

17 THE CONTRACT FOR PUBLIC PROCUREMENT IN SYSTEM OF PUBLIC SECTOR INSTITUTIONS' THE MANAGEMENT

17.1 Introduction

The purpose of this elaboration is the analysis of chosen issues, related to the problem of contracts for public procurement, realized in the system of public sector institutions' management.

This issue, as essential for the practice of public procurement, is regulated by the present obliging act from 29 January, 2004 The Public Procurement Law (called PublProcL) [1]. This law indicates the way of defining entities, who are obliged to use it, adapting Polish rules of expending public recourses with The European Union requirements' law.

Wording of appropriate regulations of above mentioned law (article 3 paragraph 1 PublProcL) indicates, that, in spite of public finances sector units, its object range was defined in the functional way, it means by dependence of the using law necessity from realizing defined public tasks, without indicating for the institutional characteristic or organizational and legal form (in spite of the purchaser's definition defined in article 2 paragraph 12) [2].

Therefore, the fundamental group of purchasers is created by the public finances sector units, in the conceptual meaning, resultant from the rule of article 9 the law from 27 August, 2009 – The Public Finances Law (called FinPubL) [3]. The subjects of above mentioned group are government administration units, local authorities and amenable them institutions.

Budget units, local budget units, agencies, budget economy institutions and government funds use the rules of financial economy defined in mentioned The Public Finances Law (article 10 paragraph 1 FinPubL). Among these rules, in the frame of this elaboration, it is necessary to indicate especially the duty of expending public resources in the purposeful and economical way, with the usage of rules connected with receiving the best results from expenditures (article 162 paragraph 2 and 3 FinPubL) and the duty of realizing the tasks, based on the best bid choice, with respecting the rules of The Public Procurement Law – so in the procedure and with the rules defined in this law.

Polish accession to The European Union caused the necessity of adapting procurement processes to rules obliged in the community law, which are connected with procurement procedures and reconsidering connected with them appeal instruments.

Accepted by membership countries of The European Union the rule of community law priority indicates, in the case of contradiction with the national law, the necessity of community regulations. At first fundamental rules concerning to the topic of public procurement were defined in The Treaty establishing The European Community from 25 March, 1957. Now, directives are the basic, lawful cooperating public procurement law in the range of The European Union. Directives define especially the group of authorized entities, the content of allowed law and the entities obliged to realize such authorizations [4].

These directives, with the moment of Polish accession to The European Union, started, in the same sphere, to influence directly into our law area. The Public Procurement Law from 2004 (repeatedly amended) expressed it through accepting the European solutions defined by directives, especially in the range of defining rules and procurement procedures, measures

of legal protection, procurement control and proper institutions in cases regulated with this law.

In the autonomous range, it means in the range under the national law regulations, The Public Procurement Law left these issues, which are not included in the law and are not included in rules of community law, contained in this law, either. Therefore, The Public Procurement Law is the special regulation in relation to The Civil Code regulations. This law in the article 14 and 139 paragraph 1 anticipates, that as far as the rules do not determine in other way, to contracts in public procurement, The Civil Code regulations (called CC) are used [5].

Therefore, the contract concluded in public procurement is the basic instrument, stimulating the process of realization and implementing procurements in the system of public sector institutions' management, which are bound in their activity to give procurements, in agreement with requirements of the national Public Finances Law and The Public Procurement Law.

Some of public procurement law regulations have strictly binding character, what signifies, that in such situations it is forbidden to use general code regulations to public procurement contracts.

17.2 The contract for public order

Submitting to public sector institutions under the regime of The Public Finances Law and The Public Procurement Law does not exclude— as was written above – the possibility of general regulations usage, which are resultant of suitable rules of The Civil Code. Mentioned article 139 paragraph 1 of The Public Procurement Law adjudicates, in what range the rules of The Civil Code have the application for contracts in the public procurement. The rules of The Civil Code will find the application for contracts, if The Public Procurement Law does not determine the way differently. Thus, for contracting in public procurement, apart from law regulations, which have the priority before general regulations, the code regulations have the application included in its first tome. These regulations are connected with for example with defect in a declaration of will, the principle of representation, the operating in somebody's case or closing dates. The code regulations have also the application included in its third tome, and they are connected with contractual obligations [6].

It concerns especially the period for which the contract can be concluded, loyal contractors' responsibility or the possibility of contracts changes. But the application of defined by strictly binding rules cannot be excluded or limited for example by will of parties. Therefore, parties of the contract cannot exclude for example the solid contracting responsibility of contractors, jointly trying to win the bidding competition, for the contractual obligation of the realization and the responsibility for discharging the proper fulfillment of the contract obligation. Therefore, the implementation of norms, which have an imperative character constitutes the limitation of free contracting, what expresses, that it is forbidden to regulate the legal relation in the different way than the law indicates. The purpose of this regulation is the business protection of the parties' interest and the social interest, for example the solid contractors' responsibility protects the purchaser's interest, whereas interdiction to conclude the contract for indefinite period has positive aspect in assuring the competition [7].

The contract concluded in public procurement procedures has the character of mutual one, in the meaning of this concept, which is the result of article 487 section 2 of The Civil Code. This article indicates, that the contract is mutual, when both parties commit themselves in such a way, that rendering one of them is to be the equivalent of rendering the second one. It is accepted that the equivalent of rendering (it means their adequacy) signifies not objective valuation, but subjective conviction of parties about their mutual equivalence [8].

The contract mutuality in The Public Procurement Law comes out directly of the public procurement legal definition. Article 2 point 14 of The Public Procurement Law indicates, that the contractor's rendering relies on providing services, works or goods, but the purchaser's rendering relies on paying them for their services. Each party of the contract is at the same time the debtor and the creditor. The purchaser is the creditor of the contractor, who can demand from him the execution of the procurement and at the same time, as his creditor, he is obliged to pay the remuneration. Inversely, the contractor, as obliged to realize the procurement, is the purchaser's debtor and the creditor, because of the inherent payment. The mutual contract's character should be recognized as essential feature of such contracts. Both, the contract, when the purchaser receives gratuitous enlargement, and the contract, when the purchaser provides services without receiving mutual rendering, will not fulfill the law requirements of the contract in the public procurement, because in the first case, the element of procurement paying by purchaser will not appear and in the second one, there is no element of receiving goods, services or works [9].

The mutual character of public procurement contract allows to be concluded for the benefit for the third party (*pactum in favorem tertii*) regulated in article 393 section 1 of The Civil Code. For example, the communal union gives the public procurement for roads' building for communes, which are the members of the union [10].

The Public Procurement Law (article 139, paragraph 2) indicates, that the contract requires the written form with the restriction of the invalidity. These requirements, connected with the written form, are defined in article 79 section 1 sentence 1 of The Civil Code, which constitutes, that it is enough to sign the document personally (the document, in which there is the content of will's declaration), to know, that the written form of legal action is done. Therefore, it is necessary, not only to contain the content of declaration in written on the document, but also personal signing this declaration by the person, who such a statement makes.

Article 78, section 1, sentence 2 of The Civil Code demands only exchanging by parties documents, including the content of both will's declaration, each signed by one of the parties – the first option. The second option is connected with exchanging by parties documents, where each of them includes only the content of the declaration of will of one party and is signed only by this party. Therefore, a legislator does not require the preparation of two original contracts, when each of them contains the declaration of will and is signed by them, although such practice dominates [11].

The consequence of not keeping the written form of the public procurement contract is its invalidity, as the result of law regulations. It means, that such contracts concluded between parties in another form (for example spoken agreements) does not have its result and the parties are obliged to give back eventually taken services, according to given such unimportant procurement, because of the form. However, the equivalent to concluding the contract

in the written form is concluding it in electronic form with the signature of parties, which is verified with the important qualified certificate [12]. The regulation of article 60 of The Civil Code provides, that with the restriction of exceptions defined in law, the will of a person, taking the legal activity, can be done by each behavior of this person, which shows the person's will in sufficient way. It is also connected with showing this will in electronic form (a declaration of will). Such understanding is also shown in article 78, section 2 of The Civil Code, which constitutes, that the declaration of will made in electronic form with save electronic signature, verified by important, qualified certificate is equivalent with the declaration of will in written form.

The Public Procurement Law regulations lead in article 8 the rule of proceedings openness in the public procurement system. The purchaser can limit the access to information connected with public procurement procedures only in defined in law cases [13].

It is not possible to disclose information being the secrecy of enterprise, in the meaning of regulations about overcoming with unfair competition, if the contractor, not later than in the date of the tender (the bid or the application), stipulated, that it cannot be accessible. However, according to article 84, paragraph 4 of The Public Procurement Law the contractor cannot stipulate information connected with his identification (the name of enterprise), and the information connected with the price, the period of the procurement realization, the period of guarantee and the conditions of payment, which are contained in bids.

Making contracts accessible in public procurement system follows in accordance with rules defined in regulations about the access to public information [14]. The refusal of disclosure information takes place in administrative procedures [15]. Such refusal must be given by the institution obliged to disclose public information by the issuance of the suitable decision. Such decision must contain the reason of refusal. These decisions can be complained in administrative procedure.

17.3 Instruments of public procurement managements created through contracts

The public procurement contract based – as indicated – on the European regulations and in the national law system as well, is not the separate type of the contract, defined in The Public Procurement Law. Therefore, this law does not define strictly the elements of such contract, but by indicating article 14 and article 139, paragraph 1 of this law, it shows the possibility of implementing The Civil Code regulations in public procurement system. It allows to use in these procurements also contracts, which are usual in the civil code regulations (for example sale, deliveries, works, ect.) and other contracts, as well, with mixed character (it means contracts containing elements of different, typical contract) or unknown contracts (it means not standard in obliging code regulations). It is the effect of the possibility (directing to the civil code) of the general code regulations usage, connected with the rule of free contracting in legal transactions. It is the result of the content of the article 3531 of The Civil Code, which constitutes that contacting parties can create the legal relation on their own. The only condition concerns the content and the aim of this relation, which cannot be in opposition to the relation's nature, the law or the rules of social relation as well.

However, this rule, which allows free content contract's creation undergoes the limitations, connected with the contracting process by, for example the limitation of contractor's choice (16), what must be done in accordance to the procedures, written in the public procurement system, defined in section 3 (article 39-81 PublProcL): national competitive bidding, competitive bidding, negotiations with announcement, negotiations without announcement, competitive dialogue, direct contract, enquiry for quotation, electronic bidding.

The law limitation (PublProcL) also refers to the content of concluded contracts and it is connected with the possibility of demanding guarantee in the value not higher than 3% of the procurement value (article 45 PublProcL); with the possibility of contracting for unspecified time, only in the case of water delivery and sewage disposal, gas and heat delivery or license for computer software (it is the result of article 143 PublProcL, because the general rule of giving public procurements, defined in article 142 PublProcL, is contracting for designated time not longer than 4 years, with the exception of credit and loan; in case of bank account and insurance for the period of 5 years). This law limitation is also connected with the possibility of demanding performance of contracts' security, which can be paid only in cash, bank guarantees (and savings account and credit bank counter or The Polish Agency of Enterprise Development), insurance guarantees, possibly promissory notes, deposits and depositary's lien and it cannot be higher than 2%-10% of the total procurement price (article 147-150 PublProcL).

This limitation of the code rule of contracting liberty in reference to public procurement contracts finds its expression in the content of article 144 PublProcL, according to which making further changes (corrections) of already concluded contract (the shape of the contract is defined by the purchaser in the fundamental procurement conditions' specification – article 36 PublProcL) is possible, when the purchaser not only provided the possibility of the contract changes in the announcement about procurement or in the specification, but also, when the purchaser defined in it (so previously provided within the bounds of contracting liberty mentioned above) the conditions of such change, with the consequence of nullity of changes, not designed in advertisement or specification.

The legal sanction of the contracting liberty's contravention (defined in article 3531 in The Civil Code, limited in articles 144 and PublProcL) is the possibility of contract invalidation in whole or in the part, compatibly to The Public Procurement Law. Moreover, article 58 of the Civil Code provides the general, civil and legal sanction of contracts' nullity, which are contrary to the law or which aim is not to use the law (17).

17.4 Summary

Presented circumstances have the fundamental meaning in the process of public procurement management, also realized by public sector units, because the proper creation of the contract's content, which has to be made in this range, decided not only about the suitable procurement realization, but it has also the influence for making expenses in the purposeful and economical way, with the restriction of the best bid choice, in agreement with The Public Procurement Law. This requirement is indicated in mentioned article 162, point 3 of The Public Finances Law.

It is also very important, taking into account regulations, connected with the responsibility for contravention of public finances' discipline [18] predicting (article 31 of this law) punishment (admonition, reprimand, fine or prohibition on exercising duties connected with public resource's administrating) for people responsible for public procurements unconstitutionally.

Therefore – taking into account presented issues – it is worth emphasizing, that the results of concluded contract (even adversities) will charge against the purchaser through all contract period.

The Public Procurement Law provides only one case (article 145 PublProcL), when the purchaser can avoid the consequences of concluded contract. This regulation indicates, that in the situation, when the essential change of circumstances appears, what causes that the contract realization is not in agreement with the public interest and what could not be possible to anticipate in the moment of contracting, the purchaser can withdraw from an agreement in the time of 30 days from the moment of taking information about these circumstances. Such withdrawing does not allow the purchaser not to pay for goods, services or works provided till withdrawing. All these circumstances must be fulfilled together.

The law does not define the definition of “public interest”, so generally speaking, it is thought, that the procurement realization is pointless for the public interest. The contract realization should be assured by the purchaser, as the entity, responsible for public regulatory tasks [19].

Such situations in the practice of public procurement procedures and realization, which content was previously created by the contract, will appear exceptionally, because the aim and the essence of public procurement procedures' usage is its realization in agreement with the contract and basically without the possibility of resigning by the purchaser from the liability incurred by him in the limit of values, defined in the financial plan (article 162, point 3 FinPubL), so when incurring such a liability is the effect of public interest existing.

Taking into account above arguments, the proper and suitable public contract creation within the bounds of contract liberty, constitutes the fundamental element of public sector institutions' management, being at the same time the important instrument of fulfilling statutory tasks. It is worth concentrating on the fact, that the entity, obliged to use the public procurement procedures, is responsible for the contract's content creation (section 2, article 29-38 PublProcL), and its shape in the managing process of the purchaser's area activity.

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