content of the contract under the proposed new law.

Regulations in favour of SMEs

The new provisions are intended to protect not only the immediate contractors, but also further links in the process of contract performance. Therefore, the draft responds to calls from the market and aims to strengthen the position of players in the SME sector. Among other things, a number of provisions protecting the interests of subcontractors serve this purpose. For example, a provision in the proposed new Art. 492 would prohibit less-favourable solutions in contracts with subcontractors than in the principal public procurement contract regarding contractual penalties and conditions for payment of the subcontractor's fee.

Among other things, the provision requiring appropriate adjustment to the subcontractor's fee (in contracts for longer than 6 months) in the event of a change in the contract between the contracting authority and the main contractor has a similar meaning. Advances and partial payments, which under

the proposed new Art. 471 would have to be paid during the performance of contracts for longer than 12 months, will certainly also help SMEs.

Proportionate rights and obligations

The proposed new Art. 462 would prohibit gross disproportion in the provisions of the contract in relation to the type of procurement and the risks associated with its performance. This provision is intended to enshrine the principle of proportionality in the formulation of contracts. But it will only fulfil this role if the final version upholds this principle without restricting it to situations where it is grossly violated. Since proportionality is a principle of public procurement, there is no reason to ban only "gross" disproportionality in contracts.

Upholding proportionality in specific cases will often be an issue of evaluation. Therefore, as always, common sense in application of the rules should prevail. An advantage of the current draft is that, in a sense, it defines gross disproportionality by indicating situations that will be considered as such. It gives the contractors assurance that at least the sorts of provisions mentioned in the draft will not be included in contracts. This is already a big step, especially as the situations mentioned in the draft provision reflect contractors' most frequent complaints. These certainly include unfair assessment of contractual penalties for delays for which the contractor is not responsible, penalties for behaviour unrelated to the contract or its proper execution, and imposition of grossly excessive penalties. All these actions will now be prohibited. Under the current legal framework, grossly excessive penalties, as defined in the Civil Code, may be mitigated by the court, but that generates unnecessary costs and time commitments for both parties to the contract. Under the proposed new Public Procurement Law, such proceedings would be unnecessary because such provisions would be banned from contracts.

Escalation

The introduction of mandatory adjustment in fees for contracts for construction works and services concluded for more than 12 months is also a response to problems occurring on the market. The aim is to ensure flexibility of the contract in relation to changing prices of materials or costs essential for performance of the contract. It has been noted that a change in the conditions of contract performance is a natural phenomenon affecting long-term contracts and should not burden contractors, who are forced to declare a price at the time of submitting a bid. Thus this appears to be a rational solution.

The proposed Art. 468 of the new law contains a broad regulation concerning the provisions that must be included in the contract for an appropriate escalation of fees to be effective. In particular, there would be an obligation to adjust the contract price if the contract is concluded more than 180 days after the deadline for submission of bids. Often, lengthy procurement procedures have discouraged contractors from bidding (due to the impossibility of predicting prices so far in advance) or have led to an unrealistic valuation of bids.

Options

It is very good that option rights have been clearly regulated in the draft of the new Public Procurement Law. The current act refers to this only marginally in indicating the method of determining the value of the procurement of services or supplies (Art. 34(5) PPL). Both the legal literature and the decisions of the National Appeal Chamber raised doubts as to whether options can be provided for only in contracts of this kind, or also in contracts for construction works. The second solution was mainly supported by a pro-European interpretation.

The EU's procurement directives undoubtedly do not limit the possibility of using options on the basis of the subject of the procurement. However, this also needs to be clearly stated in the national legislation. In line with the wording of Art. 72 of Directive 2014/24/EU, Art. 470 of the proposed new Public Procurement Law provides the same requirements for options as for price revision clauses.

New type of notices and contract performance report

The proposed new act introduces a new type of notice: a notice on the performance of a contract. It will be published in the Public Procurement Bulletin immediately after completion of a contract. In addition, the contracting authority will have to prepare a report on the performance of the contract if complications specified in the Art. 475 occurred during performance. These are related to a specified increase in the contractor's fee, assessment of contractual penalties, significant delays, or withdrawal from the contract by one of the parties.

These additional obligations on the part of the contracting authority are intended to raise awareness among contracting authorities themselves and other participants in the public procurement market on the causes and consequences of failure to execute the contract as originally foreseen. Such evaluation is intended to prevent similar situations in the future. Certainly, contracting authorities will raise the argument of excessive bureaucracy in

this context, as it will undoubtedly increase the amount of documentation. However, such actions will not only gather information on unplanned circumstances during the performance of contracts, but will also increase the transparency of the contracts.

Nonetheless, with the complexity of a large proportion of contracts, especially for construction works, the obligation to prepare a performance report appears excessively burdensome. The multiplicity of circumstances affecting the final effect of the construction works and the existence of competitive reasons, for example, will also make it impossible to draw clear conclusions from such reports. It would suffice if the terms of the contract were properly drafted, so that each of the parties bears the responsibility for the circumstances they cause. Sanctioning particular behaviours should sufficiently mobilise the parties to complete the contract in accordance with the original plans. An analysis of the course of the project should remain an internal matter for each of the entities involved in the execution of the project.

To secure a contract

The new act (Art. 481(2)) would set the security for contract performance at no higher than 5% of the total price stated in the bid (currently 10%). However, the contracting authority could require security up to 10%, but this would have to be justified in each case. This is to prevent an unthinking, automatic establishment of security of 10% even in situations where it is not necessary. However, if the contracting authority demonstrates that the specifics of a particular contract requires security of more than 5%, it could request more. This once more stresses the principle of proportionality, which permits actions appropriate to the subject of the procurement. This is a very positive signal to contractors. Smaller entities, for whom obtaining collateral from financial institutions involves heavy commitments if it is possible at all, will certainly be most affected by the change. The change in the rules may remove one of the barriers to their participation in proceedings for award of public contracts.

Withdrawal from a contract

The current law regulates separately the grounds for withdrawal from a contract and termination of a contract. In the implementation of the directives from 2014, the premises for termination of a contract by the contracting authority were introduced without much thought. Such a distinction is unnecessary. In fact, the European Parliament used the notion "termination of a public contract" by the contracting authority (in the Polish version *rozwiązanie*), leaving this institution to be adapted to national laws while preserving its meaning. Unfortunately, the Polish Parliament stuck with the literal word

rozwiązanie from the Polish version of the directive, which does not conform to the Polish tradition under the Civil Code, where *rozwiązanie* refers rather to "dissolution" of a contract by mutual consent of the parties (e.g. in Civil Code Art. 77 §§2–3), not unilateral termination. The drafters of the new law noticed this mistake. Therefore, the new provision on grounds for withdrawal brings order to this area, correctly including the existing grounds for withdrawal and termination of the contract in one provision.

However, the new regulation also introduces a provision that appears redundant. The proposed Art. 486(2) states that the contracting authority may withdraw from the contract, in whole or in part, in the event of an amendment to the contract not in accordance with the provisions of the law.

Considerations of equity justify limiting the right of the contracting authority to withdraw only from the part of the contract that was introduced by an amendment to the original contract, and not the entire contract. This interpretation is in line with the aim of Directive 2014/24/EU, which states in recital 112 that member states should "ensure that contracting authorities have the possibility, under the conditions determined by national law, to terminate a public contract during its term if so required by Union law." Termination should therefore aim at removing the consequences of a defective act and not termination of the entire contract, which before the amendment was a contract that fully complied with the relevant provisions. The principle of proportionality stressed above supports this interpretation of EU law. Such an understanding of the possibility of termination by the contracting authority is also supported by the internal consistency of the proposal. The proposed Art. 486(2) (current Art. 144(2) PPL) provides that a contract term that has been amended contrary to the rules for amending contracts is subject to invalidation. Therefore, it is difficult to find a justification for the position that on the basis of Art. 144(2) PPL the court would only invalidate provisions covered by an amendment to a contract made in breach of the law, while under the current Art. 145a(1) PPL the contracting authority would have the right to annihilate the entire contract.

Hence the conclusion that the provision on the possibility of withdrawing from the whole contract is misleading. But if there were no such provision, the correct interpretation of the scope of the possible right of withdrawal from the contract could be gleaned from a broader perspective on the public procurement regime.

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Data protection and public procurement

Joanna Krakowiak

A key element of the proposed new Public Procurement Law is to regulate the protection of personal data collected in the course of procurement procedures. Significant exceptions from the general rules of the GDPR are planned. What should they consist of?

Specific challenges

Organising and participating in public procurement procedures inevitably involves processing of a significant amount of personal data. These include for example criminal records of the members of management boards of companies submitting bids, as an offer failing to attach criminal record certificates of the relevant persons is usually rejected. Moreover, to prove that the contractor's personnel are able to perform certain work, the contractor submits health certificates of individuals to be involved in the work after the award of the contract.

In practice, questions arise about the best ways to fulfil the information obligations of contracting authorities that become controllers of personal data provided to them by contractors. At a later stage, the issue of the exercise of data subjects' rights, e.g. with regard to rectification or erasure of data, may become a problem. These are key issues addressed in the draft of the new Public Procurement Law published on 24 January 2019.

Access to criminal record certificates and medical data

As a rule, public procurement procedures are public. This applies, among other things, to the protocol of the procedure and, in some cases, also the appendices to the protocol.

Admittedly, data contained in criminal record certificates are no longer treated as sensitive data under the General Data Protection Regulation. However, due to their specific nature, the draft provides for restrictions on access to personal data relating to legal convictions and violations. Access to such personal data is to be possible only for the purpose of pursuing legal protection measures provided for in Chapter IX of the draft act, and only up until the deadline for filing them. Even more far-reaching protection is to be ensured in relation to health data. Providing access to such data is to be prohibited entirely.

These are important exceptions to the principle that public procurement procedures are public. The restrictions on access to personal data are also

intended to apply to the disclosure of appendices to the protocol, to contractors and to other entities entitled to seek legal remedies.

Enforcement of data subjects' rights

It is not always possible to fully exercise the rights of data subjects, as this could paralyse procurement procedures and prevent the parties from effectively transitioning to the contract execution phase.

The draft of the new law provides in this respect:

- Exercise by the data subject of the right of rectification or supplementation cannot result in a change in the outcome of the procurement procedure or modification of the contract to an extent inconsistent with the act.
- In the procurement procedure, notification of a request to limit the processing of personal data will not limit the processing until the end of the procedure.

The draft confirms that the contracting authority may fulfil the information obligation towards data subjects by including the required information in the contract notice or in the contract documents. It is the contracting authority's duty to inform data subjects of the limitations on the exercise of their rights. According to the draft, this may be done on the contracting authority's website, in the contract notice, in contract documents, or in any other way accessible to data subjects. The list of possible ways of providing this information to data subjects is therefore to be non-exhaustive.

Arduous shaping of practice

The practice of applying the GDPR in individual sectors is constantly being shaped and thus changing. It is hoped that the proposed new Public Procurement Law contributes to clarification of at least some practical doubts and helps develop solutions that will prove effective in applying the GDPR on a daily basis.

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Public Procurement practice

The Public Procurement practice at Wardyński & Partners provides comprehensive legal advice for contracting authorities and participants in proceedings for the award of public contracts under the Public Procurement Law and the Act on Concession Contracts for Construction Works and Services, and on implementation of public-private partnership projects.

We draft, review and advise on tender documentation (e.g. contract announcement, terms of reference, description of subject matter of the procurement, and terms of the contract). We provide ongoing advice during the procedure for award of public contracts (including at the phase of drafting applications and bids, negotiations, and evaluation of offers). We advise contracting authorities and also represent contractors.

We examine applications for admission to tender proceedings and bids for compliance with the law. We prepare legal analyses and opinions on public procurement law. We advise on the correctness or possibility of taking certain actions by the contracting authority during the contract award procedure. We are involved in the work of tender commissions as experts. We also represent contractors, contracting authorities, and parties joining appeals before the National Appeal Chamber and the state courts.

Mirella Lechna, attorney-at-law and partner at the firm, who heads the practice, and Anna Prigan, attorney-at-law, are founding members of the Public Procurement Law Association, made up of legal practitioners and scholars specialising in public procurement. They also serve on the association's audit committee.

The members of the firm's Public Procurement practice regularly speak at professional forums and publish in the professional press, particularly on the In Principle portal for lawyers and legal market participants (codozasady.pl).

Mirella Lechna, Anna Prigan and Hanna Drynkorn are also the authors of *Prawo zamówień publicznych* (Public Procurement Law, ISBN 978-83-278-0612-3), published by LexisNexis Polska. The book discusses experiences gleaned from advising the firm's clients.

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