COUNTRY COMPARATIVE GUIDES 2022

The Legal 500 Country Comparative Guides

Poland

PUBLIC PROCUREMENT

Contributing firm

KKLW Legal Kurzyński Wierzbicki Sp.k.

Przemysław Wierzbicki

Advocate/Founding Partner | pwierzbicki@kklw.pl

Marta Ewiak-Kawecka

Advocate | mewiak@kklw.pl

This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Poland.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

POLAND
PUBLIC PROCUREMENT

1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)

The rules on public procurement in Poland are regulated in the Act on the Law of Public Procurement (hereinafter "LPP") dated 11.09.2019, (Dziennik Ustaw as of 2019, no. 2019 as amended). The LPP entered into force on 01.01.2021. The LPP implements all the EU public procurement regulations, including the key EU public procurement directives, including directive 2014/24/EU, directive 2014/25/EU, and directive 2009/81/EC.

Being a member state of the EU, Poland is also a party to the World Trade Organisation's Agreement on Government Procurement (GPA) in its currently applicable version.

The Polish public procurement market is developing dynamically – in the recent years it has been approximately EUR 40 – 45 billion on average, with the average annual number of public contracts being 135,000 – 145,000 (out of which in 2020 Polish contracting authorities published 28,036 contract notices and design contest notices in the Official Journal of the European Union, which accounts for 12% of all tendering procedures published on the EU-level). In 2020, 43% of all public contracts were contracts for works, 31% – for supplies, and 26% – for services. In a number of areas the market is still characterised by relatively low competition – for example in more than 2/3 of tendering procedures one or two tenders only were submitted, and in more than 46% tendering procedures for services one tender only was submitted. In case of contracts below the "EU thresholds", 2.78 tenders on average is submitted in one procedure.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?

In addition to any central government procurement regime please address the following: regulated utilities suppliers (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports) military procurements non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulates such procurements.

Public procurement applies where:

a. the contract is to be awarded by a specified entity (the "contracting authority"), and
b. the contract relates to works, supplies or services, and the contract value exceeds the specified minimum thresholds, whereas
c. given the specific subject-matter, some categories of contracts are governed by public procurement rules with modifications (e.g., sector contracts).

Re. a.

In the meaning of the LPP, the contracting authority is:

a. for classic contracts:
    a. so-called public finance sector units (government, ministries, offices, local authorities);
    b. state organisational units not having legal personality, other than those specified above;
    c. legal persons, other than those specified in item (a) above, established for the specific purpose of meeting needs in the general interest, not having industrial or commercial character, if the entities referred to in item (a) or

item (b) above exert a decisive influence on such legal entities (e.g., through holding more than half of their shares)

d. associations of entities referred to in item (a) or item (b) above or entities referred to in item (c) above,
e. so-called subsidised contracting authorities if:
    i. more than 50% of the value of the contract awarded by the entity is financed from public funds or by public contracting authorities,
    ii. the contract value is equal to or exceeds the so-called “EU thresholds”;
    iii. the subject-matter of the contract are: civil engineering works defined in Annex II to Directive 2014/24/EU, building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes or services connected with such works,

b. sector contracting authorities, in turn, are:
    a. public contracting authorities to the extent that they pursue one of the sector activity types referred to below:
    b. other entities which pursue one of the sector activity types referred to above, and over which public contracting entities exert a dominant influence, whether separately or jointly, directly or indirectly through another entity, in particular they hold more than half of shares,
    c. entities other than those specified in items (a) and (b) above, which pursue one of the sector activity types referred to below, if such activity is conducted on the basis of special or exclusive rights.
    d. the above relates to the following sector activity types:
        i. water management (supply of water),
        ii. supply and transmission of electricity,
        iii. supply and transmission of gas and heat,
        iv. provision or operation of networks providing a service to the public in the field of transport by railway, tramway, trolley bus, bus, cable or automated systems;
        v. providing inland ports, maritime ports and airports to carries,
        vi. provision of key postal services,
        vii. extraction of oil or gas and prospecting for and extraction lignite, hard coal, or other solid fuels,
    c. in case of defence and security contracts – those are contracts to be awarded by a public contracting authority or sector contracting authority, whose subject-matter is:
        a. supplies of military equipment,
        b. supplies of sensitive equipment,
        c. works, supplies and services relating to security of facilities which are at the disposal of contractors of defence and security contracts or relating to equipment referred to above,
        d. works and services designated exclusively for specific military purposes, sensitive works or sensitive services.

Re. b. and c.

In terms of the value and the specific subject-matter of the contract, the LPP governs four types of public procurement:

a. classic contracts the value of which is equal to or exceeds the amount of PLN 130,000 (approximately EUR 30,000), by public contracting authorities;
b. sector contracts the value of which is equal to or exceeds the EU thresholds;
c. contracts in the field of defence and security the value of which is equal to or exceeds the EU thresholds, by public contracting authorities and sector contracting authorities;

d. classic contracts the value of which is equal to or exceeds the EU thresholds, by subsidised contracting authorities.

Whichever type of contract is involved, the contract is governed by the LPP (there are no separate provisions for certain types of contracts).

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?

The LPP refers to the following thresholds:

Value of the subject-matter of the contract	Classic contracts	Sector contracts	Defence and security contracts	Contracts awarded by subsidised contracting authorities
< PLN 130,000 (ca. EUR 30,000)	—	—	—	—
> PLN 130,000 < EU thresholds	Subject to the LPP but lower requirements	—	—	—
> EU thresholds	Subject to the LPP – full requirements	Subject to the LPP – full requirements (but with modifications)	Subject to the LPP – full requirements (but with modifications)	Subject to the LPP – full requirements (in case of a specific subject-matter of the contract)
– works > EUR 20,000,000 – supplies or services > EUR 10,000,000 if financed by EU	Additional obligations (including prior inspection by the PPO [Public Procurement Office])	Additional obligations (including prior inspection by the PPO)	Additional obligations (including prior inspection by the PPO)	Additional obligations (including prior inspection by the PPO)

"EU thresholds" are amounts of the value of contracts or design contests laid down in respective directives (the LPP does not set "its own" threshold amounts, but refers directly to the directives):

1. Art. 4 and 13 of directive 2014/24/EU,
2. Art. 15 of directive 2014/25/EU,
3. Art. 8 of directive 2009/81/EC.

Hence, the EU thresholds are as follows:

1. for classic contracts:
    a. for public contracting authorities:
        i. EUR 5,382,000 – for works contracts;
        ii. EUR 140,000 – for supply and service contracts awarded by central government authorities;
        iii. EUR 215,000 – for supply and service contracts awarded by sub-central contracting authorities;
        iv. 750 000 EUR – for public service contracts for social and other specific services listed in Annex XIV of directive 2014/24/EU,
    b. in case of subsidised contracting authorities:
        i. EUR 5,382,000 – for works contracts,
        ii. EUR 215,000 – for service contracts which are connected to such works contracts,
2. for sector contracts:
    a. EUR 431,000 – for supply and service contracts;
    b. EUR 5,382,000 – for works contracts;
    c. EUR 1,000,000 – for service contracts for social and other specific services listed in Annex XVII.
3. for contracts in the field of defence and security:
    a. EUR 431,000 – for supply and service contracts;
    b. EUR 5,382,000 – for works contracts.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

For contracts "outside of the Act" (namely below PLN 130,000 for classic contracts and below the EU thresholds for other types of contracts), the LPP does not provide for any special regulations – a number of contracting authorities, however, adopt for such contracts rules which are similar to those arising from the LPP or the rule of sending requests for proposals [*Polish: zapytanie o złożenie oferty*] to at least three bidders (this is usually the case for contracts "outside of the Act" of a value of at least PLN 50,000). Such contracts are called "regulation contracts" [*Polish: zamówienia regulaminowe*].

5. For the procurement of complex contracts*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes?

For public contracts below the “EU thresholds”	Public Procurement Bulletin [Polish: Biuletyn Zamówień Publicznych] – access via the website of the Public Procurement Office [Polish: Urząd Zamówień Publicznych], Publications are made electronically and relate to major events, such as: – contract notice; – notice of intention to conclude a contract; – notice of the results of the procedure; – design contest notice; – notice of the results of a contest; – notice of changes to the notice; – notice of modifications of a contract; – notice of the completion of the contract; – in-house procurement notice.
For contracts of a value equal to or exceeding the “EU thresholds”	Notices in the Official Journal of the European Union (pursuant to the general rules)
Note! In most types of public procurement procedures in Poland the contracting authorities are obliged to publish procurement information on their websites (including information about tenders submitted). They often publish a notice of the commencement of the procedure even if there is no such an obligation.	

Since more than 90 per cent of public procurement of “complex contracts” is processed in an open procedure – it is worth noting the minimum time limits for receipt of tenders under the said procedure (in practice the contracting authorities usually prolong the periods later on):

- in general – the time limit must not be shorter than:
    a. for contracts below the EU thresholds:
        a. supplies or services – 7 days from the publication of the contract notice in the Public Procurement Bulletin,
        b. works contract – 14 days from the publication of the contract notice in the Public Procurement Bulletin,
    b. for contracts exceeding the EU thresholds:
        a. for an open procedure – 35 days from the date the contract notice is sent to the Publications Office of the European Union (exceptionally, the contracting authority may shorten the time limit to 15 days),
        b. for procedures other than an open procedure – 30 days from the date the contract notice is sent to the Publications Office of the European Union (exceptionally, the contracting authority may shorten the time limit to 15 days),
        c. for sector contracts – the timeframes are usually shorter by no more than 5 days,
        d. for contracts in the field of defence and security – the time limits are usually longer by no more than 5 days.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?

If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences?

In case of classic contracts – public contracting authorities and subsidised contracting authorities award contracts in one of the following types of procedures:

a) “full” procedure – for contracts above the EU thresholds:

1. open procedure;

2. restricted procedure;
3. negotiated procedure with publication of a contract notice;
4. competitive dialogue;
5. innovation partnership;
6. negotiated procedure without publication of a contract notice;
7. single-source procurement.

Whereas the first two procedures may be applied in all cases, the remaining procedures require meeting additional conditions under the LPP.

b) simplified procedure – for contracts below the EU thresholds:

1. basic procedure (in the most popular variant it is similar to an open procedure),
2. innovation partnership,
3. negotiated procedure without publication of a contract notice,
4. single-source procurement,

c) For sector procurement, the following types of procurement procedures are available:

1. open procedure;
2. restricted procedure;
3. sector negotiated procedure with publication of a contract notice;
4. competitive dialogue;
5. innovation partnership.
6. (in an exceptional case) negotiated procedure without publication of a contract notice,
7. (in an exceptional case) single-source procurement.

d) For procurement in the field of defence and security, the following types of procurement procedures are available:

1. restricted procedure,
2. negotiated procedure with publication of a contract notice,
3. (by way of exception) competitive dialogue,
4. (by way of exception) negotiated procedure without publication of a contract notice,
5. (by way of exception) single-source procurement.

As far as the conditions for participating in the procedure are concerned, the conditions usually relate to the following:

a. the economic operator's experience in the performance of similar contracts,
b. the economic operator's having financial resources,
c. the economic operator's having machinery,
d. the amount of insurance,
e. a team which will be at the economic operator's disposal for the purpose of performing the contract.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?

Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?

The LPP provides for two types of grounds for excluding an economic operator from participation in a procedure:

1. mandatory – applicable by virtue of the act, whether the contracting authority quoted the same in the procedure documents or not, and
2. discretionary – which apply only if the contracting authority indicated so in the procedure documents.

Mandatory exclusion from a procurement procedure applies to an economic operator:

a. who has been convicted for one of the specified offences – e.g., bribery, white-collar crime and crime against the interest of creditors, or some cases of illegal employment of foreigners (or where members of governing bodies of the economic operator have been convicted for the same) [in general – exclusion for 5 years],
b. in respect of whom a final and binding court judgement or a final administrative decision has been issued with regard to arrears in taxes, levies or social security or health insurance contributions, which has not been paid yet and no arrangement has been concluded,
c. in respect of whom a final decision was issued prohibiting from tendering for public contracts [exclusion for the period of the prohibition],
d. where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into bid rigging with other economic operators, in particular where while being members of the same group of companies they submitted separate tenders, unless they prove that they

prepared the tenders or requests independently of one another [exclusion for 3 years],

e. where the economic operator or an entity being a member of the same group of companies has been involved in the preparation of the procurement procedure, unless the distortion of competition resulting from the same can be remedied by a measure other than excluding the economic operator from the participation in the procedure [exclusion from the given procedure only],
f. for contracts of a value equal to or exceeding the amount of EUR 20,000,000, and for supplies or services – EUR 10,000,000 – where the economic operator makes it impossible or difficult to ascertain the criminal origin of funds or conceals the origin of funds, due to the inability to determine the beneficiary owner [exclusion from the given procedure only].

Discretionary grounds – the contracting authority may apply all or some of the following grounds for exclusion, hence an economic operator may be excluded:

a. where the economic operator is in breach of its obligations relating to the payment of taxes, levies or social security or health insurance contribution (or where a member of the economic operator's governing bodies has done so), unless the same has been paid or an arrangement has been entered into,
b. where the economic operator has violated obligations in respect of environmental protection, social law or labour law – committing a crime or an offence in that field [exclusion for 3 years],
c. where liquidation has been opened in respect of the economic operator, the economic operator has been declared bankrupt, the economic operator's assets are being administered by a liquidator or by the court, the economic operator has entered into an arrangement with creditors, where the economic operator's business activities are suspended or the economic operator is in any analogous situation arising from a similar procedure under the local laws in the jurisdiction in which the procedure has been initiated [exclusion for 3 years];
d. where the economic operator is guilty of grave professional misconduct, which renders its integrity questionable, in particular where, as a result of wilful misconduct or gross negligence, the economic operator has not performed or has shown deficiencies in the performance of a contract, which the contracting authority is able to demonstrate by relevant evidence [exclusion for 3 years];
e. where there is a justified doubt as to the impartiality or independence of the persons in charge of the given procurement procedure on the part of the contracting authority, for example on account of their prior work for the economic operator, and the same cannot be effectively remedied otherwise than by excluding the economic operator [exclusion from the given procedure only],
f. where, for reasons attributable to the economic operator, the economic operator has shown significant or persistent non-performance or deficiencies in the performance of a substantive requirement under a prior public contract, or a prior concession contract which led to early termination or rescission of the contract, damages, substitute performance or exercising rights under statutory warranty for defects [exclusion for 3 years];
g. where, as a result of wilful misconduct or gross negligence, the economic operator has committed misrepresentation to the contracting authority in supplying to the information that the economic operator is not subject to exclusion, fulfils the participation criteria or the selection criteria, which might have a material influence on the decisions made by the contracting authority in the procurement procedure, or the economic operator has withheld such information or is not able to submit the supporting documents required [exclusion for 2 years];
h. where the economic operator has unduly influenced or has made an attempt to unduly influence the actions of the contracting authority, to has made an attempt to obtain or has obtained confidential information that may confer upon it advantages in the procurement procedure [exclusion for 2 years]
i. where the economic operator has recklessly or negligently provided misleading information that might have a material influence on the decisions made by the contracting authority in the procurement procedure [exclusion for 1 year].

The last ground is particularly dangerous for economic operators, since due to an error or an omission in theory they may be excluded from all procedures for a considerable period.

The LPP also provides for a possibly for an economic operator to undertake a self-cleaning procedure.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.

Since nearly 90% of “complex contracts” procedures is conducted in an open procedure – we describe below the typical open procedure process.

See table here.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?

(For these purposes please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)

For public procurement regarding contracts below the EU thresholds, contracting authorities usually follow the so-called basic procedure, under which:

1. the contracting authority publishes a contract notice,
2. in response to which all interested economic operators may submit their tenders,
3. and then the contracting authority:
    a. (the most common situation) selects the best tender without conducting negotiations, or
    b. (an exception) may conduct negotiations in order to improve the contents of the tenders, if the contracting authority has provided for such a possibility, and upon the completion of the negotiations the contracting authority invites the economic operators to submit additional tenders, or
    c. (does not occur in practice) the contracting authority conducts negotiations in order to improve the contents of the tenders, and upon the completion of the negotiations the contracting authority invites the economic operators to submit final tenders.

In practice the basic procedure in its most common variant is very similar to an open procedure, subject to some specific solutions:

a. shorter time limits (including time limits for submitting tenders and for appeals),
b. lower formal requirements,
c. lower maximum amount of tender deposit,
d. possibility of conducting negotiations with the economic operators after the tenders have been submitted, thus the economic operator whose tender was the best one at the moment the tenders were submitted, nevertheless may finally lose.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

From the point of view of a foreign economic operator, it is worth taking in advance those actions which may later involve numerous technical difficulties or will be time-consuming. For example it is advisable:

a. to monitor websites of selected contracting authorities since they often provide information about planned contracts on their websites,
b. to secure in advance documents regarding convictions, if any, of members of governing bodies of the economic operator – such documents (e.g., criminal record documents) must be issued in the state where the economic operator is based rather than the state of residence of such a member of the governing bodies,
c. to take care of the contents of guarantees in advance, if the given foreign economic operator wishes to submit the tender deposit in the form of a bank guarantee or an insurance guarantee (often there are problems with regard to having such a guarantee issued by an issuer outside Poland or especially outside the EU),
d. also to secure testimonial letters in advance to confirm due performance of prior contracts,
e. for large, complex contracts, it is worth ensuring that the economic operator has its representative in Poland starting from the early stage of the procedure – it facilities the communication with the contracting authority and considerably facilitates the preparation of, for example, the explanations for the contents of the tender or preparation of an

appeal to the NAC.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

The contracting authority selects the best offer based on tender assessment criteria set out in the procurement documents. Pursuant to the LPP, the contracting authority provides an unequivocal and intelligible description of the tender assessment criteria, while the tender assessment criteria and the description thereof must not allow the contracting authority an unlimited freedom to select the best tender, and will enable verification and comparison of the tenders.

Therefore, the tender assessment criteria must be linked to the subject-matter of the contract – such a link exists where the criteria relate to the works, supplies or services that are the subject-matter of the contract in any respect and in relation to any stage of their life cycles (e.g., the quality guarantee period for works performed). The tender assessment criteria must not relate to the properties of the economic operator, including but not limited to the economic, technical or financial relatability of the economic operator.

The best tender may be selected based on:

1. quality criteria and the price or cost;
2. the price or cost.

Quality criteria may relate in particular to the following:

1. quality, including technical parameters, aesthetic and functional characteristics such as accessibility for persons with disabilities or design for users' needs;
2. social characteristics, including occupational and social inclusion of excluded persons;
3. environmental characteristics, including energy efficiency of the subject-matter of the contract;
4. innovative characteristics;
5. organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract;
6. after-sales service, technical assistance, delivery conditions such as delivery date, delivery process or delivery period, and period of completion.

The tender assessment quality criteria that are most common in Poland include: date of performance / delivery date, period and terms and conditions of guarantee / warranty of quality, payment dates and terms and conditions, quality / functionality / technical characteristics, knowledge / experience of the economic operator's team, response time.

The best tender is the tender which represents the best price-quality ratio or cost effectiveness or the tender with the lowest price or cost.

In practice, for years the contracting authorities have preferred the lowest price to be important to the greatest possible extent as the sole or the major criterion, as a result of which often goods of lower quality or goods from unexperienced economic operators are procured.

Hence, in the new LPP (in force since 01.01.2021) public finance sector entities and state organisational units were ordered in general are ordered not to use the price criterion as the sole criterion for tender assessment or as a criterion of a weight exceeding 60%. It is possible to give a higher weight to that criterion on exceptional occasions only.

12. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.

Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?

On the basis of the Polish LPP, bidders should receive a justification for their scoring. Tenderers should also receive a rationale for the scoring of other tenderers, including the tenderer selected as the most competitive.

The contracting authority is obliged to provide the justification for the scoring after selecting the most advantageous offer.

Providing the justification for the score enables the bidders to check the correctness of the evaluation awarded by the awarding entity. Bidders – if they do not agree with the scoring made – may appeal to the National Appeals Chamber and complain about the selection of the best offer.

If an appeal against the awarding entity's actions is lifted – until the appeal is examined by the National Appeals Chamber, as a rule, no public procurement contract may

be concluded with the winning tenderer. If the appeal is not lodged, the contracting authority may sign the contract after the deadlines for lodging an appeal have expired.

13. What remedies are available to unsuccessful bidders in your jurisdiction?

In Poland, it is possible to appeal to the National Appeals Chamber against the selection of the contracting authority, including the selection of the best offer in the procedure. Therefore, such a choice may be appealed against, indicating that the awarding entity selected the most advantageous tender in breach of the provisions of the public procurement law. If the appeal is not accepted, it is possible to file a complaint with the District Court in Warsaw. In the event that such a complaint is rejected, a cassation appeal may be brought to the Supreme Court.

1) Appeal procedure in public procurement

a) Appeal to the National Appeals Chamber

A special body has been appointed to examine appeals – the National Appeals Chamber. This body remains specialized in matters related to the public procurement.

To successfully file an appeal, the following conditions must be met:

a. the appellant has or had an interest in the procurement, and
b. the appellant has suffered or may suffer damage as a result of the contracting authority's breach of the provisions of the Public Procurement Law.

The interest in obtaining an order is manifested in the loss of the possibility of obtaining an order. For example – a contractor whose offer was classified in the second position in the tender evaluation ranking may appeal against the selection of the most competitive tender in the procedure. Currently, also contractors whose offers were classified further in the offer evaluation ranking, may, in principle, also appeal against the selection of the most advantageous offer. It is not necessary for contractors with further positions in the tender evaluation ranking to contest all the tenders that were on the list prepared by the contracting authority, placed higher.

The deadlines for lodging an appeal are relatively short – as a rule, they are:

a. 5 days – in procedures with a value below the EU thresholds,
b. 10 days – in procedures with a value above the EU thresholds.

The time for examining the appeal in accordance with the provisions of LPP is 15 days. In practice, the average time for examining an appeal in 2020 was 30 days, and in 2019, the average time for examining an appeal was 14 days.[1]

It is important that until the appeal is examined by the National Appeals Chamber, the possibility of concluding a public procurement contract is, in principle, excluded. This means that in order to conclude a contract, the contracting authority must wait until the appeal is examined by the National Chamber of Appeals.

LPP regulations allow, as an exception, the lifting of the ban on concluding a contract. The ban on concluding a contract is revoked by the National Appeal Chamber in strictly defined cases. In accordance with the provisions of LPP, it is possible to revoke the ban on concluding a contract if:

a. failure to conclude a contract could result in negative effects for the public interest, exceeding the benefits associated with the need to protect all interests, which are likely to be prejudiced as a result of actions taken by the contracting authority in the procurement procedure (e.g. in the case of public contracts for waste management),
b. the contracting authority made it plausible that the appeal is brought only in order to prevent the conclusion of the contract (e.g. in the case when the contractor's offer was rejected, and the contractor only appealed against the selection of the most advantageous offer of another contractor, and did not challenge that its offer was rejected).

In practice, applications to revoke the ban on concluding a contract are submitted to the National Appeals Chamber quite rarely. Such applications are received only in about 4% of the appeals lodged. At the same time, the National Appeal Chamber considers approximately 45% of such applications.

Below we present statistics from the last years, i.e. from 2020 and 2021.

	Appeals lodged	Applications for lifting the ban on concluding a contract	Applications for lifting the ban on concluding a contract were accepted
Year 2020[2]	3263	119	52
2021 (as of 29 December 2021)	3793	109	38

b) A complaint to the District Court in Warsaw

The decision of the National Appeals Chamber may be appealed to the District Court in Warsaw (the Public Procurement Court).

The deadline for lodging a complaint is 14 days and is counted from the date of delivery of the decision of the National Appeals Chamber along with a written justification. The time for examining the complaint, in accordance with the provisions of LPP, is 1 month from the date of receipt of the complaint.

It is important, however, that bringing an action before the General Court no longer obstructs the conclusion of a public procurement contract. Therefore, if the National Appeals Chamber dismisses the appeal, the awarding entity may conclude a contract with the winning tenderer. Thus, if the Court finds that the complaint is justified, it will, in practice, rule that the awarding entity has breached the provisions of the public procurement law.

In practice, complaints against judgments of the National Appeals Chamber are brought quite rarely. In 2020, only 122 complaints were brought against the decisions of the National Appeals Chamber[3].

c) Cassation appeal to the Supreme Court

A cassation appeal may be filed with the Supreme Court against the judgment of the District Court, which must be lodged within 2 months from the date of delivery of the judgment together with the justification.

A cassation appeal is a formalized legal remedy. It is required to be drawn up by a professional entity. It is necessary to comply with a number of formal requirements. Moreover, in practice, the Supreme Court accepts for examination only some of the filed cassation appeals. **2) Possibility to cancel the contract**

The provisions of LPP allow for the cancellation of the concluded public procurement contract. Cancellation of the concluded contract is possible only exceptionally, in strictly defined cases. In practice, it is about situations where:

a. the contract was awarded without applying the public procurement law,
b. the contract was awarded in a non-competitive procedure (single-source), despite the lack of grounds for doing so,
c. the contract is concluded before the expiry of the standstill period, i.e. the period during which tenderers may appeal to the National Appeals Chamber.

Cancellation of the contract is possible in the course of the appeal procedure before the bodies specialized in public procurement matters. Therefore, the National Appeals Chamber and the District Court in Warsaw (the Public Procurement Court) may cancel the contract. In the course of the appeal procedure before the indicated authorities, it is possible to cancel the concluded contract in its entirety or cancel the contract in the scope of obligations not yet fulfilled. It is also possible to shorten the term of the contract. Exceptionally, in strictly defined cases, it is possible for the tenderer to file a lawsuit to a common court for the invalidation of the concluded contract.

References

[1] Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2020, dated May 2021. [2] Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2020, dated May 2021. [3] Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2020, dated May 2021.

14. Are public procurement law challenges common in your jurisdiction?

Is there a perception that bidders that make challenges against public bodies suffer reputational harm/harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost:((i) for the defendant and for the (ii) claimant?

There are challenges in the field of public procurement in Poland. These challenges are visible to the Polish authorities, which is why in 2021 a completely new public procurement law entered into force (the previous

law was repealed in its entirety). The new Public Procurement Law, to some extent, responds to the current problems of the system. Many changes have been adopted to increase interest in the public procurement market.

When it comes to challenges in the field of public procurement, the following can be mentioned in this respect:

i. challenges related to low interest in the public procurement market – the average number of bids submitted in 2020 was 2.78,[1]
ii. challenges related to the so-called green procurement, i.e. contracts with a lower environmental impact
iii. challenges for the competitiveness of public procurement in the health sector for drugs.

In Poland, lodging an appeal in a public procurement procedure does not affect the tenderer's reputation. At the same time, lodging an appeal by a tenderer does not in any way affect the participation of these tenderers in public procurement procedures. In practice, many well-known and large companies file appeals in public procurement procedures. Small companies are also lodging appeals. It happens that awarding entities consider appeals lodged before the National Appeals Chamber examines the appeal. In practice, in 2020:

a. in 21% of appeal procedures the contracting authority admitted the charges of the appeal, therefore the National Appeals Chamber discontinued the proceedings,
b. in 27%, the appeal proceedings were discontinued as a result of the withdrawal of an appeal (in practice, the withdrawal of an appeal is most often due to the awarding entity taking actions that satisfy the appellant and make it unnecessary to further support the appeal),
c. in 18% of the appeal procedures, the appeal was formally admitted.

As for the costs of the appeal proceedings before the National Appeals Chamber these costs include the appeal fee and costs awarded to the awarding entity in the event that the case is lost.

The cancellation fee is:

i. in proceedings above the EU thresholds:
    - PLN 15,000 (approximately EUR 3,279) – in proceedings for deliveries or services
    - PLN 20,000 (approximately EUR 4,372) – in construction contracts,
ii. in proceedings below EU thresholds:
    - PLN 7,500 (approximately EUR 1,639) – in proceedings for deliveries or services,
    - PLN 10,000 (approximately EUR 2,186) – in construction contracts.

In practice, the maximum costs that may be awarded by the National Appeals Chamber to the awarding entity in the event of losing the case are PLN 3,600 (approximately EUR 787) and the costs of travel to the hearing.

Reference

[1] Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2020, dated May 2021.

15. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case).

In Poland, the disputes related to public procurement can be divided into two categories:

a. disputes related to the conducted public procurement procedure (disputes in the course of the public procurement procedure),
b. disputes related to the performance of the concluded public procurement contract.

Disputes related to the conducted public procurement procedure were discussed in the answer to questions 13 and 18.

As for the time of examining a dispute between the contracting authority and the contractor, regarding a concluded public procurement contract, the time of examining such a dispute is generally quite long.

In practice, it usually takes about 3-5 years to recognize a complicated dispute until a final resolution of the Court. It happens that court cases – until their final resolution – take even longer. In practice, the time it takes to examine a case depends on many factors, including:

a. from the appointment of the court hearing the case,
b. the degree of complexity and the amount of evidence, including the number of witnesses reported by the parties for questioning,
c. since the preparation of an opinion by court

experts, if it is necessary to obtain evidence from such an opinion.

1) Key stages and their duration

a) The case before the Court of first instance

A litigation is initiated by bringing a claim to the Court. In the case of large cases, the value of the subject of the dispute exceeds PLN 75,000, the cases are heard by the regional courts.

The statement of claim should precisely indicate the status of the case, specify the claim, and refer to evidence.

After the claim is received by the Court, the Court sends a copy of the claim to the defendant. In practice, a copy of the statement of claim is sent to the defendant after about 2 months. It also happens that the defendant receives a copy of the statement of claim even several months after it was filed.

By sending a copy of the statement of claim, the court obliges the Defendant to submit a response to the statement of claim. The court sets a deadline for submitting a response to the claim, not shorter than 14 days. In practice, in complex and large cases, the deadline for submitting a response to the statement of claim is up to 60 days.

Then, in practice, in some cases, the Court arranges a preparatory hearing. At the preparatory hearing, a plan for the hearing is drawn up, which is used to set the dates of court hearings, as well as to determine what evidence the Court will conduct and on what dates.

Then, hearings are held in the case where the parties present their views. At hearings, the Court also hears witnesses called by the parties. Usually, the hearings are held every few months. In practice, each hearing lasts a maximum of approx. 2.5 hours.

The factor that significantly extends the duration of court proceedings is the admission of evidence based on an expert opinion. In many complex disputes, the resolution of the case requires the preparation of a court expert or several experts (e.g. to determine whether the design documentation provided by the contracting authority was defective). The time to prepare such an opinion is sometimes even several months. It should be added that a party dissatisfied with the expert's opinion may raise objections to it. If the Court shares such reservations, the Court decides to prepare a supplementary expert opinion or even decides to prepare a new, subsequent opinion.

After examining the case, including taking evidence, the Court issues a judgment. However, the issued judgment does not become legally binding immediately. There is a possibility of appealing against the judgment.

b) The case before the Court of second instance

A party that has lost a case in the first instance may appeal to the second instance court. In the case of large court cases when the value of the subject of the dispute exceeds PLN 75,000, the appeal is heard by the courts of appeal.

As a rule, evidentiary proceedings are not repeated in the appeal proceedings. The court of second instance examines the correctness of the decision of the Court of first instance.

The time for considering the case before the Court of second instance is approximately 12 months. The court of second instance may either uphold the judgment under appeal or change the judgment under appeal.

It is also worth adding that the court of second instance may, exceptionally, also revoke the judgment under appeal and refer the case for re-examination by the court of first instance. This means that the case will be re-examined.

As a consequence, the court of first instance will re-examine the case and issue a judgment again, and the judgment in question may again be appealed to the court of second instance. In such a situation, the time for considering the case is significantly extended.

c) Cassation appeal to the Supreme Court

As a rule, a cassation appeal may be lodged with the Supreme Court against the judgment of the Court of the second instance. A cassation appeal is an extraordinary remedy, and at the same time remains extremely formalized. The Supreme Court does not always accept a cassation appeal for examination. Adopting it requires proving the existence of certain premises. In 2019, 58% of cassation appeals were not accepted for consideration in the Civil Chamber of the Supreme Court.[1] The time for considering a cassation appeal in civil proceedings is in practice more than 6 months.

Reference

[1] Information on the activities of the Supreme Court in 2019 and Information on the activities of the Disciplinary Chamber of the Supreme Court in 2019.

16. What rights/remedies are given to bidders that are based outside your jurisdiction?

In Poland, the public procurement market, in principle, remains open to bidders from the third countries, including bidders based outside the European Union. Such bidders may submit offers as well as lodge appeals and complaints in public procurement procedures.

The restriction of the number of bidders was introduced in public procurement procedures in the fields of defence and security. In these public procurement procedures, only those economic operators may apply for awarding the contract who have their registered office:

a. in a Member State of the European Union,
b. in a member state of the European Economic Area,
c. in a country with which the European Union or Poland has concluded an international agreement on contracts in the field of defence and security – in this respect, the Agreement on Government Procurement (GPA) concluded under the World Trade Organization (WTO) does not apply.

At the same time, the contracting authority may specify in the contract notice that contractors from countries other than those indicated above may also apply for contracts in the field of defence and security. The contracting authority may, therefore, extend the catalogue of economic operators who may apply for such a contract, but this is its own optional decision.

It is also worth adding that in public procurement procedures in the fields of defence and security, the catalogue of possible grounds for exclusion from the procedure remains much broader than in other public procurement procedures.

17. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?

Under Polish law, a subsidiary with its registered office in Poland – which has separate legal independence – may submit a bid in a public procurement procedure. LPP regulations do not provide for any restrictions in this respect. There is no requirement that the parent company has submitted a bid. Similarly, in the case of using legal remedies – there are no restrictions in this regard.

The situation is different in the case of a branch of a foreign entrepreneur. A branch of a foreign entrepreneur does not have a separate legal personality. Formally, the contractor may only be a foreign entrepreneur, not its branch. In this situation, the branch cannot submit an offer or use legal remedies.

As regards the subsidiary, it is also worth adding that when a subsidiary submits an offer, the subsidiary should demonstrate that the conditions for participation in the procedure have been met, including:

a. in terms of technical or professional ability,
b. economic or financial standing.

The subsidiary does not automatically use the resources of companies belonging to the entire capital group. Experience of capital linked related companies is not the same and automatic experience of all companies from the capital group. For example: if the condition for participation in the public procurement procedure is the requirement to have experience in the execution of a specific construction work worth EUR 5 million, and only the parent company (parent company) has such experience, then the subsidiary (daughter company) cannot automatically refer to that experience to prove that it meets the condition of participation in the procedure. It is necessary in this respect to make resources available in accordance with the principles of LPP.

Thus, subsidiaries based in Poland may formally submit bids in public procurement procedures, but they must remember that the experience of companies from the capital group does not automatically transfer to the subsidiary.

18. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?

In Poland, there are authorities and courts whose task is to hear cases in the field of public procurement.

These entities (simply) can be divided into two groups:

a. the authority and courts hearing cases related to the conduct of public procurement procedures,
b. courts hearing disputes related to the performance of a concluded public procurement contract.

1) The authority and courts hear matters related to the conduct of public procurement procedures

Within the first group, there is an authority and a court in Poland that specialize in examining cases related to the conduct of public procurement procedures.

This body is the National Appeals Chamber, and this court is the District Court in Warsaw – Public Procurement Court (currently: XXIII Commercial Division of Appeals and Public Procurement).

The National Appeals Chamber is the body competent to:

a. recognize the appeals regarding:
    i. actions or omissions of the awarding entities inconsistent with the provisions of the law in public procurement procedures,
    ii. failure to conduct a contract award procedure or organize a competition under the Public Procurement Law, despite the fact that the contracting authority was obliged to do so,
b. examining applications for lifting the prohibition to conclude a contract,
c. adopting resolutions containing an opinion on the contracting authority's reservations to the result of prior control and ad hoc control conducted by the President of the Public Procurement Office.

The District Court in Warsaw (currently: XXIII Commercial Division of Appeals and Public Procurement) is the court which hears complaints against the decisions of the National Appeals Chamber.

At the same time, this structure also includes the Supreme Court, which hears cassation appeals against the decisions of the above-mentioned District Court in Warsaw.

2) Courts examining disputes related to the performance of a concluded public procurement contract.

The disputes related to the performance of a public procurement contract are heard by common courts and the Supreme Court as part of instance control. However, there is no single dedicated court to hear these types of cases. Therefore, each time the place and property of the Court should be determined in accordance with the provisions of generally applicable law.

19. Are post-award contract amendments/variations to publically procured, regulation contracts subject to regulation in your jurisdiction?

The issue of amending public procurement contracts remains extremely important for the public procurement market. Changing conditions often make it necessary to change the concluded contract.

However, contrary to classic market business relations, contracts concluded in the public procurement regime cannot be changed freely. In this respect, there are significant legal limitations in Polish law that result directly from EU law.

Polish LPP has a separate chapter on the amendment of public procurement contracts. LPP regulations indicate which changes to the contract are possible and which are not. At the same time, in accordance with the case law, the interpretation of provisions relating to contract changes should be formalistic and rigorous. The rule is that amendments to a public procurement contract are not admissible. This principle has exceptions, but – as indicated above – these exceptions should be interpreted strictly.

Moving on to the merits, in accordance with Polish LPP regulations, changes to the contract can be divided into:

a. insignificant changes that are always allowed,
b. permissible changes which – in order to make them – require the fulfilment of the prescribed conditions in the public procurement law.

1) Insignificant changes and significant changes

As a rule, a significant change to the concluded contract requires a new public procurement procedure. Insignificant changes are always allowed with no limits.

A significant contract change is a change that causes the nature of the contract to change significantly in relation to the original contract. The example of the change in the nature of the contract may be:

a. changing the lease contract into a sales contract,
b. changing the delivery of computer equipment to the delivery of telephones,
c. changing the subject of the contract from construction works to services,
d. conversion from a fixed-term contract to a contract for an indefinite period.

The Polish regulations also provide an exemplary catalogue of changes that are significant changes. The amendment to the contract is considered significant if:

a. introduces conditions which, if they were applied in the contract award procedure, other contractors would take part in it or could take part, or other contractors would be accepted (this applies, for example, to the following changes: reduction of the catalogue of contractual penalties, extension of the contract performance time, introduction of the possibility of granting an advance payment, changing the cost estimate to a flat-rate remuneration, resignation from the security on the proper performance of the contract),
b. violates the economic equilibrium of the parties to the contract to the benefit of the contractor, in a manner not provided for in the original contract (e.g. this applies to, for example, the following changes: increasing the amount of the advance payment, changing the schedule of remuneration payment in favour of the contractor, increasing the contractor's remuneration without any prerequisites),
c. significantly extends or reduces the scope of services and obligations resulting from the contract (e.g. this applies, for example, to the following changes: increasing the scope of delivery from 100 cars to 150 cars, despite the lack of appropriate review clauses or option rights in the contract),
d. consists in replacing the economic operator to whom the awarding entity awarded the contract with a new economic operator in cases other than those permitted by the provisions of the public procurement law.

Since significant changes to the contract are changes that cause the nature of the contract to change significantly in relation to the original contract, then any other changes to the contract will be insignificant. An irrelevant change to the contract may be, for example, a change of the address for the delivery of VAT invoices, a change of the parties' contact e-mail addresses.

Each time, the assessment whether a given contract amendment is significant or immaterial must be made in a specific case. You should always refer to the relevant LPP regulations. Additionally, both Polish and EU jurisprudence may also be helpful in assessing the significance of changes.

2) Permissible changes, requiring the fulfilment of certain conditions

As indicated above, it is justified that it is not possible to make significant changes to public procurement contracts. This principle, however, has some exceptions.

The regulations of LPP provide for the possibility of a significant amendment to the contract when certain conditions are met. Therefore, in order to make a significant change to the contract, certain conditions must be met.

a) Review clauses

In Poland, it is possible to amend the contract on the basis of the so-called review clauses (adaptation clauses). These review clauses are relevant provisions that make it possible to adapt the contract to changing conditions during the term of the contract.

Review clauses make it possible to shape the contract with a certain level of flexibility, which is necessary for the effective implementation of the planned investment. At the same time, bidders applying for a public procurement already know at the stage of the procedure in which cases it will be possible to amend the public procurement contract. This knowledge allows them to properly assess the risk, and thus to optimally calculate the remuneration for the implementation of the subject of the contract.

In order to be able to amend the contract on the basis of the review clauses, it is necessary to indicate the possibility of changing the contract in the contract notice or procurement documents. At the same time, such a change must be provided for at the stage of the public procurement procedure in the form of clear, precise and unambiguous contractual provisions that meet the following conditions jointly:

a. determine the type and scope of changes,
b. define the conditions for introducing changes,
c. do not provide for such changes that would modify the general nature of the contract.

The scope of admissible changes is quite wide and may include, inter alia, change in the amount of remuneration, irrespective of the value of this change. However, each time, for the possibility of changing the contract on the basis of the so-called review clauses, the above-mentioned conditions must be met.

An example of the so-called review clause: It is permissible to change the date of the performance of the Agreement in the event of delay of public administration bodies in issuing administrative decisions, arrangements, expert opinions or other administrative acts necessary to perform the subject of the Agreement, despite the fulfilment by the Contractor of the conditions for obtaining them, including the submission by the Contractor of a correct and complete application for their issuance. The deadline for the performance of the Agreement may be changed by the time by which the

above-mentioned circumstances influenced the date of the performance of the Contract by the Contractor, i.e. prevented the Contractor from performing the subject of the Contract in a timely manner.

b) Change of the contractor

The provisions of LPP also provide for the possibility of changing the contractor of a public procurement. A subjective change on the part of the contractor is possible in strictly defined cases.

As a rule, a new contractor may replace an existing contractor in the following cases:

a. if the possibility of a subjective change on the part of the contractor has already been provided for at the stage of the tendering procedure in contractual provisions, in the form of clear, precise and unambiguous provisions specifying the circumstances and conditions for changing the contractor performing public contracts (the possibility of such a change is very rarely provided for in the contractual provisions),
b. as a result of:
    i. succession, i.e. assuming the rights and obligations of a contractor as a result of a takeover, merger, division, transformation, inheritance or acquisition of the current contractor or its enterprise,
    ii. bankruptcy or restructuring (in practice, this applies to the bankruptcy or restructuring of one of the consortium members),

    if:

    - the new contractor meets the conditions for participation in the procedure,
    - there are no grounds for exclusion regarding the new contractor, and
    - the subject change does not entail any other significant changes to the contract,
    - the subject change is not intended to avoid the application of the provisions of the public procurement law.

c) Additional supplies, services, construction works

It is possible to change the contract by entrusting the current contractor with the performance of additional supplies, services or construction works that were not included in the basic contract.

Such a change is possible if the performance of additional supplies, services or construction works has become necessary for the proper performance of the basic contract.

At the same time, it is imperative that the following conditions are met:

a. the change of the contractor cannot be made for the following reasons:
    i. economic (e.g. a change of the contractor would result in the loss of the quality guarantee for the current scope of work, a change of contractor would involve the necessity to incur real higher costs related to the provision of additional services by the new contractor compared to the costs calculated by the current contractor),**or**
    ii. technical (e.g. regarding the interchangeability or interoperability of equipment, services or installations ordered under the basic contract.
        a. a change of the contractor would cause a significant inconvenience (e.g. related to the need to ensure proper coordination of the works of the new and existing contractor) or a significant increase in costs for the contracting authority,
        b. the price increase caused by each subsequent change does not exceed 50% of the value of the original contract.

At the same time, slightly different rules apply to the defence and security procurement.

d) Unpredictable changes

Polish LPP also allows the possibility of changing the public procurement contract if the need to amend the contract results from circumstances that could not have been

foreseen by the contracting authority acting with due diligence. It is about situations beyond the control of the parties to the contract, which could not be foreseen at the time of concluding the contract. In principle, the unforeseeable circumstances include, for example, a sudden economic downturn, limited availability of raw materials and materials, and an unusually high increase in the material prices.

On the basis of the discussed premise, the contract cannot be changed if the contracting authority did not foresee certain circumstances, in a situation where the contracting authority should have foreseen the possibility of their occurrence.

It is important that a change to the contract related to the occurrence of unforeseen circumstances cannot modify the overall nature of the contract. At the same time, the value of the change may not exceed 50% of the original contract value.

e) Minor changes

It is also possible to amend the contract, the total value of which meets the following conditions:

a. is less than the EU thresholds, and
b. is lower than:
    i. 10% of the value of the original contract in the case of contracts for services or supplies,
    ii. 15% of the original contract value in the case of works contracts.

Therefore, it is possible to increase and reduce the scope of the contractor's obligation to specific values. However, these changes may not change the overall nature of the contract.

20. How common are direct awards for complex contracts (contract awards without any prior publication or competition)?

In Poland, single-source procurement is quite rare. According to the data of the Public Procurement Office, from January 1, 2021 to September 30, 2021:[1]

a. 36% of all orders below the so-called EU thresholds were granted on a single-source basis,
b. 03% of all orders above the so-called EU thresholds were granted on a single-source basis.

1) Conditions for the award of a single-source contract

The Polish regulations of LPP indicate the conditions for awarding a single-source contract. There are several prerequisites for a single-source procurement. However, these conditions are interpreted strictly, as they constitute an exception to the application of competitive procurement procedures. Specialized authorities in public procurement cases rigorously examine whether there are any premises justifying the use of the single-source procurement procedure.

The reasons for which awarding entities usually award single-source contracts are listed below.

a) Possibility to execute the contract by only one contractor

The contracting authority may award a single-source contract if supplies, services or construction works may be provided by only one contractor for the following reasons:

a. Technical of objective nature (in practice, it applies to a situation where there is only one contractor on the market capable of performing the contract, e.g. a contractor having specific tools or means),
b. Related to the protection of exclusive rights resulting from separate provisions (in practice, this condition mainly applies to contracts involving works or other items containing original intellectual solutions protected by copyright or industrial property law), -if there is no reasonable alternative or substitute solution and the lack of competition is not the result of deliberately narrowing down the parameters of the contract.

b) Single-source contract as a prize in the competition

The contracting authority may also award a single-source contract if a competition was held in which the prize was an invitation to negotiate under the single-source procurement procedure, extended to the author of the selected competition work.

The competition is organized to select a creative work,

for example, concerning spatial planning, architectural design, and urban design.

Example: Competition for the development of an architectural and urban concept for the office building and its surroundings. The prize in the competition is an invitation to negotiate under the single-source procurement procedure. The subject of the single-source procurement is a detailed preparation of the competition work in the form of a construction design (plot or land development design, architectural and construction design and technical design) and an executive design.

c) The need to execute the contract immediately

The contracting authority may award a single-source contract if, due to an exceptional situation, immediate performance of the contract is required, and the deadlines specified for other procedures for awarding the contract cannot be met. This exceptional situation cannot be attributed to reasons relating to the awarding entities. It is also required that the contracting authority cannot – acting with due diligence – anticipate the occurrence of this situation.

A single-source procurement is therefore possible when the contracting authority is forced to react immediately as a result of an exceptional, unforeseeable event. Generally, the cases involving random events such as natural disasters, catastrophes, floods, fires, earthquakes etc. will be unpredictable. The use of the single-source procurement procedure should only be used to counter or remove the consequences of an unpredictable situation.

Example:

- award of a single-source contract for the reconstruction of a damaged flood protection embankment,
- award of a single-source contract for municipal waste management as a result of an unexpectedly long appeal procedure – only until the selection of a contractor in a competitive procedure,
- purchase of drugs for the continuation of therapy in cancer treatment.

Of course, the possibility of applying the indicated premise should be examined in relation to a specific factual state.

d) Inefficacy of the previous, competitive procedure

Polish LPP enables the award of a single-source contract, also when the previous public procurement procedure did not end with the conclusion of the contract. This applies to cases where, objectively, there were no contractors who would be interested in the competitive procedure or the competitive procedures turned out to be ineffective for reasons relating to the contractors.

This situation applies to cases where:

a. no request to participate in the procedure has been received or all requests to participate in the procedure have been rejected on the basis of the circumstances specified in the regulations,
b. no offer has been received or all offers have been rejected on the basis of circumstances precisely indicated in the regulations.

When awarding a single-source procurement, on the basis of the discussed premise, there cannot be a significant change to the original terms of the contract, including, inter alia, the subject of the contract and the terms of the contract.

e) The repetition of similar services and works

It is possible to award a single-source contract for the repetition of similar services or previous construction works to the existing contractor of the basic contract. This additional contract must be awarded within 3 years from the date of award of the basic contract. In addition, the following conditions must be met:

a. an additional contract must have been provided for in the contract notice for the main contract,
b. an additional order must be consistent with the subject of the basic order,
c. the total value of the additional order was taken into account when calculating the value of the basic order.

Thus, in practice, at the moment of initiating the original procedure, the bidders know that the contracting authority may award supplementary contracts to the selected contractor. The bidders also know what services or construction works may be entrusted to the current one as part of a supplementary contract.

Example: The contracting authority has entered into a basic contract for snow removal services for the city. The contract notice provides for the possibility of awarding an additional contract also for city snow removal services. The contracting authority, in the single-source procurement procedure, awarded the existing contractor a contract consisting in repeating the city’s snow removal services. The single-source contract was awarded within 2 years from the date of conclusion of

the original public procurement contract.

f) Additional deliveries

It is also possible to award the previous contractor a basic contract, a contract for additional supplies. However, it is required that the purpose of additional deliveries is:

i. partial replacement of delivered products or installations, or
ii. increasing current deliveries or expanding existing installations,
    - if a change of contractor would oblige the contracting authority to purchase materials with different technical properties, which would result in technical incompatibility or disproportionately high technical difficulties in the use and maintenance of these products or installations.

When awarding an additional contract for supplies, the contracting authority does not have to provide for it in advance in the procurement documents.

2) Contesting the award of a single-source contract

If the awarding entity applies the single-source procurement procedure, it is possible to appeal to the National Appeals Chamber. In such an appeal, it must be shown that there are no grounds for awarding a single-source contract.

The appeals submitted under the single-source procurement procedure can be divided into two categories:

i. the appeals lodged prior to the award of a single-source contract,
ii. the appeals lodged after the award of a single-source contract.
    a. Appeals lodged prior to the award of a single-source contract

The appeals brought before the award of a single-source contract are brought in a situation where the contracting authority – prior to awarding a public contract – publishes information about its intention to award a single-source contract. As a rule, this information is published in:

i. Public Procurement Bulletin – in the case of procedures with a value lower than the so-called EU thresholds,
ii. Official Journal of the European Union (TED) – in the case of proceedings with a value higher than the so-called EU thresholds.

In the information about the intention to award a single-source procurement, the Awarding Entity is required to justify the factual and legal grounds for selecting the single-source procurement procedure.

The contracting authority is under no obligation to publish information about the intention to award a single-source contract. In practice, however, the awarding entities often publish information about their intention to conclude a single-source contract, because then the risk of cancellation of a public procurement contract is minimized. At the same time, the contracting authority may not conclude a single-source procurement contract until the deadlines for appeal have expired.

b) Appeals lodged after the award of a single-source contract

If the contracting authority has not published information on the intention to conclude a contract under the single-source procurement procedure, then contractors have no knowledge of the intention to award a single-source contract.

In this situation, an appeal is only lodged when:

i. the contracting authority publishes the information on the award of a single-source contract in the Public Procurement Bulletin or the Official Journal of the European Union, depending on the contract value,
ii. if the contracting authority fails to publish information on the award of a single-source contract, then the deadlines for appealing are counted from the day of concluding the single-source contract and are long:
    - in the case of proceedings above the EU thresholds, the deadline for lodging an appeal is as much as 6 months,
    - in the case of proceedings below the EU thresholds, the time limit for lodging an appeal is 1 month.

In the appeal, one may demand the cancellation of the concluded contract or the shortening of its duration.

Reference

[1] Bulletin of the Polish Public Procurement Office No. 3/2021.

21. Have your public procurement rules been sufficiently flexible to allow contracting authorities to respond to the ongoing COVID-19 pandemic? What measures have been most used and in what areas have any difficulties arisen? How have these evolved over the past year and is it likely that lessons learned from procurement during this period will give rise to longer term changes?

Generally, it can be said that LPP was in many respects flexible enough to enable contracting authorities to respond to the Covid-19 pandemic. In addition, the competent authorities (the President of the Public Procurement Office) issued interpretations of the provisions of public procurement law favourable to bidders (e.g. with regard to the submission of documents relating to no criminal record).

The challenge of the Covid-19 pandemic was, first and foremost, the need to award certain contracts quickly. LPP regulations provide such a possibility. It is possible to award a single-source contract (non-competitive) when, due to an exceptional situation, beyond the control of the contracting authority, immediate performance of the contract is required. Therefore, this procedure could be used to award contracts related to counteracting Covid.

Regardless of such a possibility, special regulations have been enacted in Poland, according to which the public procurement law does not apply to contracts for services or supplies necessary to counteract COVID-19, if there is a high probability of rapid and uncontrolled spread of the disease or if it is required to protect the public health. On the basis of the exclusion in question, the contracting authorities purchased, inter alia, antiseptics, disinfectants, gas and respiratory therapy devices, hospital beds, protective and security clothing. These purchases were made in many cases with the exclusion of the application of the public procurement law.

At the same time, the Covid-19 pandemic has shown even more how important it is to maintain the financial liquidity of contractors. In this respect, the public procurement law provides for special regulations aimed at ensuring that contractors have financial liquidity. In the case of contracts concluded for a period longer than 12 months, the awarding entities are required to pay the remuneration in parts or provide advance payments for the performance of the contract.

The area where problems arose were already concluded and implemented public procurement contracts. The principle on the basis of LPP is the immutability of public procurement contracts, and contracts can only be changed exceptionally, on the basis of strictly interpreted exceptional ones. The Covid-19 pandemic influenced the performance of the contract in many cases, which resulted in the need to change already concluded contracts (including contract performance dates, contractor's scope of services, contract performance). Often such a change of the contract was not possible or was doubtful under the public procurement law. Therefore, new, special legal regulations have been adopted. Pursuant to these regulations, it is possible to amend a public procurement contract if the circumstances related to the occurrence of Covid-19 influenced the proper performance of the contract.

It seems that the lesson to be learned from the Covid-19 pandemic is better preparation of draft public procurement contracts in the field of so-called review clauses. The point is to better identify the risks associated with the performance of the contract and provide for appropriate adaptation clauses at the stage of conducting the public procurement procedure. This will then allow the contract to be amended in such a way as to adapt the contract to changing conditions.

Contributors

Przemysław Wierzbicki
Advocate/Founding Partner
pwierzbicki@kklw.pl

Marta Ewiak-Kawecka
Advocate
mewiak@kklw.pl